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U.S. Citizenship  
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FILE: [REDACTED]  
EAC-04-232-50955

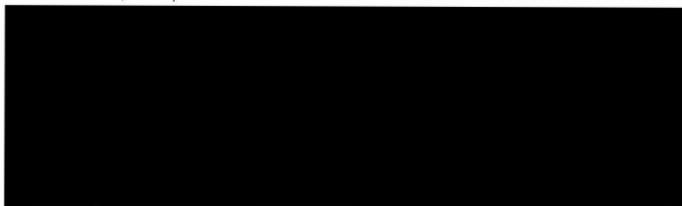
Office: VERMONT SERVICE CENTER

Date: OCT 06 2006

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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, Chief  
Administrative Appeals Office

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

The petitioner is a painting company. It seeks to employ the beneficiary permanently in the United States as a painter. 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 record did not establish that the petitioner had the ability to pay the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief statement and additional evidence.<sup>1</sup>

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:

*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, 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 24, 2001. The proffered wage as stated on the Form ETA 750 is \$25.52 per hour (\$53,081.60 per year). On the Form ETA 750B, signed by the beneficiary on March 27, 2001, the beneficiary claimed to have worked for the petitioner since 2000.

On the petition, the petitioner claimed to have been established in March 1982, to have a gross annual income of \$175,000 and a net annual income of \$60,000. However, the petitioner did not provide the information on the number of current employees on the petition.

In support of the petition, the petitioner submitted IRS printouts of Form 1040, U.S. Individual Income Tax Return filed by [REDACTED] and [REDACTED] for 2000 through 2003 pertinent to the petitioner's ability to pay the proffered wage.

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<sup>1</sup> 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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The director denied the petition on December 6, 2004 finding that the individuals' adjusted gross income for 2001 and 2002 is less than the proffered wage, and the remaining balance after deducting the proffered wage from the adjusted gross income in 2003 could not sustain the family of two.

On appeal, counsel asserts that the director arrived at her decision after only reviewing the employer's individual tax returns, and submits a copy of the petitioner's corporate tax return for 2003 as evidence of the corporation's funds and its ability to pay the proffered wage.

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. In the instant case, the petitioner did not submit the beneficiary's W-2 forms or any other evidence of compensation from the petitioner for any relevant year although the beneficiary claimed on the Form ETA 750B that he worked for the petitioner. Therefore, the petitioner failed to establish its ability to pay the proffered wage through wages already paid to the beneficiary.

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. The consideration of net income will depend on the structure of the petitioner.

If the petitioner is structured as a corporation, CIS will 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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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 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 that 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.

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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>2</sup>

In the instant case, counsel asserts that the petitioner is structured as a limited liability company (LLC) which is supported by the petitioner's 2003 tax return submitted on appeal. The petitioner used the name of [REDACTED] in filing its tax return for 2003. The Schedule K-1 attached to the Form 1065 tax return indicates that the petitioner is a LLC.<sup>3</sup> As a LLC, although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. A 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.<sup>4</sup> An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, 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.

The record contains the petitioner's Form 1065, U.S. Return of Partnership Income, for 2003. The tax return states that the petitioner had net income of \$3,448<sup>5</sup> in 2003 which is \$49,633.60 less than the proffered wage. Therefore, the petitioner had insufficient net income to pay the proffered wage in 2003. Similarly, if a LLC's net income, 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 net current assets. A LLC's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15

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<sup>2</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.

<sup>3</sup> Schedule B of the tax return indicates that the petitioner is a domestic limited liability partnership. The petitioner did not explain the inconsistency. The AAO assumes that the petitioner is structured as a LLC since a majority of the evidence indicates so. The petitioner should clarify this issue in any future proceedings.

<sup>4</sup> 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 is inapplicable in the instant case.

<sup>5</sup> Ordinary Income (loss) from trade or business activities reported on Line 22 of Form 1065.

through 17 of Form 1065. If a LLC'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 petitioner's 2003 tax return shows that the petitioner had net current assets of \$2,158 in that year. Therefore, the petitioner had insufficient net current assets to pay the proffered wage in 2003. The petitioner failed to establish its ability to pay the proffered wage as a LLC for 2001, the year of the priority date, and 2002 because it did not submit regulatory-prescribed evidence, such as its tax returns, annual reports or audited financial statements, for 2001 and 2002.

With the initial filing the petitioner submitted the owner's Form 1040, U.S. Individual Income Tax Return for 2000 through 2003 which gave the director the incorrect impression that the petitioner is a sole proprietorship. However, as discussed above, the petitioner is a LLC, not a sole proprietorship. Furthermore, the AAO finds that even if the petitioner was a sole proprietorship, and [REDACTED] and [REDACTED] were sole proprietors, the petitioner still could not have established its continuing ability to pay the beneficiary the proffered wage.<sup>6</sup>

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date. Counsel's assertion and evidence submitted on appeal cannot overcome the director's decision.

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.

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<sup>6</sup> If the petitioner were a sole proprietorship, CIS would consider the sole proprietor's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. The Form 1040 tax returns stated adjustable gross income of \$31,832 in 2001, \$49,688 in 2002 and \$59,356 in 2003. Therefore, the adjusted gross income was not sufficient to pay the beneficiary the proffered wage in 2001 and 2002; and it is most unlikely that the owner's family could sustain itself with the remaining balance of \$6,275 in 2003 after paying the proffered wage from the adjusted gross income. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).