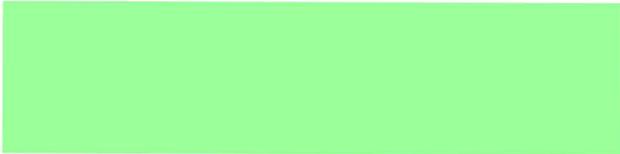


(b)(6)

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: **JAN 24 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,

Rachel Mitomo
RM

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a church. It seeks to employ the beneficiary permanently in the United States as a pastor's administrative assistant. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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 August 21, 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. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on October 27, 2005. The proffered wage as stated on the ETA Form 9089 is \$23.00 per hour (\$47,840.00 per year based on 40 hours per week). The ETA Form 9089 states that the position requires three years of education in religious studies.

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

On appeal, counsel submits a brief; compiled financial reports for 2005, 2006, 2007, 2008, and 2009; and copies of bank account statements from 2005, 2006, 2007, and 2008.

The evidence in the record of proceeding shows that the petitioner is structured as a tax-exempt corporation.² On the petition, the petitioner claimed to have been established in 1992 and currently to employ one worker. According to the documents in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary sometime after August 26, 2006,³ the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the director erred in neglecting to consider some documents which are critical to the establishment of the petitioner's ability to pay. On appeal, counsel asserts that the petitioner's "audited financial statements for 2005, 2006, 2007, 2008 and 2009" demonstrate that the petitioner had sufficient "net income" to pay the proffered wage. On appeal, counsel also asserts that the petitioner maintained a sufficient balance in its bank accounts to pay the beneficiary the proffered wage for each year from 2005 through 2009.

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

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). However, as the evidence provided on appeal was requested but not provided by the petitioner in response to the director's RFE, the documents newly submitted on appeal will not be considered. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The petitioner is a church, which is exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code.

³ Though both the beneficiary and the pastor of the petitioning church signed ETA Form 9089, neither individual affixed a date next to his signature.

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 that it employed or paid the beneficiary any wages during any relevant timeframe including the period from the priority date in 2005 or subsequently.

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. 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).

With the initial petition submission, as evidence of the ability to pay, the petitioner submitted unaudited budget statements for 2005, 2006, and 2007; copies of the petitioner’s Employer’s Quarterly Federal Tax Return (Form 941) for the third and fourth quarters of 2006; and bank statements from 2006 and 2007. On January 15, 2009, the director issued a request for evidence (RFE), noting that the evidence in the record did not demonstrate that the petitioner had the ability to pay the beneficiary the proffered wage from the priority date onward. The director, therefore, requested that the petitioner provide evidence of the ability to pay from the priority date to the present in the form of either audited financial statements or IRS Forms 990. The petitioner responded on February 26, 2009. In its response, the petitioner noted that, as a tax-exempt organization, it is not required to file federal income tax returns. The petitioner made reference to 8 C.F.R. § 204.5(g)(2), as well as to unpublished administrative decisions, to assert that, in lieu of federal income tax returns, audited financial statements, or annual reports, it is permitted to submit bank account statements. To that end, the petitioner submitted bank account statements for 2005, 2006, 2007, and 2008. Now, on appeal, counsel claims that the petitioner is submitting audited financial statements for 2005, 2006, 2007, 2008, and 2009.

It should be noted, however, that the statements provided on appeal are not audited. Rather, they are compiled. The record before the director closed on February 26, 2009 with the receipt by the director of the petitioner’s submissions in response to the director’s RFE. As of that date, the petitioner’s 2008 federal income tax return was not yet due. However, the petitioner, being a tax-exempt organization is not required to file federal income tax returns. While the petitioner could have provided audited financial statements, it chose not to do so, but provided compiled statements on appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that, where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that the petitioner submitted are not persuasive evidence. The accountant’s report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant’s report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into

a standard format. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Therefore, the petitioner did not demonstrate sufficient revenue to pay the proffered wage for 2005, 2006, 2007, or 2008.

As a tax-exempt organization, the petitioner is not required to submit federal income tax returns. As discussed above, the petitioner did not provide audited financial statements. Rather, as evidence of its current assets, the petitioner provided checking account statements, savings account statements, and money market account statements for 2005, 2006, 2007, and 2008.

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.⁴

Therefore, the petitioner has not demonstrated sufficient net current assets to pay the proffered wage for 2005, 2006, 2007, or 2008.

Therefore, 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 that the director erred in neglecting to consider documents, which are critical to the demonstration of the petitioner's ability to pay. On appeal, counsel states that the "audited financial statements" for 2005, 2006, 2007, 2008, and 2009 all show sufficient "net income" to pay the proffered wage. As discussed above, the financial statements provided on appeal are compiled and not audited.

Further, the director requested audited financial statements in his RFE, which was issued to the petitioner on January 15, 2009. However, in its response, the petitioner chose not to submit such statements at that time.

⁴ The petitioner provided complete sets of bank account statements for only two of five accounts (the checking account ending in 2373 and the savings account ending in 8902) and those for only one of four years: 2006. Therefore, the statements provided as evidence do not present a complete picture of the petitioner's current assets for all of the years under consideration.

On appeal, counsel references 8 C.F.R. § 204.5(g)(2) and unpublished administrative decisions to assert that the petitioner is allowed to submit evidence other than federal tax returns, audited financial statements, or annual reports for the establishment of the petitioner's ability to pay.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements...*In appropriate cases, additional evidence*, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by the Service.

[emphasis added].

The regulations indicate that a petitioner may submit evidence such as bank statements in appropriate cases. However, as discussed above, the petitioner 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's financial status. Further, the funds reflected in the petitioner's bank accounts only account for a portion of the petitioner's current assets without taking into consideration the petitioner's current liabilities. Therefore, it is misplaced to look to the petitioner's bank statements alone.

The regulations state that evidence such as profit/loss statements and bank account records may be submitted as additional evidence, but not in lieu of the regulatory-prescribed evidence which is required by 8 C.F.R. § 204.5(g)(2). The petitioner has not provided any of the forms of regulatory-prescribed evidence articulated above.

On appeal, counsel cites *O'Conner v. Atty. Gen.*, 1987 WL 1843 (D. Mass. Sept. 29, 1987) and *C & K Corp. v. Sava*, 1986 WL 2816 (S.D.N.Y. 1986) for the premise that supplementary evidence may be supplied in instances in which the petitioner's tax returns do not demonstrate sufficient income to pay the proffered wage. However, *O'Conner* indicates that the personal assets and income of the sole proprietors are relevant to a determination of the ability of the sole proprietorship to pay the proffered wage. In the instant circumstance, the petitioner is a non-profit corporation, not a sole proprietor.

C & K Corp. did not provide guidance regarding the submission of supplementary evidence. Rather, the court addressed *Matter of Sonogawa*, 12 I. & N. Dec. 612 (R.C.1967), noting that, in that case, the petitioner submitted with its petition not only its income tax return showing a small profit, but also additional evidence pertaining to its financial ability to pay the wages offered to the beneficiary alien. The other evidence included a financial statement prepared by an accountant, evidence such as newspaper and magazine articles which tended to show the future viability of the business, lists of clients and professional accomplishments, and evidence regarding the business "good will." The petitioner in *Sonogawa* did not submit the supplemental evidence in lieu of regulatory-prescribed evidence. Rather, the petitioner in *Sonogawa* supplemented the regulatory-prescribed evidence with other documentation to show that, in considering the totality of the petitioner's financial circumstances, it was more likely than not that the petitioner had the ability to pay the beneficiary notwithstanding a temporary, unplanned, financial setback.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 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 \$100,000.00. 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 has provided no regulatory-prescribed evidence of its revenue or expenditures. Thus, the petitioner has not demonstrated an increase in giving or revenue, which might overcome any deficiencies in the forms of documentation discussed above. The petitioner has not established the occurrence of any uncharacteristic expenditures or losses or whether the beneficiary is replacing a former employee or an outsourced service. 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.