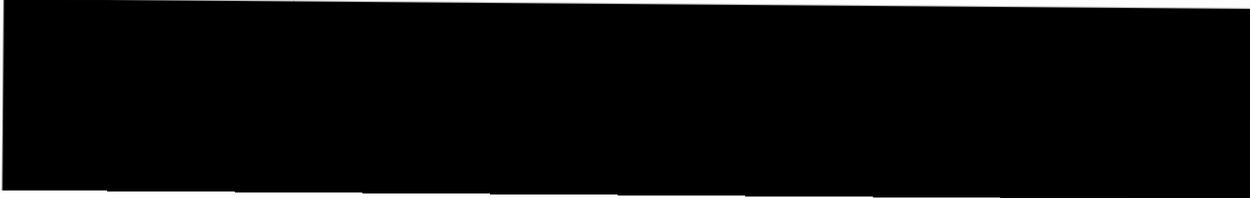




U.S. Citizenship  
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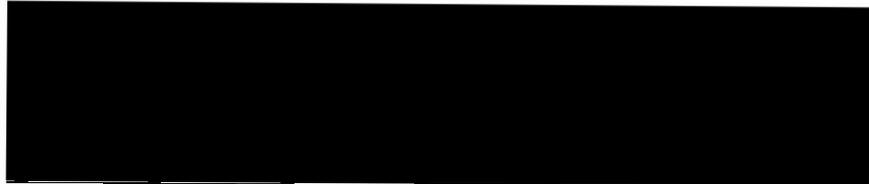
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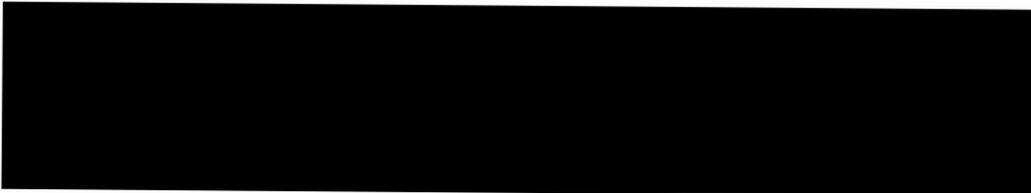
IN RE: Petitioner:

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:



**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 Acting Director, Nebraska Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a nursing home. It seeks to employ the beneficiary permanently in the United States as a nursing assistant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 13, 2003. The proffered wage as stated on the Form ETA 750 is \$25,000 per year.

The Form I-140 petition in this matter was submitted on September 2, 2005. On the petition, the petitioner stated that it was established on January 1, 2001 and that it employs 70 workers. The petition states that the petitioner's gross annual income is \$3,493,632 and that its net annual income is a loss of \$483,641. On the

Form ETA 750, Part B the beneficiary, who signed the form, did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Niles, Illinois.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.<sup>1</sup>

In the instant case the record contains (1) the petitioner's 2004 and 2005 Form 1065 U.S. Returns of Partnership Income, (2) the 2004 Form 1065 U.S. Return of Partnership Income of [REDACTED] (3) a letter dated August 31, 2005 from the petitioner's president, and (4) a letter dated December 20, 2005 from the petitioner's president. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a limited liability company (LLC), that it commenced business on January 1, 2001, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2004 the petitioner declared a loss of \$98,058 as its net income.<sup>2</sup> At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner's total wage expense during that year was \$2,107,488.

During 2005 the petitioner declared a loss of \$10,262 as its net income. At the end of that year the petitioner's current liabilities exceeded its current assets. The petitioner's total wage expense during that year was \$2,060,871.

The tax return of [REDACTED] shows that it is a corporation separate from the petitioner. As that company has no income other than rental income and pays no salaries or wages, but has expenses, deductions, assets and liabilities consisting of and related to real estate, this office gathers that it is a real estate holding company.

The petitioner's president's August 31, 2005 letter cited the petitioner's gross receipts and total wage expense as evidence of its continuing ability to pay the proffered wage beginning on the priority date. That letter also stated, "[The petitioner] currently employs approximately 70 individuals, including health care professionals and administrative staff."

The petitioner's president's December 20, 2005 letter stated that the petitioner employs more than 100 workers, with 85 employed at the nursing home and 19 in real estate, and that it has the ability to pay the proffered wage. The petitioner's president further stated that the petitioner's payroll was \$2,107,488 in 2004 and \$2.7 million in 2005.

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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 at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>2</sup> Form 1065, Page 4, Analysis of Net Income (Loss), Line 1.

The relevance of a nursing home requiring 19 real estate professionals is unclear. Further, the petitioner's president's assertion in her December 20, 2005 letter that the petitioner employs 104 workers is apparently inconsistent with the statement in the petitioner's president's August 31, 2005 letter that the petitioner then employed approximately 70 workers and the statement on the Form I-140, submitted September 2, 2005, that it then employed 70 workers. Further still, although the petitioner's president stated that from 2004 to 2005 the petitioner's wage expense rose approximately from \$2,107,488 to \$2.7 million, the petitioner's 2005 tax return shows that it dropped to \$2,060,871. That decrease in the petitioner's wage expense does not support the assertion that the number of the petitioner's employees was growing rapidly during that period.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The acting director denied the petition on March 14, 2006. In the decision the acting director questioned whether the petitioner, itself, employs 100 or more workers. The acting director further noted that pursuant to 8 C.F.R. § 204.5(g)(2) CIS is not obliged to accept a statement that a petitioner employs 100 or more workers and is able to pay the proffered wage as conclusive evidence of its ability to pay the proffered wage.

The petitioner appealed through counsel. The body of counsel's appeal argument, in its entirety, follows,

Petitioner, through legal counsel, moves to reopen above captioned case. USCIS denied the petition on 3/14/2006, stating "the evidence does not establish that the petitioner had the ability to pay the proffered wage at the time the priority date was established and continuing to the present."

With this letter, I submitted the petitioner's new tax return – Form 1065 U.S. Return of Partnership Income 2005, which clearly shows Salaries and Wages expenses for FY2005 [are] \$2,060,871, and business loss reduced to \$10,262.

The petitioner's Net Current Assets [are] negative because of mortgages (\$1,250,040).

The [redacted] owns the property where the nursing home operates business. Both [redacted] and the petitioner belong to the same owner.

In addition, [CIS] should consider the fact that the employer currently employs more than 100 employees.

The submission of the tax return of a company other than the petitioner implies that the petitioner wishes to rely on that other company's finances as evidence of its own ability to pay the proffered wage. Counsel cited

that other company's affiliation with the petitioner, its common ownership and the fact that it is the petitioner's landlord, in support of that reliance.

The petitioner is a LLC. Just as a corporation is a separate legal entity, distinct from its owners or shareholders, *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958), so is an LLC separate and distinct from its members. The debts and obligations of a corporation or LLC are not the debts and obligations of the owners, the members, the stockholders, other companies, or anyone else. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

As the members and others are not obliged to pay the petitioner's debts the income and assets of the members 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.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses<sup>3</sup> or otherwise increased its net income,<sup>4</sup> the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080, 1084 (S.D.N.Y. 1985), 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 income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The point of counsel's assertion that the petitioner's negative net current assets are the result of mortgages is unclear. That the petitioner listed \$1,350,581 in mortgages, notes, and bonds payable in less than one year at the end of 2004, and \$1,250,040 at the end of 2005, indicates that it expected those expenses to be due and payable within a year. That they were mortgage expenses does not attenuate them. The petitioner expected to pay those funds within a year and they would not, therefore, be available to pay additional wages.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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.

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<sup>3</sup> The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to cover the proffered wage.

<sup>4</sup> The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

§ 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 examine whether the petitioner employed 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 establish that it employed and paid 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 a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2). Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. *See also Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically<sup>5</sup> shown on lines 15(d) through 17(d). If a corporation'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.

This office would consider the petitioner's employment of 100 or more employees, if that fact were sufficiently evidenced. As the acting director noted, however, the evidence on that point is contradictory.

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<sup>5</sup> The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

Counsel did not choose to address that point on appeal, merely restating the assertion that the petitioner employs more than 100 workers, rather than producing any evidence in support of that proposition. Unsupported assertions are insufficient to meet the burden of proof in these proceedings. *Matter of Soffici* 22 I&N Dec. 158, 165 (Comm. 1998) (citing to *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). This office, like the acting director, finds that the evidence in the record does not establish that the petitioner itself, Grosse Pointe Manor LLC DBA Grosse Pointe Manor Nursing Home & Rehab, employs 100 or more workers.<sup>6</sup>

The proffered wage is \$25,000 per year. The priority date is January 13, 2003.

The petitioner is required, pursuant to 8 C.F.R. § 204.5(g)(2), to demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted no such evidence pertinent to 2003. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

During 2004 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds at its disposal during 2004 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had negative net current assets. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its net current assets during that year. The petitioner submitted no other reliable evidence of funds at its disposal during 2005 with which it could have paid the proffered wage. The petitioner has not demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on September 2, 2005. On that date the petitioner's 2006 tax return was unavailable. On October 13, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2006 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2003, 2004, and 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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<sup>6</sup> Further, as the acting director noted, employment of 100 or more workers, if established, does not mandate a finding of ability to pay the proffered wage. Because this office does not find that the petitioner employs 100 or more workers, however, it need not reach that issue.

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The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.