

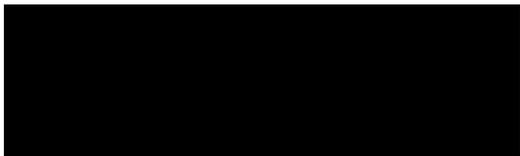
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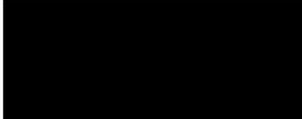
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services



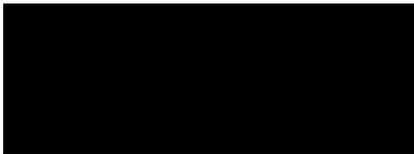
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DATE: **AUG 22 2012** Office: NEBRASKA SERVICE CENTER FILE: 

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The appeal was dismissed by the Administrative Appeals Office (AAO). Counsel to the petitioner filed a motion to reopen the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted, and the appeal will be dismissed on its merits. The petition remains denied.

The petitioner is a rehabilitation services provider. It seeks to employ the beneficiary permanently in the United States as an occupational therapist. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner 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.

As set forth in the director's July 21, 2009 denial, and the AAO's August 24, 2010 decision, the issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO determined that the petitioner had not submitted any evidence to demonstrate that the petitioner's owner was willing to forego her officer compensation in order to pay the proffered wage. It is noted that the AAO determined that the petitioner had not demonstrated its ability to pay the proffered wage for 2008 and 2009.

A review of the AAO's decision reveals that the AAO accurately set forth a legitimate basis for the denial with respect to the above noted issues. Therefore, on motion the issue is whether or not the petitioner has established its ability to pay the proffered wage for 2008 and 2009.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C.S. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the ETA Form 9089 was accepted on January 7, 2008. The proffered wage as stated on the ETA Form 9089 is \$38.00 per hour (\$79,040.00 per year). The ETA Form 9089 states that the position requires a bachelor's degree in occupational therapy or a foreign degree equivalent and 36 months experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1990 and that it currently employs seven workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary, the beneficiary claims to have been employed by the petitioner since September 19, 2007.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 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. The petitioner submitted the following wage statements:

- In 2008, the amended Form W-2c stated total wages of \$72,807.10 (a deficiency of \$6,232.90).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1).

- In 2009, the petitioner's Quarterly Wage and Withholding Report states a total of \$44,865.74 in wages paid to the beneficiary during the first three quarters of the year (a deficiency of \$34,174.26).

If, as in this case, 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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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); *Ubada 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 118. “[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).

The petitioner’s 2009 tax return is the most recent one available. The proffered wage is \$79,040.00. The petitioner’s 1120S² tax returns demonstrate its net income as shown in the table below:

- In 2008, the Form 1120S stated net income of -\$35,961.00.
- In 2009, the Form 1120S stated net income of -\$50,763.00.

Therefore, the petitioner has not established its ability to pay the difference between the wages paid and the proffered wage through its net income.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. 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 using those net current assets. The petitioner’s tax return demonstrates its net current assets as shown in the table below:

- In 2008, the Form 1120S stated net current assets of \$3,809.00.
- In 2009, the Form 1120S stated net current assets of -\$101,924.00.

Therefore, the record does not demonstrate that the petitioner had sufficient net current assets in 2008 and 2009 to pay the difference between the wages paid and the proffered wage. Therefore, from the date the labor certification was accepted for processing by the DOL, the petitioner had

² Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. *See Instructions for Form 1120S*, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholders’ shares of the corporation’s income, deductions, credits, etc.).

³ According 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.

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.

On motion, counsel asserts that USCIS erred in not properly taking into account the totality of circumstances and assessing the evidence which demonstrated the petitioner's ability to pay the proffered wage. Counsel further asserts that when taken into consideration, other sources of income such as officer's compensation amounts can be funds made available to pay the proffered wage; and that the shareholder's statement confirms this claim. The petitioner submits as evidence copies of the petitioner's owner's Forms 1040 and a statement from the sole shareholder.

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S. For this reason, the petitioner's figures for compensation of officers may be considered in certain circumstances as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that in 2008, the shareholder Phyllis L. Borgardt held 99.174863 percent of the company's stock, and in 2009 she held 100 percent of the company's stock. According to the petitioner's IRS Forms 1120S, at page 1, line 7 (Compensation of Officers), the petitioner elected to pay the shareholder compensation in the amount of \$83,508.00 in 2008 and \$57,822.00 in 2009. As evidence on appeal, the petitioner submitted a statement by the shareholder [REDACTED] specifically expressing her willingness to forego a portion of her compensation in order to meet the proffered wage. The petitioner submitted a copy of the shareholder's IRS Form 1040 personal income tax return. However, the record of proceeding does not contain a list of the shareholder's recurring monthly household expenses. In order to determine the petitioner's ability to pay the proffered wage, the shareholder's monthly expenses must be considered along with the officer's adjusted gross income (AGI) to confirm that this claim would have been realistic. Without the household expense amounts, the petitioner's ability to pay the proffered wage cannot be determined when based upon officer compensation. Furthermore, based on the sole shareholder's Forms 1040 alone, her willingness to forego any of her compensation in 2008 or 2009 appears to be unrealistic. Her Form 1040 shows substantial negative AGI in both years, which was further reduced by itemized deductions. Accordingly, although the sole shareholder was compensated in 2008 and 2009, her tax returns show that it was more likely than not that none of this money could have been redirected to the beneficiary.

Counsel asserts that the petitioner experienced an uncharacteristic business expense in 2008. Counsel further asserts that the petitioner issued a \$10,820.00 loan to the majority shareholder's son and that the amount should be considered in determining the petitioner's ability to pay the proffered wage. Counsel cites to *Full Gospe Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). However, the decision in *Full Gospel Portland Church v. Thornburgh* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the

same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that USCIS should consider the pledges of parishioners in determining a church's ability to pay the wages of an occupational therapist. Here, counsel's assertion is that USCIS should treat its loan to a shareholder's son as evidence of its ability to pay, even though a loan is considered a debt, whereas a parishioner's pledge is a promise to give money to a church. In the latter situation, a pledge does not create a corresponding debt and liability, as does the loan. Furthermore, the petitioner has failed to provide evidence of such loan depicting its terms.

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. 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 this matter, the totality of the circumstances does not establish that the petitioner had or has the ability to pay the proffered wage in the relevant years. There are no facts paralleling those found in *Sonogawa* that are present in the instant matter to a degree sufficient to establish that the petitioner had the ability to pay the proffered wage. The loan to the shareholder's son has not been shown to have been an uncharacteristic business expenditure or loss which would overcome the petitioner's apparent inability to pay the proffered wage. The petitioner did not provide corroborating evidence to establish the nature of the loan or its terms. The petitioner has not submitted evidence to establish that the beneficiary is replacing a former employee whose primary duties were described in the ETA Form 9089. Counsel suggests that USCIS should consider the petitioner's anticipated business growth and increased profits in the future. While the petitioner may anticipate business growth and increased profits in the future, it still must show that it had such capacity beginning in 2008.

Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

ORDER: The AAO's prior decision, dated August 24, 2010, is affirmed. The petition remains denied.