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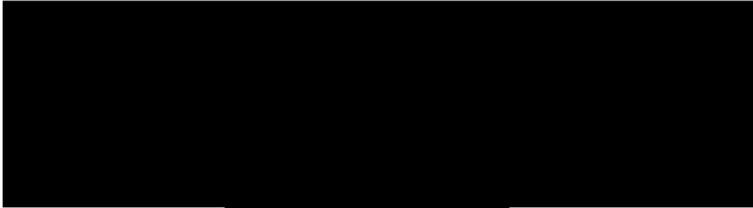
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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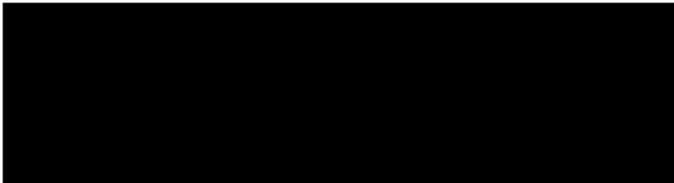
Date: **MAR 08 2010**

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential and commercial construction business. It seeks to employ the beneficiary permanently in the United States as a cement mason. 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).¹ The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record 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 October 26, 2007 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.

¹ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services ("USCIS") based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750 (in this case, the ETA 9089). Memo. from Louis D. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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 Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien 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 Form ETA 750 was accepted on June 24, 2002. The proffered wage as stated on the Form ETA 750 is \$19.80 per hour or \$41,184 per year. The Form ETA 750 states that the position requires two years of experience in the job offered of cement mason.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The evidence in the record of proceeding shows that the petitioner was structured as a sole proprietorship in 2001 through 2005 and as a LLC (limited liability company) in 2006 and 2007. On the petition, the petitioner claimed to have been established in 1988 and to currently employ two

² 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).

workers. On the Form ETA 750B, signed by the beneficiary on April 18, 2007, the beneficiary did not claim to have worked for the petitioner. However, the petitioner has submitted payroll records on behalf of the beneficiary establishing that it employed the beneficiary from September 22, 2007 through November 23, 2007. The beneficiary received wages totaling \$6,904.80 for that time period. Therefore, the petitioner is obligated to show that it had sufficient funds to pay the entire proffered wage of \$41,184 in 2002 through 2006 and the difference of \$34,279.20 between the proffered wage of \$41,184 and the actual wages paid to the beneficiary of \$6,904.80 in 2007.³

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). 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 2002 onwards.

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).

³ The AAO notes that the petitioner filed a Form I-140 on September 11, 2006 for an additional beneficiary. If the priority date for that beneficiary was also in the year 2002 or subsequent, the petitioner is obligated to show that it had sufficient funds to pay the proffered wage to the current beneficiary and the appropriate proffered wage to the additional sponsored beneficiary.

Proprietor's adjusted gross income for 2003 (Form 1040, line 34)	\$55,081
The petitioner did not submit its 2004 Form 1040.	
Proprietor's adjusted gross income for 2005 (Form 1040, line 37)	\$73,989

In 2002, the sole proprietor's adjusted gross income of \$39,878 fails to cover the proffered wage of \$41,184. It is improbable that the sole proprietor could support himself and his spouse on a deficit, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. While it appears that the petitioner had sufficient funds to pay the proffered wage in 2003 and 2005, the sole proprietor has not submitted any evidence of its recurring personal monthly expenses for those years.⁵ Therefore, the AAO is unable to determine if the petitioner had sufficient funds to pay the proffered wage of \$41,184 and support a family of two. In addition, USCIS records indicate that the petitioner has filed another Form I-140 for an additional beneficiary, and if the priority date for that petition was for the same priority date year or subsequent, then the petitioner would be obligated to show that it had sufficient funds to pay the proffered wage to the instant beneficiary, the proffered wage to the additional sponsored beneficiary, and support a family of two. The petitioner has not done so in 2002, 2003, or 2005 and has submitted no regulatory-prescribed evidence of ability to pay in 2004 at all.

In 2006 and 2007, the petitioner was structured as a single member limited liability company. 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 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, an LLC formed under Maryland law/Virginia law,⁶ is considered to be a sole proprietorship for federal tax purposes. Therefore, the petitioner's net income is reported on the member's IRS Form 1040, Schedule C at line 31.

In 2006, the Form 1040 Schedule C stated net income of \$4,497.
The petitioner did not submit its 2007 Form 1040 or Schedule C.

tax return except when evaluating the totality of the circumstances affecting the petitioning business if the evidence warrants such consideration.

⁵ The AAO notes that the director failed to request the sole proprietor's recurring personal monthly expenses when he issued his request for evidence (RFE) on July 2, 2007.

⁶ The petitioner was registered in the state of Maryland as a limited liability company on January 12, 2007. *See* [REDACTED] (accessed on January 4, 2010). The petitioner was registered in the state of Virginia as a limited liability company on March 26, 2007. *See* [REDACTED] (accessed on February 23, 2010). Copies of the petitioner's 2006 licenses show that the petitioner was also registered in the state of Maryland as a LLC and in the state of Delaware as [REDACTED]

Therefore, for the year 2006, the petitioner has not established that it had sufficient net income to pay the proffered wage. For the year 2007, the petitioner did not submit its Form 1040 or Schedule C and has not established that it had sufficient net income to pay the difference of \$34,279.20 between the wages actually paid to the beneficiary of \$6,904.80 and the proffered wage of \$41,184.

On appeal, counsel asserts that the petitioner has established its ability to pay the proffered based on the fact that the petitioner is currently paying the beneficiary a wage close to the proffered wage. The sole proprietor states that "I could use, if necessary some of the wages paid to my independent contractors for the beneficiary because as an employee he would replace one or more of them."

Both counsel and the petitioner are mistaken. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is June 24, 2002. Thus, the petitioner must show its ability to pay the proffered wage not only in 2007, when counsel claims it actually began paying close to the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2002 through 2006. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time. In the instant case, the petitioner has not done so.

The petitioner advised that the beneficiary will replace one or more of its independent contractors. The record does not, however, name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. In general, 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. Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)).

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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's I-140 indicates it was established in 1988. The petitioner has provided its tax returns for 2001 through 2003 and 2005 and 2006, with none of the tax returns clearly establishing the petitioner's ability to pay the proffered wage of \$41,184 and support a family of two. In addition, the petitioner has submitted no regulatory-prescribed evidence of ability to pay the proffered wage in 2004 at all. Furthermore, the petitioner has filed an additional immigrant petition that may have a similar or subsequent priority date. Therefore, the petitioner must establish that it had sufficient funds to pay all the wages from the priority date and continuing to the present. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 9089 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). In this case, the petitioner has not established that it had sufficient funds to pay the proffered wage to the beneficiary and the additional sponsored beneficiary that may have the same priority date in 2002 or a subsequent priority date. In addition, the tax returns are not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry⁷ or of any temporary and uncharacteristic disruption in its business activities. 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 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.

⁷ Although not part of this decision, the AAO notes that the petitioner has used several different names using the same address. While it appears that the petitioner and the entities using different names are one and the same, this issue must be clarified should the petitioner wish to pursue sponsoring this beneficiary. In addition, the AAO notes that the certified labor certification was issued for [REDACTED]. USCIS is unable to determine if the petitioner has filed a Form I-140 for this beneficiary. If the petitioner has filed a Form I-140 for [REDACTED] that petition would need to be withdrawn in order for the current beneficiary to use the certified labor certification. Again, this issue would need to be addressed if the petitioner wishes to pursue the current petition.

ORDER: The appeal is dismissed.