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

U.S. Citizenship and Immigration Services

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FILE: WAC-04-197-51884 Office: CALIFORNIA SERVICE CENTER Date: APR 2 6 2007

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

The petitioner is a property management company and seeks to employ the beneficiary permanently in the United States as a building, grounds, cleaning and maintenance worker ("Maintenance Repairer Buildings"). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). As set forth in the October 15, 2005 denial, the director denied the case on the basis that the petitioner had not established its ability to pay the beneficiary the proffered wage from the priority date continuing until the beneficiary obtains lawful permanent residence.

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[1].

The record shows that the appeal is properly and timely filed, 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.

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 Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *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 of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on March 8, 2001. The proffered wage as stated on the Form ETA 750 is $12.65 per hour,[2] 40 hours per week, for an

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[1] 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).

annual salary of $26,312 per year. The labor certification was approved on December 18, 2002, and the petitioner filed the I-140 on the beneficiary's behalf on July 7, 2004. On the I-140, the petitioner listed the following information: date established: 1996; gross annual income: "see attached;" net annual income: "see attached;" and current number of employees: not listed.

On March 4, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide additional evidence related to the petitioner's ability to pay from March 2001 to the present in the form of annual reports, federal tax returns, or an audited financial statement. The RFE additionally requested that the petitioner provide documentation that the beneficiary met the requirements as set forth in the certified Form ETA 750.

The petitioner responded. On June 14, 2005, the director issued a second RFE, noting that the petitioner's business was a "sole proprietorship."[3] As a sole proprietor must demonstrate that the petitioner can pay the beneficiary the proffered wage, and support the owner, the director requested that the petitioner provide information related to the owner's personal monthly expenses. Further, the RFE provided that if the sole proprietor planned to pay the beneficiary from personal funds, then the owner should submit documentation related to assets available for use to pay the proffered wage. The petitioner responded, however, on October 15, 2005, the director denied the case based on the petitioner's inability to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed to the AAO.

We will examine information contained in the record and then consider the petitioner's additional arguments on appeal. The petitioner must establish that its job offer to the beneficiary is a realistic one. 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.

First, in determining the petitioner's ability to pay the proffered wage during a given period, CIS will 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 case at hand, on Form ETA 750B, signed by the beneficiary on March 5, 2001, the beneficiary did not list that he was employed with the petitioner. The petitioner did not claim to have employed the beneficiary, and did not provide any evidence of payment to the beneficiary. Accordingly, the petitioner cannot demonstrate that it can pay the beneficiary the proffered wage based on prior wage payment.

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. 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.*

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[2] The petitioner initially listed an hourly rate of $8.00 per hour. DOL required that the petitioner amend the wage to $12.65 per hour prior to certification of the ETA 750.

[3] The petitioner's business is formed as a limited liability company (LLC) and not as a sole proprietorship, which we will address below.

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).

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 petitioner is formed and operates as a limited liability company (LLC). Although structured and taxed as a partnership, the owners of an LLC enjoy limited liability similar to corporation owners. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The company's debts and obligations are generally not the owner's debts and obligations.[4] An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the owners' individual total income and assets 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 the petitioning company's funds.[5]

Where a LLC's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. The instructions on the Form 1065 U.S. Income Tax Return of Partnership Income state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 22 below." The petitioner's Form 1065 tax return for 2002 shows that the petitioner's income in 2002 was not exclusively from a trade or business. Where a LLC has income from sources other than from a trade or business, net income is found on Schedule K, Form 1065, page 4, Analysis of Net Income (Loss), line 1. In the case at hand, however, the petitioner derives its income from net rental real estate income, which is reported on line 2 of Schedule K.[6] The petitioner's Form 1065 Schedule K, line 2, reflects the following:

Tax year	Net income or (loss)
2003[7]	-$85,133

[4] This general rule might be altered in some cases by contract or otherwise, however, no evidence appears in the record to indicate that the general rule would not apply in the instant case.

[5] In contrast, a sole proprietor is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore, the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

[6] The tax returns identify that two individuals own the petitioner and divide profit and loss sharing equally. Each partner is required to complete Schedule K-1 and report their share of the profits and losses respectively on that Schedule.

[7] The petitioner supplied a letter from its accountant, which provided that the petitioner had requested an extension to file its 2004 federal tax return, and, therefore, the petitioner was unable to submit the 2004 return.

2002	-$37,519
2001	-$18,971

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a LLC taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A LLC's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a LLC'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 would be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Tax year	**Net current assets**
2003	$0[8]
2002	$0
2001	$0

The director additionally considered rental income from four other entities owned by the petitioner's owners, and found that the rental income from these properties would be equivalent to $48,485 in the year 2003, and that this income could be used to pay the proffered wage. We do not agree. Each other entity is structured separately and has its own Federal Employment Identification Number (FEIN), which is different than that of the petitioning entity. Accordingly, the rental income would be from separate and unrelated corporations, and could not be used to show the petitioner's ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Accordingly, rental income derived from other LLC corporations cannot be used to demonstrate the petitioner's ability to pay the proffered wage.

The director denied the petition and specifically provided:

> The petitioner's business appears to be a partnership so the USCIS will consider evidence of other income of the petitioner but must consider personal expenses as part of the determination of ability to pay. The USCIS has requested for a statement of monthly expenses for expenses such as rent, food, car payments, insurance, utilities, credit cards, etc., however, none were provided. For the year 2003, the petitioner submitted evidence of real estate rental income of $48,485; the proffered salary is $26,312 . . . The petitioner did not provide a statement of monthly expenses, however, the balance left over after deducting the proffered wage [$22,173] does not appear sufficient to sustain a family of two adults.

In response, on appeal, counsel contends that the petitioner can pay the proffered wage: that the petitioner owns five "prime real estate properties" in Southern California; that CIS should follow the May 4 William

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[8] The petitioner did file and complete Schedule L. Schedule L, however, did not evidence any items listed for the categories 1 through 6 for current assets, or for items 15 through 17 related to current liabilities.

Yates Memo; and that the LLC's partners have substantial individual assets from which they can pay the proffered wage.

Counsel cites to the May 4, 2004 William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo (May 4 Yates Memo). The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary. We have considered all three points above. The petitioner's net income is negative for all three years examined; the petitioner has no net current assets; and the petitioner has not submitted evidence, or claimed, that it has employed the beneficiary. Counsel has failed to address how CIS failed to consider the petitioner's ability to pay in accordance with the Yates Memo.

Counsel provided a letter from the petitioner's tax preparer, which provides that one of the LLC's partners will receive "approximately $400,000 of interest income on cash investments of approximately 10 million dollars."[9] The interest income would appear to be held individually by the partner, rather than by the petitioner, and accordingly would not be considered in determining the petitioner's ability to pay. As noted above, a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). *See Si tar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Similarly, counsel provided the partner's list of rental income generated by varying rental properties incorporated as separate LLCs with separate FEINs. Income from the other LLCs, separate corporations,

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[9] A prior letter from the petitioner's tax preparer also references that the petitioner's taxable income would be higher, if the petitioner's claimed depreciation deductions were considered. Depreciation as a tax concept is a measure of the decline in the value of a business asset over time. *See* Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, *available at* http://www.irs.gov/pub/irs-pdf/i4562.pdf. Therefore, depreciation is a real cost of doing business.

The depreciation argument has previously been addressed by courts, and dismissed this argument accordingly. The court in *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989) 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.

Therefore, the AAO is not persuaded that the petitioner's depreciation can show its ability to pay the proffered wage.

would not be considered to determine the petitioner's ability to pay. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

Finally, counsel provided a letter from the partner's bank, which indicated that she, as opposed to the petitioner, had substantial assets in a Wells Fargo Bank Account(s). As these assets also appear to be held individually apart from the corporation, the assets of the bank account would not be considered in determining the petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

While the director's decision specifically refers to the petitioner as a "sole proprietorship," and improperly references that the owners' individual assets would be considered in determining the petitioner's ability to pay, the petition was properly denied based on the petitioner's failure to demonstrate its ability to pay the beneficiary the proffered wage. The petitioner has not provided any documentation on appeal to demonstrate its ability to pay the beneficiary the proffered wage. In reviewing the regulatory prescribed evidence provided in the record of proceeding, the petitioner's federal tax returns demonstrate negative net income, and zero net current assets. The petitioner further has not demonstrated that it employed or paid the beneficiary since the time of the priority date. Accordingly, the petitioner has failed to demonstrate its ability to pay the proffered wage.

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.

ORDER: The appeal is dismissed.