

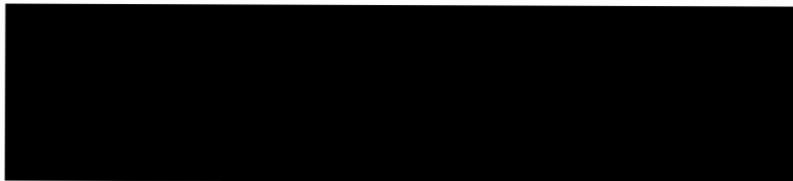
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U.S. Citizenship
and Immigration
Services

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FILE:



SRC 07 009 51500

Office: TEXAS SERVICE CENTER

Date:

NOV 07 2008

IN RE:

Petitioner:

Beneficiary:



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.

A handwritten signature in black ink, appearing to read "Robt P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The nature of the petitioner's business is special painting, wallpaper hanging, and pressure cleaning for interior and exterior surfaces. It seeks to employ the beneficiary permanently in the United States as a painter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien 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 January 5, 2007, 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 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.

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 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. 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 750 Application for Alien Employment Certification certified by DOL 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 750 was accepted on April 23, 2001.¹ The proffered wage as stated on the Form ETA 750 \$20.85 per hour (\$43,368.00 per year).

¹ It has been approximately seven years since the Application for Alien Employment Certification has been

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.²

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 1983. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 6, 2001, the beneficiary did claim to have worked for the petitioner.

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, by DOL; Form 1099-MISC statements issued by the petitioner to the beneficiary in 2001, 2002, 2003, 2004 and 2005; the petitioner's U.S. Internal Revenue Service Form 1040 tax returns for 2001, 2002, 2003, 2004 and 2005; explanatory letters from counsel dated October 7, 2006 and December 23, 2006; approximately 11 bank savings account statements for the sole proprietor for the period from January 1, 2001, through November 30, 2001;³ approximately 14 bank checking account statements for the petitioner for the period from January 1, 2002 through December 31, 2002; approximately four bank checking account statements for the sole proprietor for the periods December 7, 2001 to February 5, 2002, May 7, 2002 to June 6, 2002, and December 6, 2002 to January 7, 2003; approximately eight bank checking account statements for the petitioner for the period from January 1, 2002 to September 30, 2002; approximately eight bank checking account statements for the petitioner for the period from July 6, 2002 to December 31, 2002; approximately three bank checking account statements for the petitioner for the period December 31, 2002, to February 28, 2002; approximately four bank checking account statements for the petitioner for the period from January 29, 2003, to December 31, 2003; and approximately nine bank checking account statements for the petitioner for the period May 1, 2003 to January 31, 2003.

On appeal, the petitioner asserts that the amount paid to subcontractors should have been considered by the director as evidence of the petitioner's ability to pay the proffered wage.⁴

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

accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² 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).

³ Since the priority date is April 23, 2001, savings statements submitted into evidence for the period prior to 2001 have slight probative value in the determination of the petitioner's ability to pay the proffered wage from the priority date.

⁴ Since the beneficiary was in the employ of the petitioner since October of 2000, counsel's assertion is misplaced.

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, 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 (Reg. Comm. 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. Counsel submitted Form 1099-MISC statements issued by the petitioner to the beneficiary in 2001, 2002, 2003, 2004 and 2005 in the amounts of \$12,202.00, \$25,104.00, \$30,813.00, \$63,895.00 and \$55,059.00. Since the proffered wage is \$43,368.00 per year, the petitioner must establish that it can pay the beneficiary the difference between compensation actually paid and the proffered wage, which is \$31,166.00, \$18,264.00, and \$12,555.00 respectively. In the instant case, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2004 and 2005.

The director erroneously evaluated the petitioner as a sole proprietor. However, the petitioner is a limited liability company (LLC). Under U.S. IRS regulations if the organization is a single member LLC, that member must file a Schedule C for the LLC, which is attached to the Form 1040. If the LLC is a multiple member LLC, the LLC will file a separate tax return for the LLC, and each member will file a Schedule K-1, which will be reported on Schedule E of the members' personal 1040 tax returns.

Although an LLC is 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. 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.

An investor's liability is limited to his or her initial investment. Counsel is arguing that the member's income and assets are available to pay the proffered wage although there is no contract or no other evidence in the record to substantiate this assertion. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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. In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The relevant tax returns⁵ reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Petitioner's gross receipts or sales (Schedule C)	\$226,670	\$217,674
Petitioner's wages paid (Schedule C)	\$ -0--	\$ -0-
Cost of goods sold (Schedule C)	\$152,738	\$165,926
Petitioner's net profit from business (Schedule C)	\$ 33,858	\$ 36,536

	<u>2003</u>
Petitioner's gross receipts or sales (Schedule C)	\$287,262
Petitioner's wages paid (Schedule C)	\$ -0--
Cost of goods sold (Schedule C)	\$169,206
Petitioner's net profit from business (Schedule C)	\$ 54,798

The cost of goods sold includes wages paid. Since the proffered wage is \$43,368.00 per year, the petitioner did have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002 and 2003. As stated above, the petitioner paid the beneficiary, in compensation, the proffered wage in 2004 and 2005.⁶

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.

⁵ In 2004 and 2005 the petitioner paid the beneficiary more than the proffered wage.

⁶ Internal Revenue Service Form 1099-MISC.