

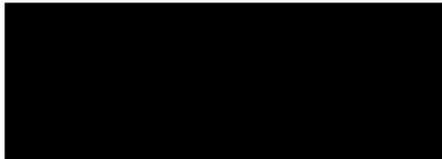
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

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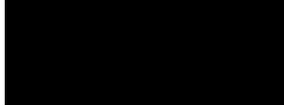


U.S. Citizenship
and Immigration
Services



B6

DATE: **MAY 18 2011** Office: NEBRASKA SERVICE CENTER

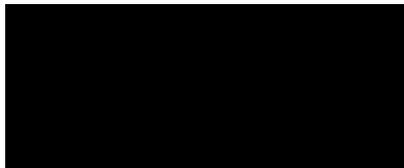
FILE: 

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:

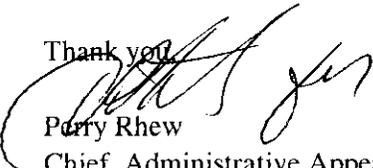


INSTRUCTIONS:

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 your 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 employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The director determined that the appeal was late and treated it as a Motion to Reopen. The director reopened the petition and affirmed his original decision. The petitioner filed a Motion to Reconsider the denied Motion to Reopen. The director again affirmed his original decision to deny the petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The petitioner filed a motion to reopen and reconsider. The AAO granted the motion and affirmed the previous decisions of the director and the AAO. The matter is now before the AAO on a second motion to reopen to the AAO. The motion will be granted and the previous decisions of the director and the AAO will be affirmed. The petition will remain denied.

The petitioner is an automotive salvage, repair, and sales operation. It sought to employ the beneficiary permanently in the United States as an auto repair service estimator ("Service Manager").¹ As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL) accompanied the petition.² The director determined that the petitioner had not established that it had the continuing financial ability to pay the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

¹The petitioner sought to classify the beneficiary as a skilled worker under Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), which 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 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) further 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

² The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. In this case, the ETA Form 750 was filed prior to the enactment of the PERM regulations.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).³

In this matter, the AAO dismissed the appeal on December 31, 2007, concurring with the director's decision that the petitioner had failed to establish that it had the continuing ability to pay the beneficiary's proffered wage. The proffered wage is \$700 per week based on a 40 hour work week, which amounts to \$36,400. The priority date as set forth on the labor certification is November 6, 2001.⁴

The petitioner, through former counsel filed a motion to reopen and reconsider. On February 25, 2010, the AAO determined that the petition should remain denied. The AAO noted that former counsel had submitted:

- 1) a copy of a real estate appraisal of the petitioning business dated January 30, 2008;
- 2) a copies of real estate appraisals dated January 18, 2008 and January 23, 2008, respectively of property located at [REDACTED] copies of the owner's 2005 and 2006 individual income tax returns (Form 1040), as well as copies of the 2005 and 2006 corporate tax returns of a separate business named [REDACTED];
- 4) a memorandum from [REDACTED], indicating that the petitioning business, [REDACTED] acquired [REDACTED] in March 2006, and 5)) copies of a July 2001 loan related to [REDACTED] copies of individual bank statements from US Bank specified as "home improvement" [REDACTED] for June 23, 2000, December 26, 2001, January 25, 2002, May 23, 2002, August 23, 2002, and January 27, 2003; and 5) copies of miscellaneous bills incurred by the sole proprietor. Because this motion is submitted with new evidence that is consistent with the regulation, it will be

³ The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

⁴ 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 overall 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). These issues were discussed in the AAO's previous decision on appeal.

considered as both a motion to reconsider and a motion to reopen in accordance with 8 C.F.R. § 103.5(a)(2) and (a)(3).

The AAO noted in its February 25, 2010 that the petitioner is structured as a limited liability company, which must establish its own ability to pay the proffered wage out of its corporate own funds. If the only member of an LLC is an individual, the LLC income and expenses are reported on Form 1040, Schedule C, E, or F. The AAO determined that the petitioner's net income was reflected on line 31 of Schedule C, Profit or Loss from Business of the owner's individual Form 1040. For the years 2001 through 2006 the AAO noted that these figures were:

Year	Net profit or (loss)
2001	\$14,907
2002	\$10,699
2003	\$ 7,971
2004	\$45,757
2005	\$ 9,449
2006	\$39,349

Further, the AAO found that the petitioning LLC's ability to pay the beneficiary's proffered wage of \$36,400 was affected by the fact that it had petitioned for another beneficiary, who, along with the current beneficiary, also happened to be the petitioning owner's other brother, "[REDACTED]" Where a petitioner has filed multiple employment-based petitions, it must show that it has had sufficient continuing ability to pay all the wages as of their respective priority dates, which in this case are the same dates. Therefore, the petitioner must establish that it has had the *continuing* ability to cover the total of both proffered wages or \$72,800. In contrast to this case, that visa petition was ultimately approved by the director on June 23, 2009. Both petitions were filed on June 29, 2005. Similar to this case, evidence of wages paid to [REDACTED] by this petitioner was not submitted in that petition.⁵

Following a review of the evidence and arguments offered, the AAO determined that counsel's motion failed to overcome the grounds for denial and concluded that the petition should remain denied based on the petitioner's failure to establish its continuing ability to pay the proffered wage from the priority date onward.

The petitioner, through current counsel, has filed a second motion to reopen the AAO's decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported

⁵ Additional correspondence submitted by counsel relating to that case indicates that [REDACTED] was not paid as an employee until January 7, 2006. However, although evidence of wages paid to the present beneficiary have been submitted to the record with this motion, no evidence of wages paid to the second sponsored beneficiary, [REDACTED] have been submitted except in his own case relating to his employment [REDACTED] for "[REDACTED]"

by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2).

Included with the motion, counsel submits new evidence related to the petitioner's ability to pay the proffered wage. With the motion, counsel submits: 1) copies of previously submitted tax returns of the petitioner; 2) a copy of the petitioner's owner's individual tax return of 2007 without the corresponding Schedule C, Profit or Loss from Business; a copy of the 2008 tax return showing the petitioner's net income on Schedule C of \$139,222; 3) copies of bank statements from U.S. Bank account number [REDACTED] from June 2006 to April 2006; copies of U.S. Bank statements from U.S. Bank account number [REDACTED] covering April 2007 to February 2009, but omitting July 2007 and November 2008; a copy of a bank statement of U.S. Bank account number [REDACTED] for February 2009; 4) copies of the beneficiary's individual income tax returns for 2005, 2006, 2007, 2008 and 2009; 5) copies of W-2s issued by the petitioner for 2006 for \$26,276.25; for 2007 for \$32,077.50; and for 2008 for \$38,902.50; 5) copies of various documents relating to a business [REDACTED] identified as "[REDACTED]" Included with the documents is a letter signed by this petitioner's owner [REDACTED] stating that the business was purchased on March 30, 2009, and praising an individual with the same middle name and surname as the beneficiary for his work as an assistant and as a manager. It is unclear if this letter refers to the beneficiary in this case, however this would raise a question as to whether the job offer remains [REDACTED] where the petitioning business is located or whether it is [REDACTED] where this individual has actually been employed. Also submitted is a calendar of 2001.

It is further noted that elsewhere in the record, a copy of the petitioner's income tax return for 2009 has been submitted. It reflects net income of \$97,736.

Counsel asserts on motion that the petitioner is also the owner of [REDACTED] and that business' income can cover any deficit relevant to the petitioner's ability to pay in this case. As noted in the AAO's previous decision, similar to a corporation, a limited liability company is a separate and distinct legal entity from its member(s), therefore the individual assets of its members or of other enterprises or corporations cannot be considered in determining the petitioning LLC's ability to pay the proffered wage. *See i.e., Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Similar to the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), which considered whether the personal assets of a director of a closely held family corporate business should be included in the examination of the petitioner's ability to pay the proffered wage, in this case, the AAO will not consider the assets or income of a separate corporation, [REDACTED], or [REDACTED] because "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *Id.* Moreover, as noted in the record, [REDACTED] was not purchased by the petitioner's owner until March 30, 2009. Even if considered as a financial resource, which it is not, it would not qualify as such prior to its acquisition, and, therefore was not available from the priority date.

Counsel reiterates that the obligation to pay the proffered wage begins at the priority date of November 6, 2001. The AAO does not dispute this, however as stated in its previous decision, it will only 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). In this case, while the petitioner has submitted some W-2s covering the annual wages of the later years of the beneficiary's employment, the petitioner has not submitted evidence of wages paid that specifically cover the portion of the year occurring after the priority date in 2001.

As noted in the previous decisions, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 CFR § 204.5(d). The ETA 750 reflects that the priority date in this case is November 6, 2001. The beneficiary's proffered wage is \$36,400.

Counsel's reliance on the petitioner's bank statements does not overcome the evidence reflected on the petitioner's tax returns. 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 provides an inaccurate financial portrait of the petitioner. Bank statements generally show only a portion of a petitioner's financial status and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage as set forth on an *audited* financial statement or Schedule L of a corporate tax return or in this case, as would be reflected within Part I and Part II showing the limited liability company's Income and Expenses. Here, it is noted that no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not be reflected within the figures shown therein such as in its gross receipts and expenses, and reflected in net profit.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the alien less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this case, the record does not contain any evidence of wages paid to the beneficiary from 2001 through 2005. It is noted that current counsel submitted a copy of the beneficiary's individual tax return for 2005, but it was unaccompanied by any W-2 or Form

1099. Therefore, the petitioner did not establish that wages were paid to the beneficiary in 2005.⁶ As noted above, the following evidence of wages paid to the beneficiary by the petitioner consists of the following:

	Wages	Difference from Proffered Wage of \$36,400
2001 – 2005	none paid	\$36,400 Less
2006	\$26,276.25	\$10,123.75 Less
2007	\$32,077.50	\$ 4,322.50 Less
2008	\$38,902.50	\$ 2,502.50 More
2009	\$33,722.50	\$ 877.50 Less

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 gross sales and profits and wage expense is misplaced. Showing that the petitioner’s gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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. 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).

It is noted that with both beneficiaries, the petitioner’s ability to pay both proffered wages amounted to a total obligation of \$72,800 per year. It is noted that considering the other beneficiary sponsored

⁶ As noted within the record, according to the petitioner’s owner’s affidavit, dated October 19, 2005, the beneficiary was neither an employee nor a paid consultant. The owner does not refer to a period of time but merely states that the beneficiary came to the United States in 2000 and the owner provided him with a small stipend and room and board in exchange for assistance in his business.

and the lack of any evidence of payment of his wages in this record by the petitioner, as noted in the AAO's prior decision, the petitioner has not demonstrated the continuing ability to pay the instant beneficiary as of the priority date onward pursuant to the requirements of 8 C.F.R. 204.5(g)(2).

In 2001, the petitioner's net income of \$14,907 could not cover either beneficiary's proffered wage of \$36,400. The petitioner has not established the ability to pay the proffered wage in this year.

In 2002, the petitioner's net income of \$10,699 could not cover either beneficiary's proffered wage of \$36,400. The ability to pay has not been demonstrated.

The ability to pay the proffered wage of \$36,400 has not been established in 2003 because the net income reported was \$7,971 and was not enough to establish the ability to pay a proffered wage of \$36,400 for either beneficiary.

In 2004, although the petitioner's net income of \$45,757 was enough to pay one proposed wage offer, being attributed to the other beneficiary's proffered wage of \$36,400, the remaining \$9,357 would not be sufficient to cover the instant beneficiary's proposed wage offer of \$36,400 or demonstrate the ability to pay.

In 2005, the petitioner's reported net income of \$9,449 was insufficient to cover a proposed wage offer of \$36,400 of either beneficiary or demonstrate the ability to pay in this matter.

In 2006, the petitioner reported net income of \$39,349. Attributing the first \$36,400 to the other beneficiary, whose evidence of payment of wages by the petitioner are not contained herein, the remaining \$2,949 would not be enough to cover the \$10,123.75 shortfall between the beneficiary's actual wages paid and the proffered salary of \$36,400. The petitioner has not established the ability to pay in this year.

In 2007, as noted above, the petitioner submitted an individual income tax return but failed to submit a complete tax return, omitting Schedule C as well as other attachments and schedules. Although its net income is reported on page 1, it must be correlated to one or more Schedule Cs. As each business reports its income and expenses on one Schedule C, in order to attribute the figure given on page 1 to the petitioning business, there must be a Schedule C that supports the figure given for business income on page 1. Therefore, without a tax return or audited financial statement showing the petitioner's income for that year, the petitioner has not demonstrated that it could cover the other beneficiary's proffered wage of \$36,400 and additionally the \$4,322.50 difference between the beneficiary's actual wages and the proffered wage of \$36,400. The ability to pay has not been established in this year.

In 2008 and 2009, the petitioner established its ability to pay the proffered wage to this beneficiary because: 1) the W-2 reflects that it paid the beneficiary an amount exceeding the proffered wage of \$36,400 in 2008, and also because its declared 2008 net income was \$139,222, an amount sufficient to cover both this beneficiary's and the other beneficiary's cumulative wages of \$72,800; and 2) in

2009 its net income of \$97,736 was sufficient to cover the \$877.50 difference between the beneficiary's actual wages and the proffered wage, as well as cover the other beneficiary's full proffered wage of \$36,400. However, this represented two years. As noted above, in the other seven years, the petitioner has failed to demonstrate its *continuing* ability to pay as required by 8 C.F.R. § 204.5(g)(2).

As indicated above, the petitioner is a limited liability company. Its owner is the beneficiary's brother. As noted in the AAO's previous decision, a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Sunmart 374*, 2000-INA-93 (BALCA May 15, 2000). When or if future proceedings may be initiated by the petitioner involving this beneficiary, further investigation may be merited including consultation with DOL. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986).

The AAO finds that the petitioner has not met its burden in establishing that it had *continuing* financial ability to pay the proffered wage \$36,400 as of 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.

ORDER: The second motion to reopen is granted. The prior decisions of the AAO, dated December 31, 2007 and February 25, 2010, are affirmed. The petition remains denied.