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U.S. Citizenship
and Immigration
Services

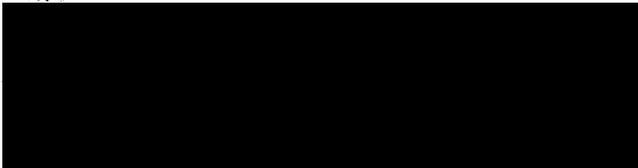


FILE: WAC 02 127 53691 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an auto repair shop. It seeks to employ the beneficiary permanently in the United States as an automobile body repairer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a Form I-290B accompanied by additional documentary evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), 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) 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.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the petition's priority date is July 21, 1997. The beneficiary's salary as stated on the labor certification is \$18.63 per hour for a forty-hour workweek, which equates to \$38,750.40 per annum.

The petitioner is a partnership.¹ The petitioner initially submitted an incomplete copy of its 2000 federal tax return, copies of a general partner's Schedule C from his 2000, 1999, and 1998 individual tax returns, and a letter verifying the beneficiary's work experience from a previous employer. The director determined that the evidence submitted in support of the petition was insufficient to establish the petitioner's ability to pay the proffered wage as of the priority date. In addition, the director found defects in the employment verification letter. Consequently, the director issued a request for evidence on April 23, 2002. The request for evidence required the petitioner to submit regulatory sanctioned evidence, such as tax returns, annual reports, and/or audited financial statements to demonstrate that the petitioner had the ability to pay the beneficiary's salary at the time the priority date was established and continuing thereafter. The director specifically requested complete copies of tax returns with all schedules and attachments as well as copies of the petitioner's quarterly wage statements for the previous year. Finally, the director advised the petitioner that the employment verification letter was unacceptable since it did not have a translator's certification and since it did not state the signatory's title.

¹ The AAO notes that the director questioned the petitioning entity's status. However, the tax records submitted clearly demonstrate that the petitioner is a partnership; therefore, no further discussion of this issue is necessary.

In response to the request for evidence, the petitioner submitted the following documents:

1. Complete copies of the petitioner's federal and state tax returns for the years 1999, 2000, and 2001;
2. Quarterly wage statements for the quarters ending on September 30, 2001 and March 31, 2002;
3. An illegible and unsigned copy of the petitioner's Quarterly Tax Return for an unspecified period;
4. An unsigned copy of the petitioner's Annual Reconciliation Statement for 2001 for the State of California; and
5. A letter from one of the petitioner's general partners.

The director determined that the evidence in the record did not establish that the petitioner had the ability to pay the proffered wage from the priority date and continuing thereafter. As a result, the director denied the petition on September 4, 2002.

On October 7, 2002, counsel filed a Form I-290B accompanied by additional evidence. No brief or explanation was included in support of the documentation submitted. The petitioner stated on the Form I-290B "I truly Believe [sic] that the company does meet the requirements necessary to sponsor the alien, therefore we are submitting [sic] extra evidence to show my ability to pay the alien."

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. 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).

Additionally, CIS will examine the petitioner's net current assets as reported on tax returns. Net current assets are a taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A partnership's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If a partnership's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between the current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

The record contains a copy of the petitioner's federal tax returns for the years 1999, 2000, and 2001. The director reviewed the petitioner's net income for each year, and determined that it did not have the financial ability to pay the beneficiary's proffered wage. The AAO has reviewed the returns, and notes that the petitioner's ordinary income and net current assets for the relevant years are as follows:

<u>Year</u>	<u>Net Income</u>	<u>Net Current Assets</u>
1997	<i>no record</i>	<i>no record</i>
1998	<i>no record</i>	<i>no record</i>
1999	\$ 908.00	\$15,908.00
2000	\$16,760.00	\$ 9,472.00
2001	-\$ 2,758.00	\$20,195.00

The petitioner failed to establish its ability to pay as of the priority date because it failed to submit any financial documentation for 1997, the year the priority date was established. Moreover, it failed to produce financial evidence for 1998. Finally, since the proffered wage is \$38,750.40 per annum, the petitioner has not demonstrated sufficient net income to pay the beneficiary's proffered salary in the years thereafter.

The petitioner also submitted copies of Schedule C from the 1998, 1999, and 2000 tax returns of one of its general partners. Although the director specifically requested that the petitioner submit *complete* copies of all tax returns, the petitioner failed to provide any additional pages of these returns in response to the request for evidence. While the personal assets of the general partners can be considered in determining the petitioner's ability to pay, these documents are not acceptable because they are incomplete records and thus fail to present a concise overview of the general partner's financial situation.

In addition, the AAO notes that one of the petitioner's general partners claims to have employed the beneficiary since 1996. Generally, documentary evidence of the beneficiary's employment by the petitioner is considered prima facie proof of the petitioner's ability to pay the proffered wage. In this case, however, the evidence submitted by the petitioner is insufficient for two reasons. First, the only evidence in the record is a copy of the petitioner's quarterly wage reports for the quarters ending September 2001 and March 2002, both of which demonstrate that the petitioner paid wages of \$3,900.00 to the beneficiary for each quarter. The wages reflected on these statements are substantially less than the proposed salary. Even if the quarterly wage of \$3,900.00 was multiplied by four quarters for a total annual wage of \$15,600.00, the petitioner would still be \$23,150.10 short of the proffered wage. As evidenced by the previous review of the petitioner's net (ordinary) income and net current assets, it lacks the funds to make up this difference. Secondly, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The statement of the general partner, without supporting W-2 forms or pay stubs for the entire relevant period, is not reliable evidence.

The petitioner submits additional documents in the form of a Quarterly Tax Return and Annual Reconciliation Statement for the year 2001. These documents are not relevant for purposes of this decision. First, the quarterly return is illegible, unsigned, not dated, and not offered to show the petitioner's ability to pay the proffered wage at the establishment of the priority date. The reconciliation statement is also unsigned, and states that the petitioner paid total wages in the amount of \$49,000.00, but offers no explanation as to their recipients or their distribution. Therefore, these documents have little probative value and will not be considered.

Since the record contained no financial evidence that established the petitioner's ability to pay the proposed salary during the relevant period, the director denied the petition. The AAO concurs with the director's findings.

On appeal, no brief was submitted to support the documentary evidence filed with the Form I-290B. The petitioner has merely submitted additional documentation without further explanation as to how such documents support the petitioner's position.

Counsel submits the following documents on appeal:

1. A copy of a letter confirming a line of credit to the petitioner from Bank of America;
2. Ameritrade account summaries for June and August 2002 for one of the petitioner's general partners;
3. Bank of America statements for one of the petitioner's general partners;
4. A letter from Administrative Services Co-Op confirming the aforementioned general partner's investment assets;
5. A copy of the petitioner's tax registration certificate; and
6. Copies of the general partner's annual shareholder activity reports reflecting his shares in another business venture.

The AAO will address each of these separately.²

First, counsel submits evidence of a line of credit extended to the petitioner in apparent support of its ability to pay the proffered wage. This evidence is not persuasive. In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Additionally, CIS will give less weight to loans and debt as a means of paying the beneficiary's salary since the debts will increase the partnership's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

Next, counsel submits copies of bank and investment statements for one of the petitioner's general partners in an attempt to demonstrate that it had sufficient cash flow to pay the proffered wage. These statements, however, are not persuasive evidence of the petitioner's ability to pay because there is no proof that these statements somehow represent additional funds beyond those of the tax returns. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes. Additionally, the statements submitted only demonstrate assets for two non-consecutive months in 2002, and do not provide a full overview of the general partner's financial status.

² The tax registration certificate, however, will not be addressed because it is not pertinent to this decision.

Finally, counsel submits evidence of the aforementioned general partner's investment shares in a business venture called Yellow Cab; namely, ownership of fourteen taxi cabs. In addition, copies of the shareholder activity reports for each of the fourteen cabs are submitted for the year ending December 31, 2002. The AAO notes that eleven of the fourteen reports show a negative year-end balance, and the highest amount of earnings displayed on the forms that do not show negative returns does not exceed \$1,000.00.

None of the documentation submitted on appeal demonstrates the petitioner's ability to pay the proffered wage. Most importantly, the petitioner has failed to submit any financial documentation from 1997, the year that the priority date was established. Accordingly, after a review of the record, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing thereafter.

Beyond the decision of the director, the request for evidence required the petitioner to submit a verification of the beneficiary's experience in accordance with the regulatory requirements set forth at 8 C.F.R. §204.5(l)(3)(ii). The petitioner submitted a new letter accompanied by a translation, as requested by the director. This letter, however, is also unacceptable to corroborate the beneficiary's claims of experience. The beneficiary claimed to work for Servicio Provincia from April 1988 to April 1997 on his form ETA-750 Part B, which he signed and declared as true. The original verification letter in the file from Servicio Provincia corroborates this contention, but did not indicate the signatory's title nor did it include a certification by the translator which fails to comply with the regulatory requirements set forth at 8 C.F.R. §204.5(l)(3)(ii). The evidence submitted in response to the request for evidence, however, does not reconcile these errors. Instead, the letter provided is from an entirely different company called Servise J.M., which claims that the beneficiary worked full time for that company from 1988 to 1995. This letter also fails to indicate the signatory's title, which fails to comply with the regulatory requirements set forth at 8 C.F.R. §204.5(l)(3)(ii).

Clearly, the two companies providing experience letters for the beneficiary are different companies. They do not share the same name, address, nor are the signatories the same. Furthermore, the letter from Servise J.M. claims that it employed the beneficiary in a full time position *at the same time* the beneficiary claims to have worked full time for Servicio Provincia.³ Although the director did not discuss this issue in his opinion, this is a serious inconsistency that raises questions with regard to the authenticity of the beneficiary's claims of experience. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

Therefore, should the petitioner choose to further pursue this matter, it will be obliged to clarify this issue for the record.

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.

³ The beneficiary did not list Servise J.M. as a previous employer on his Form ETA 750 Part B.