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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: APR 06 2009
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

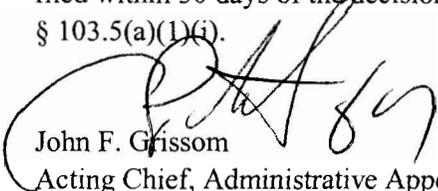
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner is a firm engaged in the fields of hospitality, real estate, and laundry equipment maintenance. It seeks to employ the beneficiary permanently in the United States as a technical engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had failed to establish its continuing financial ability to pay the proffered wage as of the priority date and denied the petition accordingly.

On appeal, counsel asserts that the petitioner has established its continuing financial ability to pay the proffered 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 Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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.

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).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 26, 2004. The proffered wage as stated on the Form ETA 750 is \$50,000 per year. On the ETA 750B, signed by the beneficiary on January 10, 2004, the beneficiary claims to have worked for the petitioner since July 2003 to the present (date of signing).

The record indicates that the Immigrant Petition for Alien Worker (I-140) was filed on November 27, 2006. Part 5 of the I-140 reflects that the petitioner was established on October 8, 1997, claims a gross annual income of 786,147 and currently employs twenty workers.

In support of the petitioner's continuing ability to pay the proffered wage, the petitioner, through counsel, submitted copies of the petitioner's federal income tax returns (U.S. Returns of Partnership Income) for 2004, 2005 and 2006. They indicate that the petitioner is a domestic limited liability company and files its returns using a standard calendar year.¹ The tax returns also contain the following information:

	2004	2005	2006
Net Income ²	-\$ 70,262	\$ 61,232	\$ 49

¹A limited liability company (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 is considered to be a partnership for federal tax purposes.

² It is noted that a limited liability company (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 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

Current Assets	(Sched. L)	\$ 9,248	\$ -0-	\$ -0-
Current Liabilities	(Sched. L)	\$ -0-	\$ -0-	\$ -0-
Net Current Assets		\$ 9,248	\$ -0-	\$ -0-

As noted in the above table, besides net income, as an alternative method of reviewing a petitioner’s ability to pay a proposed wage, U.S. Citizenship and Immigration Services (USCIS) will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.³ It represents a measure of liquidity during a given period and a possible readily available resource out of which the proffered wage may be paid. A petitioner’s year-end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its partnership return. If the petitioner’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 further provided copies of the beneficiary’s Wage and Tax Statement (W-2) for 2004, 2005, and 2006, as well as a 2007 payroll record. They disclose the following wages paid by the petitioner:

Year	Wages Paid	Difference from Proffered Wage of \$50,000
2004 ⁴	\$22,160.06	-\$27,839.94
2005	\$10,903.12	-\$39,096.88
2006	\$17,600.40	-\$32,399.60

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, as indicated by the record, the I-140 petitioner, an LLC formed under the laws of Guam is considered as a partnership for tax reporting purposes. In this case, it reports additional income or additional deductions and credits on Schedule K. Its net income is reflected as a combined total of its ordinary business income as shown on line 22 of the Form 1065 and income, credits and deductions reflected on Schedule K. Here, the petitioner’s net income is found on line 1 of Analysis of Net Income on page 4 of Form 1065. See Instructions for Form 1065, at <http://www.irs.gov/pub/irs-pdf/i1065.pdf>.

³ 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.

⁴ USCIS records reflect that the petitioner has filed nonimmigrant petitions for the beneficiary and pursuant to petitioner’s SRC0318850162 was required to pay the beneficiary \$45,000, and pursuant to petitioner’s WAC0621350645 was required to pay the beneficiary \$26,000 in compliance with 20 C.F.R. § 655.

2007	(Year to Date as of November 30, 2007)	
	\$17,500	-\$28,333.37 (compared to 11 months of proffered wage)

The petitioner also submitted copies of bank statements issued by Farmers & Merchants Bank to the petitioner regarding a Comfort Inn covering January to March 2004, June to December 2004, January to October 2005 and May, August and September 2006. Under a bank and account number related to a cleaning business, the petitioner provided copies of bank statements from the Regions Bank covering January to April 2004, July to December 2004, and January to December 2006.

Finally, the petitioner provided an internal sales and occupancy chart for a motel covering 2004 and two internal statements of its income and expenses for 2005 and 2006, respectively.

On January 23, 2008, the director denied the petition, finding that the petitioner had not demonstrated its ability to pay the proffered salary. He noted that the petitioner's returns that were provided indicated insufficient net income or net current assets for the years 2004, 2005, and 2006. The director further concluded that they did not demonstrate sufficient funds to cover the difference between the wages paid to the beneficiary and the proffered salary of \$50,000.

On appeal, counsel asserts that the director failed to recognize the bank statements provided and failed to distinguish between the cash basis tax returns and the accrual basis profit/loss statements.⁵

Counsel's assertions are not persuasive. Counsel's reliance on the petitioner's bank statements is misplaced as noted by the director. Bank 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," the petitioner in this case failed to demonstrate why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. The petitioner's bank statements show only a portion of a petitioner's financial profile and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as set forth on an audited financial statement or a federal income tax return. Further, cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Counsel provided no evidence that demonstrated that the funds reported on the petitioner's selected bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not

⁵Counsel indicated on the notice of appeal that he would submit a brief and/or additional evidence in 30 days. However, his response to a fax inquiry from this office confirmed that he did not submit any additional documentation.

already have been reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L. In this case, we do not conclude that the bank statements should be accepted as probative of the petitioner's ability to pay the proffered wage in lieu of the data set forth on the tax returns as required by 8 C.F.R. § 204.5(g)(2).

The unaudited internal statements of income and expenses submitted are also not among the three types of evidence required by the regulation at 8 C.F.R. § 204.5(g)(2). The regulation 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Counsel also asserts that the director failed to account for the fact of different accounting methods used to prepare the tax returns and the statements of income and expenses. Because the petitioner is a cash basis tax payer, and the statements of income and expenses are accrual based, where revenue may be recognized when it is billed but not received, counsel claims that the figures used in the statements of income and expenses should prevail. We do not concur. As noted above, such statements are not probative of the petitioner's ability to pay the proposed wage offer and are not considered in lieu of the federal income tax returns. Additionally, the record does not indicate whether the income statements were prepared based on an accrual convention or a cash accounting method. Further, counsel cites no authority by which the election of a particular accounting method should be determinative of a petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets as shown on its federal tax return, audited financial statement, or annual report during the given period, the petitioner is deemed to have demonstrated its ability to pay a proffered salary. As indicated above, the petitioner failed to pay the beneficiary the full proffered wage. The wages paid to the beneficiary in 2004, 2005 and 2006 indicate that they were respectively, \$27,839.94, \$39,096.88, and \$32,399.60 less than the proffered salary of \$50,000 per year.

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, USCIS will next 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 supported by federal case law. *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). *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 USCIS, 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.

As shown by the record, neither the petitioner's net income of -\$70,262 nor its net current assets of \$9,248 in 2004 could cover the \$27,839.94 difference between the actual wages paid of \$22,160.06 and the proposed wage offer of \$50,000 per year or establish the petitioner's ability to pay the proffered wage in this year.

In 2005, neither the petitioner's -\$61,232 in net income nor its \$-0- in net current assets could cover the \$39,096.88 difference between the proffered wage and the actual wages of \$10,903.12 paid to the beneficiary in this year or demonstrate the petitioner's ability to pay the certified salary.

In 2006, the petitioner's reported \$49 of net income and its \$-0- in net current assets failed to cover the \$32,399.60 difference between the actual wages paid of \$17,600.40 and the proffered wage of \$50,000. The petitioner failed to establish its ability to pay in 2006.

In 2007, the petitioner also failed to establish its ability to pay the certified salary of \$50,000 per year as the \$17,500 wages paid year-to-date as of November 30, 2007 were approximately \$28,333.37 less than the proffered wage as of that date.

In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) may be applicable. *Sonogawa* related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The

petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In this matter, the petitioner's tax returns reflected declining gross receipts from 2004 to 2006. The petitioner additionally submitted charts listing sales, rooms sold and occupancy rates. This information shows that the petitioner experienced declining revenues and decreased occupancy rates between 2003 and 2004. No unusual or unique business circumstances or reputational factors have been shown to exist in this case that parallel those described in *Sonegawa*, nor has it been established that 2004 was an uncharacteristically unprofitable year within a framework of profitable years for the petitioner.

Based on a review of the underlying record and the evidence and argument provided on appeal, the AAO concludes that the petitioner has failed to establish its continuing ability to pay the proffered wage beginning at the priority date of January 26, 2004.

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.