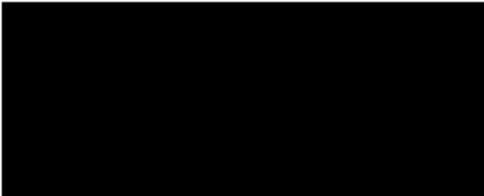




U.S. Citizenship  
and Immigration  
Services

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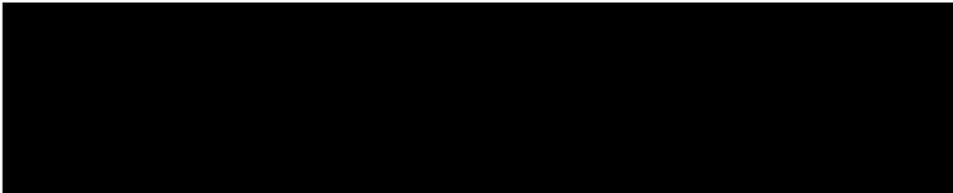
Office: VERMONT SERVICE CENTER

Date: **MAR 04 2008**

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 employment based visa petition was denied by the Director, Vermont Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a commercial and residential renovation and restoration firm. It seeks to employ the beneficiary permanently in the United States as roofing specialist. 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.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

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:

*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 establish that it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). Here, the ETA 750 was accepted for processing on February 23, 1996. The proffered wage as stated on the ETA 750 is \$24.58 per hour, which amounts to \$51,126.40 per year. On the ETA 750 B, signed by the beneficiary on November 11, 1995, the beneficiary claims that he began working for the petitioner in May 1995.

Subsequent indications from the petitioner through counsel indicate that the beneficiary's employment terminated in May 1996.

On Part 5 of the Immigrant Petition for Alien Worker (I-140), filed on October 13, 2005, the petitioner states that it was established in 1985 and reports an annual gross income of \$1,457,269.

As noted by director in his denial, the petitioner also petitioned for the same beneficiary on April 19, 1999. It is noted that each petition filing is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

In contrast to some of the materials submitted on appeal suggesting that the petitioner may have been or possibly is a partnership or limited liability company, based on the documentation initially provided with the petition and in response to the director's request for evidence, the petitioner appeared to be operated as a sole proprietorship, that is a business in which one person operates the business in his or her personal capacity. *Black's Law Dictionary* 1398 (7th Ed. 1999). This observation is based on the submission of the I-140 showing only a social security number matching that given in the 2004 and 2005 Form 1040, U. S. Individual Income Tax Return of [REDACTED] and [REDACTED] in which Schedule C, Profit or Loss From Business is included. It identifies [REDACTED] as the sole proprietor of [REDACTED] which is also the I-140 petitioner, and presents the financial information of the business. Schedule C also advises that partnerships, joint ventures, etc., must use Form 1065 or Form 1065-B. Form 1065 or Form 1065-B have not been submitted to the record. It is further noted that Schedule E of the two [REDACTED] individual tax returns which provide for the declaration of income or loss from partnerships and S Corporations does not indicate that the [REDACTED] identified [REDACTED] as a partnership source of income or loss. The two returns further reflect that [REDACTED] filed jointly with his spouse and claimed no dependents in either 2004 or 2005. The return also contains the following information:

	2004	2005
Gross Income (Sched. C)	\$217,092	\$345,906
Total Expenses (Sched. C)	\$165,999	\$113,496
<b>Net profit or (loss) (Sched. C)</b>	<b>\$ 51,093</b>	<b>\$ 18,307</b>
Adjusted Gross Income <sup>1</sup>	\$ 74,460	\$ 25,279

The director denied the petition on September 18, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage of \$51,126.40.

On appeal, the petitioner, through counsel, contends that it is *not relevant to the consideration of the petitioner's ability to pay the proffered wage whether the beneficiary is employed by the petitioner and that independent of any employment, the petitioner's ability to pay the proffered wage may be established by other evidence.* As supplied on appeal, counsel identifies the other evidence as a business certificate of [REDACTED], the 2005 individual tax return of [REDACTED] and [REDACTED] that counsel identifies as two out of the three principals of

<sup>1</sup> Adjusted gross income is shown on line 37 of the Form 1040 in 2004 and 2005.

[REDACTED], and a bank statement. No additional explanation is provided which specifies the form of business organization that the petitioner has used.

Neither the evidence submitted to the underlying record or on appeal establishes the petitioner's continuing financial ability to pay the beneficiary's proposed wage offer of \$51,126.40 beginning on the priority date of February 23, 1996. It is noted that this petition must fail at the outset because the record contains no evidence of the petitioner's ability to pay the proffered wage for 1996, 1997, 1998, 1999, 2000, 2001, 2002 and 2003. 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 determining a petitioner's ability to pay a certified wage, if there is no evidence that a petitioner may have employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, as is the case here, 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). 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

When a petitioner is operated as a sole proprietorship, additional factors will be considered. Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). The sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return (line 12). Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup> Cir. 1983). Such petitions often include a summary of household expenses. In this case, such a summary was not solicited or offered.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. In the instant case, if it is assumed that the petitioner is a sole proprietorship, the family is smaller but this beneficiary's proposed wage offer of \$51,126.40 represents 69% of the sole proprietor's adjusted gross income in 2004. Additionally, the sole proprietor's adjusted gross income of \$25,279 is \$25,847.40 less than the proffered wage in 2005. It may not be concluded that under this review of the petitioner

as a sole proprietorship that the petitioner's ability to pay the proffered wage has been established for either of these years.

On appeal, a copy of an amended business certificate filed in New York on August 21, 1989, on behalf of [REDACTED] indicates that [REDACTED] "has now become a partner." The certificate is signed by [REDACTED] and [REDACTED]. A copy of [REDACTED] and [REDACTED]'s 2005 individual tax return has also been submitted on appeal. It indicates that they reported an adjusted gross income of \$111,682 in 2005. Their declaration of income or loss from partnerships and S Corporations as shown on Schedule E of the 2005 return reveals a list of nineteen business entities, but none include the petitioner's name.

It is noted that a copy of an August 31, 2006, bank statement from Citibank is included on appeal. The name on the account is [REDACTED]. The statement indicates that [REDACTED] with a specified tax identification number is a control account showing no funds. Sixteen accounts showing various entities and balances contained in escrow accounts are listed. One of the entities is [REDACTED] with the same tax identification number as that listed for the control account of [REDACTED].

It is noted that regardless of the tax classification, an LLC is an artificial entity and is separate from its members. It is obliged to establish its separate ability to pay a certified wage. It may have attributes of other business entities such as a partnership or sole proprietorship because of the manner in which it is taxed, but it also affords its members of certain advantages generally associated with a corporation such as limitation on the member's personal liability for the debts of the LLC. Members are like shareholders of a corporation and own an interest in the LLC but they are not the LLC. Property interests may be acquired by the LLC and the title acquired vests in the LLC. *See HB Management, LLC v. Brooks*, 2005 WL 225993 (D.C. Super. Ct.); *see also McKinney's Limited Liability Company Law* § 609(a) (members and managers of limited liability companies are generally expressly exempt from personal responsibility for a company's obligations). Further, CIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft* 2003 WL 22203713 (D.Mass. Sept. 18, 2003). Under this analysis, it may be observed that if the petitioner is considered an LLC, its net profit as reflected on Schedule C of [REDACTED]'s tax returns shows sufficient funds to pay the proffered wage in 2004 but not in 2005.

As discussed above and as indicated by the record, clarification as to the petitioner's history and business structure has not been provided in this case. 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).

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<sup>2</sup> It is noted that a limited liability company 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 for tax purposes 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 this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date.

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

**ORDER:** The appeal is dismissed.