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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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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 20 2007
EAC 06 129 50150

IN RE: Petitioner:
Beneficiary: [redacted]

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

The petitioner is a renovation and construction firm. It seeks to employ the beneficiary permanently in the United States as an ornamental plasterer. 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 failed to establish its continuing financial ability to pay the proffered wage as of the priority date and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has established its continuing financial ability to pay the proffered wage.

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).

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) 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 7, 2002. The proffered wage as stated on the Form ETA 750 is $30.25 per hour, which amounts to $62,920 per annum. On the ETA 750B, signed by the beneficiary on September 20, 2002, the beneficiary does not claim to have worked for the petitioner.

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on March 30, 2006. Part 5 of the I-140 reflects that the petitioner was established on January 1, 1995, has a gross annual income of $4,467,615, a net annual income of $347,547, and currently employs five workers.

In support of the petitioner's continuing ability to pay the proffered wage, the petitioner, through counsel, initially submitted an incomplete copy of the petitioner's Form 1065, U.S. Return of Partnership Income, for 2002. Its omissions include various statements as identified on the return. The petitioner's tax return indicates that it is a limited liability company.[1] The return also indicates that the petitioner files its tax returns using a standard calendar year. In 2002, it reported net income of $338,800.[2] Its current assets as reflected on Schedule L, are shown as $2,536,105. Current liabilities are $2,926,469, resulting in -$390,364 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.[3] Besides net income, and as an alternative method of reviewing a petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets as a possible resource out of which a proffered wage may be paid. A partnership's year-end current assets and current liabilities are generally shown on Schedule L of a Form 1065 tax return.[4] Current assets are found on line(s) 1(d) through 6(d) and current liabilities are specified on line(s) 15(d) through 17(d). If a partnership's year-end 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.

On May 25, 2006, the director instructed the petitioner to submit additional evidence that it had the ability to pay the proffered wage. **Citing the regulation at 8 C.F.R. § 204.5(g)(2), the director specifically instructed the** petitioner:

> For each of the years 2003 through 2005 inclusive, please submit at least one of the following:

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[1] A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, an LLC formed under Connecticut law, is considered to be a partnership for federal tax purposes.

[2] For a partnership, where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Return of Partnership Income. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065, at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf. In the instant case, the petitioner's Schedule K has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K.

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

[4] Certain partnerships are not required to complete Schedule L. *See* Internal Revenue Service Publication 541 (Rev. November 2004)

1. A copy of the petitioner's filed annual federal tax return, including copies of all Schedules, or
2. A copy of the petitioner's published annual report, or
3. A copy of the petitioner's audited (or reviewed) financial statement.

Submit any other evidence of your ability to pay the proffered wage during 2006, such as copies of payroll or bank account records. If you have paid the beneficiary a wage or salary during 2006, submit evidence of the wage/salary paid (as further proof of ability to pay).

In response, the petitioner, through counsel, submitted incomplete copies of the petitioner's 2003 and 2004 federal income tax returns omitting all statements referred to on the returns. The petitioner also provided a copy of an Internal Revenue Service (IRS) application for an extension of time to file a 2005 tax return. The 2003 and 2004 returns contain the following information:

On October 4, 2006, the director denied the petition, finding that the petitioner had not demonstrated its ability to pay the proffered salary. Although she noted that the petitioner's returns that were provided indicated sufficient net income for the years 2002-2004, the director further concluded that because the petitioner had failed to submit any of the financial documentation requested for 2005 and 2006, it had not demonstrated its continuing 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 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 first year of 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS [Citizenship and Immigration Services] will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it 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 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 as shown on its federal tax return, audited financial statement, or annual report during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. In this case, there is no indication that the petitioner has employed the beneficiary.

If a petitioner's federal tax returns are considered, the review is initially focused on a petitioner's net income. *See 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

On appeal, counsel provides a partial copy of the petitioner's 2005 partnership return and a copy of a bank statement which shows the petitioner's commercial checking account balance as of September 29, 2006.

Here, the AAO concurs with the director's observation that the petitioner's reported net income of $338,800, $203.610, and $288,033 reflected a positive determination of its ability to pay in 2002, 2003, and 2004, respectively.

However, the AAO finds the petitioner's failure to submit the requested federal income tax return, annual report, or audited financial statement for 2005 and additional financial documentation for 2006 as specifically requested by the director cannot be excused and will not be considered for the first time on appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted at least one form of the requested document(s) in response to the director's request for evidence on May 25, 2006. Under the circumstances, the AAO need not and does not consider the sufficiency of this evidence. The regulation at 8 C.F.R § 204.5 (g)(2) requires that the *continuing* financial ability to pay the proffered wage be demonstrated as of the priority date and continuing until the beneficiary obtains lawful permanent residence. As no documentation was submitted to the director that established the petitioner's *continuing* financial ability to pay the proffered wage subsequent to the year 2004, pursuant to 8 C.F.R. § 204.5(g)(2), the director did not err in denying the petition on this issue.

Based on a review of the underlying record and the evidence and argument provided on appeal, the AAO concludes that the petitioner has failed to establish its continuing ability to pay the proffered wage beginning at the priority date of October 7, 2002.

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.