

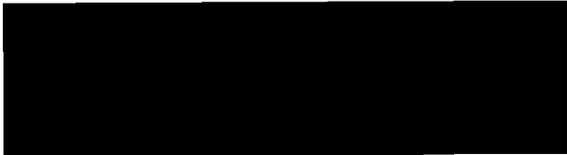


U.S. Citizenship
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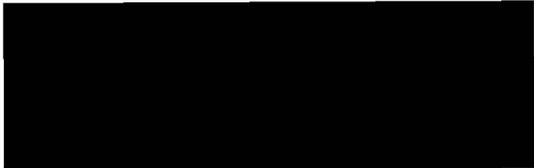
Office: VERMONT SERVICE CENTER

Date: MAR 14 2007

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

The petitioner is a retail store. It seeks to employ the beneficiary permanently in the United States as a retail manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's original June 14, 2005 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 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) 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

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 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). The priority date in the instant petition is April 25, 2001. The proffered wage as stated on the Form ETA 750 is \$17.50 per hour (35 hour workweek) or \$31,850 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent

evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on appeal includes a letter, dated April 13, 2005, from [REDACTED] Certified Public Accountant (CPA), and a letter, dated June 29, 2005, from [REDACTED] of the petitioner. Other relevant evidence includes copies of the first page of the petitioner's 2000 through 2003 Forms 1065, U.S. Returns of Partnership Income. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The first page of the petitioner's 2000 through 2003 Forms 1065 reflect ordinary incomes of \$2,715, -\$6,233, \$5,486, and -\$16,304, respectively. Since the petitioner's 2000 through 2003 Forms 1065 were not complete, the AAO is unable to determine the petitioner's net current assets for those years.

The letter from the CPA states:

The tax returns from Genesis Cellular, LLC, tax identification # [REDACTED] for the years 2001, 2002, 2003, and 2004 reflect guaranteed payments of \$56,631, \$34,300, \$36,500, and \$36,086 to the Retail Store Managers for each of the respective years.

Guaranteed payments to members of an LLC represent payments for personal services rendered by a member of the LLC and deducted as an expense by the LLC. In the matter of Genesis Cellular, LLC, these guaranteed payments were to the Retail Store Managers [REDACTED] and [REDACTED] for the calendar years 2001 through 2004.

The letter from [REDACTED] reaffirms the statements made by the CPA and further states that the beneficiary will be assuming a position currently held by one of the owners.

On appeal, counsel makes no statement, but the letters from the CPA and [REDACTED] appear to claim that the petitioner has established its ability to pay the proffered wage of \$31,850 through its guaranteed payments to partners.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the

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).

instant case, on the Form ETA 750B, signed by the beneficiary on April 22, 2001, the beneficiary claims to have been employed by the petitioner from January 2000 to the present. However, counsel has not submitted any evidence such as Form W-2, Wage and Tax Statements, or Form 1099-MISC, Miscellaneous Income, in support of the beneficiary's statement. The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$31,850 and the actual wage paid to the beneficiary in the pertinent years (2001 to the present). Since no evidence was presented which detailed the beneficiary's wages, the AAO is unable to determine what that difference would be.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as 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. Tex. 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). In *K.C.P. Food Co., Inc.*, 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. 623 F.Supp at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Chi-Feng Chang*, 719 F. Supp. at 537. See also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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 wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If a partnership's end-of-year 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. In the instant case, no Schedule L was submitted. Therefore, the AAO is unable to determine whether or not the petitioner had sufficient net current assets to pay the difference between the proffered wage of \$31,850 and the actual wages paid to the beneficiary in 2001 to the present.

On appeal, _____ and the petitioner's CPA state that the petitioner's guaranteed payments to partners should be considered when determining the petitioner's ability to pay the proffered wage of \$31,850.

² 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 petitioner was organized as an LLC on January 25, 2000. An LLC is an entity formed under state law by filing articles of organization. If an LLC has two or more owners, it will automatically be considered to be a partnership for federal income tax purposes unless an election is made to be treated as a corporation. *See* 26 C.F.R. § 301.7701-3. The petitioner filed IRS Form 1065, U.S. Partnership Income Tax Return, after organizing itself as a limited liability company in the State of Massachusetts. Therefore, from the date of its organization as an LLC, the petitioner is considered to be a partnership for federal tax purposes.

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.³ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their 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.

The petitioner and the CPA advised that the beneficiary will replace one of the owners. The record does not, however, name this owner, state his/her wages, verify his/her full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). 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, the petitioner has not documented the position, duty, and termination of the owner who performed the duties of the proffered position. If that owner performed other kinds of work, then the beneficiary could not have replaced him or her

The petitioner's 2000 tax return reflects an ordinary income or net income of \$2,715. The petitioner could not have paid the proffered wage of \$31,850 from its net income in 2000. As Schedule L was not provided, net current assets could not be determined.

The petitioner's 2001 tax return reflects an ordinary income or net income of -\$6,233. The petitioner could not have paid the proffered wage of \$31,850 from its net income in 2001. As Schedule L was not provided, net current assets could not be determined.

³ 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.

The petitioner's 2002 tax return reflects an ordinary income or net income of \$5,486. The petitioner could not have paid the proffered wage of \$31,850 from its net income in 2002. As Schedule L was not provided, net current assets could not be determined.

The petitioner's 2003 tax return reflects an ordinary income or net income of -\$16,304. The petitioner could not have paid the proffered wage of \$31,850 from its net income in 2003. As Schedule L was not provided, net current assets could not be determined.

For the reasons discussed above, the assertions of the petitioner on appeal and the evidence submitted on appeal do not overcome the decision of the director.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.