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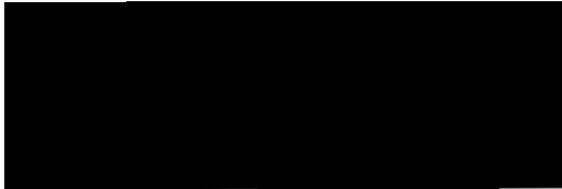
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 05 230 50858

Office: TEXAS SERVICE CENTER Date:

JUN 11 2008

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.

Kevin S. Poulos for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The petitioner filed an untimely appeal, which was treated by the director as a motion to reopen. The motion to reopen was denied by the director. The visa petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a property rental and management company. It seeks to employ the beneficiary permanently in the United States as a building maintenance repairer. 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 February 9, 2006¹ denial of the petition and subsequent March 23, 2006 denial of the petitioner's motion to reopen, 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 either 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

¹ It is noted that the director incorrectly stated the date on the original decision as February 9, 2005.

system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$399.73 per week or \$20,785.96 annually.²

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal³. Relevant evidence submitted on appeal includes counsel's brief, a copy of an AAO decision dated February 26, 2004,⁴ a copy of a letter, dated February 28, 2006, from ██████████ CPA, of Chastang, Ferrell, Sims, & Eiserman, L.L.C., a declaration by the beneficiary, dated March 7, 2006, copies of the 2000 through 2005 Forms W-2, Wage and Tax Statements issued by the petitioner on behalf of ██████████, copies of the petitioner's 2000 through 2005 Forms W-2c, Corrected Wage and Tax Statement, reflecting a name and social security number change for the beneficiary,⁵ a copy of a

² It is noted that the director incorrectly calculated the annual wage to be \$19,200.

³ 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).

⁴ The decision submitted by counsel is not a precedent decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished 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). While the decision submitted by counsel will be reviewed, it will not be considered as part of the AAO's decision.

⁵ The AAO notes that the beneficiary appears to have used an invalid social security number from 2000 through 2005. Misuse of another individual's social security number is a violation of Federal law and may lead to fines and/or imprisonment.

The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. *See* <http://ssa-custhelp.ssa.gov> (accessed on August 27, 2007).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

letter, dated April 12, 2006, to counsel from the petitioner, and a copy of the Social Security Online Business Services Online acknowledging the petitioner's correct annual wage report. Other relevant evidence includes copies of the petitioner's 2000 through 2004 Forms 1065, U.S. Returns of Partnership Income, for the fiscal years October 1 through September 30 of the following year for each Form 1065. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The CPA's letter of February 28, 2006 states:

We have reviewed the federal and state partnership returns for tax years 2001, 2002, 2003, and 2004. Based on the nature of the business and the fact that [the petitioner] is a partnership, the operations of the business is not reported on page one of the federal and state income tax returns. Rather the financial information is found on Schedule K and Schedule L of the partnership tax returns. We have prepared a summary for your review of income and current assets separated by year for the tax years 2001, 2002, 2003 and 2004.

*	*	*		
Year	Partnership Income excl. Depreciation And related pt. Mgmt fees	Partnership Current assets	Annual Wage Proffered Per Labor Certificate Job Offer	Excess Net Income Available:
2001	\$ 61,509	\$11,240	\$19,200	\$ 42,309
2002	\$131,227	\$ 6,980	\$19,200	\$112,027
2003	\$ 57,415	\$30,024	\$19,200	\$ 38,215
2004	\$260,325	\$70,615	\$19,200	\$241,125

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

If an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. 8 U.S.C.A. § 1324a(a)(2). Employers who violate the Immigration Reform and Control Act of 1986 (IRCA) are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use any forged, counterfeit, altered, or falsely made document or any document lawfully issued to or with respect to a person other than the possessor for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U.S.C. § 1546(b). Therefore, in the present case, with the filing of a Form I-485, Application to Register Permanent Residence or Adjust Status, the beneficiary may be considered inadmissible under Section 212(a)(6)(C)(i) of the Act which states:

[Misrepresentation] IN GENERAL. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

- ❖ Excess Income:
- ❖ Column 1: Refers to the adjusted net income available for the tax year
- ❖ Column 2: Refers to the net current assets available at the end of each tax year.
- ❖ Column 3: [The beneficiary] was offered a salary of \$19,200 according to the Labor Certification file, and Column 3 refers to the dollar amount that the U.S. Company needs to net per year to cover salary to be paid to [the beneficiary].
- ❖ Column 4: Refers to the excess net income available after deducting the proffered salary of \$19,200 each year.

The declaration, dated March 7, 2006, from the beneficiary states that he has worked for the petitioner from 1999 to the present, that his birth name is [REDACTED] but that he has always used the name [REDACTED], and that [REDACTED] and [REDACTED] are one and the same person.

The 2000 through 2005 Forms W-2c issued by the petitioner on behalf of the beneficiary reflect wages paid to the beneficiary of \$19,775, \$21,156, \$22,684, \$25,281, \$26,590, and \$25,900, respectively.⁶

The letter, dated April 12, 2006, from the petitioner to counsel states “my office has sent to the IRS as of last week W2-C’s and W3-C’s for the period covering 2000 through 2005 for [the beneficiary].” The petitioner submitted a W-2c online receipt acknowledgement for tax year 2005 from the Social Security Administration.

The petitioner’s 2000 through 2004 Forms 1065 reflect net incomes from Schedule K of -\$13,959, -\$147,264, -\$5,656, -\$201,337, and \$26,927, respectively. The petitioner’s 2000 through 2004 Forms 1065 also reflect net current assets of \$66,297, -\$108,616, -\$119,450, -\$130,714, and -\$16,923, respectively.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage based on the wages paid to the beneficiary in the years 2000 through 2005, based on its income and assets, and based on the fact that the petitioner actually paid wages in excess of the proffered wage of \$20,785.96.

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).

⁶ The petitioner’s fiscal year runs from October 1 to September 30 of each year, and the beneficiary’s IRS Forms W-2c cover the period from January 1 to December 31 of each year. For this appeal, we will credit the petitioner with having paid the beneficiary the wages listed on his 2000 Form W-2c in the petitioner’s 2000 fiscal year, the wages listed on his 2001 Form W-2c in the petitioner’s 2001 fiscal year, the wages listed on his 2002 Form W-2c in the petitioner’s 2002 fiscal year, the wages listed on his 2003 Form W-2c in the petitioner’s 2003 fiscal year, the wages listed on his 2004 Form W-2c in the petitioner’s 2004 fiscal year, and the wages listed on his 2005 Form W-2c in the petitioner’s 2005 fiscal year (the 2005 tax return was not submitted).

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 instant case, on the Form ETA 750, signed by the beneficiary on April 25, 2001, the beneficiary claims to have been employed by the petitioner from October 1999 through the present (2001). In addition, counsel has submitted copies of the 2000 through 2005 Forms W-2 issued by the petitioner on behalf of the beneficiary establishing that the petitioner did, in fact, employ the beneficiary during those years. Therefore, the petitioner has established that it employed the beneficiary from 2000 through 2005.

The petitioner is obligated to show that it had sufficient funds to pay the difference between the proffered wage of \$20,785.96 and the actual wages paid to the beneficiary in 2000 through 2005. In fiscal year 2000, the difference between the proffered wage of \$20,785.96 and the actual wages paid to the beneficiary of \$19,775 was \$1,010.96. In fiscal years 2001 through 2004, the beneficiary was paid wages of \$21,156, \$22,684, \$25,281, \$26,590, and \$25,900 (2001 – 2005), respectively, more than the proffered wage of \$20,785.96. Therefore, the petitioner has established its ability to pay the proffered wage of \$20,785.96 for the fiscal years 2001 through 2004.

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 Elatos Restaurant Corp.*, 632 F. Supp. at 1054. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The petitioner is a limited liability company (LLC). An LLC is an entity formed under state law by filing articles of organization. An LLC 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, an LLC formed under Florida law, is considered to be a partnership for federal tax purposes.

For a partnership, where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf> (accessed November 5, 2007). In the instant case, the petitioner's 2000 fiscal year Schedule K has relevant entries for additional income and deductions and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K. The petitioner's net income in fiscal year 2000 was -\$13,959. The petitioner could not have paid the difference of \$1,010.96 between the proffered wage of \$20,785.96 and the actual wages paid to the beneficiary of \$19,775 from its net income in fiscal year 2000.

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.⁷ A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. 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. The petitioner's net current assets in fiscal year 2000 were \$66,297. The petitioner could have paid the difference of \$1,010.96 between the proffered wage of \$20,785.96 and the actual wages paid to the beneficiary of \$19,775 from its net current assets in fiscal year 2000. Therefore, after a review of the petitioner's tax returns and the beneficiary's Forms W-2, the AAO concludes that the petitioner has established its ability to pay the proffered wage of \$20,785.96 from the priority date and continuing through the fiscal year 2005.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal do overcome the decision of the director.

⁷ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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 been met.**

ORDER: The appeal is sustained. The petition is approved.