

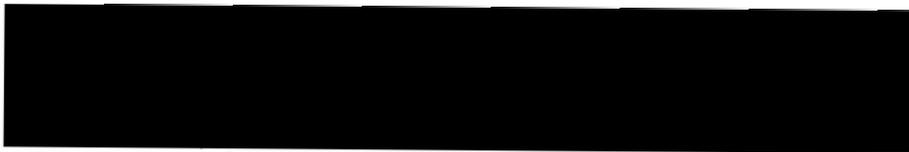
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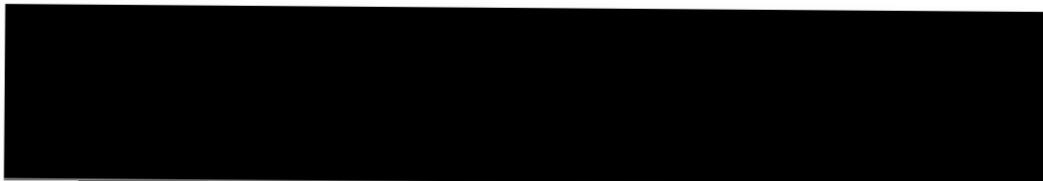
Petitioner:

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

The petitioner is a software development and computer consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 continuing until the beneficiary obtained lawful permanent residency. 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 November 9, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the 2002 priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>1</sup>

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 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 CFR § 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

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<sup>1</sup> In his decision, the director appears to state that the petitioner established its ability to pay the proffered wage during the 2002 priority year, while the petitioner did not establish its ability to pay the proffered wage in the subsequent years. The AAO will address the director's comments on the 2002 tax return more fully further in these proceedings.

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 November 9, 2002. The proffered wage as stated on the Form ETA 750 is \$75,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in computer science or engineering or math and one year 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 upon appeal<sup>2</sup>. On appeal, the petitioner submits a second letter dated December 6, 2005 from ██████████ Columbus, Ohio, an accountant hired by the petitioner to review its financial status.<sup>3</sup>

██████████ states that in analyzing a company's financial position, it is prudent to examine the petitioner's balance sheet. ██████████ then states that the petitioner's 2002 Form 1065 did not contain a Schedule L because it was not required to be completed, and the petitioner did not submit a Schedule L for its 2004 tax return because as a single member limited liability company (LLC), the petitioner does not file a tax return but is included with the single member's personal tax return. ██████████ then states that since the petitioner does not complete a Schedule L balance sheet with its tax return, it is being harmed in that it cannot demonstrate its ability to pay by using its net current assets. ██████████ then states that the petitioner completed hypothetical Schedules L to demonstrate what the petitioner's net current assets would be in the relevant years. ██████████ also states that the hypothetical Schedules L differ from the original unaudited balance sheet submitted initially with the I-140 petition. ██████████ also refers to a Citizenship and Immigration Services (CIS) interoffice memo,<sup>4</sup> and to an excerpt from a prior AAO decision that discusses how net current assets are determined. The petitioner also submits its 2004 tax return, for the first time, on appeal.

Relevant evidence in the record includes the petitioner's Form 1065 for tax year 2002, with Schedule L, and the single member limited liability company's Form 1040 tax return for tax year 2003 with accompanying Schedule C, as well as an unaudited financial statement for the period ended December 31, 2003, prepared by ██████████ CPA, on September 17, 2004. The petitioner also submitted the beneficiary's W-2 Forms for tax years 2002, 2003, and 2004. These documents indicate the petitioner paid the beneficiary \$5,400 in tax year 2002, \$8,647 in 2003, and \$34,850 in 2004. Three PAYCHEX earning statements for the beneficiary are submitted to the record also that indicate he earned \$3,168 biweekly from August 1, 2005 to September 15, 2005. The beneficiary's total earnings as of September 15, 2005, based on the PAYCHEX documentation is \$47,344. In response to the director's request for further evidence dated May 12, 2005, the petitioner submitted an initial letter dated October 6, 2005 from ██████████ and hypothetical Schedules L for tax years

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<sup>2</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).

<sup>3</sup> The state of Ohio licensing center indicates that ██████████ CPA license expired on December 31, 2005. *See* <https://license.ohio.gov/lookup/default.asp>. (Available as of April 12, 2007.)

<sup>4</sup> Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

2002, 2003, and 2004.<sup>5</sup> With regard to the identity of the petitioner, the petitioner also submitted several documents from the state of Colorado Secretary of State office. One document was the petitioner's Articles of Incorporation, dated March 17, 1998. A second document is entitled "Articles of Reinstatement" and is dated July 11, 2005.<sup>6</sup> 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 during the 2002 priority year, the petitioner was structured as a limited liability company taxed as a partnership, and that during tax years 2003 and 2004, the petitioner was structured as a single member limited liability company taxed as a sole proprietorship.<sup>7</sup>

On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of \$750,000 and to currently employ eight workers. On the Form ETA 750B, signed by the beneficiary on November 8, 2002, the beneficiary claimed to have worked for the petitioner since June 2002.

On appeal, the petitioner asserts that the director's decision is arbitrary and unreasonable based on the analysis provided by [REDACTED] in the letter submitted to the record on appeal.

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, 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).

Upon review of the record, the AAO notes that [REDACTED] the petitioner's accounting consultant, submitted what he describes as "hypothetical Schedules L" to the record to attempt to establish the petitioner's ability to pay the proffered wage based on the petitioner's net current assets. For priority year 2002, the petitioner's accountant submits a new Schedule L, as the petitioner did not fill out the Schedule L section contained in the petitioner's Form 1065 for tax year 2002. With regard to tax years 2003 and 2004, both years in which the single member limited liability company filed a Form 1040 for tax purposes, [REDACTED] constructs a hypothetical Schedule L. However, the AAO views the "hypothetical" documents as attempts to make material changes to the instant petition. A petitioner may not make material changes to a petition in an effort

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<sup>5</sup> The initial Form 1065 for tax year 2002 submitted by the petitioner to the record, contains no information on Schedule L. For tax years 2003 and 2004, the petitioner was not required to submit Schedules L, nor does the tax form contain Schedule L balance sheets.

<sup>6</sup> On another document from the state of Colorado Secretary of State website, it is indicated that the petitioner was dissolved on January 1, 2004.

<sup>7</sup> Based on the IRS website, a single member LLC (SMLCC) can be either a corporation or a single member "disregarded entity". To be treated by the IRS as a corporation, the SMLLC has to file Form 8832 and elect to be classified as a corporation. An SMLLC that does not elect to be a corporation will be classified by the IRS as a disregarded entity which is taxed as a sole proprietor for income taxes. (*See* <http://www.irs.gov/businesses/small/article/O,,id=158625,00.html>, accessed as of May 4, 2007)

to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Thus, the AAO will not consider any of the hypothetical Schedules L in its deliberations in these proceedings.

As previously stated, the regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part, that evidence of the petitioner's ability to pay the proffered wage shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. The petitioner submitted an unaudited balance sheet to the record for the period of time ending December 31, 2003. The regulation at 8 C.F.R. § 204.5(g)(2) 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 unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The AAO will examine the petitioner's ability to pay the proffered wage, first based on its status as a limited liability company taxed as a partnership in tax year 2002, and then as a single member limited liability company taxed as a sole proprietor in tax years 2003 and 2004.

In determining the petitioner's ability to pay the proffered wage during a given period under either status, 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 submitted W-2 Forms for the beneficiary that indicated he earned \$5,400 in tax year 2002, \$8,647 in 2003, and \$34,850 in 2004. The petitioner also submitted pay statements for the beneficiary for three two week periods of employment that indicated he received a biweekly salary of \$3,168 during this period of time. The AAO notes that if the beneficiary was paid this biweekly salary throughout tax year 2005, the petitioner would have paid the beneficiary wages of \$82,638. However, the record with regard to the beneficiary's 2005 wages is not complete. Furthermore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$75,000 from the 2002 priority date. The petitioner thus has to establish it has the ability to pay the difference between the beneficiary's actual wages and the proffered wage as of the 2002 priority date until the beneficiary obtains lawful permanent residence.

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). 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay while taxed as a partnership:

- In 2002, the Form 1065 stated net income of \$8,457.19.<sup>8</sup>

Therefore, for 2002, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages and the 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>10</sup> A partnership's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 15 through 17. If the total of a partnership's end-of-year net

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<sup>8</sup> Line 22 of the Form 1065, U.S. Partnership Income Tax Return.

<sup>10</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.

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 petitioner's net current assets during 2002 were \$0.<sup>11</sup>

Therefore, for 2002, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

With regard to tax years 2003 and 2004, during these years, the petitioner was organized as a single member limited liability company and filed a Form 1040, with accompanying Schedule C. Therefore, the petitioner's net income is reported on the member's IRS Form 1040, Schedule C at line 31. The petitioner's tax returns demonstrated its net income for 2003 and 2004 as shown in the table below:

- In 2003, the Form 1040 Schedule C stated net income of \$10,445.
- In 2004, the Form 1040 Schedule C stated net income of \$31,740.

As stated previously, the petitioner established it paid the beneficiary \$8,647 in tax year 2003 and \$34,850 in tax year 2004. Thus, the petitioner did not have the ability to pay the difference between the beneficiary's wages and the proffered wage of \$75,000 in either 2003 or 2004.<sup>12</sup>

With regard to whether the petitioner, while structured as a single member limited liability company in tax years 2003 and 2004, had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, the petitioner would have to provide regulatory-prescribed documentation, such as audited financial statements or annual reports, rather than hypothetical documents with which to gauge the petitioner's net current assets. Since the petitioner did not provide any such documentation, the AAO cannot examine the petitioner's ability to pay the proffered wage during tax years 2003 and 2004 based on the petitioner's net current assets.

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, or its net income or net current assets.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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<sup>11</sup> The Schedule L submitted with the original Form 1065 was blank, with no further information on the petitioner's assets or liabilities. As previously stated, the hypothetical Schedule L for tax year 2002 submitted to the record by the petitioner in response to the director's request for further evidence is given no weight in these proceedings. If the petitioner had wanted to demonstrate its net current assets for 2002, and was not required to complete Schedule L to Form 1065 in 2002, it could have submitted its annual report or audited financial statements, as prescribed by 8 C.F.R. § 204.5(g)(2)

<sup>12</sup> As stated previously, the petitioner did submit some evidence of the beneficiary's biweekly pay statements in tax year 2005 which suggests an annual wage greater than the proffered wage; however, the record is not complete as to the beneficiary's actual wages in 2005.

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.