

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: NEBRASKA SERVICE CENTER

Date **OCT 28 2009**

LIN 06 267 52115

IN RE:

Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to employ the beneficiary¹ permanently in the United States as a religious school teacher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner, as a tax exempt organization, had not submitted sufficient financial documentation as described at 8 C.F.R. § 204.5(g)(2) and thus had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 11, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2001 priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification,

¹ The AAO notes that the record contains an approved I-130 application for the beneficiary, (EAC 02 130 51204). This application was approved on March 24, 2003. While CIS records reflect the denial of the instant petition, there is no record of the revocation of the earlier I-130 application. The beneficiary's daughter also petitioned for the beneficiary's father, whose I-130 application was also approved.

was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$27,000 per year. The Form ETA 750 states that the position requires two years of work experience in the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

With the initial petition, the petitioner submitted IRS correspondence dated January 24, 2001 that states the petitioner is exempt from federal income tax under section 501(a) of the IRS code. In a cover letter dated July 24, 2006, [REDACTED] states that the beneficiary is the petitioner's first employee. The petitioner also submitted its HSBC checking and saving's bank account statements from January 18, 2001 to June 16, 2006.³ In response to the director's RFE, the petitioner submitted the beneficiary's Form 1099-MISC for tax year 2006 that indicated she was paid \$4,152. The petitioner also submitted copies of paychecks made out to the beneficiary in the amount of \$1,038 for November 15, 2006, November 30, 2006, December 13, 2006, and December 30, 2006.

On appeal, the petitioner submits additional HSBC bank statements from May 2006 to April 2007; copies of the beneficiary's paychecks from January 2006 to May 30, 2007;⁴ a paycheck for \$4.00 dated May 30, 2007 annotated "salary owed for November/December;" a paycheck for \$6.00 dated May 30, 2007 annotated "salary owed for January through March 07." The petitioner also submitted an amended Form 1099-MISC that indicates the petitioner paid the beneficiary \$4,156 in tax year 2006.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ The 2001 statements indicate that the petitioner deposited its first savings deposit in the amount of \$1,100 on November 14, 2001.

⁴ In April 2007, the amount of the beneficiary's bi-weekly pay check was increased to \$1, 039.

The petitioner is a tax exempt church. On the petition, the petitioner claimed to have been established on September 1, 1998, to have a gross annual income of \$761,000, a net annual income of \$396,000 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on October 11, 2005, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel states the director's decision is incorrect because the petitioner can pay the prevailing wage. Counsel notes that the petitioner did pay the beneficiary the prevailing wage of \$27,000 minus \$.23 per week in 2006 and 2007 due to an accounting error. Counsel states that the petitioner has corrected this accounting error. Counsel also asserts that the bank statements submitted to the record establish that the petitioner paid the prevailing wage while maintaining sufficient cash on hand. Counsel in his cover letter that accompanies the appeal refers to the director's decision, and states that evidence of payment of the prevailing wage during a period of employment is prima facie evidence of the petitioner's ability to pay the prevailing wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In response to the director's RFE, counsel noted that the petitioner is tax exempt and does not file tax returns. The AAO notes that the proffered position is described in Section 13 of the ETA Form 750 as "Teacher in religious school." Educational institutions (including, but not limited to religious schools) can qualify for 501(c)(3) exempt status under section 170(b)(1)(A)(ii) of the Internal Revenue Code. The petitioner should be able to produce a letter from the IRS to this effect (or documentation showing that the school is covered by a group determination issued to a larger religious organization). An independent school needs to file Form 1023 from the IRS and get a determination letter. If an organization is a component of a church (for instance, located within the church building itself), then it may be covered under the church's exemption. Churches are classified under section 170(b)(1)(A)(i) of the Code. By law, churches have the option of filing Form 1023 and obtaining a determination letter, but they are not required to do so.

In the instant petition, the petitioner submitted IRS correspondence January 24, 2001, that states the petitioner is classified as an organization described in sections 509(a)(1) and 170(b)(1)(a)(i), namely, a church. The IRS correspondence also states that the petitioner is exempt from federal income tax under section 501(a) of the Internal Revenue code as an organization described in section 501(c)(3), and is not required to file Form 990. However, the petitioner could have submitted other financial records stipulated at 8 C.F.R. § 204.5(g)(2), namely audited financial reports, or annual

reports, or other similar documents to more clearly establish its financial resources. If the petitioner had filled out any forms such as Form 990 but had not submitted these documents to the IRS, these documents could also have been submitted to the record. Thus, while the petitioner has provided evidence that it is exempt from federal income tax, the petitioner still must provide evidence of its ability to pay the proffered wage as set out in 8 C.F.R. § 204.5(g)(2) in the form of annual reports, or audited financial statements. The petitioner has failed to provide sufficient evidence beyond bank statements to establish the petitioner's assets or income or to further corroborate the petitioner's claimed gross income of \$761,000, and net annual income of \$396,000, as stated on the I-140 petition.

Counsel's reliance on the balances in the petitioner's HSBC bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why all the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner.

Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. With regard to the petitioner's earlier HSBC bank statements, in 2001, the monthly balances at times are less than the beneficiary's prorated \$1,039 biweekly salary.⁵ In some instances, the petitioner would have negative balances if it had paid the proffered wage in particular months. As previously stated, the petitioner did not have any money in its savings accounts, a financial source readily available, until November 2001. Thus, the petitioner cannot establish ability in 2001 to pay the proffered wage based on its savings. In addition, even if the petitioner's monthly bank statements in the following years always had sufficient monies to pay the beneficiary's wages, either in its checking or savings account, the actual funds available to pay the wages would have been reduced each month by \$1,039, eventually reducing the petitioner's resources by \$27,000 annually during the relevant period of time.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has only established that it paid the beneficiary the prorated wages from November 2006 through May 2007. USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs. The petitioner submitted such evidence for November and December 2006 and for January through May 2007.

⁵ The petitioner's HSBC bank statements for May and August 2001 have ending balances of \$957.80 and \$973.13 respectively.

On appeal, counsel incorrectly interprets the director's comments on the petitioner's ability to pay the proffered wage through wages paid to beneficiaries as evidence that the petitioner has established its ability to pay the proffered wage in the instant petition. The petitioner can establish its ability to pay the proffered wage utilizing the beneficiary's wages as of the April 26, 2001 priority date through the present. The fact that for part of the 2006 tax year and from January to May 2007, the petitioner is paying the beneficiary a biweekly salary that is equal to the prorated biweekly salary of the proffered position does not establish the petitioner's ability to pay the proffered wage in tax years 2001 through October 2006.

The AAO notes that the director's comment that the petitioner had missed paying the full proffered wage in 2006 by two dollars is not central to the denial of the instant petition. The petitioner has to establish its ability to pay the entire proffered wage of \$27,000 as of the April 26, 2001 priority date through December 31, 2001, and then during tax years 2002, 2003, 2004, and 2005. With regard to tax year 2006, the petitioner has to establish its ability to pay the proffered wage from January to November 15, 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

As stated previously, the petitioner is a tax exempt church and thus is not required to file Form 990 with the IRS. With regard to tax years 2001 to 2006, the only evidence submitted to the record are the petitioner’s bank statements, which the AAO does not view as probative of the petitioner’s ability to pay the proffered wage from the 2001 priority year to October 2006. There is no evidence in the record as to the petitioner’s net income in any relevant year. Therefore the petitioner cannot establish its ability to pay the proffered wage based on its net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. The petitioner’s total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner’s total assets must be balanced by the petitioner’s liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner’s ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner’s current assets and current liabilities.⁶ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. **Its year-end current liabilities are shown on lines 16 through 18.** If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage

⁶According to *Barron’s Dictionary of Accounting Terms* 117 (3rd ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

using those net current assets. Once again, the petitioner only submitted its bank statements to the record. The record has no evidence as to the petitioner's net current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage based on its net current assets.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for the period of time from November 2006 to May 2007.

Counsel's assertions on appeal cannot be concluded to outweigh the fact that the record contains no financial documentation to establish that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the only information with regard to the petitioner's business operations is found on the I-140 petition. This document indicates the petitioner has one employee, and states the petitioner's current level of gross and net annual income as of the filing of the I-140 petition. The record reflects no other information as to the petitioner's profile within the community, the growth of the petitioner within the relevant period of time. This information is not sufficient to establish the totality of the petitioner's circumstances. Thus, even considering the totality of the petitioner's circumstances, it cannot be concluded that the petitioner has established that it had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.