

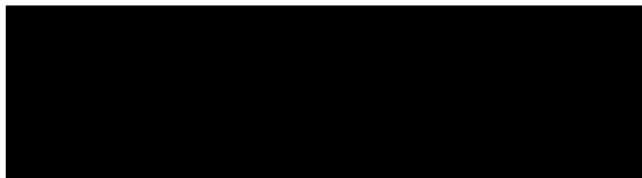
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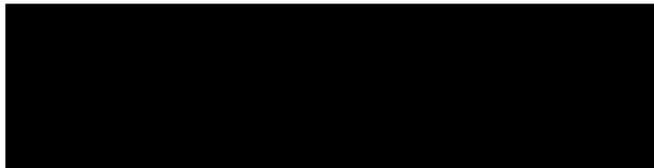
Office: NEBRASKA SERVICE CENTER

Date: DEC 05 2006

IN RE: Petitioner: [Redacted]
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:



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 Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed the decision. After review, the Director affirmed his decision, and denied the petition. The petitioner then appealed the director's decision. The Administrative Appeals Office (AAO) rejected the appeal because it was untimely filed. The petitioner then submitted a motion to reopen and/or reconsider the decision of the AAO. The motion to reopen will be granted. The appeal will be dismissed.

The petitioner's business is landscape and stonework design. It is organized as a limited liability company. It seeks to employ the beneficiary permanently in the United States as a stonemason supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. 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. The director denied the petition accordingly.

According to the petition, the petitioner's business was established in 1991, and, at the time the petition was prepared, employed ten individuals.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, 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 U.S. Department of Labor. *See* 8C.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 U.S. Department of Labor 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 April 30, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$36.47 per hour (\$75,857.60 per year).

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated July 26, 2002; an un-audited balance sheet dated April 30, 2001; an un-audited financial statement for the period January 1, 2002, and August 16, 2002; page two of a U.S. Internal Revenue Service Form 1040 tax return for 2001; and, copies of documentation concerning the beneficiary's qualifications.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on October 28, 2002, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date.

The director requested the petitioner's U.S. federal tax return for 2001. Further, the director indicated that the petitioner may submit profit/loss statements, bank account records and/or personnel records for 12 consecutive months as additional evidence of the ability to pay the proffered wage. As the Form ETA 750 stated that the petitioner employed the beneficiary since 1996, the petitioner was requested to provide copies of the beneficiary's W-2 Wage and Tax statements and payroll statements.

In response to the request for evidence, counsel submitted copies of the following documents: the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2000 and 2001; an un-audited financial statement for 2002; Employers Quarterly Federal Tax Form (Form-941) for 2002; the petitioner's bank account records for 2002; a letter from the petitioner concerning the 2002 tax return; and, a letter from the petitioner dated January 16, 2003; stating that the beneficiary had been employed by the petitioner since 1999.

The director denied the petition on April 3, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Further, the director stated that Citizenship and Immigration Services (CIS) records demonstrated that the petitioner had filed six immigrant petitions having a priority date within the same year. The director stated that the petitioner must demonstrate the ability to pay the proffered wage for all of the six beneficiaries.²

On appeal filed May 9, 2003, counsel asserts, among other things, that "the requirement" that petitioner pay the beneficiary a salary equal to or greater than the proffered wage as proof of the ability to pay the proffered wage is not applicable in this case. Counsel has not submitted any proof of wages paid to the beneficiary by petitioner. There are statements in the record of proceeding that the petitioner employed the beneficiary since 1999, and a statement dated August 15, 2002, from the shareholder of the petitioner that the beneficiary was employed full time at the hourly rate of \$36.47. There is also a written statement from the shareholder of petitioner dated January 16, 2003, that employment or company history records could not be found that would substantiate this statement. Since the beneficiary has been in the employ of the petitioner for approximately seven years it is reasonable to assume that wage information such as cancelled pay checks, W-2 or 1099-MISC statements, FICA and state unemployment compensation payments, payroll register or other indicia would be available. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

² The petitions are identified in the records of CIS as LIN 03 009 52141, LIN 03 009-52565; LIN 03 007 53025, LIN 02 294 54377, LIN 02 294 54351 and LIN 02 296 50171.

Contrary to counsel's assertion, the AAO and CIS will review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, the record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date.

Counsel asserts that "had the Petitioner been able to find skilled full time stonemasons, such as the beneficiary the Petitioner's revenues in 2001 would have been much greater." Since the petitioner claims to have employed the beneficiary since 1999, it is unclear why counsel is making this statement, since the relevant issue is the petitioner's ability to pay the beneficiary's proffered wage from the priority date, although as noted below, the petitioner has filed immigrant petitions for five additional beneficiaries. No information was presented by counsel to support the contention that the beneficiary's employment would increase the petitioner's revenues, or the multiple beneficiaries for which, will be discussed, immigrant petitions have been filed. The assertions of the petitioner 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).

Counsel stated under the topic in his explanatory letter headed "Petitioner's net current assets in the year of filing were equal or greater than the proffered wage," that an examination of the petitioner's net current assets "do not reflect business realities." While the AAO does not agree with counsel's assertion, since the petitioner was not required to prepare a balance sheet (i.e. Schedule L or Part III) to support its tax return, because it is a limited liability company with a single member, counsel's contention is not relevant to the structure and reporting duties of the petitioner.

Counsel cited financial data from the tax returns and submitted financial statements to assert that the petitioner has experienced sales growth in 2002 and 2003 over that experienced in 2001. Counsel asserted that the financial data contained in the compiled financial statements and the accepted proposals for hardscaping/landscaping services in 2003 are evidence of the ability to pay the proffered wage. According to the regulation at 8 C.F.R. § 204.5(g)(2) audited financial statements are acceptable evidence of the petitioner's ability to pay the proffered wage. Un-audited financial statements are not probative evidence under the regulation.

There are both compiled and other financial statements submitted in the record of proceeding that are unqualified meaning there is no indication on their face or in counsel's explanatory letters of the manner of their preparation. Counsel has submitted compiled financial statements for the business to show the ability to pay the proffered wage. Counsel cites no legal precedent for the admissibility of the compiled financial statements which, as noted above, are not one of the kinds of evidence required by the regulation.³

A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*, in the form of copies of audited financial statements with a declaration of the maker indicating their manner

³ 8 C.F.R. § 204.5(g)(2).

of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in CIS and AAO deliberations in these matters. The statements presented were not audited.

The accounting service that prepared the financial statement in a cover letter dated May 1, 2003 qualified the financial statement as follows:

The owner has elected to omit substantially all the disclosures and statement of owner's capital and cash flows by generally accepted accounting principles. If the omitted disclosures and statement of cash flows were included in these financial statements, they might influence the user's conclusions about the Company's financial position, results of operations, and cash flows. Accordingly, these financial statements are not designated for those who are not informed about such matters.

In a generally accepted accounting principles (GAAP) based cash flow statement, the sources of cash are disclosed. The general categories are cash received from operations, investments and borrowings. Other sources of cash can be from the sale of stock or the sale of assets. A cash flow statement, used with the balance sheet and income statement, present an analysis of the financial health of a business. With important data withheld by petitioner, and, the accountants curtailed to produce only a compiled report, the statement can have little probative value in the determination of the ability to pay the proffered wage.

Counsel had submitted copies of the following documents to accompany the appeal statement: an explanatory letter dated May 1, 2003; the director's decision; two pages (Schedule C) from two tax returns for 2000 and 2001; a compiled financial statement with cover letter dated May 1, 2003; and, 11 letter contracts and/or accepted proposals for hardscaping/landscaping services in 2003.

On July 11, 2003, the director affirmed the previous decision dated April 3, 2004 of the director. The director found that the evidence submitted by the petitioner did not demonstrate that the petitioner had the ability to pay the proffered wage.

On August 13, 2003, the petitioner appealed the director's decision asserting that "[CIS] did not fully consider the evidence presented and further evidence regarding the company have [sic] become available."

Counsel repeats on the appeal the contentions made in the former appeal of the director's decision. Counsel indicated there, and he repeats the assertion here, that the gross receipts or sales stated on Schedule C in 2001 and 2002 along with those stated on the compiled financial statement for the first quarter of 2003 are evidence of the ability to pay the proffered wage.

Counsel stated that the pending accepted proposals (for year 2003) "exceeding \$330,00.00" for which evidence was submitted (i.e. "book of business") are all evidence of the ability to pay the proffered wage. Since there was no tax return submitted for 2003, or other evidence other than un-audited financial statements discussed above, it is unclear how this book of business affected the petitioner's future profitability and the shareholder's adjusted gross income relative to those figures as stated in the tax returns for 2001 and 2003 recited below. Again as stated above, petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future which in this instance would be the anticipated revenues from the completed projects for which probative evidence was not submitted. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Against

the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel had submitted copies of the following documents to accompany the appeal statement: an explanatory letter dated August 11, 2003, the petitioner's U.S. Internal Revenue Service (IRS) Form 1040 tax returns for years 2001 and 2002. Counsel also incorporated by reference in this appeal a compiled financial statement dated May 1, 2003, and, approximately 11 letter contracts and/or accepted proposals for hardscaping/landscaping services in 2003 submitted in the prior appeal mentioned above. These exhibits are in the record of proceeding.

The AAO rejected the petitioner's appeal on December 3, 2004, as untimely filed.

The petitioner has submitted a motion to reopen and/or reconsider the decision of the AAO on December 17, 2004. Counsel had submitted copies of the following documents to accompany the appeal statement: an explanatory letter dated December 14, 2004; the explanatory letter dated May 1, 2003 that accompanied the appeal filed May 9, 2003; the director's decision dated April 3, 2003; an undated Form I-290B appeal statement; one page (schedule C) from the petitioner's tax return for 2001; a statement from the shareholder of petitioner that the April 30, 2001 balance sheet is incorrect in part; a financial statement dated as of April 30, 2001; a cover letter dated May 1, 2003 with a compiled financial report for the first quarter of 2003; an unqualified financial statement for the period January-August 2004; and, the AAO's decision dated December 3, 2004.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. See 8 C.F.R. § 103.5(a)(2). The instant motion does qualify as a motion to reopen. There are new facts presented here by counsel that related to the initial evidence accompanying the petition, and, to the issue of whether or not on the priority date of the alien labor application the petitioner had the ability to pay the beneficiary the proffered wage. The motion to reopen is granted.

The petitioner is a limited liability company (LLC). Although structured and taxed as a partnership, its owners enjoy limited liability similar to owners of a corporation. 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 initial investment. As the owners and others only are obliged to pay a certain portion of those debts should they come due, the total income and assets of the owners and others and their ability, if they wished, 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.

Under U.S. Internal Revenue Service regulations, if a limited liability company is a single member LLC, that member must file a Schedule C for the LLC, which is attached to the Form 1040. The LLC's sole member is called the shareholder in this discussion.

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.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) 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. Evidence was submitted to show that the petitioner employed the beneficiary since 1999 but no wage information was submitted.

Counsel asserted that the petitioner's net income does not "reflect the financial ability of the petitioner to pay the proffered wage." In determining the petitioner's ability to pay the proffered wage, CIS will 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); *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).

Counsel contends that that the gross receipts or sales stated on Schedule C in 2001 and 2002 along with those stated on the compiled financial statement for the first quarter of 2003 are evidence of the ability to pay the proffered wage. In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The tax returns⁵ demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$75,857.60 per year from the priority date of April 30, 2001:

- In 2001, the Form 1040 stated an adjusted gross income loss of <\$7,793.00>. Schedule C of the return stated net profits of \$36,544.00 for that year.⁶
- In 2002, the Form 1040 stated an adjusted gross income loss of <\$117,316.00>. Schedule C of the return stated a net loss of <\$104,973.00> for that year.

Therefore for the two years for which tax returns were submitted there was insufficient income as stated on Schedule C to pay the proffered wage.

CIS electronic database records show that the petitioner filed I-140 petitions on behalf of five other beneficiaries at about the same time as the instant petition was filed. Although the evidence in the instant case indicated financial resources of the petitioner less than the beneficiary's proffered wage, it would be

⁵ Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 2000, the petitioner stated an adjusted gross income loss of <\$32,497.00>. The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁶ IRS Form 1040, Line 33 states the taxpayer's adjusted gross income, and, on Schedule C to that Form, Line 31 states either a net profit or loss from business activities of the taxpayer.

necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. When a petitioner has filed petitions for multiple beneficiaries, it is the petitioner's burden to establish its ability to pay the proffered wage to each of the potential beneficiaries. The record in the instant case contains no information about wages paid to other potential beneficiaries of I-140 petitions filed by the petitioner, or about the present employment status of those other potential beneficiaries. Lacking such evidence, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition.

In the explanatory letters in the record of proceeding, counsel has combined contentions of what may be characterized as expectations of profits leading to the ability to pay the proffered wage from the petitioner's gross profits, and, the approximately 11 letter contracts and/or accepted proposals for hardscaping/landscaping services in 2003. In the totality of all the evidence submitted in this case, there is evidence to demonstrate that the petitioner's business was in a profitable period in 2001 stating net profits of \$36,544.00 for that year (that is insufficient to pay the proffered wage), but a loss of <\$104,973.00> for 2002. In neither year was the petitioner able to pay the proffered wage of \$75,857.60.

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

Unusual and unique circumstances have not been shown to exist in this case to parallel those in *Sonogawa*, to establish that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. Counsel stated that there were expectations of an increase in profitability of the petitioner's business from the book of business "exceeding \$300,000.00" for year 2003. Since the gross receipts for the business were \$548,747.00 in 2001 and \$463,545.00 in 2002, if the book of business of \$300,000.00 relates to gross receipts, then in that case the petitioner business was in decline for those three years based. By the evidence presented, the petitioner has not proven its 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.

Counsel's contentions cannot be concluded to outweigh the evidence presented in the tax returns as submitted by petitioner that shows that the petitioner has not demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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 motion to reopen is granted. The appeal will be dismissed.