

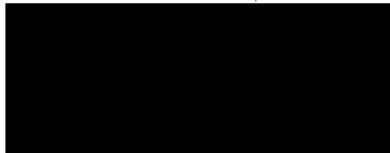
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy
PUBLIC COPY**

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B6



AUG 02 2010

FILE: [REDACTED]
LIN 07 061 52425

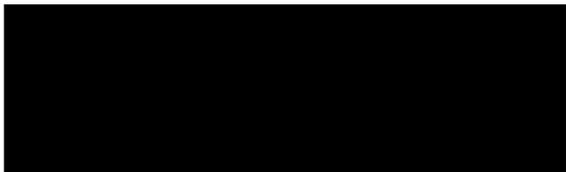
Office: NEBRASKA SERVICE CENTER

Date:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 construction company. It seeks to employ the beneficiary permanently in the United States as a carpenter. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification approved by the United States Department of Labor (DOL). The director determined that the petitioner had not submitted the petitioner's household monthly expenses as requested by the director, and thus the director was unable to make an accurate determination of the petitioner's ability to pay the proffered wage as of the 2006 priority date of the petition and onward. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes 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 April 7, 2008 denial, 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 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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on January 3, 2006. The proffered wage as stated on the ETA Form 9089 is \$19.95 an hour, or \$41,496 per year. The ETA Form 9089 states that the position requires two years of work experience as a carpenter.

The AAO maintains plenary power to review each appeal on a *de novo* basis. . See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, the petitioner submits the beneficiary's Forms 1099-MISC for tax years 2005 and 2006. These documents indicate the petitioner compensated the beneficiary \$42,000 in 2005 and \$45,600 in tax year 2006. The petitioner also submitted its Forms 1040 for both 2005 and 2006² with accompanying Schedules C, and no other Schedules. The petitioner also submitted an itemized list of monthly household expenses for the petitioner's family members. This list indicates the petitioner has yearly household expenses totaling \$61,920.

Prior to analyzing the petitioner's ability to pay the proffered wage, the AAO will comment briefly on the petitioner's business structure. The director described the petitioner as a sole proprietorship and in his RFE requested the petitioner's entire 2005 and 2006 tax returns, copies of the petitioner's checking and savings account statement, and an itemized list of household expenses.

In response to the director's RFE dated November 30, 2007, [REDACTED] identified as the [REDACTED] stated that the petitioner is a limited liability corporation with one member and one officer. [REDACTED] states that petitioner is a Disregarded Entity for federal tax purposes. [REDACTED] also states that Tech Construction LLC is also the sole proprietor and that salaries drawn by the LLC or members of the LLC could be or are sometimes greater than the annual income from sales or cost of goods sold. [REDACTED] notes that if the salary for [REDACTED], the petitioner's [REDACTED] were eliminated for the year as officer or member, the petitioner would show a positive cash flow or no loss. The petitioner also submitted a copy of a state of New Jersey document entitled [REDACTED] filed by the petitioner and dated October 22, 2007 for tax year 2006. This document indicates the petitioner paid a fee of \$100 as a single member disregarded entity for federal income tax purposes.

According to IRS instructions³ for single member limited liability companies:

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).

² The petitioner previously submitted only the Schedule C for the 2005 tax year with the initial petition, and submitted its Form 2006 with W-2 Forms for the petitioner's owner and manager in response to the director's RFE.

³ See <http://www.irs.gov/businesses/small/article/0,,id=158625,00.html> (Available as of June 30, 2010.)

A multi-member LLC can be either a partnership or a corporation, including an S corporation. To be treated as a corporation, an LLC has to file Form 8832, Entity Classification Election (PDF), and elect to be taxed as a corporation. A multi-member LLC that does not so elect will be classified by federal law as a partnership. A single member LLC (SMLLC) can be either a corporation or a single member "disregarded entity". An SMLLC that does not elect to be a corporation will be classified by the existing federal guidance as a Disregarded Entity which is taxed as a sole proprietor for income taxes.

The instant petitioner is not a sole proprietor, but rather a single member limited liability company. The AAO will withdraw the director's analysis of the ability of the petitioner, described as a sole proprietorship, to pay the proffered wage. The AAO also notes that even though a single member LLC is treated as a sole proprietorship for tax purposes (unless it elects to be treated as a corporation), the analysis of its ability to pay is not the same for both of these business organizations. For example, in considering a single member LLC's net income, the AAO considers Line 31 of Schedule C to the Form 1040 and not the single member's adjusted gross income on the first page of his/her Form 1040.

In the instant case, the petitioner submitted its Schedule C for 2006 with the initial petition. It submitted its Form 1040 for 2006 in response to the director's RFE. On appeal, it submits its 2005 Form 1040, with accompanying Schedule C.

On the petition, the petitioner claimed to have been established in 2003, to have a Gross Annual Income of \$729,000, and to currently employ 15 workers. On the ETA Form 9089, signed by the beneficiary on December 6, 2006, the beneficiary claimed to work for the petitioner since 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, United States Citizenship and Immigration Services (USCIS) 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, USCIS 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 not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2006 onwards.

Although the director requested that the petitioner submit the beneficiary's W-2 Forms or Forms 1099-MISC for 2005 to 2007 in his RFE, the petitioner provides the beneficiary's Forms 1099-MISC, only on appeal. The AAO will consider these documents; however, we note that they are submitted for the first time on appeal with no explanation. Without further explanation, the AAO would give no weight to the beneficiary's Forms 1099-MISC.

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 reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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).

As stated previously, for a single member limited liability company, the AAO will examine the petitioner's net income based on line 31, of the petitioner's Schedule C. The AAO notes that the record closed as of January 4, 2008, at which time the petitioner's 2007 tax return would not have been available. The AAO also notes that the priority date for the instant petition is January 3, 2006, and thus the petitioner's tax return for 2005 is not dispositive in this matter. However, since the 2005 tax return is available and in the record, the AAO will examine the petitioner's 2005 and 2006 tax returns. The record indicates the petitioner had a net loss of -\$17,194 in 2005 and -\$23,984 in 2006. Thus the petitioner cannot establish its ability to pay the proffered wage of \$41,496 during either year.

On appeal, counsel asserts that the petitioner's profit and loss statement lists cost of labor in excess of \$140,000 for each tax year from which the beneficiary's Form 1099-MISC was issued. Counsel also notes that the petitioner's 2005 and 2006 tax returns indicate adjusted gross income in excess of \$130,000. However, as a single member limited liability company, the owner is separate from the business entity and is not liable to pay the expenses of the business entity. Thus, the petitioner's owner's adjusted gross income or salaries would not be necessarily available to pay the proffered wage. The AAO does not find counsel's assertions to be persuasive.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

There is a paucity of information in the record concerning the petitioner's business organization and finances. There is no information in the record concerning the petitioner's reputation within the industry, or the occurrence of any uncharacteristic business expenditures or losses. Although it indicates that it has 15 employees on the I-140 petition, the AAO notes that if these employees were paid the same wages as the claimed wages on the beneficiary's Forms 1099-MISC, the petitioner's payroll should be significantly higher than \$242,064 and \$242,776, noted as costs of labor on the petitioner's Schedules C, for tax years 2005 and 2006, respectively. The AAO also notes that if the salaries for the petitioner's owner and manager are part of these costs of labor for 2005 and 2006, significantly less monies would have been available to compensate the remaining workers. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

Beyond the decision of the director, the AAO questions whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The regulation at 8 C.F.R. § 204.5(l)(3) also provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

With the I-140 petition, the petitioner submitted a letter of work verification dated December 13, 2004, from [REDACTED]. The letterhead states [REDACTED] Since 1984.” The letter writer indicated the beneficiary worked for this business for two years with a salary of \$28,800. This letter contains no address for the former employer and no title for the person writing the letter. The contents of the letter does not conform to the requirements described at 8 C.F.R. § 204.5(g)(1) and (1)(3)(ii)(A).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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.