

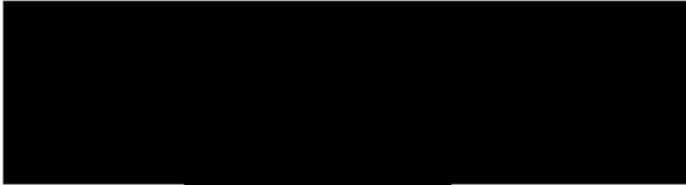
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



Office: TEXAS SERVICE CENTER

Date:

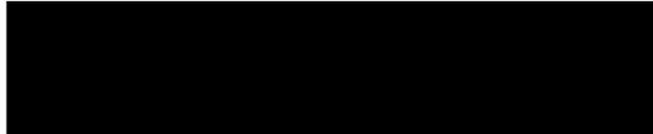
MAR 10 2008

SRC 06 189 51652

IN RE:

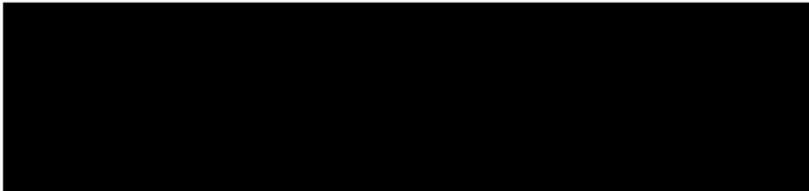
Petitioner:

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 Director, Texas 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 software development firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment 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 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 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 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 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 DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on December 4, 2002. The proffered wage as stated on the Form ETA 750 is \$47,278.48 per year.

The Form I-140 petition in this matter was submitted on May 31, 2006. On the petition, the petitioner stated that it was established during 1989 and that it employs one worker. On the Form ETA 750, Part B, signed by the beneficiary on November 22, 2002, the beneficiary claimed to have worked for the petitioner since February 2002. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Auburn, Michigan.

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 evidence properly in the record including evidence properly submitted on appeal.¹ In the instant case the record contains (1) the petitioner's sole member's 2003, 2004, and 2005 Form 1040 U.S. Individual Income Tax Returns, (2) three pay stubs showing wages the petitioner paid to the beneficiary, (3) the petitioner's Form 941 Employer's Quarterly Federal Tax Return for the first quarter of 2006, (4) an unaudited profit and loss detail showing invoices issued to the petitioner's clients and other income and expenses during 2003, (5) monthly statements pertinent to the petitioner's business checking account, (6) a statement pertinent to an investment account of the petitioner's sole member, and (7) statements pertinent to the checking account and an annuity of Lois Broderick, the petitioner's sole member's mother. 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 sole member's personal tax returns include corresponding Schedules C, Profit or Loss from Business. They indicate that the petitioner is a sole-member Limited Liability Company (LLC).

During 2003 the petitioner suffered a loss of \$9,889.² During 2004 the petitioner returned a net profit of \$4,790. During 2005 the petitioner returned a net profit of \$2,226.

The pay stubs submitted show that the petitioner paid the beneficiary gross wages of \$2,054.16 for work performed during each of three consecutive two-week pay periods during 2006. The most recent pay stub covers the pay period from September 4, 2006 to September 17, 2006, and shows year-to-date gross wages of \$28,758.24.

The director denied the petition on October 20, 2006.

On appeal, counsel cited the various bank statements submitted as indices of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Counsel also stated, but provided no evidence to demonstrate, that the petitioner has a \$50,000 line of credit available.

Previously, in response to a request for evidence, counsel stated

[The petitioner] requested an audited financial statement from [its accountant.] However, due to delays in their (sic) processing we are unable at this time to obtain the documents. If [CIS]

¹ 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).

The petitioner's net profit or loss during each given year is shown on Schedule C of its sole member's individual income tax return at Line 31.

should feel such documentation is necessary please kindly give this office a 30[-]day extension to obtain such documentation.

On appeal, counsel also observed that his request for an extension of time to file additional evidence had not been granted.

In the request for evidence, the director indicated that the petitioner, when it filed the visa petition, failed to provide evidence sufficient to show its continuing ability to pay the proffered wage beginning on the priority date. The director, in accordance with 8 C.F.R. § 103.2(b)(8), requested evidence to show that ability as required by 8 C.F.R. § 204.5(g)(2). Counsel submitted some evidence in response, and a conditional request for an extension of time. In effect, counsel was asking that, if the evidence he had submitted with the petition and the evidence he submitted in response to the request for evidence, taken together, did not justify approval of the visa petition, he be given notice and a third opportunity to provide the evidence that should have been submitted with the petition.

Neither the director nor this office is obliged to determine whether additional evidence might help to support the petitioner's case. The director requested evidence to satisfy the requirements of 8 C.F.R. § 204.5(g)(2). Counsel's responsibilities in this matter included determining what evidence might help support the petitioner's cause.

If the evidence of record was still insufficient, after counsel's response to the request for evidence had been received, the director was not then obliged to accord counsel yet a third opportunity to present his case. In that event, the duty of the director would be to deny the petition, not to issue another request for evidence. Adjudication of the visa petition on the evidence then in the record was proper. If the petitioner has evidence that shows its continuing ability to pay the proffered wage beginning on the priority date that was not submitted, its submission pursuant to motion may be considered timely.

Counsel's asserted that the petitioner has a credit line but provided no evidence to support that assertion. The assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof. Counsel's assertion that the petitioner has a credit line will not be considered.

In any event, a line of credit, or any other indication of available credit, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed against a line of credit becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

The record contains an unaudited Profit and Loss statement. Reliance on that unaudited financial statement to show the petitioner's net profit is misplaced. 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. Unaudited financial statements are the representations of management. The

unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.³

One of the accounts shown on that Profit and Loss Statement, however, is Payroll Expense. That statement shows that all of the petitioner's payroll expenses consisted of payments made to the beneficiary, thus confirming the assertion that the beneficiary is the petitioner's sole employee. That statement shows that during 2003 the petitioner paid the beneficiary \$1,697.54 for work performed during 2002 and \$42,297.24 for work performed during 2003. This office will exercise its discretion to consider that financial statement for the sole purpose of demonstrating wages that the petitioner paid to the beneficiary during those years.

In the July 1, 2006 request for evidence issued in this matter, the director requested evidence pertinent to the petitioner's sole member's personal income and living expenses. The director indicated that the petitioner's sole member must show the ability to pay the proffered wage and to continue to support himself. The decision of denial incorrectly analyzed the instant petition as though the petitioner were a sole proprietorship. Further, counsel cited *Matter of Ranchito Coletero*, 2002-INA-105 (Jan. 8, 200-4) for the proposition that, because the petitioner is a sole proprietorship, the income and assets of the petitioner's owner should be considered.

The petitioner is not, however, a sole proprietorship, but a sole member LLC, as was noted above. 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, 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.

Because of the separation of the petitioner's funds from its sole member's, however, the ability of the petitioner's sole member to support himself in addition to paying the proffered wage is not an issue. The petitioner's sole member is not obliged to pay the proffered wage. The petitioner is the entity that proposes to hire the beneficiary and to pay him wages. The petitioner's income and assets must be shown to be sufficient to pay the proffered wage, without reference to the income, assets, or financial requirements of its sole member or of anyone else.

³ Even if the petitioner were permitted to rely on the unaudited profit and loss statement to show its ability to pay the proffered wage during 2003, that statement shows, pursuant to accrual convention, that the petitioner suffered a loss of \$9,540.77 during that year, and would not have demonstrated that the petitioner was able to pay any portion of the proffered wage out of its profits during that year.

Counsel's reliance on the bank statements in this case, even those that pertain to the petitioner, rather than its sole member or its sole member's mother, is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and generally cannot show the sustainable ability to pay a proffered wage.⁴ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Counsel cited *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *v. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988) for the proposition that net assets and salary the petitioner paid to the beneficiary may show the ability to pay the proffered wage. 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).

However, this office agrees with counsel, at least in part, on his substantive assertions. This office will consider the salary the petitioner paid to the beneficiary for performing the duties of the proffered position during the salient years.

This office further agrees that a petitioner's assets, correctly considered, may show the ability to pay the proffered wage. The policy of this office is to consider a corporate petitioner's net current assets⁵ in the determination of its ability to pay the proffered wage during a given year. This office would also consider the net current assets of the instant petitioner, if reliable evidence of the petitioner's net current assets during the salient years were in evidence. The petitioner in the instant case, however, is a LLC reporting income on a Schedule C attached to its sole member's personal income tax return. As such, it does not file a Schedule L, the tax form from which a petitioner's current assets, current liabilities may be extracted and its net current assets, therefore, calculated. As the evidence does not demonstrate what, if any, net current assets the

⁴ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁵ Net current assets are current assets less current liabilities. 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 shown on lines 16(d) through 18(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.

petitioner had during the salient years, its net current assets cannot be included in the analysis of its ability to pay the proffered wage during those years.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing a Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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. § 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 established that it paid the beneficiary \$1,697.54 for work performed during 2002, \$42,297.24 for work performed during 2003, and \$28,758.24 during 2006. The petitioner must show the ability to pay the balance of the proffered wage during those years.

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).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 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. 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 proffered wage is \$47,278.48 per year. The priority date is December 4, 2002.

The petitioner demonstrated that it paid the beneficiary \$1,697.54 for work performed during 2002 and is obliged to show the ability to pay the remaining \$45,580.94 during that year. The petitioner submitted no copies of annual reports, federal tax returns, or audited financial statements pertinent to 2002 as required by 8 C.F.R. § 204.5(g)(2). The petitioner produced no other reliable evidence of its ability to pay the proffered wage during that year. The petitioner has not demonstrated its ability to pay the proffered wage during 2002.

The petitioner demonstrated that it paid the beneficiary \$42,297.24 for work performed during 2003, and must show the ability to pay the remaining \$4,918.24 during that year. The 2003 Schedule C shows that the petitioner suffered a loss during that year. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. The petitioner submitted no reliable evidence of any other funds available to it during 2003 with which it could have paid any portion of the proffered wage. The petitioner has not demonstrated its ability to pay the proffered wage during 2003.

The petitioner provided no evidence that it paid any wages to the beneficiary during 2004 and must show the ability to pay the entire annual amount of the proffered wage during that year. During 2004 the petitioner returned a net profit of \$4,790. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no reliable evidence of any other 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.

The petitioner provided no evidence that it paid any wages to the beneficiary during 2005 and must show the ability to pay the entire annual amount of the proffered wage during that year. During 2005 the petitioner returned a net profit of \$2,226. That amount is insufficient to pay the annual amount of the proffered wage. The petitioner submitted no reliable evidence of any other 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 May 31, 2006. On that date the petitioner's 2006 Federal income tax return was unavailable. On July 1, 2006 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. CIS received counsel's response to that request on September 27, 2006, and the record is deemed to have closed on that 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.⁶

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002, 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. The petition was correctly denied on this basis, which has not been overcome on appeal.

The record suggests an additional issue that was not addressed in the decision of denial.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

⁶ The petitioner submitted evidence that it paid the beneficiary \$28,758.24 during 2006. Had it been required to provide evidence pertinent to its ability to pay the proffered wage during 2006 it would have been obliged to show the ability to pay the remaining \$18,520.24 balance of the proffered wage during that year. If the petitioner reopens this matter on motion, it would be obliged to show its ability to pay the proffered wage not only during 2002, 2003, 2004, and 2005, but also during the ensuing years for which evidence is available.

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The Form ETA 750 in this matter shows that the proffered position requires a bachelor's degree in computer science or a related field. The record shows that the beneficiary has a bachelor's degree in Materials Science and Engineering. The record does not contain any evidence that the beneficiary has the required degree in computer science or a related field and does not, therefore, demonstrate that he is qualified for the proffered position. The petition should have been denied on this additional basis.

On appeal, a decision shall be affirmed if the result is correct, notwithstanding that the decision from which the appeal was taken relied upon an incorrect basis or a wrong reason. *Securities and Exchange Commission v. Chenery*, 318 U.S. 80, 88 (1943) citing with approval *Helvering v. Gowran*, 302 U.S. 238, 245. Further, as was noted above, "On appeal from or review of [a] decision, the agency [rendering the appeal or review] 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. 5 U.S.C. § 557(b). See also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989), which notes that the AAO reviews appeals on a de novo basis. It follows from those authorities that this office may rely on any basis of ineligibility that appears in the record, even if it was not relied upon in rendering the decision denying the application from which the appeal was taken.

The petition will be denied for both of the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.