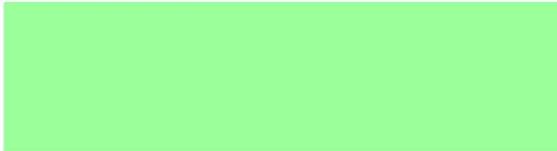


(b)(6)

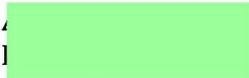
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

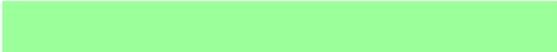


U.S. Citizenship  
and Immigration  
Services



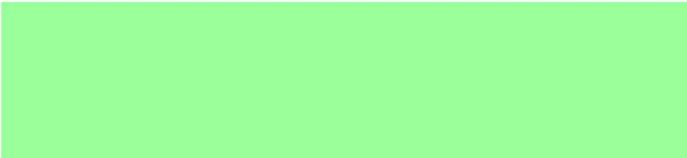
DATE: **FEB 19 2013**

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner is a California corporation that engages in the business of duplicating videos under the name [REDACTED]. It seeks to employ the beneficiary permanently in the United States as an accountant. 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 failed to establish 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.

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 who are members of the professions. Section 203(b)(3)(A)(i) of 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).

Here, the Form ETA 750 was accepted on December 3, 2002. The proffered wage as stated on the Form ETA 750 is \$26.97 per hour (or \$56,097.60 per year based on a full-time, 40-hour work week).

The Form ETA 750 states that the position requires a bachelor's degree in business administration, accounting or the equivalent, and two years of 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.<sup>1</sup>

The evidence in the record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1995 and did not indicate how many workers it employed. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 to September 30. On the Form ETA 750B, signed by the beneficiary on November 16, 2002, 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 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. The totality of the circumstances affecting the petitioning business will also be considered. *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 that it employed and paid the beneficiary since the priority date. The petitioner has not submitted copies of W-2 forms, 1099 forms or payroll records evidencing its employment of the beneficiary. The petitioner has therefore not established that it paid the beneficiary the proffered wage since the priority date of December 3, 2002.

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.*

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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).

*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. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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).

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner has submitted copies of its federal

income tax returns from 2002 to 2008. The petitioner's tax returns show net income amounts of \$(165,222)<sup>2</sup> for 2002, \$(200,043) for 2003, \$(89,493) for 2004, \$(159,014) for 2005, \$(131,597) for 2006, \$(70,816) for 2007, and \$54,817 for 2008. None of the net income amounts that the petitioner listed on its federal income tax returns for 2002 through 2008 met or exceeded the annual offered wage rate of \$56,097.60. The petitioner has therefore not demonstrated 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>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 returns show end-of-year net current assets of \$(84,177) for 2002, \$930,842 for 2003, \$517,297 for 2004, \$355,074 for 2005, \$62,176 for 2006, \$35,975 for 2007, and \$10,347 for 2008. The petitioner's tax returns therefore show that it had sufficient net current assets to pay the proffered wage in 2003, 2004, 2005 and 2006, but insufficient net current assets to pay the proffered wage in 2002, 2007 and 2008.

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 based on wages paid to the beneficiary, its net income or its net current assets.

On appeal, counsel asserts that the USCIS regulation requiring evidence of a petitioner's ability to pay the proffered wage was intended "merely to establish that the employer is a *bona fide* company." According to counsel, in remarks at the 2004 Annual Convention of the American Immigration Lawyers Association, William Yates, former USCIS Associate Director, Operations, said 8 C.F.R. § 204.5(g)(2) "was meant to be a tool that officers apply, not a sword." If a petitioner has "been in business for years, there really isn't any question on ability to pay or the *bona fides* of the company," counsel quoted Yates as saying. According to counsel, the petitioner's demonstration that it is a *bona fide* company that has conducted business for several years should demonstrate its ability to pay the offered wage.

Counsel's reliance on Mr. Yates' comments is misplaced. The statements of a senior USCIS official

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<sup>2</sup> Numbers in parentheses indicate negative amounts.

<sup>3</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.

do not legally bind the agency. Rather, USCIS is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals in the circuit where the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the Administrative Procedures Act, even when they are published in private publications or widely circulated). Section 204.5(g)(2) of Title 8 of the Code of Federal Regulations expressly requires evidence “that the prospective United States employer has the ability to pay the proffered wage,” not merely that the prospective employer is a *bona fide* company.

Moreover, federal courts have upheld USCIS’ method of determining a petitioner’s ability to pay the proffered wage. See *Construction & Design Co. v. USCIS*, 563 F.3d 593, 596 (7<sup>th</sup> Cir.2009) (if a petitioner’s ability to pay the proffered wage is not clear from USCIS’ review of its tax returns, “the firm has to prove by other evidence its ability to pay the alien’s salary”), *citing O’Conner v. Attorney General of the United States*, 1987 WL 18243, at \*1 (D.Mass., Sept.29, 1987); *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054; See also *River Street Donuts, LLC v. Napolitano*, 558 F.3d at 118 (upholding USCIS decision to not add depreciation back to net income to determine a petitioner’s ability to pay the offered wage). Any comments by Mr. Yates to the contrary do not persuade USCIS to allow the petitioner to merely show that it is a *bona fide* company. In accordance with 8 C.F.R. § 204.5(g)(2), the petitioner must demonstrate its continuous ability to pay the beneficiary’s proffered wage since the priority date.

Counsel next argues that the negative net income amounts on the petitioner’s tax returns reflect the petitioner’s successful attempts to minimize its tax liabilities and do not reflect the petitioner’s inability to pay the offered wage. Counsel urges USCIS to instead consider the petitioner’s annual total income amounts. According to counsel, “the [p]etitioner may choose to spend less on many of its non-essential expenditures and apply that money to the beneficiary’s proffered wage.” Counsel cites various pre-2003 decisions in which the AAO allowed petitioners to add back depreciation expenses to their net income amounts to demonstrate their ability to pay offered wages.

Counsel’s assertion that the petitioner can use other “non-essential expenditures” to pay the offered wage is insufficient. The petitioner has not submitted evidence of – or even identified - any “non-essential expenditures” that were or are available to pay the beneficiary’s offered wage. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (The assertions of counsel do not constitute evidence):

With respect to counsel’s argument that depreciation expenses may be added back to its income for purposes of paying the offered wage, as indicated above, the court in *River Street Donuts, LLC v. Napolitano* upheld USCIS’ decision to exclude depreciation expenses from net income. *River Street*

*Donuts* at 118. USCIS will therefore not consider the petitioner's depreciation expenses in determining whether it has had the continuing ability to pay the offered wage.<sup>4</sup>

Counsel also argues that the petitioner's employment of the beneficiary will increase its profits. Counsel asserts that the beneficiary's assumption of the petitioner's accounting duties will free the company's president to generate more business and thus more revenues. The petitioner, however, has not submitted evidence of potential business foregone because of its president's preoccupation with accounting duties. See *Matter of Obaighena*, 19 I&N at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506 (the assertions of counsel do not constitute evidence). Moreover, a belief in vague, prospective profits is not sufficient to demonstrate the ability to pay the offered wage rate. See *Matter of Great Wall*, 16 I&N Dec. at 144-145, stating:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally, counsel urges USCIS to consider a broader variety of financial factors – including the petitioner's total income and employee wages paid – in determining the petitioner's ability to pay the beneficiary's proffered wage. Counsel's argument is well-taken. As indicated above, 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. at 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

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<sup>4</sup> Even if USCIS recognized depreciation expenses as net income or assets in the instant case, the amount of the petitioner's depreciation expenses are insufficient to demonstrate its continuous ability to pay the offered wage. For example, counsel urges USCIS to add \$4,403 in depreciation expenses listed on the petitioner's 2007 tax return to its annual net current asset amount for that year of \$35,975. But even the addition of that depreciation amount would not yield an annual net current asset amount sufficient to pay the annual offered wage of \$56,097.60. The petitioner's inclusion of depreciation expenses in its annual net income or net current asset amounts therefore would not demonstrate its continuing ability to pay the proffered wage.

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 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 has remained in business for a longer period of time (17 years) than the petitioner in *Sonegawa* (11 years). But the petitioner's business does not seem as financially strong as the business in *Sonegawa*. The petitioner in *Sonegawa* only had one sub-par financial year out of 11 years. Conversely, the petitioner in the instant case has only showed profitability on its tax returns for one year between 2002 and 2008. The petitioner's total income rose impressively from 2002 to 2005, but dropped by 2008. The amounts that the petitioner has paid in employee wages, according to its tax returns, are similarly unpredictable, ranging from a high of \$194,358 in 2003 to a low of \$35,800 in 2007, an amount that would not be sufficient to pay the beneficiary's annual offered wage rate. And, unlike the petitioner in *Sonegawa*, the petitioner in the instant case has not submitted evidence of an outstanding business reputation in its field. Thus, assessing the totality of the circumstances in this individual case in accordance with *Sonegawa*, the petitioner has not established that it has had the continuing ability to pay the proffered wage.

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.