

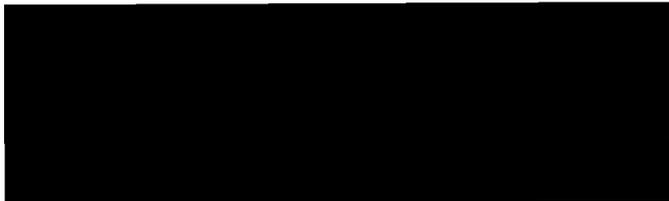
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington DC 20529-2090



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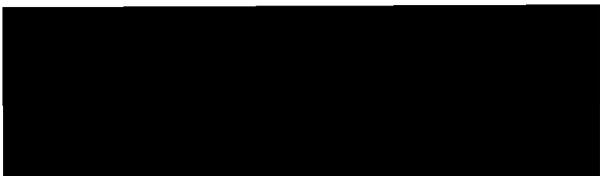
Date: **MAR 12 2010**

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)

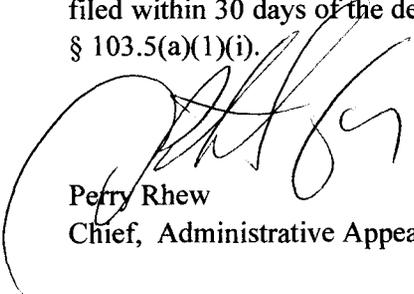
ON BEHALF OF PETITIONER:



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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based 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 religious organization. It seeks to employ the beneficiary permanently in the United States as a pastoral assistant. As required by statute, an ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director also determined that the petitioner had failed to establish that it had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, asserts that the director failed to consider net assets in support of the petitioner's ability to pay the proffered wage.

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).

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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [United States Citizenship and Immigration Services (USCIS)].

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning as of the priority date. The filing date or priority date of the ETA 750 is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 5, 2002. The proffered wage as set forth on the ETA 750 is \$12.10 per hour, which amounts to \$25,168 per year. Part B of the ETA 750, signed by the beneficiary on April 1, 2002, does not indicate that the petitioner had employed the beneficiary.

The Immigrant Petition for Alien Worker (Form I-140) was filed on November 14, 2006. As set forth on Part 5 of the I-140, the petitioner claims that it is a non-profit organization and currently employs two workers.

In support of its ability to pay the proffered wage, the petitioner provided copies of two undated pages from an unknown source listing financial information about various churches including the petitioner. The director issued a request for evidence on November 6, 2007 requesting, in part, additional financial documentation of the petitioner's ability to pay the proffered wage.

In response the petitioner provided originals of Form 990-EZ, Return of Organization Exempt From Income Tax for 2002, 2003, 2004, 2005, and 2006.¹ They were all signed on December 5, 2007, by [REDACTED]² For the purpose of this review, for the year reported, net

¹The record does not contain any evidence of the designation of the petitioner's tax status as confirmed by the Internal Revenue Service (IRS). It is noted that the special tax rules that may apply to churches do not apply to religious organizations as classified by the IRS. However, all tax-exempt organizations, including churches and religious organizations (regardless of whether tax exempt status is claimed) are required to maintain books of accounting and other records to support any claim for exemption. Religious organizations that are not recognized as churches may include nondenominational ministries, interdenominational and ecumenical organizations or other organizations whose main purpose is the study or advancement of religion. Generally, all religious organizations must file Form 990, Return of Organizations Exempt from Income tax subject to certain dollar thresholds. Churches, interchurch organizations of local units of a church, certain mission societies, or an exclusively religious activity of any religious order are some exceptions to the required filing of a Form 990. See *Tax Guide for Churches and Religious Organizations*, <http://www.irs.gov/pub/irs-pdf/p1828.pdf> (accessed 9/16/09). Forms 990 and 990-EZ are used by tax-exempt organizations, nonexempt charitable trusts, and section 527 political organizations to provide the IRS with the information required by section 6033. For tax years beginning in 2009, Form 990-EZ can be filed by organizations with gross receipts of less than \$500,000 and total assets of less than \$1,250,000 at the end of their tax year. See *2009 Instructions for Form 990-EZ*, <http://www.irs.ustreas.gov/pub/irs-pdf/i990ez.pdf> (accessed 2/26/10). In the years covered by the returns submitted in this case, lower dollar thresholds applied.

²Given that they are originals and signed on the same date, it raises a question as to whether any of these returns were filed with the Internal Revenue Service (IRS). This would require

income is reflected on line 18 as the excess or deficit for the year resulting from the difference between total revenue (line 9 of the Form 990-EZ) and total expenses (line 17). Here, the returns contain the following information:

Year	2002	2003	2004	2005	2006
Net Income	\$2,141	\$6,567	\$9,413	\$8,887	\$12,370

The director denied the petition because the petitioner's net income was insufficient in each of the respective years to cover payment of the proffered wage of \$25,168.

On appeal, counsel asserts that the director failed to consider the petitioner's net assets as shown on line 27 of the petitioner's Form 990-EZ for each of the years. Counsel maintains that these balances far exceeded the proffered wage and were sufficient to establish the petitioner's ability to pay the proffered wage.

Counsel's reliance on line 27 of the returns is misplaced. It is noted that besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will generally examine a petitioner's net *current* assets. Net current assets are the difference between the petitioner's *current* assets and *current* liabilities. It represents a measure of liquidity during a given period and a possible readily available cash or cash equivalent resource out of which the proffered wage may be paid for a given period. "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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). See *Barron's Dictionary of Accounting Terms* 117, 118 (3rd ed. 2000). We reject, however, the idea the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage because a 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. Moreover, total assets also include long-term assets such as land or buildings that would not be considered as a readily available current asset available for payment of the proffered wage.

In this case, it is noted that the net assets or fund balances referred to on line 27 of the Form 990-EZ include a combination of figures consisting of cash, savings, and investments (line 22), land and buildings (line 23), other assets (line 24), and total liabilities (line 26). Except for line 27,

additional investigation in any future filings by this petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

the petitioner listed no figures representing any of these items on the 2003, 2004, 2005 and 2006 returns. In these years, line 27 is represented as \$402,019, \$411,432, \$420,319 and \$432,689, respectively. In 2001, line 27 shows \$402,141 and represents land and buildings valued at \$400,000 and other assets of \$2,141. Thus land and buildings appears to account for the majority of the balances on line 27 in the other years. There is no information given as to the petitioner's definition of "other assets." There is no separate itemization for current liabilities such as loans payable in less than a year or other current liabilities. Thus, except for cash, savings, and investments, these figures would not represent *current* assets or even *net current assets* that have been calculated as a comparison of current assets and current liabilities and are not part of a review of the petitioner's ability to pay the proffered wage.

In determining a petitioner's ability to pay a proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as noted above, there is no indication that the petitioner has employed and paid wages to the beneficiary.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS 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).

In this case, as set forth above, the proffered wage is \$25,168. The petitioner’s net income of \$2,141 in 2002; \$6,567 in 2003; \$9,413 in 2004; \$8,887 in 2005 or its net income of \$12,370 in 2006 failed to represent sufficient funds to pay the proffered wage or establish the petitioner’s ability to pay in any of the relevant years. As set forth above, the petitioner did not provide evidence of net current assets to be considered, such as in an audited financial statement. The tax returns are insufficient in this case to accurately calculate net current assets.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. In this case, the petitioner has failed to demonstrate its ability to pay.³

³*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included

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.

movie actresses, society matrons and Miss Universe. The petitioner had 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 *Sonegawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere. In this case, the petitioner has consistently reported a very modest net income. Although the petitioner claims two employees, it is noted no salaries or wages are reported to have been paid on line 12 of the Form(s) 990 EZ until 2005 when \$500 in compensation is shown as having been paid to the pastor. In 2006, this compensation was listed as \$800. It is noted that the proposed wage offer of the certified job of pastoral assistant is \$25,168, which far exceeds any salaries or wages reported on the Form(s) 990 EZ. It may not be concluded that the petitioner established the kind of framework of profitability existed in this case analogous to *Sonegawa* or that such unusual or unique circumstances prevailed here as in *Sonegawa*, that would support the approval of the petition.