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U.S. Citizenship  
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: JUN 11 2008

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IN RE:

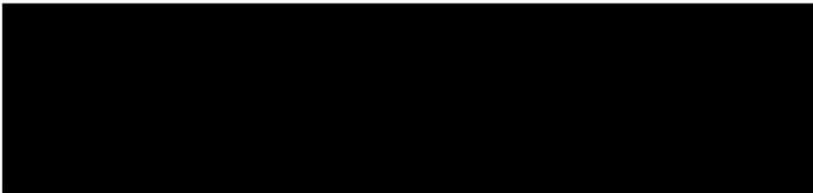
Petitioner:



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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is an air purification equipment manufacturer. It seeks to employ the beneficiary permanently in the United States as a heating and air conditioning mechanic (air conditioning mechanic). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089 or labor certification), approved by the 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. 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 February 11, 2008 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.

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 ETA Form 9089 was 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 ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on May 15, 2006. The proffered wage as stated on the ETA Form 9089 is \$17.54 per hour (\$36,483.20 per year). The ETA Form 9089 states that the position requires a high school education and twenty-four (24) months of experience in the job offered. On the petition, the petitioner claimed to have been established in 2004, to have a gross annual income of \$285,638, to have a net annual income of \$52,415, and to currently employ three (3) workers. On the ETA Form 9089, the beneficiary did not claim to have worked for the petitioner.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal counsel submits a brief, a copy of 2007 Instructions for Schedule C to IRS Form 1040, the petitioner's Business Registration Certificate, New Jersey Department of Treasury Short Form Standing and Certificate of Formation of the petitioning company. Other relevant evidence in the record includes the Form 1040 U.S. Individual Income Tax Return filed by [REDACTED] z and [REDACTED] a jointly for 2005 and 2006, 2006 W-2 forms and recent paystubs for the petitioner's employees. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that the petitioner is a single member limited liability company (LLC) and thus, the net profit/income, as indicated in the line 31 of Schedule C, established the petitioner's ability to pay the proffered wage; and that the director erred in treating the petitioner as a sole proprietor in determining the petitioner's 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 an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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 submitted its employees' W-2 forms for 2006 and paystubs for periods from August to October 2007. However, these documents were submitted with the employee's name, address and identification covered, and therefore, it is not clear whether these W-2 forms and paystubs were issued to the instant beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Therefore, the petitioner failed to establish its ability to pay through examination of wages paid to the beneficiary for relevant years.

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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 evidence in the record of proceeding shows that the petitioner is structured as a New Jersey LLC and reported its income on schedule C of its member's Form 1040 individual tax return since it is a single member LLC. Although taxed as a sole proprietor, a LLC's owner or member enjoys 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>2</sup> An investor's liability is limited to his or her initial investment. As the owners and others only are liable to their initial investments, 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. Similarly, unlike a sole proprietorship, CIS will not consider the single member's adjusted gross income as the LLC's net income and will not consider the single member's other liquefiable assets and personal liabilities as part of the petitioner's ability to pay. Further, the petitioner in the instant case as a LLC is not obligated to establish that the owner of the petitioner had sufficient adjusted gross income and liquefiable assets to support her personal living expenses in addition to paying the proffered wage and business expenses. The AAO concurs with counsel's assertions on appeal that the petitioning business entity should be treated as a single member LLC instead of a sole proprietorship.

Therefore, for a LLC filing its tax return with its owner's individual income, the AAO will consider net income to be the figure shown on line 31, Net profit or loss, of Schedule C to the owner's Form 1040 U.S. Individual Income Tax Return. The record contains copies of Schedule Cs, Profit or Loss From Business, for the petitioner for 2005 and 2006. The priority date in the instant case is May 15, 2006, and therefore, the petitioner's 2005 tax return is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage as of the priority date. The Schedule C stated the petitioner's net income of \$104,795 in 2006. Therefore, the petitioner's net income in 2006 was sufficient to pay the beneficiary the proffered wage, and thus, the petitioner has established its ability to pay the proffered wage to the instant beneficiary for 2006, the year of the priority date. The director's determination that the petitioner failed to establish its ability to pay the proffered wage with its owner's adjusted gross income is withdrawn.

Counsel's assertions on appeal have overcome the director's finding in his decision to deny the petition. The evidence submitted on appeal and already in the record demonstrates that the petitioner had sufficient net income to pay the proffered wage in 2006. Therefore, from the date the Form ETA 9089 was accepted for processing by the U. S. Department of Labor, the petitioner established that it had the ability to pay the beneficiary the proffered wage as of 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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved.

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<sup>2</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.