



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **JAN 20 2015**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a non-profit Japanese language school. It seeks to employ the beneficiary permanently in the United States as a Japanese language instructor. 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 September 29, 2014 denial, an 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)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

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 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 September 13, 2012. The proffered wage as stated on the ETA Form 9089 is \$56,971 per year. The ETA Form 9089 states that the position requires a

Master's degree in the Japanese language and three months experience as an intern Japanese teacher.¹

We conduct appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The record indicates the petitioner is structured as a school below college level affiliated with a church or operated by a religious order and is thereby exempt from filing a federal income tax or annual information return. On the petition, the petitioner claimed to have been established in 1915 and to currently employ 5 workers. On the ETA Form 9089, signed by the beneficiary on December 12, 2012, the beneficiary claimed to have begun working for the petitioner part-time on August 15, 2007.

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 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 submitted the following proof of payment to the beneficiary:

- The 2012 IRS Form W-2 states that the petitioner paid the beneficiary \$21,318.50.
- The 2013 IRS Form W-2 states that the petitioner paid the beneficiary \$21,993.50.

The amount paid by the petitioner to the beneficiary each year is less than the proffered wage. As a result, the petitioner must submit evidence of its ability to pay the difference between the actual

¹ The ETA Form 9089 also states in Part H.14 that the position requires a Master's degree plus three years of experience, and that "[a]n additional three months of practical experience is required."

² 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).

wage paid and the proffered wage, which in 2012 was \$35,652.50 and in 2013 was \$34,977.50.

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 income³ 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). 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.⁴ Net current assets are the difference between the petitioner's current assets and current liabilities.⁵

The record before the director closed on July 16, 2014 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. According to Internal Revenue Service (IRS) guidelines, as a "school below college level affiliated with a church or operated by a religious order," the petitioner is not required to file a federal income tax return or an annual information return. Although the petitioner may not be required to file a return with the IRS, the regulation concerning immigration petitions at 8 C.F.R. § 204.5(g)(2) requires the petitioner to provide evidence of its ability to pay the difference between the actual wage paid and the proffered wage. In response to the director's Request for Evidence, the petitioner submitted IRS Forms 941, Employer's Quarterly Federal Tax Return, covering each quarter of 2012 and 2013. The IRS Form 941 is used by "employers who withhold income taxes, social security tax, or Medicare tax from employee's paychecks or who must pay the employer's portion of social security or Medicare tax." www.irs.gov/uac/Form-941,-Employer's-Quarterly-Federal-Tax-Return (accessed December 16, 2014). The Form 941 does not contain any statement about the business's net income or net current

³ A nonprofit organization issues a statement of activities (income statement). The statement of activities reports revenues and expenses according to three classifications of net assets: unrestricted net assets, temporarily restricted net assets and permanently restricted net assets. The statement of activities explains how net assets changed from one date to another. Net assets generally increase when revenues are recorded and decrease when expenses are recorded. See FASB Accounting Standards Codification® Topic 958 at <https://asc.fasb.org> (accessed December 16, 2014). In a for-profit business, revenues minus expenses is called net income. In a nonprofit organization, the change in net assets is a surplus or deficit that is carried forward.

⁴ In a nonprofit organization, current assets minus current liabilities is also known as net working capital or net working deficit.

⁵ According 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.

assets and is not among the regulatory prescribed evidence acceptable to establish the petitioner's ability to pay the difference between the actual wage paid and 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.

On appeal, counsel submitted the petitioner's unaudited financial statements for 2012 and 2013. 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 counsel submitted with the petition 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 standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also submitted on appeal a statement from [REDACTED] with its end of year balances in two accounts in 2011, 2012, 2013, and 2014 with corresponding bank statements as well as a bank statement dated October 6, 2014. Counsel's reliance on the balance 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that would be reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Part X that would be considered in determining the petitioner's net current assets had such documents been submitted.

The petitioner submitted a letter from its director, [REDACTED] stating that the petitioner has only assets and no liabilities to outweigh the balances shown on the bank statements. 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)). Without any regulatory prescribed evidence as provided in 8 C.F.R. § 204.5(g)(2), the petitioner has not demonstrated its ability to pay the difference between the actual wage paid and the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years

and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, counsel states that the length of time of operation, the rate of pay being provided to the beneficiary on a per hour, part-time basis exceeding the rate of the proffered wage, and the petitioner's history of meeting its salary obligations should be considered. The letter from Dr. [REDACTED] states that the petitioner has been in operation since 1915 and met its salary obligations for close to a century. Specifically, Dr. [REDACTED] states that the petitioner averages total wages paid per quarter of \$40,000 as evidenced by the IRS Forms 941 submitted. The total wages paid of \$159,629 in 2012 and \$156,574 in 2013 averages to only \$10,000 for each of the 15 claimed employees annually indicating that the petitioner does not employ a full-time workforce. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner submitted no regulatory prescribed evidence of its ability to pay the difference between the actual wage paid and the proffered wage, nor did it submit any evidence that it experienced an anomalous year or revenue or expenses nor did it submit evidence of its reputation or standing in the community to liken its situation to the one presented in *Sonegawa*. 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.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position.⁶ The petitioner must establish that the beneficiary possessed all

⁶ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises*,

the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires three years of experience as a Japanese language teacher and an additional three months of practical experience. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Japanese language instructor with [REDACTED] for 10 hours a week from October 7, 2010 through the date of signing; the [REDACTED] for 10 hours a week from June 10, 2008 through July 24, 2008; [REDACTED] for eight hours per week from August 6, 2007 through July 24, 2008; [REDACTED] for 30 hours per week from October 1, 2002 through April 18, 2003; and with the petitioner for 30 hours per week from August 15, 2007 onward.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(g)(1). The record contains a letter dated March 20, 2012 from [REDACTED], a business teacher with [REDACTED], which states that the beneficiary worked as an intern Japanese teacher from "October 1, 2002 to April 18, 2002[sic]" at [REDACTED] Oregon. 8 C.F.R. § 204.5(l)(3) requires that letters submitted to verify experience be submitted by employers. Ms. [REDACTED] identifies herself as a former co-worker of the beneficiary's and was not an employer. As a result, her letter is insufficient to establish that the beneficiary has the experience required by the terms of the labor certification. No other evidence was submitted to document the beneficiary's experience.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.