

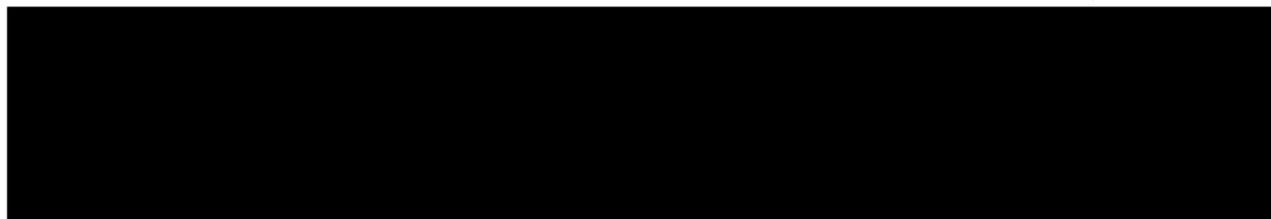
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



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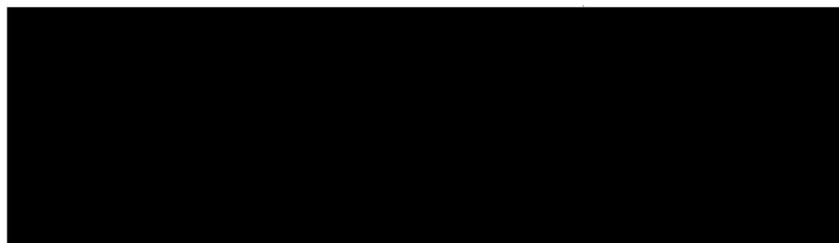
DATE: NOV 22 2011 OFFICE: TEXAS SERVICE CENTER FILE: 

IN RE: Petitioner:  
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 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 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 employment-based immigrant visa petition was denied by the Director, Texas Service Center (director), and appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision. The director dismissed the motion. The matter is currently before the AAO on appeal. The appeal will be dismissed.

The petitioner is a single-member limited liability company (LLC).<sup>1</sup> The petitioner describes itself as a [REDACTED]. It seeks to employ the beneficiary permanently in the United States as a Certified Professional Collector. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

The instant petition was filed on August 29, 2007. On September 18, 2008, the director denied the petition because the petitioner had not established the ability to pay the proffered wage. The director's decision incorrectly characterized the petitioner as a sole proprietorship.

The petitioner appealed the director's decision to the AAO on October 21, 2008. The appeal contained additional evidence of the financial resources available to the owner of the petitioner. On August 25, 2010, the AAO dismissed the appeal. The AAO decision affirmed the director's decision and also incorrectly characterized the petitioner as a sole proprietorship.

The petitioner filed a timely motion to reopen and reconsider the AAO decision on September 24, 2010. The motion contained a copy of a Form W-2, Wage and Tax Statement, issued to the beneficiary in 2009. The director treated the motion as a motion to reconsider, and, on November 5, 2010, dismissed the motion. However, since the AAO was the last office to issue a decision in this case, the director did not have jurisdiction to adjudicate the motion. 8 C.F.R. § 103.5(a)(1)(ii).

On December 2, 2010, the petitioner appealed the director's decision on the motion to the AAO. This appeal is currently before the AAO. The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact.

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

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<sup>1</sup> An 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, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

properly submitted upon appeal.<sup>2</sup>

As is noted above, the director incorrectly adjudicated the petitioner's motion to reopen and reconsider the AAO's August 25, 2010 decision. The motion should have been forwarded to the AAO for adjudication. Therefore, the director's November 5, 2010 dismissal of the motion is withdrawn. The instant decision will consider all of the evidence in the record and the arguments made by counsel at the various stages of the proceeding.

The petitioner requests classification of the beneficiary as an unskilled worker pursuant to section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii). This section of the Act 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 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, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on November 9, 2004. The proffered wage as stated on the ETA Form 9089 is \$10.40 per hour (\$21,632 per year). The ETA Form 9089 states that the position requires no training and no experience. On the petition, the petitioner claimed to have been established in 2003 and to currently employ three workers. On the ETA Form 9089, signed by the beneficiary on April 12, 2006, the beneficiary claimed to have worked for the petitioner since September 2, 2004.

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 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'l Comm'r 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'l Comm'r 1967).

The record before the director closed on August 15, 2008 with the receipt 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 was not yet due. Therefore, the petitioner's income tax return for 2007 is the most recent return available. Accordingly, this decision will examine whether the petitioner has established its ability to pay the proffered wage from the November 9, 2004 priority date through the end of 2007.

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.

As is noted above, the ETA Form 9089 states that the beneficiary has worked for the petitioner since September 2, 2004. As evidence of this claimed employment, the petitioner provides a list of checks purportedly issued to the beneficiary from February 1, 2005 through July 19, 2008 in amounts ranging from \$50.00 to \$2,600.00. The record also contains eight canceled checks issued by the petitioner to the beneficiary from 2005 to 2008. These checks are completed by hand, and it is not clear that the checks were issued for the payment of wages to the beneficiary. In addition, while the petitioner claims to have employed the beneficiary since 2004, the record only contains a copy of one IRS Form W-2, Wage and Tax Statement (for 2009). There are no Forms 1099-MISC in the record. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).<sup>3</sup>

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<sup>3</sup> Even if the cancelled checks were accepted as evidence of wages paid to the beneficiary, they would have only totaled \$250.00 in 2005, \$2,750.00 in 2007 and \$2,558.77 in 2008. The only evidence sufficient to establish that the beneficiary was paid a wage by the petitioner is the 2009 Form W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner and reflecting a wage paid of \$20,020.00.

Since the proffered wage is \$21,632 per year, the petitioner must establish that it can pay the full proffered wage in 2004, 2005, 2006 and 2007.

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).

With respect to depreciation, the court in [REDACTED] 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.

██████████ 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 petitioner’s tax returns reflect the following net income:<sup>4</sup>

2004	\$-11,833
2005	\$-2,540
2006	\$-18,679
2007	\$11,377

Therefore, through an examination of its net income, the petitioner has not established the ability to pay the proffered wage to the beneficiary from the 2004 priority date.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.<sup>5</sup>

As evidence of its net income and net current assets, the petitioner submitted a printout of a web-based “Financial Statement.” 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 financial statements. Unaudited financial statements are the representations of the petitioner, are not reliable evidence, and are insufficient to demonstrate the ability to pay the proffered wage.

Since the petitioner did not submit audited financial statements or annual reports according to the regulation at 8 C.F.R. § 204.5(g)(2), and current assets and current liabilities are not stated on the petitioner’s tax returns, the petitioner’s net current assets cannot be ascertained for any year. Therefore, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage from the 2004 priority date.

Thus, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets from the priority date.

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<sup>4</sup> The petitioner’s net income is reported on its member’s IRS Form 1040, Schedule C at line 31.

<sup>5</sup> According to *Barron’s Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), “current assets” consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. “Current liabilities” are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Counsel asserted on the first appeal that the director erred in not including non-taxable Social Security benefits as part of the petitioner's net income. However, because an LLC is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "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." Although the petitioner is treated as if it were a sole proprietorship by the IRS *for federal taxation purposes*, the petitioner is an LLC and is therefore a separate and distinct legal entity from its owner. Both the director and the AAO previously erred in treating the petitioner as a sole proprietorship when assessing its ability to pay the proffered wage. A LLC's owner's personal income and assets are not considered when determining the petitioner's ability to pay the proffered wage. Consequently, the AAO will not consider the petitioner's owner's real estate, stocks, bank accounts or other assets in determining the petitioner's ability to pay.

Nonetheless, 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 (Reg'l Comm'r 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 [REDACTED], 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 operations are marginal. It had \$4,168 gross sales in 2004, \$25,098 in 2005, \$40,944 in 2006 and \$75,010 in 2007. It does not have substantial payroll or officer compensation. The petitioner has not established its reputation within its industry, nor has it claimed the occurrence of any uncharacteristic business expenditures or losses during the years in question from which it has since recovered. The petitioner's financial information in the record is not sufficient to conclude that the magnitude of its operations establishes its ability to pay the proffered

wage despite its shortfall in net income and 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.

Finally, although not the basis of this decision, it is unclear how the offered position of “Certified Professional Collector” does not require any type of certification. The failure to include such a requirement on the labor certification raises the issue of whether the actual minimum requirements of the offered position were correctly represented to the DOL during the labor certification process. *See* 20 C.F.R. § 656.30(d).

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.