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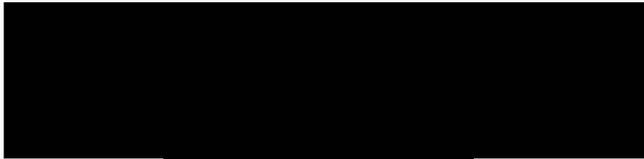
U.S. Department of Homeland Security
20 Mass Ave., NW, Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
SRC 06 162 52010

Office: TEXAS SERVICE CENTER Date: **MAY 13 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 for

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 sustained. The petition will be approved.

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a software developer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), 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, counsel submits additional evidence¹ and contends that the petitioner has established its continuing ability to pay the certified wage.

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.

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 the granting of 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.

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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the ETA Form 9089 was accepted for processing on March 20, 2006. The proffered wage as stated on the ETA Form 9089 is \$64,459 per year. On the ETA Form 9089, signed by the beneficiary on April 20, 2006, the beneficiary claims to have worked for the petitioner since June 17, 2005.

On Part 5 of the I-140, which was filed on April 28, 2006, the petitioner claims that it was established on March 1, 2003, employs two employees and one contractor and claims to have a projected 2006 gross annual income of \$400,000. On Part C of the ETA Form 9089, it states that the petitioner has two employees and commenced business in 2005.

In support of the petitioner's ability to pay the proffered wage, copies of five checks issued to the petitioner in 2006 from one of its clients, was provided. The petitioner also submitted a copy of the beneficiary's Wage and Tax Statement (W-2) for 2005. It showed that the petitioner paid \$25,384.60 in wages to the beneficiary. Further submitted was a copy of the petitioner's federal quarterly employer's tax return (Form 941) for the first quarter in 2006. It claims that one employee and reflects that \$18,240 in wages, tips, and other compensation was paid. The petitioner also provided copies of its January and February 2006 bank statements, a copy of its state certificate of its articles of organization as a limited liability company² as of September 10, 2003, and a copy of its state documentation of payment of a worker's compensation premium for five months from March to August 2006.

On June 10, 2006, the director requested additional evidence of the petitioner's ability to pay the proffered salary. Although the priority date was March 20, 2006, she instructed the petitioner to provide only evidence for 2001 and 2002.

In response, the petitioner submitted an affidavit, dated August 8, 2006, from [REDACTED] the firm's vice-president. He states that although the firm was established in 2003, the first employee was not hired until 2005 when business improved. He claims that the firm currently employs two full-time workers and three subcontractors. Mr. [REDACTED] also states that no tax returns were filed for 2003 and 2004 due to the lack of revenues, and that the 2005 tax return was not available because an extension had been filed. With this affidavit, the petitioner submits a letter from its accountant summarizing the accompanying documents and affirming the petitioner's plans for expansion. Other documents such as a copy of an Internal Revenue Service (IRS) application for extension of time, a copy of a profit and loss statement for January – June 2006, copies of the petitioner's Form(s) 941 for the last quarter of 2005 and the second quarter of 2006 are also provided, along with copies of bank statements, copies of checks issued to the petitioner by other firms, copies of various 2006 checks issued to the firm's other workers, and a payroll summary related to the beneficiary's 2006 net pay are also

² 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.

submitted. The petitioner did not provide copies of checks or details of gross wages paid to the beneficiary in 2006.

Summarizing some of the evidence provided, including the payment of wages to the beneficiary in 2005 as reflected by his W-2, as well as noting that the petitioner had failed to submit the additional evidence specifically requested by the director, she denied the petition on November 14, 2006.

On appeal, counsel asserts that the petitioner has established its ability to pay the proposed wage offer of \$64,459. In addition to previously submitted documentation, counsel submits additional evidence on appeal, including various copies of contracts with client companies, payments received in return for services rendered, as well as a copy of a profit and loss statement for January through November 28, 2006 in comparison to the monthly November 2006 figures. Counsel also provides copies of the petitioner's 2006 Form 941 from the third quarter of 2006 reflecting two employees and \$22,744 paid as wages, tips, and other compensation. Counsel also provided copies of its bank statements from January through October 2006, showing ending balances ranging from -\$649 to \$9,087.80.

With the appeal, counsel submitted a copy of the 2005 individual income tax return of [REDACTED]. As noted above, the petitioner is a limited liability company, formed under the laws of Ohio and is considered as a sole proprietorship for tax purposes as suggested by [REDACTED]'s tax return. However, it is also an artificial entity and is separate from its members. 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. The income of the petitioning LLC is reported on Schedule C (Profit or Loss from Business) that is included as part of the individual income tax return. In this case, in 2005, the petitioner reported \$44,744 in gross receipts or sales, total expenses of \$35,772, yielding a net profit of \$8,972.

On appeal counsel further provided copies of the petitioner's payroll records detailing the beneficiary's wage and withholding information for January 15, 2006 through November 27, 2006. They indicate that his year-to-date gross pay was \$63,840 as of November 27, 2006. Copies of the actual checks and withholding information accompanying the report indicate that his gross pay for 80 hours of work was \$3,040 in 2006.

It is noted that the petitioner's bank statements and the profit and loss statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as might be set forth on an audited financial statement or income tax return. Further, as set forth above, this petitioner's ending balances did not consistently reflect enough cash assets to pay the proffered wage

Similarly, it is also noted that the 2006 profit and loss statement is not persuasive evidence of the petitioner's ability to pay the proffered wage. It is noted that according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. As the document relating to the January – November 2006 individual financial condition of the petitioner is not audited as required by the regulation at 8 C.F.R. § 204.5(g)(2), it is not sufficiently probative of the ability to pay the proffered wage during the period represented because it is restricted to information based upon the representations of the petitioner.

In determining a petitioner's ability to pay a certified wage, Citizenship and Immigration Services (CIS) will examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that 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. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007). 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 corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner's 2005 federal tax return reflected that the petitioner's net income was \$8,972, far below the proposed wage offer of \$64,459 and less than the amount needed to pay the full proffered wage even when combined with the actual wages paid to the beneficiary in 2005 of \$25,284.60. As herein suggested, CIS also examines whether the petitioner may have employed and paid the beneficiary during the relevant period. In this case, because the relevant period is 2006 when the priority date was established, the documentation related to that year must be reviewed. 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. As noted above, to the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will also be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets³ for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that the financial ability to pay the proffered wage be established as of the priority date and *continues* until the beneficiary obtains lawful permanent residence. Although, according to the Form 941, we note that the petitioner did not appear to be paying two employees until the third quarter of 2006 as contrasted with the statement on the I-140 and ETA Form 9089, we accept that the beneficiary's employment was compensated at a level consistent with the certified wage. It is noted that the certified salary for a full year of employment is \$64,459 or approximately \$5,371.58 per month. The beneficiary's payroll records and withholding reflect that his gross pay for two weeks of full-time employment was \$3,040 or approximately \$6,080 per month. As of November 27, 2006, he had been paid \$63,840 in gross pay or \$619 less than the proffered wage in the eleven months of employment in 2006. Because the evidence submitted on appeal persuasively establishes that the petitioner was consistently paying slightly more than the

³ Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are usually shown on Schedule L of its federal tax return. They will also be shown on an audited financial statement. In the instant matter, the petitioner's net current assets are not reflected on the individual income tax return submitted and an audited financial statement was not provided.

monthly pay calculated from the yearly proffered wage during 2006, it may be concluded that the petitioner established its continuing financial ability to pay the proffered salary as of the priority date of March 20, 2006.

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 met that burden.

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