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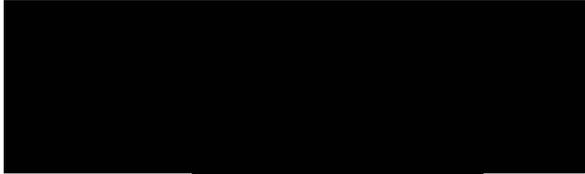
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 06 181 51937

Office: TEXAS SERVICE CENTER Date: **MAR 07 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is the production and sale of PC control systems. It seeks to employ the beneficiary permanently in the United States as a software engineer, systems. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor (DOL). 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.

The record demonstrated that the appeal was properly filed, timely and made a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial dated September 5, 2006, an 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 nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of 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, which is the date the Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.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 9089 Application for Permanent 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 9089 was accepted on January 19, 2006. The proffered wage as stated on the Form ETA 9089 is \$60,500.00 per year.

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 appeal.¹

Relevant evidence in the record includes copies of the following documents: the original Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor; a support letter from the petitioner dated May 4, 2006; the petitioner's IRS Form 1040NR for 2004; and documentation concerning the petitioner's business.

The director transmitted a notice of intent to deny the petition dated August 10, 2006, to the petitioner.

In response counsel submitted the following documents: an explanatory letter from counsel dated August 30, 2006; the petitioner's reviewed financial statement² for the periods ending December 31, 2005 and 2004; a letter from the State of Maryland, State Department of Assessments and Taxation together with a statement stating that the petitioner is a limited liability company chartered in the State of Maryland; the Articles of Organization for the petitioner dated and filed October 7, 1998; a notification dated April 20, 2005 by the U.S. Internal Revenue Service of the assignment to the petitioner of a Federal Employer Identification Number; a printed page from the State of Minnesota website entitled "2006 Domestic and Foreign Limited Liability Company" concerning the petitioner; a letter from the petitioner dated August 24, 2006 stating that the beneficiary was currently employed in nonimmigrant status as a software engineer, systems and paid "at an annual rate of \$69,900.00;" and the "Notice of Position Opening" used in the recruiting phase³ to comply with DOL regulations at a salary of \$65,000.00.

¹ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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). No new documents were submitted upon appeal.

² The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

³ The posting as submitted does not provide the address of the certifying officer of DOL and there is no evidence of posting upon in-house media as required by the regulation at 20 C.F.R. § 656.10(d)(1)(i)(ii).

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company. On the petition, the petitioner claimed to have been established in 1998 and to currently employ 44 workers. According to the tax return in the record, the petitioner's fiscal year is based on a calendar year. The net income and gross annual income stated on the petition were \$788,503.00 and \$15,669,021.00 respectively. On the Form ETA 9089 signed by the beneficiary on May 12, 2006, the beneficiary did claim to have worked for the petitioner since January 1, 2000.

On appeal, the petitioner asserts that that the director erred in assuming that the petitioner is not a United States employer.

While the director questioned the employer's status during the pendency of the case, since the petitioner demonstrated by documentary proof that it is a United States employer, and the director made no adverse finding in his decision concerning this, it is not an issue in this case. It will not be discussed further.

Further, counsel states that the federal tax returns submitted are evidence of the petitioner's ability to pay the proffered wage.

The petitioner submitted its tax return for the year 2004 which is two years before the priority date of January 19, 2006.

Accompanying the appeal, counsel submits a legal brief and no additional evidence.

Counsel again restates in the legal brief that the petitioner has submitted "U.S. federal tax returns" and refers to a 2005 tax return. Although the record before the director closed on August 31, 2006, with receipt by the director of the petitioner's response to the notice of intent to deny, and the year 2005 is before the priority date of January 19, 2006, the 2005 tax return is the most recent return available. However, a review of the exhibits listed on the petitioner's support letter of May 4, 2006, or counsel covers letters dated May 17, 2006, or August 30, 2006, demonstrate that no 2005 tax return is referenced or attached. Thus, the record does not contain the petitioner's 2005 federal income tax return.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

As a preface to the following discussion, evidence was submitted in the record of proceeding that indicates that the petitioner is a limited liability company (LLC). Normally, according to Internal Revenue Service regulations taxpayers with that status report their income on Form 1065. A 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 (as is the case here), 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 Form 8832, Entity Classification Election. In the instant case, the petitioner is an LLC formed under Maryland State law. The petitioner has reported its income on Form 1040NR.⁴

⁴ Tax returns submitted for years prior to the priority date have little probative value in the determination of

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any immigrant petition, 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, 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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. In the instant case, the petitioner has stated in a letter dated August 24, 2006, that it has paid the beneficiary at the "annual rate of \$69,900.00" but no independent objective evidence of those payments such as W-2 or 1099-MISC statements was provided by the petitioner. The petitioner not demonstrated that it employed and paid the beneficiary the full proffered wage from the priority date.

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.⁵ 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, 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's 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). Reliance on the petitioner's gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

the ability to pay from the priority date. In 2004 the petitioner stated net income of \$675,000.00 (Schedule C, Line 31).

⁵ 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 is organized as a single member limited liability company. Therefore, the petitioner's net income is reported on the member's U. S. Internal Revenue Service Form 1040, Schedule C at line 31.

Since the petitioner failed to submit its 2005 tax return and submitted no tax returns from or after the priority date of January 19, 2006 to demonstrate financial information concerning the petitioner's ability to pay, the AAO is unable to determine the petitioner's ability to pay utilizing that data.⁶

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.

⁶ Again, tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. In 2004, the petitioner's Form 1040NR stated an adjusted gross income (Line 34) of <\$1,811,405.00>. However, the net profit of the business was stated on Schedule C, line 31 to be \$675,609.00. Counsel did not submit additional documentary evidence such as copies of annual reports, federal tax returns or audited financial reports as required by the regulation at 8 C.F.R. § 204.5(g)(2) and by the director's notice of intent to deny the petition dated August 10, 2006. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).