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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
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Services

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FILE: WAC 06 055 52437 Office: TEXAS SERVICE CENTER Date: JAN 07 2010

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant 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 claims to be a property management business. On December 8, 2005, the petitioner filed a petition seeking to permanently employ the beneficiary as an accountant. The petitioner requests classification of the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). As required by statute, the petition is accompanied by an ETA Form 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).¹

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 granting 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 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 750 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 ETA Form 750 as certified by the

¹ The records of the California Secretary State office state the petitioner is structured as a foreign limited liability company (LLC) registered to do business in the State of California. See [http://kepler.ss.ca.gov/corpdata/ShowLpLlcAllList?QueryLpLlcNumber=\[REDACTED\]](http://kepler.ss.ca.gov/corpdata/ShowLpLlcAllList?QueryLpLlcNumber=[REDACTED]) as accessed November 19, 2009. Also, the petitioner provided its States of Delaware and California registration statements to the same effect. Counsel has asserted on appeal that the petitioner is a limited liability partnership. Counsel's assertion is contrary to the evidence submitted. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

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 750 was accepted on September 27, 2002. The proffered wage as stated on the ETA Form 750 is \$26.96 per hour (\$56,076.80 per year). The ETA Form 750 states that the position requires a four-year Bachelor's degree in "Accounting, Bus. Admin or Equiv" and two years of experience in the job offered or two years of experience in the related occupation of budget analyst.

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.

Relevant evidence in the record of proceeding is an U.S. Internal Revenue Service (IRS) Form 8825² U.S. tax return of [REDACTED] for 2003; an IRS Form 1065,³ U.S. tax return of [REDACTED] for 2003; an IRS Form 1065, U.S. tax return, of [REDACTED] LLC, for 2003; an IRS Form 1065, U.S. tax return, of [REDACTED] for 2003; the U.S. tax returns for five [REDACTED] properties identified by counsel as the [REDACTED] and Gold [REDACTED]; the petitioner's Employers Quarterly Federal Tax Forms (Form-941) statements for 2002, 2003, 2004 and 2005; the petitioner's quarterly and annual Statement of Deposits and Filings for tax year 2002, and for the 2nd, 3rd, and the 4th quarters of 2003; quarterly and annual Statement of Deposits and Filings for tax year 2004, and for the 1st and 2nd quarters of 2005; the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for 2002, 2003, 2004 and 2005, that were accepted by the State of California; the petitioner's Wage and Tax Statements (W-2) and IRS Form (W-3) "Transmittal of Wage and Tax Statements" for 2002, 2003, 2004, and 2005; the W-2 statements issued by the petitioner to the beneficiary for 2002, 2003, 2004, and 2005; documents detailing the petitioner's business location in Marina del Rey, California; the petitioner's telephone bills in April, May, and June of 2006; advertisements concerning the petitioner's services; and a site plan of the Marina Del Rey area.

The petitioner failed to submit its own tax returns, or other pertinent evidence according to the regulation at 8 C.F.R. § 204.5(g)(2) such as annual reports or audited financial statements, to demonstrate the petitioner's ability to pay the proffered wage. According to a cover letter from prior counsel dated December 7, 2005, that accompanied the petition and the above documentation, "[The petitioner] is an in-house management company. The company itself does not file tax returns, but the properties that [the petitioner manages] do." Further, the petitioner stated in a letter dated

² IRS Form 8825, Rental Real Estate Income and Expenses of a Partnership or an S Corporation.

³ IRS Form 1065, U.S. Return of Partnership Income.

December 6, 2005, that it has “no assets” and it would “demonstrate an insignificant tax return since it is mostly management fees paid to the owners of the company.”

On May 3, 2006, the director issued a request for evidence (RFE) instructing the petitioner to submit, *inter alia*, additional evidence of its ability to pay the proffered wage to the petitioner in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). The director requested the petitioner’s federal tax returns for 2002, 2003, 2004 and 2005, and its annual reports and/or audited financial statements. The director queried the petitioner that if taxes were not paid in the “corporation’s name” or under its federal Employer Identification Number (EIN),⁴ “please explain why and [provide the] legal regulation that state that this can be done.” The director also requested the petitioner to include in its response “a certified document from the Internal Revenue Service (IRS) that states you as a company are not required to pay such taxes.”

Counsel submitted in response to the RFE, *inter alia*, the beneficiary’s W-2 statements for 2002, 2003, 2004 and 2005, unaudited financial statements for the petitioner for 2005, and tax returns for different and purportedly related business entities.⁵ Counsel did not submit its tax returns, annual reports and/or audited financial statements, or a certified document from the IRS declaring that the petitioner was not required to pay taxes. Counsel did not submit case precedent, applicable regulation, or any independent, objective reason why the petitioner did not pay taxes in its name or under its EIN from the priority date and onwards. Finally, counsel once again stated in a letter dated July 17, 2006, that the petitioner “does not file tax returns.”

The director denied the petition on August 7, 2006. The decision stated, *inter alia*, that:

* * *

The petitioner was asked to explain and show legal regulation of why its corporation [sic LLC] did not need to submit taxes. The petitioner was also asked to submit a certified document from the Internal Revenue Service that states that the petitioner as the company was not required to pay taxes. These documents were not submitted.

* * *

⁴ The federal Employer Identification Number (EIN) stated on the I-140 petition for the petitioner I.T.C. is # [REDACTED]. The EIN is a nine-digit number assigned by the IRS. Each business entity must have a unique EIN. See [http://www.irs.gov/businesses/small/article/0,,id=\[REDACTED\]](http://www.irs.gov/businesses/small/article/0,,id=[REDACTED]) accessed November 19, 2009.

⁵ The regulation at 8 C.F.R. § 204.5(g)(2) 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.

The petitioner has submitted evidence of the ability to pay the proffered wage in form of copies of federal tax returns of the companies that are managed by the petitioner. No income tax returns for the petitioner were submitted.

Therefore, the director denied the petition and determined that the petitioner submitted none of its own income tax returns, annual reports, or audited financial statements, and provided insufficient evidence to establish its ability to pay the proffered wage from the priority date and onwards.

Counsel filed an appeal on September 6, 2006. On Part 3 of Form I-290B, Notice of Appeal or Motion, counsel states "The petitioner submits that the Service erred is [in] dismissing the evidence offered in support of [the] petitioner's ability to pay."

On appeal, the petitioner submitted for the first time its Form 1065 tax return for 2002, dated October 13, 2003; its Form 1065 tax return for 2003, dated September 26, 2004; and its Form 1065 tax return for 2004, dated October 6, 2005, which are far from "insignificant." Counsel offers no explanation for the petitioner's failure to submit this evidence in response to the RFE.

Further, counsel fails to explain the inconsistencies in the record pertaining to claims that the petitioner does not file tax returns and, if it did, that they would be insignificant. Finally, counsel on appeal claims that the petition is a LLP, not an LLC, which is inconsistent with everything else in the record.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Furthermore, as noted above, both counsel and the petitioner repeatedly denied the existence of these tax returns.

As already stated, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record indicates the petitioner is structured as a foreign limited liability company registered to do business in the State of California, and filed its tax returns on IRS Form 1065.⁶ In the petition,

⁶ 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

the petitioner claimed to have been established in 1998 and to currently employ 14 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 750, signed by the beneficiary on July 10, 2002, the beneficiary did claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 submitted the following evidence of wage payments made by the petitioner to the beneficiary: the beneficiary's W-2 statements⁷ for 2002, 2003, 2004 and 2005 in the amounts of \$34,435.50, \$36,418.75, \$36,278.75, and \$43,744.75; and, an earnings statement from the petitioner to the beneficiary for the pay period November 16, 2005, to November 30, 2005, stating "Gross Pay Year to Date" of \$39,514.75, and evidencing a pay rate of \$20.00 per hour.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$56,076.80 per year, the petitioner must establish that it can pay the beneficiary the difference between wages

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, a multi-member LLC, is considered to be a partnership for federal tax purposes.

⁷ The AAO utilized the beneficiary's higher gross wages rather than reported W-2 wages from the statements for each year.

actually paid and the proffered wage, which is for 2002 \$21,641.30; for 2003 is \$19,658.05; for 2004 is \$19,798.05; and for 2005 is \$12,332.05.

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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 specific cash 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 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* at 537 (emphasis added).

The record before the director closed on May 3, 2006, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The AAO notes that the record of proceeding contains no evidence reflecting the petitioner's financial status beginning on the priority date, such as annual reports, prepared federal income tax returns, or audited financial

statements. Failure to provide required evidence is clear grounds for denial of the petition. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Furthermore, as noted above, the petitioner attempted for the first time on appeal to submit its tax returns. However, as the director specifically requested this evidence, this evidence need not, and will not, be considered by the AAO. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). Finally, as the petitioner failed to resolve its submission of these purported returns on appeal given its multiple prior representations denying their existence, the purported returns lack credibility. *See Matter of Ho, supra*. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764; *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Consequently, the appeal will be dismissed.

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. Consequently, the appeal will be dismissed.

Therefore, from the date the ETA Form 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary from 2002 and onwards.

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. 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.

In the instant case, the petitioner refused to submit its tax returns, annual reports or audited financial statements. Therefore, although the petitioner has submitted evidence when it was established, evidence concerning its business reputation, its number of employees, its payroll,⁸ and wages paid to the beneficiary, the record lacks credible, objective and regulatorily admissible evidence such as tax returns, annual reports and audited financial statements to determine its net income or net current assets. 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.

On appeal, counsel asserts that the income and assets of the members of the petitioner demonstrate the petitioner's ability to pay the proffered wage. Counsel's statement is misplaced. According to the record,⁹ the petitioner has two members, Golden Pacific, LLC and Jade Pacific, LLC. The income and assets of the petitioner's members are not evidence of the petitioner's ability to pay. 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).

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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. The petitioner has not met this burden.

ORDER: The appeal is dismissed.

⁸ Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present.

⁹ Letter from the petitioner dated December 6, 2005.