



U.S. Citizenship
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FILE:



Office: TEXAS SERVICE CENTER

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SRC-05-003-51896

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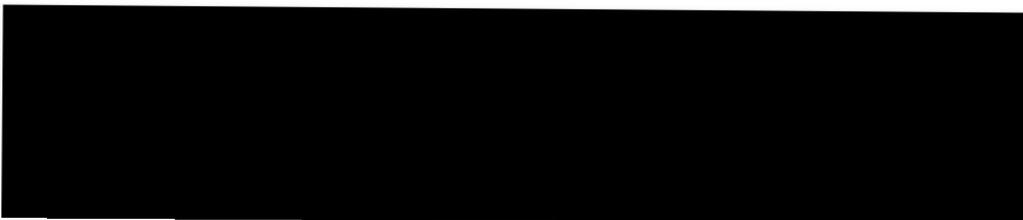
Petitioner:



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:



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 Director (Director), Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software development company. It seeks to employ the beneficiary permanently in the United States as a mechanical equipment sales engineer (engineering sales consultant). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). 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. The director denied the petition accordingly.

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 August 5, 2005 denial, the single issue in this case is whether or not 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation 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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. 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 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 4, 2004. The proffered wage as stated on the Form ETA 750 is \$72,000 per year. The Form ETA 750 states that the position requires four years of college studies, a bachelor of science degree in mechanical engineering and three years of experience in material handling, software development, and engineering in a multi-national environment.

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 upon appeal¹. On appeal counsel submits and resubmits an affidavit from the chief financial officer of [REDACTED], financial statements ending June 30, 2005 for [REDACTED], LLC and its subsidiaries, letter of credit from a bank, the petitioner's organizational documents, contribution agreement and operating agreement, payroll records and pay stubs pertinent to the beneficiary, consolidated financial statement for [REDACTED] and its subsidiaries for 2004 and 2004 federal tax return filed by [REDACTED]. Other relevant evidence in the record includes consolidated financial statements for [REDACTED] for 2002 and 2003. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company (LLC). On the petition, the petitioner claimed to have been established in 1990, and to currently employ 26 workers. The petitioner did not provide information about its gross annual income and net annual income on the petition. On the Form ETA 750B signed by the beneficiary on January 23, 2004, he claimed to have worked for the petitioner since August 2000.

On appeal, counsel asserts that the petitioner is a wholly-owned subsidiary of [REDACTED] and the consolidated financial statements of [REDACTED] and its subsidiaries for 2004, 2003 and 2002 establish that the petitioner has the ability to pay through [REDACTED]. Counsel also asserts that the petitioner's ability to pay was established with 2004 federal tax return for [REDACTED], which is a holding company of the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the 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, Citizenship and Immigration Services (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 the instant case, the petitioner did not submit the beneficiary's W-2 forms for 2004 and 2005, but instead submitted the payroll record and pay stubs for the beneficiary. A copy of the beneficiary's pay stub dated December 29, 2004 indicates that the petitioner paid the beneficiary \$63,000 in 2004, which is \$9,000 less

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 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).

than the proffered wage that year. Therefore, the petitioner failed to establish its ability to pay through examination of wages paid to the beneficiary for 2004, the year of the priority date. The payroll record submitted by the petitioner shows that as of July 31, 2005 the petitioner has paid the beneficiary \$46,422.21 as year to date gross compensation, which is greater than the monthly rate of the proffered wage. However, the beneficiary's pay stub dated July 29, 2005 shows that the year to date amounts the beneficiary has received in 2005 include regular compensation of \$39,416.70, commission of \$5.51 and bonus of \$7,000. The regulation at 20 C.F.R. § 656.20(c)(3) states that the proffered wage may not include commissions, bonuses or other incentives, except in an amount guaranteed by the petitioner. The record contains no evidence that the petitioner guaranteed any commissions and/or bonus to the beneficiary. The petitioner may not, therefore, count any portion of the commissions and bonus the beneficiary received during the salient year as evidence of its own ability to pay the proffered wage. The beneficiary's regular compensation is \$2,583.30 less than the proffered wage for the seven months. Therefore, the petitioner also failed to establish its ability to pay the proffered wage through wages actually paid to the beneficiary. The petitioner is obligated to demonstrate that it could pay the difference of \$9,000 in 2004 and \$2,583.30 in the seven months of 2005 between wages actually paid to the beneficiary and the proffered wage.

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 contrary to the petitioner's assertions. 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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.

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.² If the petitioner's total end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The record does not contain the petitioner's tax returns for any of the relevant years, but the record does contain 2004 federal tax return for [REDACTED]. However, the tax return does not indicate that [REDACTED] qualifies as a successor-in-interest to the petitioner or that the petitioner is a part of or trade name of [REDACTED]. This status requires documentary evidence that [REDACTED] has assumed all of the rights, duties, and obligations of the predecessor company.

The petitioner also submitted consolidated financial statements of [REDACTED] and its subsidiaries for years ending December 31, 2004, 2003 and 2002 and for the six months ending June 30, 2005. Counsel asserts that the petitioner is one of three subsidiaries of [REDACTED] and therefore, the net income or net current assets reflected on the consolidated financial statements for [REDACTED] and its subsidiaries establish the petitioner's ability to pay the proffered wage from the priority date.

A LLC is a legal entity separate and distinct from its members. The debts and obligations of the LLC are not the debts and obligations of the members. As the members of a LLC are not obliged to pay those debts, the income and assets of the members, including the income and assets of other companies which they own, cannot be considered in determining the petitioning entity's ability to pay the proffered wage. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958; AG 1958), *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); and *Matter of Tessel*, 17 I&M Dec. 631 (Act. Assoc. Comm. 1980). The petitioner's organizational documents submitted show that the petitioner was structured as a LLC with a sole member which is [REDACTED]. Therefore, [REDACTED] is the member of the petitioner, and owns the petitioner. However, as discussed above, the petitioner is a legal entity separate and distinct from [REDACTED]. The debts and obligations of the petitioner are not the debts and obligations of [REDACTED], and therefore, the income and assets of [REDACTED] including the income and assets of [REDACTED]'s other subsidiaries, such as [REDACTED] C and [REDACTED], cannot be considered in determining the petitioner's ability to pay the proffered wage. As the owners or stockholders or members are not obliged to pay those debts, the assets of the owners or stockholders or members and their ability, if they wished, to pay the petitioning LLC's debts and obligations, are irrelevant to this matter. CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept. 18, 2003). The petitioner must establish its ability to pay the proffered wage with its own income or net current assets.

²According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The submitted consolidated financial statements of [REDACTED] and its subsidiaries contain financial statements for the petitioner. The regulation at 8 C.F.R. § 204.5(g)(2) allows the petitioner to submit financial statements as alternative evidence to establish its ability to pay the proffered wage, however, it also makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the consolidated financial statements of [REDACTED] and its subsidiaries, including the financial statements of the petitioner, for 2004 and the seven months of 2005 are not acceptable as primary evidence to establish the petitioner's ability to pay the proffered wage as of the priority date in 2004 to the present.

Moreover, the petitioner would have had insufficient net income or net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2004, the year of the priority date, even if we could consider the financial statements as acceptable evidence in determining the petitioner's ability to pay. The 2004 financial statements indicated that the petitioner had net income of \$(240,287) and net current assets of \$(444,826). Neither of net income nor net current assets was sufficient to pay the difference of \$9,000 in 2004 between wages actually paid to the beneficiary and the proffered wage.

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 through an examination of wages paid to the beneficiary, its net income, or its net current assets.

Counsel is citing *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988). The decision in *Full Gospel* is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Further, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages. Here, counsel's assertion is that CIS should consider the assets of the petitioner's owner as evidence of its ability to pay. The petitioner is a LLC. Although a LLC may be 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.³ 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.

³ 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.

Counsel cites *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year for the petitioner *in a framework of profitable or successful years*.

Counsel also cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that the overall circumstance of the owner should be considered when assessing the petitioner's ability to pay wages. Counsel does not state how the Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA 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). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a LLC.

On appeal counsel submits a letter from The National Bank of Indianapolis offering a line of credit in the amount of \$3,037,586. However, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the LLC's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See *Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the LLC's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine

whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Counsel's assertions on appeal cannot be concluded to outweigh the evidence submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

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.