

(b)(6)

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

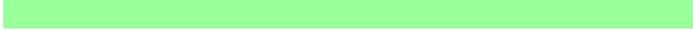


U.S. Citizenship  
and Immigration  
Services



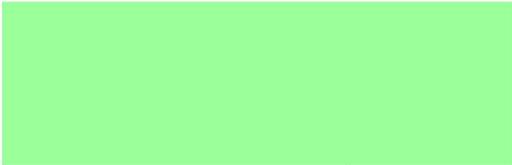
DATE: **OCT 10 2012** OFFICE: TEXAS SERVICE CENTER

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.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 The decision of the director will be withdrawn, and the matter will be remanded to the director for further consideration and a new decision.

The petitioner describes itself as a marble and granite fabrication company, and seeks to permanently employ the beneficiary in the United States as a tile and marble setter. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The priority date is October 1, 2008, the day the DOL accepted the ETA Form 9089 for processing. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the petitioner failed to establish its ability to pay the proffered wage.

The record shows that the appeal is properly filed 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.

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>2</sup>

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

---

<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

<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).

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 proffered wage is \$49,504 per year. In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>3</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The evidence in the record of proceeding shows that the petitioner is structured as a single member limited liability company (LLC). On the petition, the petitioner claimed to have been established in 2001 and to employ six workers. On the ETA Form 9089, signed by the beneficiary on May 8, 2009, the beneficiary claimed to have worked for the petitioner since May 1, 2005.

Line 31, Schedule C of the proprietor's 2008 tax return reflects a net profit of \$118,062. Therefore, the petitioner's net income is sufficient to pay the proffered wage of \$49,504.

The petitioner is treated as a sole proprietor by the Internal Revenue Service ("IRS") for federal income tax purposes. However, this does not make the single member LLC a sole proprietorship. Instead, the single member LLC is a separate corporate entity from its owner. Because a corporation 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."

Therefore, when determining a single member LLC's ability to pay the proffered wage, the owner's personal expenses, debts, liabilities and liquid assets are not considered. The single member LLC's net income is taken from Line 31, Schedule C of the petitioner's owner's Form 1040, without consideration of his or her personal finances. In short, USCIS will not treat a single member LLC as a sole proprietorship when determining its ability to pay the proffered wage even if the IRS does so

---

<sup>3</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. 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); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

for federal income tax purposes. In the instant case, the director incorrectly treated the petitioner as a sole proprietor when determining its ability to pay the proffered wage. Specifically, the director deducted the petitioner's owner's household expenses from the petitioner's net income. This was incorrect. Therefore, the director's decision is withdrawn.

In addition, the petitioner has filed another I-140 petition on behalf of different beneficiary. The priority date of the additional petition is February 10, 2007. This additional beneficiary has not yet adjusted to lawful permanent resident status. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to both beneficiaries as of the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the proffered wage or the actual wages paid to the additional beneficiary, or whether the petition has been withdrawn, revoked, or denied. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to both the beneficiary and the proffered wage to the beneficiary of its other petition.

Therefore, the AAO will withdraw the decision and remand the case to the director to request and consider evidence of the petitioner's ability to pay the proffered wage, (without deducting household expenses) such as federal tax returns, audited financial statements, or annual reports from 2008 through 2011, and Forms W-2 and 1099 issued to the beneficiary by the petitioner for 2008 through 2011. Additionally, the director should request evidence to establish that the petitioner has the ability to pay the proffered wage to the additional beneficiary. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn; however, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.