(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

DATE: SEP 1 1 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electrical company (electrical contractor). It seeks to employ the beneficiary permanently in the United States as an electrician. As required by statute, ETA Form 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 9, 2009 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 ETA Form 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 ETA Form 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 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 750 was accepted on February 13, 2004. The proffered wage as stated on the ETA Form 750 is $1,210 per week ($62,920 per year). The ETA Form 750 states that the position requires two years of experience in the job offered.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On appeal, counsel submits a brief; a copy of a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum dated May 4, 2004 by Associate Director of Operations William R. Yates, entitled "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2);" a copy of *Ranchito Coletero*, 2002-INA-104 (2004 BALCA); a copy of an unpublished administrative decision issued by this office; a letter dated July 6, 2009 from Certified Public Accountant; a letter dated July 2, 2009 from Realtor; a copy of a monthly loan statement for the mortgage on the house owned by an equity statement; a list of tools and equipment owned by the petitioning business; and a copy of 8 U.S.C. § 1361.

On appeal, counsel asserts that the petitioner has property assets, real estate and business equipment, the value of which demonstrates that the petitioner is able to pay the proffered wage. Further counsel asserts that these claims are supported in a statement by Certified Public Accountant. Counsel also asserts that the petitioner has lines of credit which may be used to pay the beneficiary. Additionally, counsel asserts that the petitioner had previously paid subcontractors but that the funds paid to these individuals may be used to pay the beneficiary since the petitioner will no longer require the services of the subcontractors. Counsel also asserts that the petitioner's wife received an income, the wages of which may contribute towards paying the beneficiary.

The petitioner is a single-member limited liability company (LLC).[2]

In his request for evidence (RFE), the director indicated that based upon the evidence in the record it

---

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[2] A limited liability company is an entity formed under state law by filing articles of organization. A limited liability company 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, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

appeared as though the petitioner was a sole proprietor and so the director requested evidence in accordance with that assumption. In its response to the director, the petitioner did not suggest otherwise and provided evidence in accordance with the director's request (e.g. evidence of the owner's recurring monthly expenses and evidence of personal assets). Since the director indicated that, according to the evidence, it *appeared* as though the petitioner was a sole proprietor, the petitioner could have and should have clarified the exact nature of its business.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Though the petitioner is treated by the Internal Revenue Service as a sole proprietor for tax purposes, the petitioner is actually structured as a Limited Liability Company.[3] USCIS' analysis is based upon the consideration of the petitioner as a Limited Liability Company because we are making a determination of the petitioner's and beneficiary's eligibility for immigration benefits. USCIS is not making a tax determination.

On the petition, the petitioner claimed to have been established in 2001 and currently to employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 750, signed by the beneficiary on October 18, 2003, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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'l Comm'r 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 the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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.

---

[3] Though the petitioner never explicitly acknowledges that it is a Limited Liability Company, its name demonstrates that such is the case. Further, a review of public records accessed through WestLaw indicates that the petitioner organized itself as a "Domestic Limited Liability Company" on August 8, 2001.

In its initial petition submission, the petitioner neither claimed to have employed the beneficiary nor provided any evidence of wages paid to him. In the director's February 23, 2009 RFE, he requested evidence of any wages paid to the beneficiary from the priority date onward, in the form of IRS Form W-2. In its response, the petitioner provided a copy of an IRS Form W-2 which the petitioner claims to have issued to the beneficiary in 2008 and which appears to have been transmitted via facsimile. The information on the W-2 is hand-written and does not resemble an official IRS Form W-2 which would have been transmitted to the Internal Revenue Service. Further, as additional evidence of the petitioner's wages, the petitioner supplied copies of the front of pay checks which were purportedly issued to the beneficiary. However, the petitioner did not provide copies of the back of either check and no other evidence demonstrating that either check had been deposited or cashed. Further, the petitioner did not provide its 2008 federal income tax returns.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Therefore, the evidence, as constituted, does not satisfy the burden of proof in demonstrating that the petitioner paid the beneficiary any wages in 2008. The petitioner provided no documentary evidence of wages paid to the beneficiary in any other years.

Therefore, in the instant case, the petitioner has not demonstrated that it employed or paid the beneficiary any wages from the establishment of the priority date onward.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 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.
>
> 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 118. "[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).

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on May 18, 2009 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's federal income tax return for 2008 should have been available for submission as evidence.[4] However, the most recent return submitted was for 2007. The petitioner's tax returns stated its net income as detailed in the table below.

- In 2004, the petitioner's Form 1040, Schedule C stated net income of $20,734.00.
- In 2005, the petitioner's Form 1040, Schedule C stated net income of $22,185.00.
- In 2006, the petitioner's Form 1040, Schedule C stated net income of $45,496.00.
- In 2007, the petitioner's Form 1040, Schedule C stated net income of $10,479.00.

Therefore, for the years 2004, 2005, 2006 and 2007, the petitioner did not establish that it had sufficient net income to pay the proffered wage.
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

[4] The director did not request the petitioner's 2008 federal income tax return and the petitioner did not submit it.

wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] Since the petitioner did not submit audited financial statements or annual reports according to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the Schedules C (Form 1040) submitted by the petitioner, net current assets cannot be ascertained for any year. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage in 2004, 2005, 2006 or 2007. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

Thus, from the date the ETA Form 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.

On appeal, counsel cites *Ranchito Coletero*, 2002-INA-104 (2004 BALCA), for the premise that entities in an agricultural business regularly fail to show profits and typically rely upon individual or family assets. Counsel does not state how the United States Department of Labor's (DOL) Board of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Ranchito Coletero* deals with a sole proprietorship and is not directly applicable to the instant petition, which deals with a limited liability company.

On appeal, counsel also asserts that the petitioner has a line of credit which is based upon the equity in his home. Counsel asserts that the petitioner may draw from this line of credit to pay the beneficiary "as needed."

The petitioner, [redacted] is a limited liability company. An LLC, like a corporation is a separate and distinct legal entity from its owners and shareholders. Therefore, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning company's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

---

[5] 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.

The house and associated line of credit are held in the name of the individual who owns the petitioning entity. Neither the house nor the line of credit belongs to the petitioning company. Therefore, neither may be considered in a determination of the petitioner's ability to pay.

On appeal, counsel provides a letter dated July 6, 2009 from Certified Public Accountant. In his letter, states that the Schedule C for includes "subcontractor costs, which were previously included as *part* of materials and supplies expense" (emphasis added). asserts that these costs should be "added back" to the petitioner's net income because, according to "this subcontractor expense will not be reoccurring since it will be replaced by[the beneficiary's] wages."

Though asserts that the beneficiary will replace certain unidentified subcontracted workers, the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position performed by any of the unidentified subcontracted workers involves the same duties as those set forth in the ETA 750. The petitioner has not documented the position, duty, and termination of the worker or workers who performed the duties of the proffered position. If that employee or employees performed other kinds of work, then the beneficiary could not have replaced him, her or them.

Moreover, states that costs associated with subcontracted workers were included as part of the materials and supplies expense. He did not say that the costs associated with subcontracted workers constituted the whole of the materials and supplies expense. In fact, the petitioner has provided no itemized list of the items which were included in the materials and supplies expense. Further, the petitioner provided no IRS Forms 1098 or 1099 identifying the sums which it paid for outside services. Additionally, the petitioner failed to provide a description of the services which might have been performed by subcontracted labor or outside service providers.

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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Because the petitioner has provided none of the forms of evidence discussed, USCIS cannot consider the sums paid for materials and supplies to be available for purposes of paying the beneficiary.

On appeal, counsel also asserts that the petitioner's wife receives an income and has assets which may be used to pay the beneficiary.
However, because an LLC, like 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 company's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing

regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

On appeal, counsel also asserts that the petitioner owns equipment, the replacement cost of which should be considered in a determination of the petitioner's ability to pay. Counsel asserts that such equipment constitutes "a property asset that impacts the overall financial circumstances of the petitioner."

However, if it is the petitioner's contention that equipment such as a truck, a backhoe and tools constitute current assets, these would have to be considered against the petitioner's current liabilities to determine the petitioner's net current assets, as explained above. Further, it is unlikely that the petitioner would sell or encumber equipment which is integral to the operation of his business to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson,* 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

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 (Reg'l Comm'r 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 petitioner has provided financial documentation for four years of business operations. In that the petitioner's net income has decreased while sales have remained relatively consistent. The petitioner has not, however, established the historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service.

Thus, assessing the totality of the circumstances in this individual case, 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.