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

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FILE: [REDACTED]
EAC 04 240 51110

Office: VERMONT SERVICE CENTER

Date: AUG 01 2007

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:

SELF-REPRESENTED

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 Acting Director, Vermont Service Center, denied the preference visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a technology and professional service. It seeks to employ the beneficiary permanently in the United States as a database developer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition. The acting 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 contains a Form G-28 Notice of Entry of Appearance recognizing an attorney as counsel in this matter. That form was executed, however, by the beneficiary, rather than by a representative of the petitioner. As such, the record contains no indication that the petitioner has consented to be represented by counsel in this matter. Only the petitioner has standing in this matter. The beneficiary is not permitted to prosecute an appeal from a denial of an employment-based visa petition. 8 C.F.R. § 103.3(a)(1)(iii)(B). All representations will be considered, but the decision in this matter will be provided only to the petitioner.

The appeal in this matter, however, was submitted by one of the petitioner's members, an appropriate representative to take that action for the petitioner. The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting 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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day 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). Here, the Form ETA 750 was accepted for processing on March 4, 2002. The proffered wage as stated on the Form ETA 750 is \$21.50 per hour for a 35-hour week, which equals \$39,130 per year.

The Form I-140 petition in this matter was submitted on August 16, 2004. On the petition, the petitioner stated that it was established during August of 2001 and that it employs two workers. The petition states that the petitioner's gross annual income is \$25,000 and that its net annual income is \$2,988. On the Form ETA 750, Part B, signed by the beneficiary on August 13, 2004, the beneficiary did not claim to have worked for the petitioner. The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Arlington, Virginia.

The AAO reviews *de novo* issues raised on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.¹

In the instant case the record contains (1) the petitioner's 2002, 2003, 2004 Form 1065 U.S. Returns of Partnership Income, (2) letters dated December 1, 2003 and March 1, 2005 from the petitioner's two employees, (3) 2003 W-2 forms showing wages the petitioner paid to those two employees, (4) a letter dated July 15, 2004 from a bank stating the balance in account 021-335006-8, which the letter states is the account of one of the petitioner's members, (5) monthly statements pertinent to account 021-335-006, showing that it is held by both, not one, of the petitioner's members, (6) a letter dated August 13, 2004 from another bank stating the balance in account 5678757, which the letter states is the petitioner's own account, (7) a letter dated April 25, 2005 giving the balance for the same account on that date, (8) monthly statements pertinent to a different bank account at that bank, 18425718, that is held in the names of the petitioner's members, (9) monthly statements pertinent to investment accounts of the petitioner's members, (10) documents pertinent to the purchase and ownership of two real properties by the petitioner's members, and (11) a spreadsheet purporting to show the market value, existing indebtedness, and equity in those properties. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns indicate that it is a limited liability company (LLC), that the business started on August 20, 2001, and that it reports taxes pursuant to cash convention accounting and the calendar year.

During 2002 the petitioner declared a loss of \$15,389 as its Line 1, Page 4 Net Income. At the end of that year the petitioner had current assets of \$340 and no current liabilities, which yields net current assets of \$340.

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

During 2003 the petitioner declared ordinary income of \$2,988. At the end of that year the petitioner had current assets of \$16,179 and current liabilities of \$4,356, which yields net current assets of \$11,823.

During 2004 the petitioner declared ordinary income of \$39,908. At the end of that year the petitioner had current assets of \$55,782 and current liabilities of \$3,096, which yields net current assets of \$52,686.

The petitioner's employees' December 1, 2003 and March 1, 2005 letters each indicate that the employees are leaving their positions and urge the petitioner to find replacement employees. The December 1, 2003 letter is from [REDACTED] and indicates that he or she desired to leave before December 15, 2003. A 2003 W-2 form shows that the petitioner paid him or her \$13,782.48 during that year. The March 1, 2005 letter is from [REDACTED] and indicates that he or she desired to leave soon but would stay to train an assistant. A 2003 W-2 form shows that the petitioner paid him or her \$3,900 during that year. The record contains no indication that either of those former employees worked as a database developer.

The acting director denied the petition on December 28, 2005.

On appeal, the petitioner asserted that the evidence submitted demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner specifically noted the amounts of its members' assets including bank accounts and investment accounts.

In a previous letter dated April 27, 2005 the petitioner cited its members' assets as funds available to pay the proffered wage. The petitioner also cited its total income, total wage expense, depreciation deductions, taxable income, and end-of-year cash on hand, as funds available to pay the proffered wage. The petitioner urged that the sum of its depreciation deduction, taxable income, and cash on hand during a given year is its "actual income."

The petitioner is a LLC. Just as a corporation is a separate legal entity, distinct from its owners or shareholders, *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958), so is an LLC separate and distinct from its members. *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980) observed that the debts and obligations of a corporation are not the debts and obligations of the owners, the stockholders, or anyone else. The personal income and assets of the members of a LLC are similarly insulated from liability for the company's debts and obligations. In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

As the members and others are not obliged to pay the petitioner's debts the income and assets of the members and others, including their bank balances, investment account balances, and equity in real estate, and their ability, if they wished, to pay the company's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

² The instant beneficiary is not the alien worker named on the Form ETA 750 Application for Alien Employment Certification. The alien worker whom the petitioner originally sought to hire was [REDACTED]. The petitioner substituted the instant beneficiary for [REDACTED] when it filed the instant Form I-140 visa petition.

Even if the petitioner's members' equity in real estate were pertinent to today's decision, this office notes that it is insufficiently evidenced.

The petitioner submitted a spreadsheet signed by its members asserting the value of two real properties and asserting the amount of indebtedness secured by those properties. The record does not demonstrate, however, that the estimate of the value of the properties is reliable. A reliable, disinterested real estate appraisal would typically be performed by a licensed or certified real estate appraiser. Here the record does not make clear who generated the estimate of market value or the basis of his or her asserted knowledge. It is neither alleged nor assumed that the person who provided that value estimate is disinterested or competent to perform real estate valuations.

The amount by which the property is encumbered is also insufficiently demonstrated. A list of a property's encumbrances would typically be generated by a real estate title search. This office finds that the petitioner did not demonstrate the amount by which the property is encumbered.

Even if the value of the property and the amount by which it is encumbered were sufficiently demonstrated, that would be insufficient to show that the difference, the amount of the petitioner's owners' equity, was available to pay wages. The petitioner's owners will not necessarily realize the value of that property in cash in the near future and that value has not, therefore, been shown to be available to pay wages.

The petitioner's owners could secure a second mortgage or home equity loan with whatever equity they have in the properties. An indication of available credit, however, is not an indication of a sustainable ability to pay a proffered wage. An amount borrowed becomes an obligation. The petitioner must show the ability to pay the proffered wage out of its own funds, rather than out of the funds of a lender. The credit available to the petitioner is not part of the calculation of the funds available to pay the proffered wage.

For all of these reasons, the value of the real property would not be considered in evaluating the petitioner's ability to pay the proffered wage even if it belonged to the petitioner, rather than its members.

Even the petitioner's own bank balances are unconvincing evidence of its ability to pay additional wages. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot generally show the sustainable ability to pay a proffered wage.³ Third, bank statements would not, in themselves, demonstrate that the funds

³ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant

reported thereon somehow reflect additional available funds that were not reported on a petitioner's tax returns.

The petitioner's net income is, as asserted, a proper consideration in the determination of the petitioner's ability to pay the proffered wage. It is addressed below.

The petitioner's end-of-year cash on hand is an appropriate consideration too, in the context of the petitioner's net current assets, the calculation of which is explained in detail below. The petitioner's end-of-year cash may not, however, be appropriately added to its net income.

Some portion of the petitioner's revenue during a given year is paid in expenses and the balance is the petitioner's net profit. Of its net profit, some may be retained as cash. Because the petitioner's Schedule L cash may be derived from its net profit, adding the petitioner's Schedule L Cash to its net profit would likely be duplicative, at least in part.

The petitioner's reliance on the amount of its depreciation deductions during the salient years is misplaced. This office is aware that a depreciation deduction does not require or represent a specific cash outlay during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate are actual expenses of doing business, whether they are spread over more years or concentrated into fewer.

This deduction represents the use of cash during a previous year, which cash the petitioner no longer has to spend. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. See *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989). See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049 (S.D.N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage.

Further, amounts spent on long-term tangible assets are a real expense, however allocated. Although the petitioner implicitly asserted that they should not be charged against income according to their depreciation schedule, it did not offer any alternative allocation of those costs.⁴ The petitioner appears to assert that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner to pay additional wages. Such a scenario is unacceptable.

case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁴ The petitioner did not urge, for instance, that its purchase of long-term assets should be expensed during the year of purchase, rather than depreciated, for the purpose of calculating the petitioner's ability to pay additional wages, nor did he submit a schedule of the petitioner's purchases of long-term tangible assets during the salient years.

The petitioner's reliance on its total wage expense is similarly misplaced. Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses or otherwise increased its net income,⁵ the petitioner is obliged to show the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income.

The petitioner has indicated, however, that two specific, named employees have left their positions, one at the end of 2003 and one sometime after March 1, 2005. The petitioner provided W-2 forms showing wages it paid those employees during 2003.

Initially, this office notes that the record contains no indication that either of those employees worked as a database developer. If their wages were paid to them for performing other essential duties, then those wages do not represent funds that were available to pay the proffered wage. In that event the beneficiary could not have replaced those employees, and the wages could not have been diverted to pay a database developer.⁶

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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, Citizenship and Immigration Services (CIS) 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 did not establish that it employed and paid the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may

⁵ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

⁶ Further, even if those employees were database developers, and the wages paid to them were available to pay the beneficiary's proffered wages, this office notes that the petitioner only demonstrated that it paid them wages during 2003. Even in that event the evidence would not show the ability to pay wages to the beneficiary during any other years.

rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). See also 8 C.F.R. § 204.5(g)(2).

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered.

Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁷ shown on lines 15(d) through 17(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$39,130 per year. The priority date is March 4, 2002.

During 2002 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year the petitioner had net current assets of \$340. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2002. The petitioner has not demonstrated the ability to pay the proffered wage during 2002.

During 2003 the petitioner declared ordinary income of \$2,988. That amount is insufficient to pay the proffered wage. At the end of that year the petitioner had net current assets of \$11,823. That amount is insufficient to pay the proffered wage. The petitioner submitted no reliable evidence of any other funds at its disposal during 2003. The petitioner has not demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner declared ordinary income of \$39,908. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

⁷ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

The petition in this matter was submitted on August 16, 2004. On that date the petitioner's 2005 tax return was unavailable. On February 3, 2005 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. On that date the petitioner's 2005 tax return was still unavailable. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2005 and later years.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 2002 and 2003. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.