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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services



B6

FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: JUN 27 2005
EAC [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

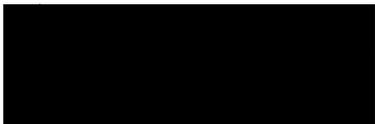
ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office



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

The petitioner is an office administrative services company. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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.

On appeal, [REDACTED] claiming to be the agent-representative of the petitioner, submits a brief and additional evidence.

While [REDACTED] has filed a Form G-28, Entry of Appearance, in this matter, it does not indicate that he is a licensed attorney in claiming to be the petitioner's authorized representative. [REDACTED] is not among the names appearing on Citizenship and Immigration Services (CIS)'s list of accredited representatives, and accordingly, the file contains no evidence that the agent is qualified and authorized to represent the petitioner. All the agent's representations will be considered but this office will furnish the decision only to the petitioner.

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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour, which amounts to \$26,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

The petition states that the petitioner was established in 1999, has a gross annual income of \$522,115, and employs one worker. In support of the petition, the petitioner submitted:

- A Form G-28;
- An original certified Form ETA 750;

- A prior employer's March 27, 2001 certified translated statement on its own letterhead certifying that the beneficiary had worked for it as a marketing supervisor from February 12, 1996, through October 25, 1999;
- A bachelor's diploma in commercial engineering from a Bolivian university; and,
- Unaudited financial statements listing the petitioner's assets and liabilities and profits and losses for 2000 and 2001.

On July 2, 2003, the director served a request for evidence (RFE) seeking:

- Copies of annual reports, specifically, annual reports for 2001 and 2002 with audited or reviewed financial statements;
- Federal tax returns, specifically, the petitioner's 2001 and 2002 federal income tax returns, including schedule C;
- Audited financial statements to demonstrate its continuing ability to pay;
- Any Form W-2 Wage and Tax Statements issued to the beneficiary; and
- Proof of the beneficiary's job and educational qualifications.

In response, the petitioner's immigration agent-representative (agent) submitted:

- An unsigned September 32, 2003 statement that the petitioner is a one-person limited liability company wholly owned by ██████████ that derives its income from leasing Loudoun County, Virginia land to another S-corporation, also wholly owned by ██████████. The lease terms permit raising the rent to cover the beneficiary's proffered wage.
- An undated statement from the agent asserting that ██████████ reports the petitioner's income on a schedule E of his personal Form 1040 income tax return.
- The 2002 Schedule E from ██████████ 2002 Form 1040 return shows gross rent and royalties of \$551,250 from one of the properties of the petitioner, i.e., Mercure II, LLC, Loudoun County, Virginia, and expenses and depreciation leaving a net \$32,417.
- An August 25, 2003 CPA-firm's statement, not on letterhead, that standard accounting principles were used in compiling attached financial statements, which also carried a disclaimer;¹ and,
- The petitioner's unaudited compilation of balance sheet and profit and loss statements for 2001 and 2002.

On December 9, 2003, the director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, denied the petition. The director found, from the submitted Schedule E, "total rental real estate and royalty income to be 432,417," and concluded that without an accompanying Form 1040, CIS could not determine the petitioner's ability to pay.

On appeal, the agent has also submitted:

¹ The disclaimer reads, "The owner has elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of reporting ...[which if included] might influence the user's conclusions about the company's assets and liabilities."

- [REDACTED] incomplete Form 1040 returns for 2001 and 2002 with schedule E's listing rental income and expenses from the various properties;
- Copies of 2001 and 2002 Form 1120S returns for JK Moving and Storage, Inc.'s (JK).²

The Internal Revenue Service Web site³ states that a limited liability company (LLC) is a relatively new type of business structure authorized by many states' statutes. The LCC is similar to corporations in that the owners have limited personal liability for the LLC's debts and actions. It is also similar to partnerships in that an LLC offers greater management flexibility and the benefits of pass-through taxation. Owners are called "members," with ownership held by one or many individuals, corporations or other LLCs. Under Virginia law,⁴ the LLC may hold title to land and its profits and losses are allocated according to the value each member has contributed.

The Schedule E and Form 1040s submitted on appeal tend to amplify the earlier submission of [REDACTED]'s 2002 Schedule E rather than introducing new evidence, thereby avoiding prohibitions against presenting new evidence on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). Submitting the schedule-E's for 2001 and 2002 along with the rest of the Form 1040 returns helps clarify how the petitioner limited liability company fits into [REDACTED]'s extensive financial network.⁵ Thus, [REDACTED] personal returns show an adjusted gross income of \$1.34 million in 2001 and \$1.04 million in 2002, with all rent and other Schedule E income totaling \$580,291 in 2001, and \$382,482 in 2002.

[REDACTED] Schedule E's reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Mercure II LLC		
Gross Rents	\$521,100	\$551,250
Total Expenses	\$479,401	\$518,833
Net Rental Income	\$41,699	\$32,417

The agent also asserts without documentation that rent from JK Moving and Storage, Inc., is the petitioner's principal source of revenue. He adds a lease agreement would enable the petitioner to increase its rents if necessary to cover the proffered wage.

JK's Form 1120S returns for 2001 and 2002 reflect the following:

	2001	2002
Line 21, ordinary Income	\$594,384	\$221,630

In determining ability to pay the proffered wage, Citizenship and Immigration Services (CIS) 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

² The agent claims [REDACTED] is sole owner of [REDACTED].

³ See www.irs.gov.

⁴ See Virginia Limited Liability Company Act, (1991, c 168).

⁵ This office is disregarding income from "Mercure Bldg. I, Loudoun County," listed on the submitted schedule E's alongside "Mercure II LLC," in determining ability to pay.

proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full, or partial, proffered wage in 2001.

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, CIS will next examine net income on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

The record purports to establish two ways in which the petitioner could afford to pay the proffered wage in both 2001 and 2002. First, the returns of █████ suggest a company able to pay the proffered wage, based upon its reported ordinary income for each of those years. However, nothing in the record, other than the CPA summary compilation, documents that █████ is obligated to lease the petitioner's land or that the lease contains an escalator clause permitting the petitioner to raise the rent if need be to cover the beneficiary's salary.

Second, the submitted Schedule E's show for each of the two years that the petitioner's net income exceeds the proffered wage. Accordingly, the petitioner has established its ability to pay the proffered wage.

The unaudited financial statements that the agent submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Therefore, the petitioner has established that it 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 met that burden. The appeal will be sustained. The petition will be approved.

ORDER: The appeal is sustained. The petition is approved.