U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 03 2009

SRC 07 042 51603

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 market making and brokerage company. It seeks to employ the beneficiary permanently in the United States as a technical publications writer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 is properly filed, timely 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.

As set forth in the director's June 19, 2007 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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, 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 the DOL. *See* 8 C.F.R. § 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on September 15, 2003. The proffered wage as stated on the Form ETA 750 is $23.03 per hour ($47,902 per year). The Form ETA 750 states that the position

requires a four year bachelor's degree in languages, journalism, or communications and one year of work experience in the proffered position.

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.[1] Relevant evidence in the record includes the first pages of the petitioner's IRS Form 1065, U.S. Return of Partnership Income, for tax years 2003 to 2005; [2] the first page of the petitioner's 2006 IRS Form 1065; [3] and the petitioner's Balance Sheet as of March 31, 2007. The petitioner also submitted the beneficiary's W-2 Wage and Tax Statements for tax years 2003 to 2006. These documents indicated that the beneficiary's employment was part-time, and that her wages were the following during the 2003 to 2006 tax years: $6,188; $16,707.60; $16,088.80; and $16,567.60. The petitioner also submitted copies of the beneficiary's pay stubs from March 24, 2007 to June 1, 2007. The last pay stub indicated the beneficiary had earned $7,084 to date and that she worked forty hours at an hourly rate of $16.10.

On appeal counsel submits a copy of the petitioner's 2004 IRS Form 1065, with Schedules A through M-2, and resubmits the first pages of the petitioner's tax returns for tax years 2003, and 2005 to 2006. Counsel submits an audited financial statement for the year ended December 31, 2004 that indicates net income of $235,776. This document was prepared by [redacted] P.A, Altamonte Springs, Florida and is dated February 3, 2005. Counsel also submits a copy of a U. S. Citizenship and Immigration Services (USCIS) memorandum written by Mr. William Yates in May 2004.[4]

Counsel also submits a letter from the petitioner's chief executive officer, dated June 29, 2007. [redacted] states that the director's decision failed to note that the labor certification was filed in late September 2003, and that only the last three months of 2003 were relevant to the petition. [redacted] states that the petitioner is only required to pay the beneficiary $11,976, or one quarter of the beneficiary's proffered salary, in tax year 2003, and that the petitioner's net income of $40,173 was sufficient to pay this prorated salary. [redacted] also states that the director's decision stated that the petitioner did not show sufficient income to pay the proffered wage in 2005, a year in which the petitioner showed nearly $400,000 in net income. [redacted] noted that the petitioner's

[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).

[2] The petitioner submitted this incomplete documentation with the initial I-140 petition.

[3] The petitioner submitted this incomplete documentation in response to the director's RFE dated May 8, 2007.

[4] Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

tax year for 2004 showed net income of $7,998 and that the beneficiary's wages of approximately $16,000 required the petitioner to demonstrate the ability to pay about $24,000 in additional salary in tax year 2004. [redacted] noted that Schedules M-1 and M-2 of the 2004 tax return shows net income in the petitioner's books of $132,028 and partners' capital accounts (net equity) totaling $856,371. [redacted] also notes that the net income on the petitioner's books includes unrealized gains of $114,094 which was not taxable and was therefore not included in the net taxable income. [redacted] states that on an income basis, as well as on a balance sheet basis, the petitioner was able to pay the proffered wage. He also notes that the petitioner's assets in 2004 were well in excess of $1 million, further demonstrating the petitioner's ability to pay the proffered wage. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The AAO notes that the petitioner in its initial I-140 petition submitted the first pages of its tax returns for tax years 2003 to 2005, and that the director did not consider this evidence to be sufficient and requested in her May 8, 2007 RFE copies of the petitioner's tax returns, annual reports or audited financial statements for the relevant period of time in question. In response, the petitioner resubmitted the front pages of its tax returns for 2003 to 2004 and submitted for the first time, the first page of its Form 1065 for tax year 2006. Only on appeal, does the petitioner submit a more complete 2004 Form 1065, with accompanying Schedules A through M-2.

The AAO note that 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). In the instant case, the director requested the petitioner's tax returns apparently because the tax returns submitted with the initial petition were incomplete. As will be discussed more fully further in these proceedings, without the accompanying schedules, the director could not determine the partnership's net income based on either the first page of the tax return or Schedule K and M of the return or net current assets based on Schedule L.

Counsel in its response to the director's RFE or on appeal does not provide any explanation for the omission of the petitioner's complete tax returns with accompanying tax schedules. 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 petitioner's 2004 tax returns with accompanying schedules to be considered, it should have submitted the complete document in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the petitioner's 2004 tax return submitted on appeal. The AAO will review the petitioner's audited 2004 tax return which it considers new evidence submitted on appeal.

On appeal, counsel reiterates [redacted] comments and adds that the petitioner is not an S Corporation but rather a partnership. As such, counsel states that the petitioner makes distributions of its business income to its partners. Counsel asserts that a look at the company's Partner Capital Accounts is a more accurate reflection of the petitioner's financial position rather than its ordinary

business income. Counsel notes that the reported ordinary business income of $7,988 in tax year 2004 is after income distributions were made to its partners. Counsel also notes that on page four of the petitioner's 2004 tax return, the petitioner reported net income of $132,028, which was distributed to its limited partners. Counsel references the Yates memo and states that this memo instructs USCIS adjudicators to make a positive ability to pay determination if the initial evidence reflects that the petitioner's net current assets are equal to or greater than the proffered wage. Counsel states that in 2004, the petitioner's net current assets in 2004 were $2,068,724[5] and that this amount is well and beyond the proffered wage.

The record indicates the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.[6] On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of $883,000, a net annual income of $400,000 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on August 29, 2003, the beneficiary claimed to have worked for the petitioner from August 2003 to the date she signed the ETA 750.

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, USCIS 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

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[5] Counsel refers to the petitioner's total assets listed on page 1 of the petitioner's Form 1065. The petitioner's net current assets for tax year 2004 would have been identified on Schedule L of the 2004 tax return, if this evidence had been accepted into the record.

[6] On its 2004 tax return, the petitioner identified itself as a domestic limited liability company, in Schedule B, Other Information. The state of Florida corporate database contains the petitioner's original articles of incorporation dated July 15, 1997 that also identify the petitioner as a limited liability company. See http://www.sunbiz.org/search.html, available as of June 23, 2009. 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 is considered to be a partnership for federal tax purposes.

the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel also refers to the partners' capital accounts as providing evidence of the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage. Counsel's implication that the petitioner could pay the proffered wage out of its Partners' Capital Accounts is incorrect. Although an explanation of double-entry accounting is beyond the scope of today's decision, Partner's Capital Accounts are an offsetting credit to some asset and are not, in themselves, assets. They are not an account out of which the petitioner can withdraw funds to pay wages. They are not a fund available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first 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 instant case, the petitioner established that it employed the beneficiary during part of the 2003 priority year and during tax years 2004 to 2006; however, it did not establish that it paid the beneficiary a salary greater to or equal to the proffered wage.

Counsel and the petitioner's financial officer state on appeal that the petitioner only has to establish its ability to pay the beneficiary's wages from September 2003 to December 2003. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs from September 15, 2003 (the priority date) to December 2003, the petitioner has not submitted such evidence. The record reflects that the beneficiary was paid $6,188 in 2003, but the petitioner provided no evidence as to the period of time in which these wages were paid.[7] Therefore the petitioner has to establish that it can pay the difference between the proffered wage of $47,902.40, and the beneficiary's actual wages in 2003 and the full proffered wage from 2004 onwards.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v.*

[7] The AAO also notes that this figure is lower than the prorated salary of $11,976 identified by the petitioner's chief financial officer on appeal.

Palmer, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
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> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] 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." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on June 7, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was the most recent return available. The petitioner's tax returns stated its net income as detailed in the table below.

> In 2003, the petitioner's Form 1065 did not contain a Schedule K, and the AAO cannot determine the petitioner's net income stated net income. [8]

[8] For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. 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. In the instant case, the petitioner has only submitted one Schedule K for its 2004 tax return. The remaining tax returns are incomplete and contain no Schedules K. Therefore the AAO cannot determine whether the

In 2004, the petitioner's Form 1065, Schedule K, stated net income of $132,028. However, the AAO does not accept this evidence into the record.
In 2005, the petitioner's Form 1065 did not have a Schedule K or Schedule M, and the AAO cannot determine the petitioner's net income.
In 2006, the petitioner's Form 1065 did not contain a Schedule K or M, and the AAO cannot determine the petitioner's net income.

Therefore, for the years 2003, 2004, 2005, and 2006, the petitioner did not establish that it had sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage based on its tax returns.

The AAO does note that the petitioner, pursuant to 8 C.F.R. § 204.5(g)(2), can establish its ability to pay the proffered wage based on other evidence, such as audited financial statements and annual reports. In the instant case, the petitioner has submitted its audited financial statement for tax year 2004 that indicates a net income of $235,776. Based on this evidence, the AAO determines that the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wages in tax year 2004.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[9] A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. As stated previously, the petitioner's tax returns for tax years 2003, 2005, and 2006 did not have any accompanying Schedules L. Therefore the petitioner cannot establish its net current assets for any of the relevant years in question. Therefore, for the years, the petitioner did not establish that it had sufficient net current assets to pay the difference between the beneficiary's wages and the proffered wage in tax years 2003, 2005 and 2006.

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petitioner had relevant entries for additional income or credits, deductions or other adjustments and thus cannot determine whether the petitioner's net income is based on line 22 of Form 1065, or by the petitioner's Schedule M, Analysis of Income (Loss). During 2004, the petitioner's Schedule K has relevant entries for additional deductions, and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K. However, as previously stated, the AAO does not accept the petitioner's 2004 tax return with accompanying schedules submitted on appeal.

[9] 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.

Thus, from the date the Form ETA 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2004.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the state of Florida business database reflects that the petitioner has been in business since 1997. However, the petitioner, for unknown reasons, has chosen to submit only the front pages of its tax returns for tax years 2003, 2005 and 2006. Thus the AAO cannot adequately judge the petitioner's net income in these years. The record contains no further evidence as to the petitioner's viability, number of employees, or its business profile within the brokerage industry. Thus the totality of the petitioner's circumstances is mostly undocumented and cannot be assessed. It is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.