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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

Date: MAY 0 4 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

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 $630. 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a welding business. It seeks to employ the beneficiary permanently in the United States as a foreman, chief welder. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. 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 and denied the petition accordingly.

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 April 29, 2010 denial, the 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)(iii) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal 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 ETA Form 9089 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 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 9089 was accepted on November 19, 2008. The proffered wage as stated on the Form ETA 9089 is $18.25 per hour ($37,960.00 per year). The Form ETA 9089 states that the position requires one year experience in the job offered.

The AAO conducts appellate review 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]

As a threshold issue, the director described the petitioning entity as a sole proprietorship and, in the Request for Evidence (RFE), requested that the petitioner submit a statement of monthly family household expenses and evidence that the petitioner is in possession of sufficient assets to pay the proffered wage. However, it appears from the record of proceeding that the petitioning entity is a single member

The petitioner submitted copies of its IRS Forms 1040 for 2005, 2006, 2007, and 2008. On the Schedule C of each of the relevant tax returns, the petitioner is stated to be a limited liability company (LLC), which is included as part of its business name. It is identified with its own federal employer identification number (FEIN) on Part 1 of the preference petition and on Schedule C of the individual tax returns. An LLC is an entity formed under state law by filing articles of organization. Members of an LLC enjoy protection from individual liability similar to that afforded to corporate shareholders. While the owners of a corporation are referenced as shareholders or stockholders, the owners of an LLC are often referenced as "members." It is possible for an LLC to be formed by a single individual, in which case it may be referenced as a "single member LLC" as in the instant matter. An LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. An investor's liability is limited to his or her initial investment. As the owner is only liable to his or her initial investment, the total income and assets of the owner and his ability to pay the company's debts and obligations, cannot be utilized to pay the proffered wage out of its own funds.[2]

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, 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).

[2] If the LLC has only one owner, it will automatically be treated as a sole proprietorship for tax purposes, unless an election is made to be treated as a corporation. A single member LLC is treated as a sole proprietorship only as a mechanism for tax filing purposes and does not change the fact that the business is legally a limited liability company. If the only member of the LLC is an individual, the LLC income and expenses are reported on Form 1040, Schedule C. Members are like shareholders of a corporation and own an interest in the LLC but they are not the LLC. USCIS need not consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713 (D.Mass. Sept. 18, 2003). In the instant matter, USCIS considers net income to be the figure shown on Schedule C, Line 31 of the petitioner's Form 1040, U.S. Individual Income Tax Return.

Therefore, 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 the proffered wage 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.

The record indicates the petitioner is structured as a single member limited liability company and filed its tax returns on IRS Form 1040.[3] On the petition, the petitioner claimed to have been established on January 1, 2003 and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on November 19, 2008, the beneficiary did not 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 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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 Sonegawa*, 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 he employed and paid the beneficiary the full proffered wage from the priority date in 2008 onwards.

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[3] 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.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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. A showing by the petitioner that it paid wages in excess of the proffered wage is similarly insufficient.

In *K.C.P. Food*, 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 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 118. "[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 February 3, 2010, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return is the most recent return available. The proffered wage is $37,960.00. In this case, the petitioner's pertinent financial information is reflected as its net profit or loss on line 31 of Schedule C of the owner's individual tax returns. These figures are reflected as follows:

- In 2008, the IRS Form 1040, Schedule C stated the net income as ($3,454.00).

Therefore, for the year 2008, the petitioner did not establish that it had sufficient net income to pay the proffered wage.

Thus, from the date the Form ETA 9089 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 as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the director erred in denying the petition and that the petitioner has established his ability to pay the proffered wage. Counsel further asserts that the petitioner's net income amounts reported on Schedule C of his individual tax returns for 2005, 2006, 2007, and 2008 exceed the proffered wage amounts in those years. Contrary to counsel's claim, in 2007 the net income amount of $31,473.00 (a deficiency of $6,487.00), and in 2008 the net income amount of ($3,454.00) do not exceed the proffered wage amounts in this matter for those years.

Counsel asserts that the balances (cash on hand) in the petitioner's business checking account for 2008 and 2009 are sufficient to demonstrate his ability to pay the proffered wage. Counsel provides a copy of the petitioner's business checking account statements for 2008 and 2009 as evidence. Contrary to counsel's claim, the funds from the petitioner's business checking account are likely shown on Schedule C of the tax returns as gross receipts and expenses, which are calculated in the net income amounts.[4] Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonegawa*, 12 I&N Dec. 612. Furthermore, counsel's reliance on the balances in the petitioner's business bank account is misplaced. First, business account bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, no evidence was submitted to demonstrate that the funds reported on the petitioner's business checking account bank statements somehow reflect additional available funds that were not reflected on his tax returns as noted above. Therefore, the petitioner cannot establish

[4] It is noted that the petitioner did not submit its 2009 income tax return.

his ability to pay the proffered wage through the demonstration of his business checking account bank statements. Regardless, the balances in the various account statements do not establish a sustainable ability to pay the proffered wage of $37,960.00 annually. In considering the 2009 statements, the petitioner had a beginning balance of $19,445.32 in January and an ending balance of $9,938.81 in December. In another account, the petitioner began 2009 with a balance of $0.00 and ended the year with a balance of $238.61. Accordingly, these records are not persuasive in establishing the petitioner's ability to pay the proffered wage.

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 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 weighing the totality of the circumstances in this case, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has not established the existence of any facts paralleling those in *Sonegawa.* Counsel asserts on appeal that the petitioner has a sizeable bank account, that the business has been profitable and has great potential for future growth. Contrary to counsel's claim, the funds in the LLC's business bank account appear to be included on the Schedule C to the 2008 IRS Form 1040. Although counsel asserts that the petitioner suffered a loss in 2008 and 2009, he fails to specify the nature of the loss or how the losses would impact his ability to pay the proffered wage. Counsel's statement with reference to the petitioner's future growth potential is too speculative, and the petitioner cannot rely upon uncertain future cash flows to establish its current ability to pay the proffered wage. Against the projection of future earnings, *Matter of Great Wall,* 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

> I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Furthermore, although it precedes the priority date, the 2007 tax return also indicates an inability to pay the proffered wage. The record is devoid of evidence pertaining to the petitioner's business reputation. Accordingly, the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage since the priority date.

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.