U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: FEB 27 2008

SRC 06 207 50952

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

IN 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a telecommunications firm. It seeks to employ the beneficiary permanently in the United States as a treasurer. 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 demonstrated its financial ability to pay the proffered wage beginning as of the priority date. The director also determined that the petitioner had not established that the beneficiary had acquired the necessary qualifying employment experience as of the priority date of the visa petition and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has had the continuing ability to pay the proffered wage and that the beneficairy

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.

Section 203(b)(3)(A)(i) of 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 or seasonal 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 employment based visa classification to qualified immigrants who hold baccalaureate degrees and who 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must also 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 DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on March 16, 2004. The proffered wage is set forth as $17.30 per hour annualized to $35,984.

On part 5 of the Immigrant Petition for Alien Worker, (I-140), filed on June 27, 2006, the petitioner claims that it has twelve employees, was established in November 1999, claims a gross annual income of $7,974,296 and a net annual income of $57,570. The ETA 750B, signed by the beneficiary on March 11, 2004 does not indicate that she has worked for the petitioner.

Item 14 of the ETA 750A describes the education, training and experience that an applicant for the certified position must have. In this matter, item 14 states that the alien must have a minimum of three years of work experience in the job offered as a treasurer. The duties are described in item 13 of the ETA 750A:

> Directs financial planning, procurement and investment of funds for employer's business engaged in IDEN digital radio services and telecommunication services. Analyzes financial records to forecast future financial position and budget requirements. Evaluates need for procurement of funds and investment of surplus. Advises management on investments and loans for short-and long-range financial plans. Prepares financial and related reports for management. Develops policies and procedures for accounts.

The ETA 750B, signed by the beneficiary on March 11, 2004 does not indicate that she has worked for the petitioner.

With the petition and in support of the ability to pay the certified wage of $35,984, the petitioner provided copies of the beneficiary's individual tax return and corresponding Wage and Tax Statements (W-2s) for 2002-2005 reflecting that she was employed by an entity not identified as the petitioner.

The petitioner also provided a copy of its Form 1065, U.S. Return of Partnership Income for 2004. It contains the following information:

	2004
Net Income[1]	$ 57,599

[1] It is noted that 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, as indicated by the record, the I-140 petitioner, an LLC formed under the laws of Guam, is considered as a

Current Assets (Sched. L)	$ 726,494
Current Liabilities (Sched. L)	$1,116,663
Net Current Assets	-$ 390,169

As noted in the above table, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, Citizenship and Immigration Services (CIS) will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.3 It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner's year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its partnership return. If the petitioner's end-of-year 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.

It is noted that this tax return identifies Choice Holdings, LLC as one of the petitioner's members as well as [redacted] as another member.

The director requested additional evidence on July 18, 2006. In addition to advising that as it had filed three I-140 petitions, it must submit evidence demonstrating its ability to pay the proffered wage to each beneficiary. The director also instructed the petitioner to submit evidence of its continuing ability to pay the certified salary in the form of copies of federal tax returns, annual reports or audited financial statements, as well as advising the petitioner to submit evidence that the beneficiary had acquired three years of qualifying work experience in the form of employment verification letters from her former and current employer(s).

In response, the petitioner submitted another copy of its 2004 partnership return as well as a copy of an Internal Revenue Service (IRS) application for an extension of time to file its 2005 return and copies of local revenue and taxation forms filed with the government of Guam identified as "monthly gross receipts, use, occupancy, liquid fuel, automotive surcharge, tobacco, and alcoholic beverages tax return." They covered the months from July 2005 to July 2006 and show gross receipts and monthly local tax rates but do not reflect other costs and expenses. No other evidence for 2005 or 2006 was submitted.

The petitioner also provided two employment verification letters. [redacted] general manager of Skycom Guam, Inc., provided a letter dated September 15, 2006. He confirms that the beneficiary has been employed full-time as a treasurer for Skycom Guam, Inc. from September 2001 to the present. He describes her duties as including designing cash management, control and reporting procedures, selecting service providers, selecting equipment, developing staffing, and coordinating service of third parties.

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partnership for federal tax purposes. In this case, it reports additional income or additional deductions and credits on Schedule K. Its net income is reflected as a combined total of its ordinary business income as shown on line 22 of the Form 1065 and income, credits and deductions reflected on Schedule K. Here, the petitioner's net income is found on line 1 of Analysis of Net Income on page 4 of Form 1065.

[redacted] as vice president of PowerPage, also provided a letter, dated September 15, 2006, confirming that the beneficiary had been employed by that firm from March 1996 to September 2001. He states that she assisted the treasurer in establishing best practices which included complying with cash management, control and reporting procedures, acting as a liaison with service providers, and implementing physical installation, testing, and commissioning processes.

The director denied the petition on October 19, 2006. The director noted that the petitioner had filed three petitions with the same priority date of March 16, 2004. Besides the beneficiary in the instant case, the director identified the other two beneficiaries and proffered salaries as:

[redacted]	$21,964
	$24,814

The director concluded that the evidence was insufficient to demonstrate that the petitioner could pay the proffered wage to these beneficiaries as well as the proffered wage to the beneficiary sponsored in the instant petition.

The director additionally determined that the petitioner had failed to establish that the beneficiary had acquired the necessary qualifying work experience in the job offered of treasurer as of the priority date of March 16, 2004. The director noted that the beneficiary's duties as a treasurer for SkyCom Guam Inc. represented two years and six months, as only the period from September 2001 until the priority date of March 16, 2004, could be considered. She further noted that the beneficiary's duties as an assistant treasurer at PowerPage did not indicate that the beneficiary had performed any of the duties of certified job of treasurer as set forth on the ETA 750A.

On appeal, counsel submits a copy of its 2005 partnership income return as well as information related to the petition of Mr. Carrillo. The petitioner's 2005 return reflects the following:

Net Income	$ 832,927
Current Assets	$1,006,867
Current Liabilities	$2,201,157
Net Current Assets	-$1,194,290

The information related to [redacted] are copies of his W-2s indicating that the petitioner employed him beginning in 2002 and paid him wages of $29,696 in 2004, $10,788 in 2005. A payroll record also indicates that the petitioner had paid [redacted] **$21,343.84 as of October 27, 2006. Counsel asserts that the** petitioner's net income in 2004 should have been considered to apply to only the current beneficiary and Mr. [redacted] because [redacted] salary was already included in the petitioner's declared net income. Counsel also maintains that the resulting shortfall when comparing the certified wages of Vasquez and the current beneficiary to the petitioner's net income was negligible and should be considered as establishing the ability to pay the certified wage. He further contends that the financial strength of the company should be considered where the employer produces a gross revenue of over ten million dollars per year.

In supplemental documentation, counsel states that petition was approved based the 2005 tax return showing substantial net income. It is asserted that this rationale should justify approving the instant petition. Counsel also explains that the company, Skycom Guam, Inc. has employed the beneficiary for the past several years and is an affiliate of the petitioner, Choice Phone LLC. He has provided a chart showing the various relationships of companies which indicates that the petitioner's member [redacted] also has a .05% interest in Skycom Guam, Inc. Counsel also supplies copies of the beneficiaries W-2s issued by this company.

We do not find counsel's suggestions persuasive that the relationship of Skycom Guam, Inc. with the petitioner and the employment and payment of wages to the beneficiary by this corporation mandates that the instant petition should be approved. A narrative of this relationship accompanied by charts of the relationship existing between these entities does not establish the petitioner's continuing financial ability to pay the proffered wage as of the March 16, 2004, priority date through the regulatory-prescribed evidence of federal tax returns, audited financial statements or annual reports. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Because 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 limited liability company's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). 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."

In determining the 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 that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, there is no evidence that the petitioner has employed the beneficiary.

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, CIS will also examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *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 taxable 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.

For 2004, the evidence indicates that [redacted] was paid more than his certified wage so his salary is not part of the consideration of the petitioner's available net income of $57,599. It appears that it is sufficient to pay either the beneficiary's certified wage of $35,984 or [redacted] certified wage of $24,814.40 out of the petitioner's net income, but not both. The petitioner's net current assets of -$390,169 could not cover any shortfall of ability to pay. It is further noted that CIS electronic records also indicate that two additional I-140 petitions were approved for [redacted] (March 21, 2007 [redacted] and [redacted] (May 30, 2007 Lin who also shared the same priority date of March 16, 2004. It is unclear what financial information supported the approval of these petitions.

For 2005, it is evident that the petitioner's net income of $832,927 could support payment of the full certified wage(s) for [redacted] and the instant beneficiary and several more beneficiaries within their salary range. The petitioner will be deemed to have established its ability to pay the certified wage to this beneficiary in this year.

For 2006, [redacted] salary is not a factor because he has been employed and was being paid his certified wage. No additional information relevant to [redacted] is contained in this record and no information relating to the other two beneficiaries mentioned above has been provided. Beyond approximately six months of copies of its local gross receipts and taxation documents, which are not sufficiently probative of the petitioner's financial status, the petitioner failed to provide any of the three forms of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2) for 2006. It is noted that the director's request for evidence was dated July 18, 2006. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established its ability to pay the beneficiary's proffered wage.

Counsel is correct that a petitioner's other overall financial circumstances may sometimes be applicable in approving a petition where factors such as the expectations of increasing business and profits overcome evidence of small profits. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the Sonegawa petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in Time and Look. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in Sonegawa was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. After reviewing the record in this case, while it is recognized that the petitioner has submitted only two tax returns which show that its

net current assets experienced a substantial downturn in 2005, we also recognize that the petitioner's gross receipts or sales grew approximately 22% from 2004 to 2005 when over ten million dollars in gross revenue was declared. It is also noted that its reported net income has increased more than 14 times from $57,599 in 2004 to $832,937 in 2005. It is further noted that the first six months of 2006 reflected that petitioner was paying local taxes on an average of over $600,000 in gross receipts per month. In this particular case, based on a review of the record as a whole, the AAO concludes that this petitioner established its ability to pay the proposed wage offer consistent with the principles set forth in *Matter of Sonegawa* based on its overall financial profile.

However, the AAO concurs with the director's review of the evidence submitted in support of the beneficiary's experiential qualifications and her conclusion that the beneficiary had not acquired three full years of qualifying work experience as a treasurer.[2] It is noted at the outset that CIS has the authority to inquire as to whether the alien is qualified for the classification sought:

> There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).
>
> *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,supra.*

Other than W-2s that evidenced payment of compensation, nothing submitted on appeal supports a finding that the beneficiary had acquired three full years of work experience in the certified job as a treasurer as set forth on the ETA 750A, as of the priority date of March 16, 2004. It is noted that this evaluation encompasses a review of the job duties of previous employment, not just job titles. *See Matter of Maple Derby, Inc.*, 89-INA-185 (BALCA 1991 (en banc). Here, the developing and designing responsibilities performed while the beneficiary was a treasurer with SkyCom Guam, Inc. were comparable with the duties of a treasurer as described in the ETA 750A. However, as noted by the director, the beneficiary's duties as an assistant treasurer for PowerPage, as verified by [redacted] suggested a more subordinate position inconsistent with the duties of the certified position of treasurer as enumerated on the labor certification. It may not be concluded that the beneficiary's job as an assistant treasurer may be credited toward the completion of the requisite three years of full-time employment as a treasurer. Thus, as noted by the director, the beneficiary obtained approximately two years and six months of employment experience as a treasurer as of March 16, 2004.

Based on a review of the underlying record and the evidence and argument submitted on appeal, the AAO finds that the petitioner has established its continuing financial ability to pay the certified wage, but has not established that the beneficiary acquired the necessary qualifying employment experience as of the priority date of the visa petition.

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[2] We note counsel's comment on appeal that the beneficiary may have been on maternity leave during part of 2004, but do not include this consideration in this review.

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.