



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF A-O-A-/S-B-C-S-

DATE: JAN. 8, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a Catholic school, seeks to permanently employ the Beneficiary as an elementary school music teacher under the immigrant classification of professional. *See* Immigration and Nationality Act (the Act) § 203(b)(3), 8 U.S.C. § 1153(b)(3).¹ The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Director stated that the hourly wage for a full-time, permanent position cannot be less than the annual prevailing wage for that position, and determined that the proffered wage was not commensurate with the prevailing wage for the proffered position. The Director also determined that the Petitioner had not established that it had the continuing ability to pay the Beneficiary the required wage beginning on the priority date of the visa petition.

On appeal, the Petitioner submits a brief, but no additional evidence. 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.

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.

I. OFFERED WAGE MUST EQUAL OR EXCEED PREVAILING WAGE

The Director stated that the hourly wage for a full-time, permanent position cannot be less than the annual prevailing wage for that position, and determined that the proffered wage was not commensurate with the prevailing wage for the proffered position. The Petitioner does not address this issue on appeal.

¹ Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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The Petitioner indicated at Part 6 of the Form I-140, Immigrant Petition for Alien Worker, that the proposed job is a full-time, permanent position, and that the rate of pay will be \$18.26 per hour. The Form I-140 does not indicate that the job offer includes 15 weeks without pay. The Form I-140 is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the U.S. Department of Labor (DOL). The prevailing wage listed at Part F.5. of the ETA Form 9089 is \$37,990 per year. Part G of the ETA Form 9089 indicates that the offered wage is \$18.26 per hour. The ETA Form 9089 does not indicate that the job offer includes 15 weeks without pay. The labor certification indicates that the Petitioner used the Occupational Employment Statistics (OES) wage survey as its prevailing wage source, under category 25-2021 (elementary school teachers, except special education), Level I.

Wages for the OES survey may be reported either as hourly wages or annual salaries. For full-time workers, annual wages are generally calculated by multiplying an hourly wage by a “year-round, full-time” hours figure of 2,080 hours. Bureau of Labor Statistics, Occupational Employment Statistics, *Occupational Employment and Wages, May 2014*, <http://www.bls.gov/oes/current/oes252021.htm> (last modified March 25, 2015). Conversely, when a wage is reported as an annual wage, hourly wages may be calculated by dividing the annual wage by the number of annual hours to be worked. In [REDACTED] the prevailing wage rate for elementary school teachers is reported as an annual wage and not an hourly wage, since teachers are typically paid an annual salary. Bureau of Labor Statistics, Occupational Employment Statistics, *May 2014 State Occupational Employment and Wage Estimates*, [REDACTED] http://www.bls.gov/oes/current/oes_gu.htm#21-0000 (last modified March 25, 2015).

The record contains a contract of temporary employment between the Petitioner and the Beneficiary signed on August 1, 2012, for the school year 2012-2013. It states that the Petitioner shall pay the Beneficiary “the sum of \$18.26 per hour adjusted for school year, school day.” The record contains a similar contract of temporary employment between the Petitioner and the Beneficiary signed on July 29, 2014, for the school year 2014-2015, except that the rate of pay was raised to “\$18.53 per hour adjusted for school year, school day.”

The Petitioner submitted a statement dated July 29, 2014, from [REDACTED] stating that the Petitioner offers the Beneficiary “full-time permanent employment” with a salary of “no less than \$18.26 per hour for a nine month school year.” The Petitioner also submitted a separate statement dated July 29, 2014, from [REDACTED] stating that 15 weeks of the position are non-paid (including various holidays and a summer break) and 37 weeks are paid at \$18.26 per hour.² Therefore, the Petitioner calculated that the adjusted prevailing wage is \$27,034 per year based on 37 weeks of paid employment (37 weeks x 40 hours per week x \$18.26 hour). However, the Petitioner’s calculation of the prevailing hourly wage rate is incorrect. The Petitioner calculated the \$18.26 hourly wage rate by dividing the annual prevailing wage rate (\$37,990) by 2080 hours. However, in this case, the Petitioner has stated that the Beneficiary will only work 1480

² The statement indicates that for the 2014-2015 school year, the Beneficiary will be paid \$18.53 per hour.

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hours per year (37 weeks x 40 hours). Therefore, the prevailing hourly wage rate would be approximately \$25.67 per hour ($\$37,990 \div 1480$ hours).

The Act requires that the hiring of a foreign worker will not adversely affect the wages and working conditions of United States workers comparably employed. The wages offered to a foreign worker must equal or exceed the prevailing wage rate for the occupational classification in the area of employment.³ See 20 C.F.R. §§ 656.10(c), 656.40, 656.41. The annual prevailing wage for the full-time, permanent position of an elementary school music teacher in [REDACTED] as stated on the labor certification, is \$37,990.00 per year. The Petitioner has offered the Beneficiary an annual wage of \$27,034.00 per year. Therefore, the wages offered to the Beneficiary do not equal or exceed the prevailing wage rate for the occupational classification in the area of employment. The Director properly denied the petition for this reason.

II. ABILITY TO PAY THE REQUIRED WAGE

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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.

The petitioner must demonstrate the continuing ability to pay the required wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on June 23, 2013.

³ According to 20 C.F.R. § 656.10(c), the employer must certify to certain conditions of employment on the ETA Form 9089 under penalty of perjury under 18 U.S.C. § 1621 (2). Failure to attest to any of the conditions will result in a denial of the application. On May 21, 2014, the Petitioner signed the labor certification and certified that the offered wage equals or exceeds the prevailing wage; and that the job opportunity is for full-time, permanent employment.

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The record indicates that the Petitioner is structured as a nonprofit corporation and is not required to file tax returns.⁴ On the petition, the Petitioner claimed to have been established in [REDACTED] and to currently employ 51 workers. On the ETA Form 9089, signed by the Beneficiary on May 21, 2014, the Beneficiary claimed to have worked for the Petitioner since January 7, 2009, as an elementary school music teacher.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 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 required 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 required wage, 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 required 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 required wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the required wage. In the instant case, the Petitioner submitted the following wage documents for the Beneficiary:

- 2010 IRS Form W-2 [REDACTED] which shows that the Petitioner paid the Beneficiary \$28,789.30 in wages that year;⁵
- 2011 IRS Form W-2 [REDACTED], which shows that the Petitioner paid the Beneficiary \$26,155.76 in wages that year;
- 2012 IRS Form W-2 [REDACTED] which shows that the Petitioner paid the Beneficiary \$25,341.44 in gross pay that year; and

⁴ The Petitioner asserts that it operates under the [REDACTED] a bona-fide non-profit religious organization, and that it is exempt from taxation under the Internal Revenue Code. The Petitioner submitted a Certification from the Department of Revenue and Taxation from the Government of [REDACTED] dated March 6, 2002, which shows that the [REDACTED] is a "duly registered non-profit tax exempt corporation." The Petitioner also submitted a Certificate of Transacting Business under a Fictitious Name, which indicates that the [REDACTED] operates under numerous fictitious names, including [REDACTED] and [REDACTED]. The 2012 Official Catholic Directory submitted by the Petitioner lists [REDACTED] under the [REDACTED]

⁵ The labor certification application indicates that the Beneficiary has worked for the Petitioner in H-1B nonimmigrant status since 2009. The Petitioner submitted two Forms I-797A, Notices of Action, for the Beneficiary. The notices indicate that the first Form I-129, Petition for a Nonimmigrant Worker, was approved on October 7, 2008, with an H-1B nonimmigrant validity period of October 1, 2008, to September 14, 2011; and the second Form I-129 was approved on August 3, 2011, with an H-1B nonimmigrant validity period of September 15, 2011, to September 14, 2014.

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- 2013 IRS Form W-2 [REDACTED], which shows that the Petitioner paid the Beneficiary \$12,000 in gross pay that year.

The Petitioner indicated that the Beneficiary had been on unpaid medical leave, resulting in a reduction in salary payments starting in 2013. The Petitioner submitted a letter dated May 17, 2014, from [REDACTED] [REDACTED] indicated that he has treated the Beneficiary as a patient since September 2013. He stated that the Beneficiary was on medical leave from November 2012 to May 2013 in the Philippines, where she was being treated for [REDACTED] and that she continued with treatments from August 2013, to March 2014, with [REDACTED] at [REDACTED] [REDACTED] indicated that the Beneficiary's work schedule was reduced for the 2013-2014 school year as a result of these treatments. While the reasons for her reduced work schedule may be relevant in the H-1B nonimmigrant context, they do not alter our calculation of the wages actually paid to the Beneficiary by the Petitioner in any given year.

The priority date in this case is June 23, 2013. The Petitioner has not established that it employed and paid the Beneficiary the full required wage in 2013, but it did establish that it paid \$12,000 in partial wages that year. The Petitioner must establish that it can pay the difference between the wages actually paid to the Beneficiary and the required wage in 2013.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the required wage from the priority date onward, USCIS will next examine the net income⁷ 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 the petitioner's ability to pay the required 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 Haw., 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. 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 required wage is insufficient.

⁶ The record also contains a letter dated May 13, 2014, from [REDACTED] stating that the Beneficiary was diagnosed with [REDACTED] in November 2012; that she received [REDACTED] and [REDACTED] in the Philippines; and that she continued her treatment in [REDACTED] from August 2013 to May 2014.

⁷ 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* Financial Accounting Standards Board (FASB) Accounting Standards Codification® Topic 958, <https://asc.fasb.org> (last visited January 4, 2016). 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.

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 February 27, 2015, with the receipt by the director of the Petitioner's submissions in response to the Director's request for evidence (RFE) dated December 11, 2014. The Petitioner did not submit its 2013 audited financial statement or 2013 annual report to report its revenues and expenses. The Director noted in his decision that where federal tax returns are not available, the regulation at 8 C.F.R. § 204.5(g)(2) requires annual reports or audited financial statements to be submitted by the Petitioner. Therefore, for the year 2013, the Petitioner did not establish that it had sufficient surplus to pay the required wage.

If the net income the petitioner demonstrates it had available during the relevant period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the required wage or more, USCIS will review the petitioner's net current assets.⁸ Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ If the total of the petitioner's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the required wage, the petitioner is expected to be able to pay the required wage using those net current assets. The Petitioner did not submit its 2013 audited financial statement or 2013 annual report to demonstrate its net current assets as required by the regulation at 8 C.F.R. § 204.5(g)(2). Therefore, for the year 2013, the Petitioner did not establish that it had sufficient net current assets to pay the required wage.

As evidence of its ability to pay the required wage, the Petitioner submitted a Time Certificate of Deposit (TCD) account statement dated February 20, 2015,¹⁰ and bank statements for December 2014, and January 2015. Bank statements and TCDs are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate the Petitioner's ability to pay a required wage. While this regulation allows "additional" material in appropriate cases, the Petitioner in this case has not provided the necessary documentation required by 8 C.F.R. § 204.5(g)(2). Further,

⁸ In a nonprofit organization, current assets minus current liabilities is also known as net working capital or net working deficit.

⁹ 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.

¹⁰ The Petitioner stated in response to the RFE that the purpose of the TCD is to pay for planned and other expenses, including the wage offered to the Beneficiary. The TCD statement shows that the Petitioner has a TCD in the amount of \$141,863.81 with a maturity date of October 27, 2015. It appears based on an automatic renewal notice in the record that the TCD automatically renews in one-year increments unless redeemed within a seven day grace period after maturity. The TCD statement does not indicate if there is an early-withdrawal penalty for withdrawing funds prior to maturity and, if so, the amount of the penalty.

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bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The Petitioner submitted an unaudited financial report for 2014. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where the Petitioner relies on financial statements to demonstrate its ability to pay the required wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, we cannot conclude that they are audited statements. 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 required wage.

The Petitioner cites several non-precedent AAO decisions on appeal. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

USCIS may consider the overall magnitude of the Petitioner's business activities in its determination of the Petitioner's ability to pay the required 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 its 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 required wage.

In the instant case, the Petitioner states on appeal that it was established in [REDACTED] that it has been educating children in the Catholic faith for 65 years; that it has 51 employees; and that the

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Beneficiary is being offered permanent, full-time employment.¹¹ However, the Petitioner has not submitted its audited financial statements or annual report for any relevant year. Without this regulatory required evidence, the petition cannot be approved.

The evidence submitted does not establish that the Petitioner had the continuing ability to pay the required wage beginning on the priority date. The Director properly denied the petition for this reason.

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). Here, that burden has not been met.

ORDER: The appeal is dismissed.

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¹¹ We note that the ETA Form 9089 was filed by [REDACTED] federal employer identification number [REDACTED]. The Form I-140 was filed by [REDACTED] federal employer identification number [REDACTED].