U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: EAC 04 108 54547 Office: VERMONT SERVICE CENTER Date: OCT 24 2006

IN RE: Petitioner: [redacted]
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:

[redacted]

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

The petitioner is a firm that designs and creates properties and artistic projects. It seeks to employ the beneficiary permanently in the United States as a construction project coordinator. 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.

On appeal, counsel submits additional evidence and asserts that the petitioner has had the continuing financial ability to pay the proffered salary.

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 at 8 C.F.R. § 204.5(g)(2) provides:

> *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. 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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $65,187 per year. On the ETA 750-B, signed by the beneficiary on April 20, 2001, she claims to have been employed full-time by the petitioner since June 1999.

On Part 5 of the visa petition, filed on March 1, 2004, the petitioner claims to have been established on October 28, 1999, to have a gross annual income of "$750,00 Project," a net annual income of "$500,000Project," and to currently employ two workers plus "Proj. Contractors 100+."

In support of the ability to pay the proposed wage offer of $65,187, a copy of the petitioner's Employer's Annual Federal Unemployment (FUTA) Tax Return (Form 940-EZ) for 2001 was submitted, as well as copies of four Employer's Quarterly Federal Tax Return (Form 941) covering 2001. Copies of bank statements representing funds held by the "International Center of Design" or "International Center of Design Art of God to the World and to Man, Inc. have also been provided, covering August 2002 until December 2002, and from January to August of 2003.

A copy of the beneficiary's 2001 individual income tax return has also been provided. It indicates that the beneficiary was married to the petitioner's vice-president and filed a joint return in 2001. Schedule C (Profit or Loss from Business) filed with the return reflects that the beneficiary ran a retail clothing business during that year. No Wage and Tax Statements (W-2s) were provided but an attached "Statement 1" to the tax return indicates that wages of $48,110 were paid to one or both of these individuals by the petitioner.

On August 2, 2004, the director requested additional evidence of the petitioner's ability to pay the proffered wage. He advised the petitioner that either federal tax returns, annual reports or audited financial statements must be provided to the record. He instructed the petitioner to submit its 2001, 2002, and 2003 federal income tax returns with all schedules and attachments or copies of annual reports accompanied by audited or reviewed financial statements.

In response, the petitioner, through counsel, provides a letter, dated September 23, 2004, from the petitioner's accountant, [redacted]. He states that a single member LLC that does not elect to be a corporation is treated as not having any entity status and the individual member reports the LLC income on Schedule C of the individual income tax return. [redacted] does not identify the single member. He adds that "the Company has not yet received income and the expenses have not been claimed on a schedule "C' since none would be required."

Included in the response are copies of data processing records representing quarterly wage records and state and federal unemployment tax forms covering various periods in 2001 and 2002. They indicate that the petitioner never had more than four employees, including the vice-president, the beneficiary, another female bearing the same name as the vice-president, and a third male. These documents reflect that the petitioner paid the beneficiary $37,710.36 in 2001 and $28,282.77 in 2002.

The director denied the petition on January 4, 2005, noting the above findings as to the wages paid to the beneficiary and finding that the petitioner had failed to demonstrate its ability to pay the proffered wage as both wage amounts were substantially less than the proffered wage of $65,187. The director additionally concluded that no evidence of wages paid to the beneficiary in 2003 was contained in the record.

On appeal, counsel submits a copy of a newspaper article from September 15, 2005 describing a well-known Russian artist, [redacted] as attending a groundbreaking ceremony in Bayonne, New Jersey for a monument dedicated to the victims of the 1993 World Trade Center bombing and the victims of the September 11th attacks. Counsel also provides a copy of [redacted] individual tax return and cites these materials as demonstrating the "notoriety and continue success of 'Birth of The New World Monument LLC' and its

Founder and sole owner, [redacted]" Counsel asserts the petitioner's ability to pay the proffered wage is demonstrated by the worth of the principal and sole owner of the Birth of The New World Monument LLC.

Based on the evidence submitted, this contention is not persuasive. At the outset, it is noted that the petitioner is represented as a single member limited liability company. Members of a limited liability company enjoy protection from individual liability similar to that afforded to corporate shareholders. If a business is sued or is unable to pay its debts, the creditors can ordinarily only reach the LLC's assets and cannot reach the assets of the members. While the owners of a corporation are referenced as shareholders or stockholders, the owners of a limited liability company are often referenced as "members." It is possible for an LLC to be formed by a single individual, in which case it is usually referenced as a "single member LLC."

For certain tax purposes, a single member LLC is treated as a sole proprietorship. It is treated so only as a mechanism for tax filing purposes and doesn't change the fact that the business is legally a limited liability company. If the only member of the LLC is an individual, the LLC income and expenses are reported on Form 1040, Schedule C, E, or F. *See* IRS Publication 3402 (Rev. 7-2000) Catalog Number 249400 "Tax Issues for Limited Liability Companies."

In this case, it is noted that after reading the newspaper article submitted on appeal and reviewing [redacted] 2003 individual tax return, no mention of the petitioner's name is found on either document. Moreover, no report of income and expenses connecting the petitioner with [redacted] can be located within any Schedule C, E, or F accompanying the return. Further, as noted by [redacted] letter of September 23, 2004, apparently the LLC has not yet reported any income, despite having been established several years ago and maintaining three to four persons on a payroll in the LLC's name.

These observations raise several questions, but it is nevertheless noted that for the reasons explained below, the petitioner's ability to pay the proffered wage has not been established. In determining a petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by reliable documentary evidence that it may have employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will also be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As noted by the director, the beneficiary's wages in 2001 and 2002 were $27,476.64 less than the proposed wage offer in 2001 and $36,904.23 less than the proffered wage in 2002. No evidence of wages for 2003 was contained in the record.

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 petitioner's net current assets or net taxable income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra,* and *Ubeda v. Palmer, supra; see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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 as counsel advocates here on appeal. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, as noted above, there is no first-hand evidence of any income generated by the petitioner to be reviewed along with the payment of wages to the beneficiary. As set forth above, it cannot be concluded that the petitioner has demonstrated the continuing ability to pay the proffered wage as set forth in 8 C.F.R. 204.5(g)(2).

Beyond the decision of the director, it is noted that the beneficiary, the petitioner's vice-president, [redacted] and at least one of the petitioner's employees appear to be related by blood or marriage. It is noted that under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden, when asked, to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Although not part of the consideration in this case, in future proceedings, this issue may also merit further investigation, including consultation with the DOL.

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.