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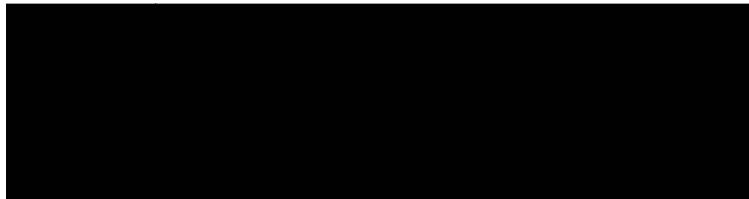
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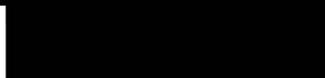
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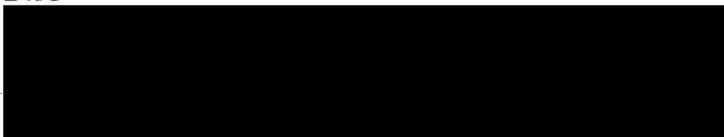
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IN RE:

Petitioner:

Beneficiary:



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, Chief
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 dismissed.

The petitioner is a dry cleaning company. It seeks to employ the beneficiary permanently in the United States as a dry cleaner. As required by statute, a Form ETA 750, Application for Alien 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. Therefore, the director denied the petition.

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 March 25, 2005 denial, the single issue in this case is whether 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)(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, which is the date the Form ETA 750 is 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 Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing on April 7, 2003. The proffered wage as stated on the Form ETA 750 is \$12.50 per hour or \$26,000 annually, based on a 40-hour work week. The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹

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 this case

The record contains copies of the petitioner's Form 1065, U.S. Return of Partnership Income, for 2002 and for 2003; the Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., for 2003 for both of the petitioner's limited liability company members: [REDACTED] and [REDACTED] page two of the Form 1040, U.S. Individual Income Tax Return, for 2003 for [REDACTED] and various other federal tax-related forms as well as the petitioner's Pennsylvania state tax forms. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as a limited liability company (LLC). On the petition, the petitioner claimed to employ one worker and to have a gross annual income of \$165,203. The petitioner failed to provide information regarding when its business was established on the petition. According to the Form 1065, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, which was signed by the beneficiary on some date that is not legible, the beneficiary did not claim to have worked for the petitioner.

On appeal, the petitioner asserts that CIS should take into account that when it originally filed the petition, it submitted 2002 tax returns that relate only to business conducted shortly after it bought the dry cleaning company, and that, since that time, its business had expanded such that, by May 2004, it had opened three additional dry cleaning locations and had begun to employ seven workers, including the beneficiary. The petitioner also submits additional documents to support its claim that it has the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that Form ETA 750, 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. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In this case, the petitioner has not provided evidence to establish that it employed and paid the beneficiary the full proffered wage from the priority date onwards.

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*

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).

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 sales 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 the Immigration and Naturalization Service, now 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 should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

Although structured and taxed as a partnership, an LLC's owners enjoy limited liability similar to owners of a corporation. An LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.² An investor's liability is limited to his or her initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners and others and their ability to pay the company's debts and obligations cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

Where an LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income (loss), shown on line 22 of page one of the petitioner's Form 1065.

Where an LLC has income from sources other than from a trade or business, that income is reported on the Form 1065, Schedule K, Partners' Share of Income Credits, Deductions, etc. Similarly, some deductions appear only on the Schedule K. The cost of business property elected to be treated as an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 9 of the Schedule K. See Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1.

In this case, the petitioner's Schedule K for 2002 and 2003 do not indicate income from activities other than from a trade or business or additional relevant deductions. Thus, the figures for ordinary income on line 22 of page one of the petitioner's Form 1065 do include all of the petitioner's income and relevant deductions. Consequently, the other tax forms in the record are not needed in the analysis of the petitioner's ability to pay.

² Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule does not apply in this case.

As such, ordinary income (loss) as reflected on line 22, page 1, of the form 1065, if greater than the proffered wage, would demonstrate the petitioner's ability to pay the wage. The petitioner's tax returns show amounts for income on the Form 1065, page 1, line 22, Ordinary income (loss) from trade or business activities, as shown in the table below.

Tax year	Net income or (loss)	Surplus (deficit) between net income (loss) and the entire proffered wage of \$26,000 ³
2002	\$1438	(\$24,562)
2003	(\$75,421)	(\$101,421)

Thus, a review of the petitioner's net income (loss) for 2002 and 2003 fails to establish that the petitioner had the ability to pay the proffered wage during those years.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are an LLC's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. An LLC's current assets are shown on the Form 1065, Schedule L, Balance Sheets per Books, lines 1 through 6. Its current liabilities are shown on lines 15 through 17 of the Schedule L.

If an LLC's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, would demonstrate the petitioner's ability to pay the proffered wage.

Calculations based on the Schedule L which is attached to the petitioner's Form 1065 for 2002 and for 2003 yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Surplus (deficit) between net current assets (liabilities) and the entire proffered wage of \$26,000
2002	\$7057	(\$18,943) ⁴
2003	(\$1899)	(\$27,899)

Thus, a review of the petitioner's net current assets for 2002 and 2003 fails to establish that the petitioner had the ability to pay the proffered wage during those years.

Finally, CIS 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 (BIA 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

³ The deficit between the petitioner's net income (loss) and the entire proffered wage, (without any wage payments deducted), is the relevant amount to consider because the record contains no evidence that the petitioner made any wage payments to the beneficiary during the years 2002 and 2003.

⁴ On the March 25, 2005 denial, the director erred when calculating net current liabilities for 2002.

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.

Accordingly, CIS may, in its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that 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 CIS deems relevant to the petitioner's ability to pay the proffered wage. In this case, however, the only relevant forms of evidence provided by the petitioner are its tax returns for 2002 and for 2003. Such evidence is not sufficient to establish that the petitioner has met all of its obligations in the past or to establish its historical growth. In addition, such evidence is not sufficient to establish whether unusual circumstances exist in this case to parallel those in *Sonegawa*, nor to establish whether 2002 and 2003 were uncharacteristically unprofitable years for the petitioner.

Finally, the petitioner's assertion that CIS should consider the extent to which its business had expanded, subsequent to the filing date, such that, by May 2004, it had begun to be able to pay the proffered wage is misplaced. The petitioner must demonstrate the ability to pay the proffered wage from the priority date onwards. See 8 C.F.R. § 204.5(g)(2). Also there is no documentation of such growth in the record. There are only the petitioner's statements regarding the expansion of its business. Unsupported assertions are not evidence. See *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Thus, the evidence submitted does not establish that the petitioner 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 not met that burden.

ORDER: The appeal is dismissed.