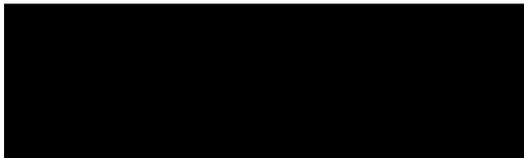


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



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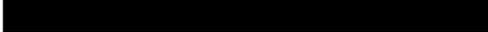
Date: **FEB 10 2012**

Office: TEXAS 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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 director subsequently determined that the grounds for denial had not been overcome by the petitioner's motion to reopen and reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a healthcare staffing agency. It seeks to employ the beneficiary permanently in the United States as a registered nurse pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1153(b)(3). The petitioner asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group I. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification) accompanied the petition.

On July 14, 2008, the director denied the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage.

On August 18, 2008, the petitioner filed a motion to reopen and reconsider the director's decision. On September 22, 2008, the director determined that the grounds for denial had not been overcome and affirmed the denial of the petition.¹

The petitioner, through counsel has appealed. Counsel asserts that the director erred in finding that the petitioner had failed to demonstrate its continuing ability to pay the proffered wage. Counsel also indicates on the notice of appeal (Form I-290B) that a brief and/or additional evidence will be submitted to the AAO within 30 days. More than 36 months later, nothing further has been received by this office. This decision will be rendered on the record as it stands.

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.² 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.

For the reasons set forth below, the AAO concurs with the director's decision that the petitioner failed to establish its continuing ability to pay the proffered wage. Beyond the decision of the director, the AAO further concludes that the petitioner failed to comply with the Department of Labor's (DOL)'s notification requirements.

¹ The motion was untimely, but the director elected to render a decision.

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).

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. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees.

The regulation at 8 C.F.R. § 204.5(a)(2) provides that a properly filed Immigrant Petition for Alien Worker (Form I-140), must be "accompanied by any required individual labor certification, application for Schedule A designation, or evidence that the alien's occupation qualifies as a shortage occupation within the Department of Labor's Labor Market Information Pilot Program."

The priority date of any petition filed for classification under section 203(b) of the Act "shall be the date the completed, signed petition (including all initial evidence and the correct fee) is properly filed with [U.S. Citizenship and Immigration Services (USCIS)]." 8 C.F.R. § 204.5(d). Here, the priority date is August 24, 2006.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Therefore these regulations apply to this case because the filing date is August 24, 2006.

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, as stated above, for a Schedule A blanket labor application and corresponding Immigrant Petition for Alien Worker, (Form I-140) petition, the

priority date was established as August 24, 2006.³ The proffered wage is stated on the G-1 of the ETA Form 9089 as \$23.00 to \$27.00 per hour.⁴ Therefore, the minimum proffered wage offered by the petitioner is calculated at \$23.00 per hour, which amounts to \$47,840 per year. The upper end of the range (\$27.00 per hour) amounts to \$56,160 per year. The ETA Form 9089 was signed by the beneficiary on August 8, 2006. On K-6 of the ETA Form 9089, she claims that she worked for the petitioner from May 2006 to July 2006.

As indicated above, the Form I-140 was filed on August 24, 2006. Part 5 of the petition indicates that the petitioner was established in 2002 and claims to have a gross annual income of \$750,000, an annual net income of \$0.00, and to currently employ five workers. The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application 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 overall 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 support of its ability to pay the proffered wage of \$47,840 to \$56,160 per year from the priority date onward, the petitioner has provided copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2005 and 2006.⁵ The record also contains page 1 of the 2004 tax return.⁶ The

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

⁴ Both the director's initial decision, and the decision issued in response to the petitioner's motion to reopen and reconsider incorrectly reference the proffered wage as \$22.00 per hour. The range stated on the ETA Form 9089 is \$23.00 to \$27.00 per hour.

⁵ Where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 (2006, 2007) 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 shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 18 of Schedule K in 2005 and 2006.

⁶ It reflects net income of -\$11,344. This return reflects financial data prior to the priority date of

returns reflect that the corporate petitioner uses a standard calendar year as its fiscal year. The returns contain the following information:

Year	2005	2006
Net Income	-\$ 1,564	-\$108,762
Current Assets	\$24,495	\$104,354
Current Liabilities	\$ 325	\$212,623
Net Current Assets	\$24,170	-\$108,269

As indicated by the record, because the priority date set by the ETA Form 9089 is August 24, 2006, the 2006 corporate tax return is more relevant in determining the petitioner's ability to pay the proffered wage of \$47,840 per year.⁷

As illustrated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.⁹

The petitioner has also provided copies of the Wage and Tax Statements (W-2s) that reflect compensation paid to the beneficiary. They reflect the following wages paid:

Year	Wages	Difference from Proffered Wage of \$47,840 to \$56,160 per year
------	-------	-----------------------------------------------------------------

August 24, 2006 and is not directly pertinent to the petitioner's ability to pay the proffered wage pursuant to 8 C.F.R. § 204.5(g)(2).

⁷As the petitioner's other federal tax returns are for the time period before the priority date, those returns will be considered subsequently within a review of the petitioner's overall circumstances.

⁸According 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.

⁹A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

2006	\$21,674	\$26,166 less than minimum wage of \$47,840 in proffered wage range of \$47,840 to \$56,160
2007	\$ 7,400	\$40,440 less than minimum wage of \$47,840 in proffered wage range of \$47,840 to \$56,160

Payroll records submitted on motion indicate that as of the pay period ending August 2, 2008, the petitioner had paid the beneficiary \$12,206.¹⁰

The petitioner has also provided a letter, dated February 1, 2006, from [REDACTED] Pennsylvania stating that the petitioner has two checking accounts [REDACTED] and a money market account [REDACTED] that represent a combined balance of \$544,236.62. A subsequent letter, dated October 27, 2006, from the same bank states that one of the previously identified checking accounts has a balance of \$504,664.77. Accompanying these letters is a Citizens Bank statement representing a balance of \$4,113.62 for account(s) [REDACTED] combined with [REDACTED] for the period ending June 17, 2008.

The record also contains copies of two contracts that the petitioner has entered into with third-party clients to provide registered nurses to work at their facilities on assignment. The first contract was dated October 6, 2005 and was executed by the petitioner and [REDACTED]. The second contract is dated February 14, 2008 and was executed by the petitioner and [REDACTED]. It is accompanied by copies of two 2008 checks, (for \$50,000 and \$9,742.50, respectively) written by [REDACTED] to the petitioner. One of the

¹⁰Based on the beneficiary's statement on the ETA 9089 and on a G-325 (Biographic Information) that she signed on August 8, 2006 in connection with her application for permanent residence in which she claimed no employment, the petitioner has employed the beneficiary intermittently. The position must be for full-time permanent employment and the petitioner must show that it is the actual employer of the beneficiary. See 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. See *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); see also Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. See *Clackamas*, 538 U.S. at 448-449; cf. New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006). (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

checks (for \$9,742.50) references the beneficiary and another individual. A copy of a third 2008 check was issued by Allegheny County and references payment for "staffing services."

The director reviewed the petitioner's tax returns and the evidence of wages paid to the beneficiary and denied the petition on July 14, 2008, based on the lack of the ability to pay the proffered wage. On September 22, 2008, the director reaffirmed the denial. He determined that the bank letters submitted on motion do not show a sustainable ability to pay the proffered wage and further noted that although the beneficiary's hourly wage on her 2008 paychecks appeared to exceed the proffered wage, the evidence failed to establish that either the petitioner's net income or net current assets could cover the difference between the actual wages paid and the proffered wage in 2006 and 2007. Similarly, the 2008 contract entered into with [REDACTED] does not apply to earlier periods. Finally, the petitioner had not established that the fee collected for the beneficiary's services was enough to offset her wages and expenses incurred by the petitioner for her employment.

With regard to the bank statements and the [REDACTED] Bank letters as noted by the director, the regulation at 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage permits additional material "in appropriate cases," bank statements are not amongst the documentation that is required to establish a petitioner's ability to pay a proffered wage and would not be an acceptable substitution. The petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the corresponding tax return. In this case, it is noted that the \$500,000 cash balance referred to in both [REDACTED] Bank letters of February and October 2006 do not represent any figures reported on the petitioner's 2005 or 2006 tax return, either as gross receipts or sales or as cash specified on Schedule L that would already be considered in determining the petitioner's net current assets. As set forth on the 2005 tax return, the petitioner's ending cash balance as shown on Schedule L was \$2,932. Its gross receipts shown on page 1 were \$87,630. In 2006, its end-of-year cash balance was -\$16,293, and its reported gross receipts on page 1 was \$200,259. This raises a question as to the *bona fides* of the financial documentation and the job offer generally. 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. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Further, it is noted that the selected June 17, 2008 bank statement showing a \$4,113.62 balance does not demonstrate a continuing ability to pay the proffered wage either in 2008 or for any prior periods. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

It is noted that if a 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. As set forth above, the W-2s show that in 2006, the year covering the priority date, the petitioner paid the beneficiary \$26,166 less than the \$47,840 minimum of the \$47,840 to \$56,160 proffered wage range. In 2007, the petitioner paid the beneficiary \$40,440 less than the minimum of the \$47,840 to \$56,160 proffered wage range.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. 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).

As shown on the petitioner's 2006 corporate tax return, which is the year covering the priority date of August 24, 2006, neither the petitioner's -108,762 in net income, nor its -\$108,269 in net current assets was sufficient to cover the difference of \$26,166 between the actual wages paid and the minimum level of \$47,840 of the \$47,840 to \$56,160 proffered wage range and demonstrate its ability to pay. It is noted that despite the 2005 contract entered into between the petitioner and the [REDACTED] Center, the petitioner's 2006 financials failed to establish an ability to pay the full proffered wage to the beneficiary.

In 2007, as stated above, the petitioner's employment of the beneficiary amounted to \$7,400 in compensation, which is \$40,440 less the minimum level of \$47,840 of the \$47,840 to \$56,160 proffered wage range. The petitioner submitted no federal tax return or audited financial statement that would demonstrate its financial ability to cover this difference. The petitioner failed to demonstrate its ability to pay the minimum proffered wage of \$47,840 of the \$47,840 to \$56,160 proffered wage range in this year.

In 2008, as contained in the record and as set forth above, the petitioner paid the beneficiary \$12,206 as of the pay period ending August 2, 2008 with an hourly rate of \$24.00 per hour. While the hourly rate may be within the offered wage range, the job offer is for a full-time permanent position. These year-to-date wages are \$35,634 less than the annual minimum level of \$47,840 of the \$47,840 to \$56,160 proffered wage range. Even on a monthly basis, the beneficiary's year-to-date wages on a calendar basis represent \$1,743.72 while the minimum level of \$47,840 proffered wage would be approximately \$3,986.67 (\$47,840 divided by 12) per month. A petitioner does not establish its continuing financial ability to pay a proffered wage through sporadic employment without submitting documentation consistent with the requirements of 8 C.F.R. § 204.5(g)(2) such as a tax return, audited financial statement or annual report. The petitioner has not established its ability to pay the minimum level of \$47,840 proffered wage in 2008.

It is noted that on motion, counsel cites payment of the hourly proffered wage to the beneficiary I 2008 as qualifying the petition for approval. She refers to a *Memorandum by William R. Yates, Associate Director of Operations*, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2)," HQOPRD 90/16.45 (May 4, 2004), in which the adjudicators are advised of three methods by which the ability to pay should be evaluated. With respect to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding

precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.¹¹ The AAO is bound by the Act, regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from the circuit where the action arose. See *N.L.R.B v. Ashkenazy Property Management Corp.*, 817 F.2d 74,75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit). Further, it is noted that the [REDACTED] Memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the [REDACTED] memorandum. However, counsel suggests an interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the [REDACTED] as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is August 24, 2006, as established by the labor certification. Demonstrating that the petitioner is paying the proffered wage during a specific year or time period may suffice to show the petitioner's ability to pay for that year or period of time, but the petitioner must still demonstrate its ability to pay for the remainder of the pertinent period of time.

As noted above, *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 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 *Sonogawa* was based in part on the petitioner's sound business reputation, historical growth and outstanding reputation as a couturiere. In this case, the petitioner provided a 2005, 2006 and one page of a 2004 corporate tax return. None of these documents indicate the ability to pay the proffered wage range of \$47,840 to \$56,160 through either net income or net current assets. Both net income and net current assets were reflected as losses. While the petitioner submitted copies of contracts for services executed in 2005 and 2008, the record

¹¹See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

does not reflect that its net income or net current assets in 2006 could cover the difference between actual wages paid to the beneficiary and the proffered wage. Despite a contract executed in February 2008, it is not apparent that the beneficiary has been employed full-time and the petitioner has not submitted any probative evidence that it can cover the difference between wages paid and the proffered wage, or even that the expenses of employment and the petitioner's operation could offset revenue received for the beneficiary's services. Finally, the petitioner's claim of substantial cash balances in its bank accounts cannot be reconciled with information within either its 2005 or 2006 tax return.

Finally, USCIS electronic records indicate the petitioner filed 34 immigrant petitions in 2006. Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA Form 9089 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. As stated above, a petitioner's filing of a labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA Form 9089. The priority date is the date that the Application for Permanent Employment Certification was accepted for processing by any office within the employment service system of DOL. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that each job offer was realistic as of the respective priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. In this case, the petitioner's financial documentation does not support its ability to pay the proffered wage for the instant beneficiary by itself and would not support the payment of the proffered wage within the context of the sponsorship of multiple beneficiaries.

Unlike the *Sonegawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonegawa* are present in this matter. The AAO cannot conclude that the petitioner has had the continuing ability to pay the proffered wage from the priority date onward.

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. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143 at 145 (noting that the AAO reviews appeals on a *de novo* basis).

Beyond the decision of the director, the AAO finds that the notice of posting the job opportunity does not comply with the regulatory requirements. The regulation at 20 C.F.R. § 656.15 states in pertinent part:

(a) *Filing application.* An employer must apply for a labor certification for a *Schedule A* occupation by filing an application in duplicate with the appropriate DHS office, and not with an ETA application processing center.

(b) *General documentation requirements.* A *Schedule A* application must include:

(1) An *Application for Permanent Employment Certification* form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.

(2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

(c) *Group I documentation.* An employer seeking labor certification under Group I of *Schedule A* must file with DHS, as part of its labor certification application, documentary evidence of the following:

* * *

(2) An employer seeking a *Schedule A* labor certification for an alien to be employed as a professional nurse (§ 656.5(a)(1)) must file as part of its labor certification application documentation that the alien has received a Certificate from the Commission on Graduates of Foreign Nursing Schools (CGFNS); that the alien holds a full and unrestricted (permanent) license to practice nursing from the state of intended employment; or that the alien has passed the National Council Licensure Examination for Registered Nurse (NCLEX-RN). Application for certification of employment as a professional nurse may be made only under this §656.15(c) and not under § 656.17.

The regulations at 20 C.F.R. § 656.40 state in relevant part:

(a) *Application process.* The employer must request a prevailing wage determination from the SWA having jurisdiction over the proposed area of intended employment. The SWA must enter its wage determination on the form it uses and return the form with its endorsement to the employer....

(b) *Determinations.* The SWA determines the prevailing wage as follows:

(1) Except as provided in paragraphs (e) and (f) of this section, if the job opportunity is covered by a collective bargaining agreement (CBA) that was negotiated at arms-length between the union and the employer, the wage rate set forth in the CBA agreement is considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it is considered the "prevailing wage" for labor certification purposes. . . .

(c) Validity period. The SWA must specify the validity period of the prevailing wage, which in no event may be less than 90 days or more than 1 year from the determination date. To use a SWA PWD, employers must file their application or begin the recruitment required by §§656.17(d) or 656.21 within the validity period specified by the SWA.

It is further noted that requirements for the petitioner to provide evidence of its notice of posting of the job opportunity, are set forth within the regulation at 20 C.F.R. § 656.10(d), which states in pertinent part:

(1) In applications filed under Section 656.15 (Schedule A), 656.16 (Shepherders), 656.17 (Basic Process), 656.18 (College and University Teachers), and 656.21 (Supervised Recruitment), the employer must give notice of the filing of the Application for Permanent Employment Certification and be able to document that notice was provided, if requested by the Certifying Officer, as follows:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least *10 consecutive business days*. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include locations in the immediate vicinity of the wage and hour notices required by 29 CFR 516.4 or occupational safety and health notices required by 29 CFR

1903.2(a). In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization. The documentation requirement may be satisfied by providing a copy of the posted notice and stating where it was posted, and by providing copies of all the in-house media, whether electronic or print, that were used to distribute notice of the application in accordance with the procedures used for similar positions within the employer's organization.

(Emphasis added.)

* * *

(3) The notice of the filing of an Application for Permanent Employment Certification must:

- (i) State the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity;
- (ii) State any person may provide documentary evidence bearing on the application to the Certifying Officer of the Department of Labor;
- (iii) Provide the address of the appropriate Certifying Officer; and
- (iv) Be provided between 30 and 180 days before filing the application.

The notice of posting provided by the petitioner was deficient. It indicated that the Certifying Officer's address was located in either Philadelphia or Pittsburgh. This is not correct. The correct address, at the time of filing, as set forth in the DOL Frequently Asked Questions and Answers, Round 1, is The United States Department of Labor, Employment and Training Administration, Atlanta National Processing Center, Harris Tower, 233 Peachtree St., N.E., Ste. 410, Atlanta, Georgia 30303. <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm>.¹²

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹² Accessed January 11, 2012. As of June 1, 2008, all posting notices need to reflect the Atlanta address. Previous notices reflected either Chicago or Atlanta based on the state of job offer.