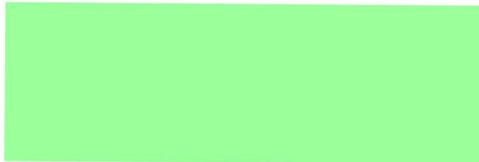


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

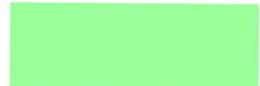
(b)(6)



DATE: **JAN 23 2015**

OFFICE: NEBRASKA SERVICE CENTER

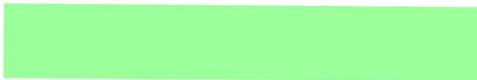
FILE:



IN RE:

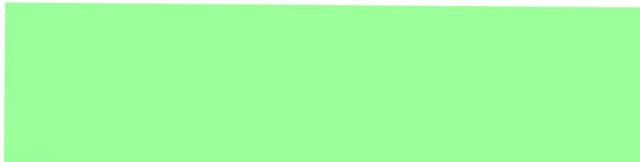
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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 private academic school. It seeks to employ the beneficiary permanently in the United States as a secondary school teacher. 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 August 27, 2014 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). 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 December 17, 2012. The proffered wage as stated on the ETA Form 9089 is \$18.58 per hour (\$38,646.40 per year, based on a 40 hour/week schedule). The

ETA Form 9089 states that the position requires a Bachelor's degree plus 24 months experience in the proffered position.

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.¹

The record indicates the petitioner is structured as a nonprofit corporation and filed its tax returns on IRS Form 990, Return of Organization Exempt from Income Tax. On the petition, the petitioner claimed to have been established in 1997 and to currently employ 49 workers. According to the tax returns in the record, the petitioner's fiscal year runs from August 1 of the tax year to July 31 of the following year. On the ETA Form 9089, signed by the beneficiary on September 26, 2013, the beneficiary claimed to have begun working for the petitioner on October 12, 2008.

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 Internal Revenue Service (IRS) Forms W-2GU:

- The 2013 Form W-2GU states that the petitioner paid the beneficiary \$20,400.
- The 2012 Form W-2GU states that the petitioner paid the beneficiary \$20,723.
- The 2011 Form W-2GU states that the petitioner paid the beneficiary \$22,000.²
- The 2010 Form W-2GU states that the petitioner paid the beneficiary \$17,564.

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).

² Only wages paid from the priority date onwards can be considered in determining the petitioner's ability to pay the proffered wage. Wages paid prior to the 2012 priority date will be considered only generally.

- The 2009 Form W-2GU states that the petitioner paid the beneficiary \$15,823.
- The 2008 Form W-2GU states that the petitioner paid the beneficiary \$699.

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). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

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 January 8, 2015). 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.

River Street Donuts, 558 F.3d 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*, 719 F. Supp. at 537 (emphasis added).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on July 16, 2014 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2012 federal income tax return would be the most recent return available. The petitioner submitted its 2010 IRS Form 990, Return of Organization Exempt from Income Tax, covering the period August 1, 2010 through July 31, 2011. As this Return covers a time prior to the priority date, its deficit of -\$265,503 may be considered only generally.⁴ Therefore, the petitioner did not submit evidence of that it had sufficient surplus to pay the proffered wage from the priority date onwards.

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.⁵ Net current assets are the difference between the petitioner’s current assets and current liabilities.⁶ 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. Part X of IRS Form 990 provides the organization’s balance sheet. The organization’s assets and liabilities are listed in order of their liquidity or maturity. However, Part X of IRS Form 990 does not indicate which assets and liabilities are current. Without audited financial statements, we are unable to determine the petitioner’s net current assets.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

⁴ IRS Form 990, Part I, line 19 (current year).

⁵ In a nonprofit organization, current assets minus current liabilities is also known as net working capital or net working deficit.

⁶ 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.

In the response to the director's May 2, 2014 Request for Evidence (RFE), counsel stated that the beneficiary is a teacher who works on a 10-month schedule instead of the traditional full-year schedule of most jobs, so the hourly proffered wage should reflect the reduced monthly schedule. In addition, the beneficiary receives benefits in addition to her salary in the form of health insurance and tuition assistance for two of her children to attend the petitioning school.

Counsel asserts that as the beneficiary works for ten months for the petitioner every year, the hourly offered wage found in Part G.1 of \$18.58 should be used to calculate the annual rate required by the terms of the labor certification, which counsel asserts to be an annual amount of \$32,700 based on a 10-month work period. Although the beneficiary's job duties may not require her to be at the petitioner's place of employment for two months out of the year, the beneficiary is still employed by the petitioner for the entire year. 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). The annualized prevailing wage is therefore \$38,646.40.

In addition, Part F.5 of the labor certification, however, indicates that the prevailing wage for the occupation of secondary school teacher is \$38,640 per year. The prevailing wage on Part F.5 represents the hourly wage found in Part G.1 annualized over a 12-month period. USCIS may not ignore a term of the labor certification. *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). Additionally, guidance from the Department of Labor states that the petitioner must pay a rate at or in excess of the prevailing wage rate as stated on the labor certification:

Will the wage offer set forth in a labor certification application be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages?

No, the wage offered must equal or exceed the prevailing wage. The wage must be at least 100% of the prevailing wage. . . .

<http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#prevwage3> (accessed on January 14, 2015). As a result, the petitioner must demonstrate its ability to pay the full prevailing wage as stated on the labor certification of \$38,646.40.

The petitioner submitted an Employment Agreement dated August 29, 2013 stating that the beneficiary would receive a total of \$32,700 in compensation, comprised of a salary of \$22,081, health insurance coverage of \$1,200, and tuition assistance for two children of \$9,420 per year. The petitioner also submitted a Declaration signed by its President attesting to the beneficiary's receipt of the health insurance coverage and tuition assistance. Certain nontaxable benefits will not be added to the wages actually reported to the beneficiary on IRS Form W-2.⁷ An employee's gross pay

⁷ A cafeteria plan is a written plan that allows employees to choose between receiving cash or taxable benefits instead of certain qualified benefits for which the law provides an exclusion from wages. *See* <http://www.irs.gov/pub/irs->

minus the nontaxable benefit payments results in the compensation figures which appear on the Form W-2. *See* I.R.C. § 125. "The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a prevailing wage paid on a weekly, bi-weekly or monthly basis that equals or exceeds the prevailing wage." *See* 20 C.F.R. § 656.10(c)(2). In the instant case, no information appears on the beneficiary's IRS Form W-2GU to indicate that she received any such nontaxable benefit that may be considered in determining the actual wage paid to the beneficiary. In any event, the amount in the Employment Agreement is still less than the proffered wage and would be insufficient to demonstrate the petitioner's ability to pay the full proffered wage.

On appeal, counsel asserts that the petitioner's overall circumstances should be considered in determining its ability to pay the proffered wage. Counsel specifically cites to bank statements as being the only evidence available to the petitioner as opposed to annual reports, federal tax returns and audited financial statements as outlined by the May 4, 2004 Yates Memorandum.

We consistently adjudicate appeals in accordance with the Yates Memorandum. *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 cites the regulation at 8 C.F.R. § 204.5(g)(2) requiring that the petitioner provide evidence of its ability to pay the proffered wage in the form of annual reports, federal tax returns, or audited financial statements. The Memorandum further states that an adjudicator may accept a financial statement and/or additional evidence such as profit/loss statements, bank account records, or personnel records *in addition to* the required additional evidence. The Memorandum does not state that the additional evidence should be accepted in lieu of the initial evidence nor does the Memorandum mandate that an adjudicator accept such evidence.

Counsel's reliance on bank statements as primary evidence of the petitioner's ability to pay the proffered wage 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) would be inapplicable or would otherwise paint 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that would not 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.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted none of the primary evidence specified by 8 C.F.R. §204.5(g)(2). The only evidence concerning the petitioner's ability to pay in the record is evidence of wages paid to the beneficiary (none of which demonstrated that the petitioner paid a rate at or exceeding the prevailing wage) and bank statements covering the period September 30, 2012 to July 31, 2013 (which are not regulatory prescribed evidence). The petitioner also submitted a balance sheet dated April 30, 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. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The petitioner provided no reason why regulatory prescribed evidence was unavailable nor did it submit evidence of its reputation or standing in the community or why it would have suffered a temporary downturn in its financial situation to liken its situation to the one presented in *Sonogawa*. 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.

(b)(6)

NON-PRECEDENT DECISION

Page 9

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.