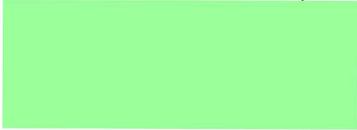
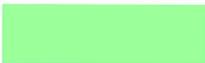


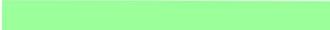


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 25 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,

Elizabeth McCormack

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Nebraska Service Center, (director). Subsequent motions to reopen and reconsider were dismissed by the director. The case is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a transportation/relocation business. It seeks to employ the beneficiary permanently in the United States as an equipment relocation analyst. 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 11, 2009, denial, at 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. On September 21, 2009, the director considered the petitioner's motions to reopen and reconsider. The director affirmed his previous decision and again found that the petitioner had failed to establish the ability to pay the proffered wage as of the priority date.

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).

Here, the Form ETA 750 was accepted on September 23, 2002. The proffered wage as stated on the Form ETA 750 is \$28.91 per hour (\$60,132.80 per year). The Form ETA 750 states that the position requires six years of grade school education and two years of experience in the offered job.

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 a C corporation. On the petition, the petitioner claimed to have been established on May 9, 2002, and to currently employ five workers. The petitioner's tax returns reveal that the petitioner's fiscal year runs from April 1 through the following March 31 each year. On the Form ETA 750B, signed by the beneficiary on September 16, 2002, the beneficiary claimed to have worked for the petitioner since February 2001.

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).

On appeal, counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) in stating that the petitioner has established its ability to pay the proffered wage in light of "[the beneficiary's] long tenure with [the petitioner] and the demonstrated ability of [the petitioner] to pay [the beneficiary's] fee." Specifically, counsel notes that the denial "was based entirely on [the petitioner's] income tax returns for the period in question. The fact that [the petitioner] paid [the beneficiary's] fees without impairing its ability to continue to do business was given no consideration."

In further support of his assertions, counsel cited the seventh circuit court of appeals' recently issued decision in *Construction and Design Co. v. USCIS*, 563 F.3d 593 (7th Cir. 2009). In that case, the

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).

seventh circuit directly addressed the method used by USCIS in determining a petitioner's ability to pay the proffered wage. The employer in *Construction and Design* was a small construction company which was organized as a Subchapter S corporation. The employer sought to employ the beneficiary at a salary of over \$50,000 per year.² The court noted that, according to the employer's tax returns and balance sheet, its net income and net assets were close to zero.³ The court also noted that the owner of the corporation received officer compensation of approximately \$40,000.⁴

In considering the employer's ability to pay the proffered wage, the court stated that if an employer "has enough cash flow, either existing or anticipated, to be able to pay the salary of a new employee along with its other expenses, it can "afford" that salary unless there is some reason, which might or might not be revealed by its balance sheet or other accounting records, why it would be an improvident expenditure."⁵

The court then turned to an examination of the USCIS method for determining an employer's ability to pay the proffered wage. The court noted that USCIS "looks at a firm's income tax returns and balance sheet first."⁶ The court, recognizing that the employer bears the burden of proof, went on to state that if the petitioner's tax returns do not establish its ability to pay the proffered wage the petitioner "has to prove by other evidence its ability to pay the alien's salary."⁷ The court found that the employer had failed to establish that it had sufficient resources to pay the proffered wage "plus employment taxes (plus employee benefits, if any)."⁸

Thus, the court in *Construction and Design* concurred with existing USCIS procedure in determining an employer's ability to pay the proffered wage. This method, which is described in detail below, involves (1) a determination of whether a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage; (2) where the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, an examination of the net income figure and net current assets reflected on the petitioner's federal income tax returns; and (3) an examination of the totality of the circumstances affecting the petitioning business pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As stated above, 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 employed the

² 563 F.3d at 595.

³ *Id.*

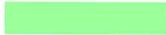
⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 596.

⁷ *Id.*

⁸ *Id.*



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beneficiary, but did not pay the beneficiary the full proffered wage subsequent to the priority date in 2002. Internal Revenue Service (IRS) Forms 1099-MISC, Miscellaneous Income, provided by the petitioner reflect the beneficiary was paid as follows:

2002	\$32,862
2003	\$37,408
2004	\$27,440
2005	\$56,130
2006	\$37,894
2007	\$55,396

The petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages from 2002 through 2007. Since the proffered wage is \$60,132.80 per year, the petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the beneficiary, that is:

2002	\$27,270.80
2003	\$22,724.80
2004	\$32,692.80
2005	\$4,002.80
2006	\$22,238.80
2007	\$4,736.80

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).

The record before the director closed on March 19, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner's tax returns reflect the following net income⁹:

2002 ¹⁰	\$6,980
2003 ¹¹	\$2,263
2004 ¹²	\$38,560
2005 ¹³	\$50,355
2006 ¹⁴	\$23,611
2007 ¹⁵	\$22,418

⁹For 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.

¹⁰April 1, 2002, through March 31, 2003.

¹¹April 1, 2003, through March 31, 2004.

¹²April 1, 2004, through March 31, 2005.

¹³April 1, 2005, through March 31, 2006.

¹⁴April 1, 2006, through March 31, 2007.

¹⁵April 1, 2007, through March 31, 2008.

Therefore, the petitioner did not have sufficient net income to pay the difference between the proffered wage and the wages actually paid to the beneficiary in 2002 and 2003.

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.¹⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 demonstrate the following end-of-fiscal-year net current assets:

2002	\$-16,963
2003	\$-7,166
2004	\$-45,292
2006	\$-9,476
2007	\$-26,775

For the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the difference between the proffered wage and the wages actually paid to the beneficiary. 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 since the petitioner has paid for the beneficiary's services during his "long tenure with [the petitioner]," the petitioner has satisfied the requirements detailed in a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, United States Citizenship and Immigration Services (USCIS), regarding the determination of ability to pay (Yates Memorandum), it has established its continuing ability to pay the proffered wage beginning on the priority date. See Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the

¹⁶According 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.

proffered wage.” The complete text of the quoted section of the memo declares that a petitioner can establish the ability to pay the proffered wage by providing “credible verifiable evidence that the petitioner not only is employing the beneficiary but also has paid or currently is paying the proffered wage.” Thus, the standard described by the memorandum is whether the petitioner has paid the proffered wage to the beneficiary, and is not whether there is a “long-standing working relationship” between the petitioner and the beneficiary.

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel’s interpretation of the language in that memorandum does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its continuing ability to pay the proffered wage beginning on the priority date. Demonstrating that the petitioner paid the beneficiary a portion of the proffered wage will count toward the establishment of the petitioner’s ability to pay the proffered wage, but the petitioner must still demonstrate its ability to pay the difference between the proffered wage and the wages actually paid.

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.

On Motion to Reopen and Motion to Reconsider, the petitioner submitted unaudited financial statements prepared by [REDACTED]. Counsel noted that these statements reflected “total assets, total liabilities, and net assets” and summarized that “this is a legit case.” On appeal, counsel states that “un-audited financial statements..., while insufficient as the ‘initial evidence’ required to be submitted in support of the petition, were probative and should have been considered

along with the other evidence.” Counsel also stated that unaudited financial statements “lend weight and credibility to the other evidence submitted.” However, counsel cited no legal precedents for his conclusions. The AAO does not find counsel's claim persuasive. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel's reliance on unaudited financial records is misplaced. 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. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In the instant case, the petitioner has not established its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question. The petitioner's revenues, payroll, officer compensation and other financial information contained on its tax returns are not sufficient to establish its ability to pay the proffered wage despite its shortfall in net income and net current assets. The petitioner did not demonstrate its ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary by means of its net income or net current assets from 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 from the priority date onwards.

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.