



U.S. Citizenship  
and Immigration  
Services

(b)(6)

Date: MAR 15 2012

Office: TEXAS 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 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,

*Kieran S. Bullock for*

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner is a telecommunications carrier company. It seeks to employ the beneficiary permanently in the United States as a project accountant. As required by statute, ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and 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 March 24, 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)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 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, Application for Permanent Employment Certification, 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 June 6, 2008. The proffered wage as stated on the ETA Form 9089 is \$43,347 per year. The ETA Form 9089 states that the position requires a baccalaureate degree in Accounting, Finance, or related area and two years of experience as a project accountant.

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.<sup>1</sup>

The record indicates the petitioner is structured as a limited liability company (LLC) and is a wholly-owned subsidiary of [REDACTED]. The petitioner states that its income and expenses are included with the income and expenses of its parent on its federal income tax return. On the petition, the petitioner claimed to have been established in 2001 and to employ 29 workers. On the ETA Form 9089, signed by the beneficiary on January 31, 2009, the beneficiary did not claim to have worked for the petitioner.

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'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 Sonegawa*, 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 that it employed and paid the beneficiary during the relevant period.

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 (1<sup>st</sup> 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

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<sup>1</sup> 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).

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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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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).

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

The record before the director closed on March 6, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner did not submit copies of its annual reports, federal tax returns, or audited financial statements as required by 8 C.F.R. § 204.5(g)(2). The record before the director did contain the 2007 IRS Form 1120S for [REDACTED] and payroll information for the beneficiary indicating he worked for [REDACTED] in 2008 and through February 15, 2009. However, as discussed below, tax and payroll records for [REDACTED] do not establish the petitioner's ability to pay the proffered wage. Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup> As the petitioner has not submitted evidence required by 8 C.F.R. § 204.5(g)(2), the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Thus, from the date the ETA Form 9089 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 the petitioner can establish its ability to pay by total reliance on its parent's financial resources based on the following: (1) the petitioner is a wholly-owned subsidiary of [REDACTED] and as such, its income and expenses are reported on its parent's federal tax return, thus no federal tax return exists for the petitioner; (2) *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) is applicable; (3) the ability to pay analysis should be consistent with DOL nonimmigrant visa regulations; (4) the January 27, 2009 letter from the petitioner's Vice President of Finance is a legally binding commitment that petitioner's parent will continue to invest millions of dollars in the success of the petitioner; and (5) that previous unpublished USCIS decisions are binding.

The petitioner is an LLC formed under Virginia law. An LLC, like a corporation, is a legal entity separate and distinct from its owners. Because an LLC is a separate and distinct legal entity from its owners, the assets of its members or of other enterprises or corporations cannot be considered in determining the petitioning LLC's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Counsel asserts that the petitioner is a wholly-owned subsidiary whose income and expenses are reported on its parent's federal income tax return, thus no federal income tax return exists for the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) requires the submission of the petitioner's annual reports, federal tax returns, or audited financial statements. Thus, while the petitioner asserts that it could not submit its own federal tax return, it still had the option to submit its annual report or its audited financial statements. It did not do so.

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<sup>2</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Counsel also asserts that the decision in *Full Gospel* is applicable to the instant case. The decision in *Full Gospel* 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. Here, the record contains a statement from [REDACTED] dated April 21, 2009 indicating that the petitioner's bank accounts are zero-balance accounts tied to its parent's master account, and an April 21, 2009 letter from the Chief Financial Officer of [REDACTED] and the petitioner stating "whenever [the petitioner] does not have sufficient revenue to fund operations, [the petitioner] withdraw[s] money automatically from [its parent's bank] account." However, this evidence is neither supported by a legally binding contract nor independent evidence, such as the petitioner's audited financial statements, that the purported arrangement results in an investment and not a debt.<sup>3</sup>

Counsel further states that the ability to pay analysis should be consistent with the DOL regulations for nonimmigrant visas, specifically 20 C.F.R. §655.736. However, counsel cites no authority for applying regulations applicable to nonimmigrant petitions instead of the regulation at 8 C.F.R. § 204.5(g)(2), which applies to immigrant petitions.

Counsel also states that the January 27, 2009 letter from the petitioner's Vice President of Finance is evidence the petitioner's parent will continue to invest millions of dollars in the success of the petitioner. The letter states in pertinent part "as [the petitioner] is still in its early stages of operations, the primary funding source for [the petitioner] is investment from its parent. [Its parent] is committed to the success of [the petitioner]...". However, this statement is not a legally binding commitment on the part of the petitioner's parent and without independent evidence, this statement cannot be construed as a legally binding contract between the petitioner and its parent requiring its parent to continue to invest millions of dollars in the petitioner.

Finally, as to counsel's assertion that previous USCIS unpublished decisions are binding, counsel refers to a decision issued by the AAO concerning entities owned by a sole individual, but 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).

The AAO also notes that according to USCIS records, the petitioner has filed four I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The

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<sup>3</sup> Counsel refers to the \$5.5 million invested by [REDACTED] in [REDACTED] locations, including [REDACTED] at Landsdowne and [REDACTED] at Broadland. However, the 2007 tax return for [REDACTED] indicates that these investments were made in separate LLCs, and not in the petitioner.

evidence in the record does not document the priority date, the proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner did not submit its financial records, and thus, the AAO is unable to determine the petitioner's historical growth. The petitioner was established in 2001. It claims to employ 29 workers; however, the petitioner provided no evidence to support this claim.<sup>4</sup> Unlike *Sonogawa*, the petitioner has not submitted any evidence reflecting its reputation. Nor has the petitioner submitted evidence of any uncharacteristic business expenses or losses. There is no evidence that the beneficiary will be replacing a former employee or an outsourced service. Thus, assessing the totality of the circumstances in this case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage.

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<sup>4</sup> 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)).

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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.