

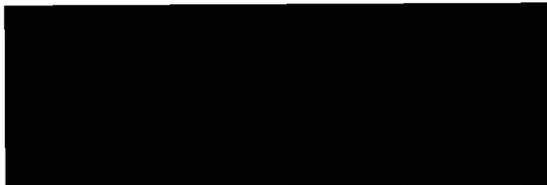
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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



B6

FILE:



Office: TEXAS SERVICE CENTER

Date: FEB 04 2010

SRC 09 136 51218

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.

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, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 petitioner is a thoroughbred horse farm and nursery. It seeks to employ the beneficiary permanently in the United States as a livestock rancher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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. Therefore, the director denied the petition.

The record shows that the appeal is properly filed, 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 July 28, 2009 denial, the single issue in this case is whether 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 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 the Form ETA 750 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 Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$14.52 per hour (\$30,201.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered.

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

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company (LLC). On the petition, the petitioner claimed to have been established in 1980, to have a gross annual income of \$738,715, and to currently employ 3 workers. According to the tax returns in the record, the petitioner’s fiscal year is the same as the calendar year. On the Form ETA 750B, signed by the beneficiary on August 20, 2003, the beneficiary stated that he began working for the petitioner in November 2000.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the Form ETA 750 establishes a priority date for any immigrant petition later based on the Form 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, 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 onwards. The evidence submitted shows that the petitioner paid the beneficiary the following amounts:

- The 2006 Form 1099, Miscellaneous Income, in the record states that the petitioner paid the beneficiary \$17,500 in 2006.
- The 2007 Form 1099 states that the petitioner paid the beneficiary \$17,500 in 2007.
- The 2008 Form W-2, Wage and Tax Statement, states that the petitioner paid the beneficiary \$17,160 in 2008.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations 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).

To prevail, the petitioner must demonstrate an ability to pay the difference between the actual wages paid and the proffered wage of \$30,201.60, or \$12,701.60 in 2006, \$12,701.60 in 2007, and \$13,041.60 in 2008.² The petitioner's owner, [REDACTED] stated in a letter dated March 26, 2009, that the petitioner paid the beneficiary \$17,500 annually each year from 2000 through 2008. He stated that this income was documented on the Form 1099. There is no documentation in the record that the petitioner paid the beneficiary at any time during 2000 through 2005. Going on record without supporting documentary evidence is not sufficient to meet the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Unsupported assertions are not evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).³ Also, the 2008 Form W-2 in the record indicates that the petitioner paid the beneficiary \$17,160 in 2008, not \$17,500 as stated by [REDACTED]

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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is not sufficient. Also, showing that the petitioner paid total wages in excess of the proffered wage is not sufficient, contrary to assertions made by the petitioner.

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.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash

² The record before the director closed on March 31, 2009 when the petitioner filed the Form I-140, Immigrant Petition for Alien Worker. The petitioner's 2008 tax return was not yet due at that time.

³ The AAO notes that even if the petitioner were able to document that it paid the beneficiary \$17,500 in each year since he began working for the petitioner in 2000, the petitioner would still have not established an ability to pay the proffered wage in any year during the relevant period of analysis.

expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang*, 719 F.Supp. at 537 (emphasis added).

Generally, for an LLC, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Return of Partnership Income.⁴ As previously noted, the record before the director closed on March 31, 2009 with the receipt by the director of the petition and supporting evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available.⁵ The petitioner's tax returns demonstrate its net income for 2001 through 2007, as shown in the table below.⁶

- The 2001 Form 1065 states a net income (loss) of -\$132,095.⁷

⁴ Where the Schedule K, line 1 of the petitioner's tax returns indicates that the LLC has other relevant income, the amount on that line represents the petitioner's net income. However, here, the figure on the Schedule K, line 1 is identical to the figure on page 1, line 22, of the Form 1065 in each year of the relevant period of analysis.

⁵ The record includes the petitioner's 2000 Form 1065. As the priority date in this matter is in April 2001, the petitioner is not required to show an ability to pay the wage in 2000. This office will consider the petitioner's information on the 2000 Form 1065 when analyzing its ability to pay generally, later in this analysis. The AAO will note here that the petitioner's net income and net current assets were both negative amounts in 2000.

⁶ This office notes that the director listed the petitioner's net income and net current assets correctly in the notice of decision for each year in the relevant period, contrary to suggestions made by counsel and by the petitioner.

⁷ On appeal, counsel argues that USCIS should permit the petitioner to establish its ability to pay only a portion of the proffered wage in 2001 because the priority date is April 30, 2001. However, the AAO will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than it would consider 24 months of income towards paying the annual

- The 2002 Form 1065 states a net income (loss) of -\$283,297
- The 2003 Form 1065 states a net income (loss) of -\$91,186.
- The 2004 Form 1065 states a net income (loss) of -\$63,695.
- The 2005 Form 1065 states a net income (loss) of -\$32,485.
- The 2006 Form 1065 states a net income of \$4,298.
- The 2007 Form 1065 states a net income of \$581.

Therefore, for the years 2001 through 2005, the petitioner did not have sufficient net income to pay the proffered wage. For the years 2006 and 2007, the petitioner did not have sufficient net income to pay the difference between the salary the beneficiary received and the proffered wage, or \$12,701.60.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities, contrary to assertions made by counsel and the petitioner. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ An LLC's year-end current assets are shown on the Form 1065, Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on the Schedule L, lines 15 through 17.⁹ If the total of an LLC's end-of-year net current assets and the wages paid to the beneficiary (if

proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

⁸According 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.

⁹In his appeal brief, counsel quoted an AAO decision in which this office analyzed the Form 1120, U.S. Corporation Income Tax Return, of a petitioning C corporation, and he suggested that the AAO should view lines 16 through 18 of the Schedule L as the petitioner's year-end current liabilities, as it did when analyzing the C corporation. This is incorrect. On the Form 1065, Schedule L, filed by the instant petitioner, an LLC, year-end current liabilities are at lines 15 through 17, as stated here and by the director in the notice of decision. This office notes that counsel also correctly stated that year-end current assets are shown at Schedule L, lines 1-6. However, he then proceeded to

any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 through 2007, as shown in the table below.

- The 2001 Form 1065 states net current assets (liabilities) of -\$107,964.
- The 2002 Form 1065 states net current assets (liabilities) of -\$9,786.
- The 2003 Form 1065 states net current assets of \$6,640.
- The 2004 Form 1065 states net current assets of \$10,598.
- The 2005 Form 1065 states net current assets (liabilities) of -\$12,502.
- The 2006 Form 1065 states net current assets (liabilities) of -\$16,182.
- The 2007 Form 1065 states net current assets (liabilities) of -\$27,065.

Therefore, during 2001 through 2005, the petitioner did not have sufficient net current assets to pay the proffered wage. Also, in 2006 and 2007, the petitioner did not have sufficient net current assets to pay the difference between the wages it actually paid the beneficiary and the proffered wage, or \$12,701.60.

Therefore, the petitioner has not established that it had the ability to pay the beneficiary the proffered wage in any year in the relevant period of analysis through an examination of wages paid to the beneficiary, or its net income or net current assets.

Any suggestion that USCIS should consider the assets of this LLC's members when analyzing the petitioner's ability to pay the wage, based on the claim that the members have in the past provided a line of credit to cover the LLC's expenses, is misplaced. USCIS may not "pierce the corporate veil" and look to the assets of the LLC's members to satisfy the LLC's ability to pay the proffered wage. It is an elementary rule that a limited liability company or corporation is a separate and distinct legal entity from its partners, owners, members, and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its partners, owners, members, or shareholders cannot be considered in determining the petitioning LLC's ability to pay the proffered wage.

Any assertion that the director erred by not issuing a request for evidence prior to denying the petition is also incorrect. The current version of the regulation at 8 C.F.R. § 103.2(b)(8)(ii) took effect on June 18, 2007, prior to the filing of the instant petition. This regulation states that, if the evidence submitted with the petition does not demonstrate eligibility, USCIS may in its discretion deny the petition. This office would also underscore that the director stated with specificity what was deficient in the petitioner's evidence in the notice of decision, and the petitioner had the opportunity to correct those deficiencies on appeal, but failed to do so. Thus, the record indicates that issuing a request for evidence would have had no impact on the outcome of the director's decision or the instant decision.

incorrectly include assets shown on Schedule L, lines 1-22, when listing the petitioner's current assets. As explained above, *current* assets are listed at lines 1-6 of the Form 1065, Schedule L.

USCIS may also 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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* 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.

In this case, according to the record, the petitioner was established in 1980 and it has 3 employees. The petitioner has not shown consistent historical growth since incorporating. Its gross sales or receipts have not steadily increased; rather, the record indicates that they have fluctuated as follows: \$285,113 in 2000; \$383,031 in 2001; \$249,500 in 2002; \$105,296 in 2003; \$320,224 in 2004; \$301,794 in 2005; \$214,416 in 2006 and \$154,546 in 2007. Further, the petitioner has not documented for the record: the occurrence of any uncharacteristic business expenditures or losses; the petitioner's reputation within its industry; or whether the beneficiary will be replacing a former employee or an outsourced service. 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.

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

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.