

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

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

B6



Date: Office: NEBRASKA SERVICE CENTER

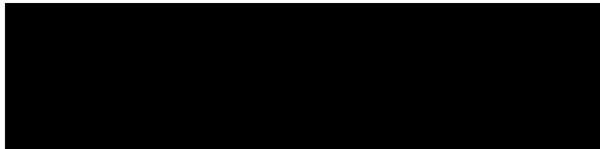
FILE:

**FEB 13 2012**

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 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 construction company. It seeks to employ the beneficiary permanently in the United States as a landscape worker. The petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, filed by [REDACTED] and approved by the United States Department of Labor (DOL) on November 30, 2006. 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 also found that the record contained inconsistencies regarding the beneficiary's actual employer and the petitioner's federal employer identification number (EIN). The director 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 December 2, 2008 denial, the issues in this case are (1) 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, (2) whether or not the petitioner has resolved the inconsistencies in the record regarding the beneficiary's actual employer, and (3) whether or not the petitioner has resolved the inconsistencies in the record regarding its EIN.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality 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 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 October 16, 2006. The proffered wage as stated on the ETA Form 9089 is \$10.35 per hour (\$21,528.00 per year).

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.<sup>1</sup>

On the ETA Form 9089 labor certification, accepted for processing by the DOL on October 16, 2006, the applicant indicated its name and address as [REDACTED] Danbury, Connecticut, with [REDACTED]. On the Form I-140, filed with United States Citizenship and Immigration Services (USCIS) on May 4, 2007, the petitioner indicated its name and address as [REDACTED] Danbury, Connecticut, with [REDACTED]. In support of the petition, the petitioner submitted IRS Forms 1040, U.S. Individual Tax Returns, for 2004, 2006 and 2007, including Schedule C's, Profit or Loss From Business, indicating a name and address for the limited liability company taxpayer as [REDACTED] Danbury, Connecticut, with [REDACTED].

The online corporate database in the State of Connecticut indicates that the petitioner on the Form I- [REDACTED] is not a registered business in Connecticut. *See* <http://www.concord-sots.ct.gov/CONCORD/online?sn=PublicInquiry&eid=9740> (accessed January 23, 2012).<sup>3</sup>

On appeal, counsel asserts that [REDACTED] is the assumed name for [REDACTED]. She states:

According to 26 C.F.R. 31.3505 the Petitioner [REDACTED] is not required to obtain a separate FEIN number and can use the EIN number of the single member. The Petitioner at all time has been [REDACTED] dba [REDACTED]. Whether the Petitioner used the separate FEIN number of the LLC, or his own personal EIN number, is permitted under 26 C.F.R.

<sup>1</sup> 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).

<sup>2</sup> The record contains no financial documentation for any business with [REDACTED].

<sup>3</sup> We also note that according to the State of Connecticut's online corporate database, [REDACTED] was registered in Connecticut on August 7, 1995 and is currently active. *Id.* It changed its name from [REDACTED] on April 15, 2003. Another company, [REDACTED] was registered in Connecticut on March 11, 1991 and has been forfeited. *See id.*

On appeal, counsel submits a notice from the IRS addressed to [REDACTED] indicating that it had failed to file IRS Forms 941 for the third and fourth quarters of 2003. The notice lists the [REDACTED] of [REDACTED] as [REDACTED] but does not indicate that [REDACTED] is the assumed name for [REDACTED]. A Form SS-4, Application for Employer Identification Number, submitted on appeal shows that [REDACTED] does not have a trade name. Additional evidence submitted on appeal establishes that [REDACTED] changed its name from [REDACTED] on April 15, 2003 and that [REDACTED] was organized in Connecticut on August 7, 1995. The petitioner has submitted no evidence to establish that [REDACTED] is the assumed name for [REDACTED]. 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)).

Regarding counsel's argument concerning the petitioner's EIN, we note that employment tax requirements for a single member limited liability company (LLC) that is a disregarded entity have changed over the past few years. For employment taxes, before January 1, 2009, a single member owner could file using either the name and EIN assigned to the LLC, or the name and EIN of the single member owner. Even if the pre-January 1, 2009 employment tax obligations were reported using the disregarded LLC's name and employer identification number, the single member owner retained ultimate responsibility for collecting, reporting and paying over employment taxes for those periods. As of January 1, 2009, the LLC is responsible for collecting, reporting and paying over employment tax obligations using the name and EIN assigned to the LLC. See <http://www.irs.gov/businesses/small/article/0,,id=158625,00.html> (accessed January 23, 2012). However, the petitioner did not submit its employment tax returns. Instead, it submitted the income tax returns of [REDACTED] the sole member of [REDACTED]. The record does not reflect that the EIN listed on the petition and the labor certification application, [REDACTED] ever belonged to [REDACTED] in his individual capacity. Thus, the petitioner has not resolved the inconsistencies in the record regarding its EIN.

The petitioner has not established that it is the same employer listed on the ETA Form 9089.<sup>4</sup> Thus, the labor certification application provided in support of the instant Form I-140 is not valid for the proffered position, as the petitioner has not established that it is the same employer listed on the ETA Form 9089. For this reason, the petition shall be denied.

Even assuming the petitioner had established that it is the same employer listed on the ETA Form 9089, the petitioner has not established its continuing ability to pay the proffered wage.

The evidence in the record of proceeding shows that [REDACTED] is structured as a single-member limited liability company.<sup>5</sup> On the petition, [REDACTED] claimed to have been

<sup>4</sup> The petitioner has not asserted that it is a successor-in-interest to the employer listed on the labor certification application.

<sup>5</sup> A limited liability company is an entity formed under state law by filing articles of organization. A limited liability company may be classified for federal income tax purposes as if it were a sole

established in 1987, to have a gross annual income of \$3,738,572.80, to have a net annual income of \$704,555.25 and to currently employ 12 workers. According to the tax returns in the record, [REDACTED] fiscal year is based on a calendar year. On the ETA Form 9089, the beneficiary claimed to have worked for [REDACTED] as a landscape worker from February 1, 1999 to October 10, 2006.

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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).

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. The petitioner submitted two IRS Forms W-2 for 2006 showing compensation received by the beneficiary from [REDACTED]. In sum, the petitioner claims to have paid the beneficiary \$15,940.50 in 2006. The petitioner submitted one IRS Form W-2 for 2007 showing compensation received by the beneficiary from [REDACTED] of \$13,313.10. Therefore, for the years 2006 and 2007, [REDACTED] has not established that it employed and paid the beneficiary the full proffered wage, but it paid partial wages in 2006 and 2007. Since the proffered wage is \$21,528.00 per year, [REDACTED] must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$5,587.50 and \$8,214.90 in 2006 and 2007, respectively.

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

---

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, [REDACTED], a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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 *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 petitioner submitted "draft" tax returns for [REDACTED]. The tax returns had not been filed with the Internal Revenue Service (IRS) at the time they were submitted with the Form I-140 petition. The petitioner did not submit copies of the returns that were actually filed with the IRS on appeal. Instead, the petitioner submitted a statement from [REDACTED] stating that the draft returns are "the actual returns which were submitted to the IRS." 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)). Thus, the AAO will not accept the "draft" versions of the tax returns of [REDACTED] that were submitted to the record of proceeding. As the petitioner did not submit evidence required by 8 C.F.R. § 204.5(g)(2), the petitioner has not established that [REDACTED] had sufficient net income or net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2006 and 2007.

Therefore, even assuming the petitioner had established that it is the same employer listed on the ETA Form 9089, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel asserts that the director should have considered the net profits of three limited liabilities owned by [REDACTED] and his wife in the determination of the petitioner's ability to pay the proffered wage. However, because a limited liability company is a separate and distinct legal entity from its owners and members, the assets of its members or of other enterprises or entities cannot be considered in determining the petitioning limited liability company'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."

Further, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will 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), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

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 Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, even assuming the petitioner had established that it is the same employer listed on the ETA Form 9089, the petitioner has not established its historical growth or its reputation in its industry, and has not established the occurrence of any uncharacteristic business expenditures or losses. Further, the beneficiary will not be replacing a former employee or an outsourced service. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The director also found that the record contained inconsistencies regarding the beneficiary's actual employer. In this case, the petitioner has failed to establish that it would actually employ the beneficiary. On appeal, [REDACTED] states that [REDACTED] of which I am the sole member owner is offering the position to [the beneficiary]." The petitioner has submitted no evidence to establish that [REDACTED] is the assumed name for [REDACTED] and, therefore, it has not established that [REDACTED] will be the actual employer of the beneficiary. Further, the record contains a letter dated February 20, 2007 from [REDACTED] stating that the petitioner is an excavation company and that [REDACTED] a company also owned by [REDACTED] performs landscaping duties. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not resolved the inconsistencies in the record regarding who will be the beneficiary's actual employer.

In sum, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, it has not resolved the inconsistencies in the record regarding who will be the beneficiary's actual employer,

and it has not resolved the inconsistencies in the record regarding its EIN. 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.