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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 25 2010

LIN 05 206 51073

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The director determined that the appeal was late and treated it as a Motion to Reopen. The director reopened the petition and affirmed his original decision. The petitioner filed a Motion to Reconsider the denied Motion to Reopen. The director again affirmed his original decision to deny the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted as a motion to reopen and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is an automotive salvage, repair, and sales operation. It sought to employ the beneficiary permanently in the United States as an auto repair service estimator ("Service Manager").[1] As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The director determined that the petitioner had not established that it had the continuing financial ability to pay the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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).[2]

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[1]The petitioner sought to classify the beneficiary as a skilled worker under Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), which 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.

The regulation at 8 C.F.R. § 204.5(g)(2) further 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.

[2] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

In this matter, the AAO dismissed the appeal on December 31, 2007, concurring with the director's decision that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary's proposed wage offer.

The petitioner, through counsel, filed a motion for reconsideration and to reopen the AAO's decision. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

With the motion, counsel submits: 1) a copy of a real estate appraisal of the petitioning business dated January 30, 2008; 2) a copies of real estate appraisals dated January 18, 2008 and January 23, 2008, respectively of property located at [redacted] 3) copies of the owner's 2005 and 2006 individual income tax returns (Form 1040), as well as copies of the 2005 and 2006 corporate tax returns of a separate business named [redacted]; 4) a memorandum from [redacted] CPA, indicating that the petitioning business, [redacted] acquired [redacted] in March 2006, and 5)) copies of a July 2001 loan related to [redacted] copies of individual bank statements from US Bank specified as "home improvement" for [redacted] for June 23, 2000, December 26, 2001, January 25, 2002, May 23, 2002, August 23, 2002, and January 27, 2003; and 5) copies of miscellaneous bills incurred by the sole proprietor. Because this motion is submitted with new evidence that is consistent with the regulation, it will be considered as both a motion to reconsider and a motion to reopen in accordance with 8 C.F.R. § 103.5(a)(2) and (a)(3).

As noted in the AAO's previous decision, 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 DOL's employment system. *See* 8 CFR § 204.5(d). The ETA 750 reflects that the priority date in this case is November 6, 2001. The beneficiary's proposed wage offer is $36,400.

Although the AAO continues to find that the petitioner failed to establish the ability to pay the proffered wage, the analysis in this decision will be amended based on the recognition that information furnished by the petitioner and contained in USCIS electronic records establishes that the petitioner has sponsored not only his brother named as the beneficiary in this petition but also his other brother, "[redacted]" in another petition. That petition's priority date is also November 6, 2001. The proffered wage is similarly ($700 per week) annualized to $36,400 per year. In contrast to this case, that petition was ultimately approved by the director on June 23, 2009. Both petitions were filed on June 29, 2005. Similar to this case, evidence of wages paid to [redacted] were not submitted in that petition.[3] Because the filing of an ETA 750 labor certification

[3] Additional correspondence submitted by counsel relating to that case indicates that [redacted] was not paid as an employee until January 7, 2006.

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 of each petition 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). Where a petitioner has filed multiple employment-based petitions, it must show that it has had sufficient continuing ability to pay all the wages as of their respective priority dates, which in this case are the same dates. Therefore, the petitioner must demonstrate that it has had the ability to cover cumulative proffered wages of both beneficiaries or $72,800. For the reasons discussed below and as set forth in the AAO's previous decision, the AAO finds that the petitioner has not established its continuing ability to pay the proffered wage.

It is noted that counsel submitted additional correspondence and documentation contending that because the director approved the petition of another beneficiary by this petitioner, then this petition also merits approval. The AAO does not concur. It is noted that the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of [the beneficiary], the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS,* 2000 WL 282785 (E.D. La.), aff'd. 248 F.3d 1139 (5th Cir. 2001), cert. denied, 122 S.Ct. 51 (2001).

The AAO additionally amends its previous decision in classifying the petitioner as a sole proprietorship for the purpose of reviewing its continuing financial ability to pay the proffered wage. It is noted that on Schedule C of each of the relevant tax returns, the petitioner is stated to be a limited liability company (LLC), which is included as part of its business name. It is identified with its own federal employer identification number (FEIN) on both Part 1 of the preference petition and on Schedule C of the individual tax returns. The owner operates the business as "[redacted]," with FEIN [redacted] A limited liability company is an entity formed under state law by filing articles of organization. Members of a limited liability company enjoy protection from individual liability similar to that afforded to corporate shareholders. While the owners of a corporation are referenced as shareholders or stockholders, the owners of a limited liability company are often referenced as "members." It is possible for an LLC to be formed by a single individual, in which case it may be referenced as a "single member LLC." A LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.[4] An investor's liability is limited to his or her

[4] Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

initial investment. As the owner is only liable to his or her initial investment, the total income and assets of the owner and his ability to pay the company's debts and obligations, 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 its own funds.[5] In this case, the petitioner's pertinent financial information is reflected as its net profit or loss on line 31 of Schedule C of the owner's individual tax returns. These figures are reflected as follows:

Year	Net profit or (loss)
2001	$14,907
2002	$10,699
2003	$ 7,971
2004	$45,757
2005	$ 9,449
2006	$39,349

It is noted that only in 2004 and 2006, did the petitioner's net profit exceed the proffered wage of $36,400 for this beneficiary, let alone sufficient income to cover the cumulative proffered wages of

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[5] If the LLC has only one owner, it will automatically be treated as a sole proprietorship for tax purposes 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. A single member LLC is treated as a sole proprietorship only as a mechanism for tax filing purposes and does not change the fact that the business is legally a limited liability company. If the only member of the LLC is an individual, the LLC income and expenses are reported on Form 1040, Schedule C, E, or F. See IRS Publication 3402 (Rev. 7-2000) Catalog Number 249400 "Tax Issues for Limited Liability Companies." Members are like shareholders of a corporation and own an interest in the LLC but they are not the LLC. Property interests may be acquired by the LLC and the title acquired vests in the LLC. *See HB Management, LLC v. Brooks*, 2005 WL 225993 (D.C. Super. Ct.); *see also McKinney's Limited Liability Company Law* § 609(a) (members and managers of limited liability companies are generally expressly exempt from personal responsibility for a company's obligations). Further, USCIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft* 2003 WL 22203713 (D.Mass. Sept. 18, 2003).

$72,800. Because the petition for the other beneficiary, [redacted] has been approved, then the allocation of the ability to pay a proffered wage of $36,400 is attributed to his petition. In 2004, after covering his certified salary, the remaining $9,357 was insufficient to cover this beneficiary's additional wage of $36,400. On motion, although [redacted] refers to net income after payment of a salary to this beneficiary in his memorandum, he does not specify a specific year or whether the employer was [redacted]. or [redacted]. Nor does the record contain any first-hand evidence of payment of wages such as W-2 statements to either beneficiary. Therefore, in 2006, after attributing the petitioner's net income of $39,349 to the payment of the proffered wage of $36,400 to [redacted] the remaining $2,949 is insufficient to cover the this beneficiary's additional $36,400 proposed wage offer or demonstrate the petitioner's continuing ability to pay the proffered salary to this beneficiary. As set forth in the above table, the petitioner's net income was insufficient to establish its ability to pay this beneficiary's salary in any of the relevant years.

As noted above, similar to a corporation, a limited liability company is a separate and distinct legal entity from its member(s), therefore the individual assets of its members or of other enterprises or corporations cannot be considered in determining the petitioning LLC's ability to pay the proffered wage. *See i.e., Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Similar to the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), which considered whether the personal assets of a director of a closely held family corporate business should be included in the examination of the petitioner's ability to pay the proffered wage, in this case, the AAO will not consider the assets or income of a separate corporation, [redacted], because "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Similarly, the appraisal of the owner's personal family residence at [redacted] is not pertinent to the consideration of the petitioning LLC's ability to pay the proffered wage. It is noted that the case of *O'Connor v. INS,* 1987 U.S. Dist. LEXIS 9114 (D. Mass., Sept. 29, 1987) as cited by counsel involved business that was structured as a sole proprietorship not a limited liability company.

Additionally, the AAO does not find the appraisal submitted on motion which refers to the fee simple real property interest located at the petitioning business address of [redacted] to support approval of the petition. USCIS does not regard real estate as representing a net current asset that would constitute readily available funds sufficient to pay a proffered wage, whether the petitioner is reviewed as a limited liability company or as a sole proprietorship. The ability to pay a proffered wage may be demonstrated by net income or, in some cases net current assets, which is the difference between current assets and current liabilities. "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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. *See Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000). The petitioning business' fee simple estate interest does not represent such a net current asset and would not be converted to cash during the ordinary course of business. It will not, therefore, be considered to become funds available to pay the proffered wage. It is noted on motion

that counsel objects to the AAO's observation in its previous decision that business owners do not typically encumber real estate holdings to pay employee wages because it ignores the fact that the beneficiary is the owner's brother. Although this relationship is stated in the record, it does not change the analysis of the petitioner's ability to pay the beneficiary's wage in addition to the other brother's proffered wage as illustrated in that approved petition. It is further noted that while the value of inventory may be considered a current asset, current assets must be balanced against current liabilities to calculate a petitioning business' net current assets. This figure would be contained in an audited financial statement pursuant to 8 C.F.R. § 204.5(g)(2). Such a statement was not provided to this record.

As set forth by the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner's ability to pay a proffered salary must be established as of the priority date and continues until the beneficiary obtains permanent residence. As previously noted, during the relevant period, USCIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during 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. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Similarly, showing that the petitioner's gross receipts or wages paid exceeded the proffered wage is insufficient.

On motion, counsel asserts that the AAO's reasoning relating to the petitioner's inability to pay the proffered wage in 2001 was flawed because the priority date was November 6, 2001. Therefore the petitioner's obligation to demonstrate its ability to pay did not commence until that date. 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), the petitioner has not submitted such evidence.

As stated above, the petitioner is a limited liability company. Its owner is the beneficiary's brother. As noted in the AAO's previous decision, a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). Although some documentation related to the recruitment efforts of the petitioner was submitted by counsel, who has cited some of the cases relied upon by DOL in adjudicating whether a *bona fide* job offer existed, this appeal is not being dismissed on that basis. However, when or if future proceedings may be initiated by the petitioner involving this beneficiary, further investigation may be merited

including consultation with DOL. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

The AAO finds that the petitioner has not met its burden in establishing that it had continuing financial ability to pay the proffered wage as of 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.

ORDER: The motion to reconsider and motion to reopen is granted. The prior decision of the AAO, dated December 31, 2007, is affirmed. The petition remains denied.