

identifying data deleted to  
prevent unauthorized disclosure

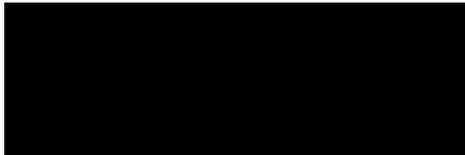
PUBLIC COPY

U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6



FILE: EAC 03 080 50304 Office: VERMONT SERVICE CENTER Date: SEP 30 2005

IN RE: Petitioner:  
Beneficiary:



Petition: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a land development and investments company. It seeks to employ the beneficiary permanently in the United States as a bookkeeper. 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, counsel submits a brief and additional evidence. In subsequent correspondence, counsel requests oral argument for the petition.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$16.75 per hour, which amounts to \$33,098 annually for a 38 hour week.<sup>1</sup>

In the petition, the petitioner claimed it is a limited liability company established in 1997, with three employees, and has a annual gross income of \$100,000. With the petition, the petitioner submitted documentation as to the beneficiary's qualifications for the position.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on October 17, 2003, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner submit its 2001 federal income tax return, with all accompanying schedules, statements and attachments, or alternatively, an annual report for 2001,

---

<sup>1</sup> The petitioner indicated on the ETA 750 that the beneficiary would work 38 hours a week. The \$16.75 hourly wage multiplied by 38 hours multiplied by 52 weeks equals \$33,098.

accompanied by reviewed or audited financial statements. If the beneficiary was employed by the petitioner in 2001, the director requested that the petitioner submit copies of the beneficiary's W-2 Form.

In response, the petitioner submitted Forms 1065, U.S. Return of Partnership Income, for the years 2001 and 2002, along with a balance sheet as of October 24, 2003, and a statement dated October 24, 2003 from Fidelity Investments that described three holdings in the account, which totaled \$861,883.52, with a cash account in the amount of \$850,848.42. The petitioner also stated that it had not employed the beneficiary.

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, on January 30, 2004, denied the petition. The director stated that the petitioner's 2001 federal income tax return indicated a net profit of \$29,392, current assets of \$185,701 and \$634,104 in current liabilities. Based on these figures, the director stated that the petitioner did not appear to have either sufficient net profits or current assets with which to pay the proffered wage. With regard to the statement from Fidelity Investments, the director noted that the statement documented an amount that was in the account as of October 24, 2003, and, as such, did not establish that the petitioner had the same financial resources on April 27, 2001, the priority date.

On appeal, counsel asserts that the petitioner's net income in 2001 from all sources reflected on its tax return is \$47,965. Counsel states that all sources of income reported in 2001 included the following: ordinary income from trade or business, identified in Form 1065, Line 22, as \$29,392; interest income, identified in Form 1065, Schedule K, Line 4a and statement 4, as \$694; ordinary dividends, identified on Form 1065, Schedule K, Line 4b and statement 5, as \$16,301; long term capital gains, identified in Form 1065, Schedule K, Line 4e(1) as \$628; and tax exempt interest income, identified on Form 1065, Schedule K, Line 19 and Statement 6, as \$950.

Counsel further states that the petitioner had a total member's equity of \$48,684 in 2001, remaining after the deduction of its total liabilities of \$1,051,148 (owed to [REDACTED] from the sum of its total assets of \$1,099,832. Counsel also asserts that the \$1,051,148 reflected on the petitioner's 2001 federal tax return and its 2001 balance sheet as outstanding liabilities are actually capital contributions made by [REDACTED] the petitioner's managing member with a 99 percent interest in the petitioner. Counsel states that these monies are completely available to fund ongoing investment activities and to pay any expenses incurred by the petitioner, including the beneficiary's wages.

Counsel asserts that consistent with treating the advance of these monies as a capital contribution rather than a loan, [REDACTED] has never collected any interest from the petitioner, on the \$1,051,148 contribution, nor has he ever received, or expected to receive, any repayment of these monies from the beneficiary. Counsel then states that in addition to having net income in 2001 in excess of the proffered wage, the petitioner also had a net member's equity (current net assets) of \$48,684 in 2001, which is in excess of the proffered wage of \$33,098. Counsel further noted that the net member equity is calculated by using the original cost of \$540,0887 for the petitioner's marketable investment securities rather than using the higher market value of \$567,430.31 for the security as of December 31, 2001

Finally counsel states that the petitioner's Fidelity Investments statements for April 2001 and December 2001 demonstrate that it had liquid marketable securities of \$432,435 and \$567,430.31, respectively, in those months.

Counsel further notes that the petitioner's investment securities had increased to \$567,430.31 by December 31, 2003. Counsel also states that the petitioner had a real estate investment with a purchase cost of \$374,044, and cash on hand and a note receivable that together were worth \$185,701. Counsel submits the following documents:

Articles of Organization of the petitioner, dated February 28, 1998.

Letter of confirmation from the office of the state of Connecticut Secretary of State.

The petitioner's Form 1065 for 2001.

A sworn statement from [REDACTED] on behalf of the petitioner. Mr. [REDACTED] identified himself as the managing member of the petitioner, with 99.99 per cent membership interest. Mr. [REDACTED] also identifies his son [REDACTED] as partner with 1 per cent membership interest. Mr. [REDACTED] explains the incorporation and business structure of the petitioner, as well as business operations. Mr. [REDACTED] states that his capital contributions to the petitioner which began after the commencement of operations in 1998 as of December 31, 2001 total \$1,051,148, and describes how these claimed contributions are identified in the petitioner's tax returns. Mr. [REDACTED] further states that although his contributions are described as either a current liability, note payable, or loan payable on the petitioner's 2001 tax return, these contributions are not an actual liabilities or debts owed to him by the petitioner. Mr. [REDACTED] states that he has never had any intention of withdrawing his capital contributions from the petitioner, as he has sufficient other assets and investments to meet his financial obligations and pay his living expenses. Mr. [REDACTED] also states that presently he does the bookkeeping services for the petitioner, but as he is 76 years of age, he wishes to turn these duties over to the petitioner's bookkeeper. Mr. [REDACTED] adds that when this occurs, each affiliate will be billed an appropriate fee for the bookkeeping services, and these fees will generate additional income and profits for the petitioner.

Balance sheet for the petitioner as of December 31, 2001.

Letter from Thomas Rich (Mr. [REDACTED] the petitioner's other partner and son, who holds a 99 percent member interest in [REDACTED] Mr. [REDACTED] states that the petitioner's 2001 income tax return erroneously stated that [REDACTED] LLC, had a note payable in the amount of \$500,000 to the petitioner, and that the note payable should reflect the name [REDACTED], in addition to his other note payable for a total of \$634,104.

A document dated February 27, 2004 that listed assets, liabilities and equity for [REDACTED] as of December 31, 2001. According to this document, the petitioner's managing and majority partner had total assets of \$15,496,361. This document also reflects investments in the petitioner in the amount of \$1,051,149.

A letter signed by [REDACTED] Vice President, [REDACTED] Stamford, Connecticut, that states [REDACTED] is entitled by the term of the trust to receive all

net income for the trust for his lifetime, and that he has free access to principal distributions from the trust for his "support, maintenance, and comfort".

Copy of the petitioner's Fidelity Investments account dated April 1, 2001 that indicates the petitioner had holdings worth \$437,535.

Copy of the petitioner's Fidelity Investments account for January 2001 to December 2001 that indicated a value as of December 31, 2001 of \$567,430.31.

In subsequent correspondence dated June 23, 2004, counsel for the petitioner requests the benefit of oral argument in order to assist the AAO in its understanding of the financial information submitted by the beneficiary.

With regard to counsel's request for oral arguments, the regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Counsel merely states that oral argument is requested to assist the AAO in its understanding of the financial information submitted to the record. However, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

Although both counsel and the petitioner's two partners refer to the notes payable on Schedule L to either change the recipient of one note payable or describe the combined note payable listed on Schedule L as capital contributions of the managing partner, the petitioner's Form 1065 indicates the sums on line 17, of Schedule L as liabilities. The AAO accordingly also regards the sum of \$634,104 as part of the petitioner's short-term liabilities. In addition, the petitioner is a limited liability company (LLC), as opposed to a limited liability partnership (LLP). Although structured and taxed as a partnership, its owners enjoy the same limited liability as the owners of a corporation. It is a legal entity separate and distinct from its owners. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958). The debts and obligations of the company are not the debts and obligations of the owners or anyone else. As the owners and others are not obliged to pay those debts, the income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 proffered wage. The petitioner did not claim to have employed the beneficiary as of the priority date.

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 the net income figure reflected 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). 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 CIS 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, now CIS, should have considered income before expenses were paid rather than net income.

The evidence indicates that the petitioner is a partnership. The record contains copies of the petitioner's Form 1065 U.S. Returns of Partnership Income for 2001 and 2002. The record before the director closed on October 30, 2003, with the receipt by the director of the petitioner's submissions in response to the RFE. Therefore the petitioner's tax return for 2002 is the most recent return available.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." Where a partnership has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. The petitioner's tax returns for 2001 and 2002 show the amounts for net income on Schedule K as shown in the table below:

Tax Year	Net Income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$47,105	\$33,098 <sup>2</sup>	\$14,007
2002	\$21,978	\$33,098	-\$11,120

With regard to tax year 2001, the petitioner has established that it did not pay the beneficiary any wages in 2001; however, it also established that it had sufficient net income in 2001 to pay the proffered wage of \$33,098. Therefore the petitioner has established that it had the capability to pay the proffered wage as of the priority date, namely, April 27, 2001. However, in 2002, the petitioner's net income was \$21,978, which is \$11,120 less than the proffered wage. Therefore, the petitioner did not establish that it had sufficient net income to pay the proffered wage of \$33,098 in 2002.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. In addition, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

<sup>2</sup> The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the tax year 2002:

	2002
Net income (Schedule K)	\$ 21,978
Current Assets	\$ 653,924
Current Liabilities	\$ 330,882
Net current assets	\$ 323,042

The petitioner established that it did not pay the beneficiary any wages in 2002; however, based on its net current assets for 2002 that total \$323,042, the petitioner has established that it has the ability to pay the proffered wage in 2002. Thus, the petitioner has established that it has the capability of paying the proffered wage as of the 2001 priority date and onward. Therefore the director's decision will be withdrawn. The petition will be approved.

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

---

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.