



U.S. Citizenship
and Immigration
Services

(b)(6)

Date: **JUN 20 2012**

Office: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 with the field office or service center that originally decided your case by filing a 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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a non-profit organization. It seeks to employ the beneficiary permanently in the United States as an information and referral specialist. 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 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 4, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 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, 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 (Acting Reg'l Comm'r 1977).

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Here, the Form ETA 750 was accepted on February 17, 2004. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour (\$31,200 per year). The Form ETA 750 states that the position requires an associate's degree and one year of experience in the job offered or the related occupation of sponsorship assistant.

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 organization exempt from income tax which reports its income and expenses on Form 990, Return of Organization Exempt From Income Tax.

On the petition, the petitioner claimed to have been established in 2001 and to currently employ fourteen workers. According to the tax returns in the record, the petitioner's fiscal year begins on October 1st and ends on September 30th. Therefore, the petitioner's financial information as of the priority date of February 17, 2004, was reflected on the 2003 Form 990. On the Form ETA 750B, signed by the beneficiary on January 12, 2004, the beneficiary claims to have worked for the petitioner from May 2003 to the present.

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'l Comm'r 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'l Comm'r 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. In the instant case, the petitioner has not established

¹ 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).

that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2004² or subsequently.

Forms W-2 were submitted indicating that the petitioner paid the beneficiary wages according to the table below.

- In 2003, the Form W-2 showed wages paid to the beneficiary of \$10,861.58.³
- In 2004, the Form W-2 showed wages paid to the beneficiary of \$26,265.68.
- In 2005, the Form W-2 showed wages paid to the beneficiary of \$27,924.77.
- In 2006, the Form W-2 showed wages paid to the beneficiary of \$31,031.84.
- In 2007, the Form W-2 showed wages paid to the beneficiary of \$29,838.79.
- In 2008, the Form W-2 showed wages paid to the beneficiary of \$27,613.84.

Therefore, as the proffered wage was \$31,200.00 per year, the petitioner did not pay the beneficiary the full proffered wage in any of the periods covered by the Forms W-2 but would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2004	\$31,200.00	\$26,265.68	\$4,934.32.
2005	\$31,200.00	\$27,924.77	\$3,275.23.
2006	\$31,200.00	\$31,031.84	\$168.16.
2007	\$31,200.00	\$29,838.79	\$1,361.21.
2008	\$31,200.00	\$27,613.84	\$3,586.16.

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), *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); *Ubeda v. Palmer*, 539 F.

² The AAO notes that the director mistakenly states in the denial that the petitioner must demonstrate its ability to pay the proffered wage in 2001, 2002, and 2003, prior to the priority date of February 17, 2004.

³ As the Form W-2 submitted from 2003 covers a period prior to the priority date of February 17, 2004, it is not necessarily dispositive of the petitioner's ability to pay the proffered wage as of the priority date but may be considered generally.

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 record before the director closed on April 7, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's tax return for 2007 is the most recent return available.

The petitioner's tax returns, Form 990, line 18, demonstrate its excess (or deficit) for 2004, 2005, 2006, and 2007 as shown in the table below.

- In 2004, the Form 990 stated revenue of -\$9,282.00.
- In 2005, the Form 990 stated revenue of -\$25,775.00.
- In 2006, the Form 990 stated revenue of -\$17,009.00.
- In 2007, the Form 990 stated revenue of -\$15,765.00.

The 2003 tax return which would have covered the period of time including the priority date was not submitted. Therefore, for fiscal years 2003, 2004, 2005, 2006, and 2007, the petitioner did not demonstrate sufficient net revenue to pay the difference between the proffered wage and wages actually paid to the beneficiary.

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.⁴ If the total of an organization'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. However, IRS Form 990 does not reflect year-end current assets, year-end current liabilities, or net current assets. An audited financial statement may reflect these figures, but no audited financial statements were submitted into the record. Therefore, for the petitioner's fiscal years 2003, 2004, 2005, 2006, and 2007, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage.

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.

On appeal, counsel asserts that not-for-profit organizations may demonstrate their ability to pay through an examination of their year-end net assets or fund balances⁵ and refers to a decision issued by the AAO concerning the ability to pay. Counsel asserts that the petitioner's ability to pay the proffered wage would be demonstrated in 2004 and 2005 if net assets were added to the amount of wages paid to the beneficiary. However, counsel does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

⁴According 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.

⁵ Year-end net assets or fund balances of an organization exempt from income tax is reported on IRS Form 990, line 21 in 2004, 2005, 2006, and 2007.

Further, the net assets/fund balances section of a not-for-profit organization's Statement of Financial Position reports totals for each of the following classifications based on the restrictions made by the donors at the time of their contributions: unrestricted net assets, temporarily restricted net assets, and permanently restricted net assets. The AAO notes that consideration of these net assets in determining an organization's ability to pay wages is not an accurate method as they may not be available to pay the wage due to restrictions on their use. In other words, they do not generally represent assets that can be liquidated during the course of normal business. These assets may include capital stock, land, building or equipment funds, retained earnings, and other such items as set forth in the net assets/fund balances category on the balance sheet which an organization may not be able to utilize to pay wages.

In a for-profit context, revenues minus expenses is called net income or net profit, and is an indicator of the firm's success. For non-for-profit organizations, the change in net assets is a surplus or deficit that is carried forward. On the Form 990, even though nonprofits are not primarily operated to generate profits, line 19 of page 1 is a reliable predictor of future activities.

Counsel also asserts that the petitioner's payroll broker [REDACTED] made an error in calculating employee leave resulting in an increased amount of accrued employee vacation hours which negatively affected the petitioner's financial reporting. Counsel asserts that the petitioner's ability to pay the proffered wage would be demonstrated in 2006 and 2007 if employee leave had been calculated correctly. A letter from the petitioner stating that [REDACTED] incorrectly calculated the employee vacation leave hours was submitted. However, the AAO notes that no evidence of the tax returns or W-2 forms being amended and filed with the Internal Revenue Service was submitted. In addition, no other probative evidence such as statements from [REDACTED] or audited financial statements was submitted. Further, 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel's and the petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not 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 (Reg'l Comm'r 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 petitioner's total revenue and net fund balances during the relevant years varied. The petitioner indicated on the Form I-140 that it employs fourteen people. While the petitioner has been operating over ten years, it does not pay substantial compensation to its officers and directors. The petitioner did not submit evidence sufficient to demonstrate that the officers or directors were willing and able to forego compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the organization, of the occurrence of any uncharacteristic expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. The petitioner failed to provide any regulatory-prescribed evidence of its ability to pay covering the priority date. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

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.