



U.S. Citizenship  
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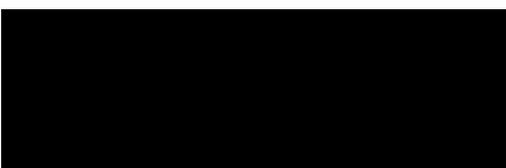
FILE: [REDACTED]  
SRC-04-025-52214

Office: TEXAS SERVICE CENTER Date: DEC 19 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: 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:

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a firm engaged in representations, productions and promotions of artists. It seeks to employ the beneficiary permanently in the United States as a musical arranger. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly.

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:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is June 10, 2002. The proffered wage as stated on the Form ETA 750 is \$38,600.00 per year. On the Form ETA 750B, signed by the beneficiary on May 2, 2002, the beneficiary claimed to have worked for the petitioner beginning in May 1996 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on November 3, 2003. On the petition, the petitioner claimed to have been established in 1988, to currently have three employees, and to have a gross annual income of \$204,388.00. On the petition the item for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a decision dated August 4, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the beneficiary has been employed by the petitioner, working under O1 and P1 nonimmigrant visas. Counsel also states that a

consideration of all relevant evidence, including bank account statements and a line of credit statement, establishes the petitioner's ability to pay the proffered wage during the relevant period.

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).

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, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on May 2, 2002, the beneficiary claimed to have worked for the petitioner beginning in May 1996 and continuing through the date of the ETA 750B.

Counsel states that the costs of labor shown on page two of its tax returns include amounts paid to the beneficiary. Counsel also states that the beneficiary has been working for the petitioner under O1 and P1 visas.

The record contains copies of P1 visas issued to the petitioner in Bogota on May 9, 1996, March 21, 1997, December 4, 1997, and November 4, 1998. The record also contains a copy of an O1 visa issued to the beneficiary in Mexico City on August 31, 2000. The petitioner's name as stated on each of those visas is Caliente Productions, which is the petitioner in the instant I-140 petition. The record also contains copies of passport pages facing each of the foregoing visas, which bear stamps showing entries to the United States after the issuance of each visa. The most recent entry stamp shows an entry into the United States on September 18, 2000 at Miami, pursuant to the O1 visa. According to the I-140 petition, September 18, 2000 is the date of the beneficiary's most recent entry into the United States.

The foregoing visas and entry stamps are evidence that the beneficiary has been employed by the petitioner in the United States. However, the record lacks any evidence as to the amount of compensation paid to the beneficiary. Counsel states that compensation to the beneficiary comprises part of the petitioner's costs of labor shown on its tax returns. However, the record contains no evidence indicating how much of those costs of labor were paid to the beneficiary. Therefore the evidence pertaining to the beneficiary's employment by the petitioner fails to establish the petitioner's ability to pay the proffered wage during the period at issue in the instant petition.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2000, 2001, 2002 and 2003. No request for evidence was issued by the director. Therefore, the record before the director closed on November 3, 2003 with the submission of the I-140 petition and supporting documents. As of that date the petitioner's federal tax return for 2003 was not yet available. However that tax return has been submitted on appeal.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2000	-\$8,669.00	not applicable	not applicable
2001	-\$1,553.00	not applicable	not applicable
2002	-\$1,820.00	\$38,600.00*	-\$40,420.00
2003	-\$181.00	\$38,600.00*	-\$38,781.00

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate 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 corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation'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 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.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2000	\$0.00	-\$1,030.00	not applicable
2001	-\$1,030.00	-\$2,583.00	not applicable
2002	-\$2,583.00	\$0.00	\$38,600.00*
2003	\$60.00	\$7,180.00	\$38,600.00*

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in either 2002 or 2003.

The record also contains copies of bank statements. However, bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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 paints an inaccurate financial picture of the petitioner. Moreover, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month.

On the petitioner's bank statements the ending balances are as follows:

	Acct. # . [REDACTED]	Acct. # . [REDACTED]
2002:		
June	\$1,712.94	-
July	\$9,637.74	-
August	\$1,279.18	-
September	\$2,098.36	-
October	\$3,465.77	-
November	\$168.73	-
December	\$460.41	-
2003:		
January	\$22,475.21	-
February	\$3,699.67	-
March	\$1,308.91	-
April	\$1,675.23	-
May	\$5,973.83	-
June	\$5,110.96	\$387.80
July	\$288.97	\$387.80
August	\$1,025.20	\$287.80
September	-\$86.07	\$287.80
October	\$4,488.93	\$272.80
November	\$2,120.83	\$537.80
December	\$9,430.77	\$522.80

	Acct. # . [REDACTED]	Acct. # . [REDACTED]
2004		
January	\$2,997.24	\$507.80
February	\$3,807.61	\$1,386.30
March	\$6,418.05	\$1,081.88
April	\$3,346.94	\$300.17
May	\$2,942.22	\$1,225.17
June	\$11,589.68	\$355.86
July	\$3,587.84	\$283.16

The ending balances above do not show monthly increases by amounts which would be sufficient to pay the proffered wage. Moreover, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

The record also contains a line of credit statement dated August 7, 2004. That statement shows a total credit line of \$50,000.00, a current principal balance of \$10,550.00, and available credit of \$39,450.00.

In her brief, counsel quotes a document issued by the Vermont Service Center, stating that "[a] line of credit may in some instances be favorably considered when determining an organization's ability to pay the proffered wage." (Brief, at 1, quoting American Immigration Lawyers Association, *VSC's Written Answers to AILA's Liaison Questions* (March 4, 2003, amended July 1, 2003). CIS, through the AAO, is not bound to follow a decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available as of the priority date. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not necessarily 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).

Counsel also asserts that the petitioner's evidence satisfies the requirements set forth in a May 2004 memorandum by William R. Yates, Associate Director of Operations, CIS. That memorandum states that a finding on a petitioner's ability to pay the proffered wage may be based on an analysis of the petitioner's net income, of its net current assets, or of the compensation paid to the beneficiary. However, as shown above, the petitioner's evidence in the instant case fails to establish its ability to pay the proffered wage under any of those methods of analysis. See Interoffice Memo. from William R. Yates, Associate Director of Operations, CIS, to Service Center Directors and other CIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The record contains no other evidence relevant to the financial situation of the petitioner. The evidence in the record therefore fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In his decision, the director correctly stated the petitioner's net income in 2000, 2001 and 2002. The director also correctly found that the petitioner's year-end net current assets in each of those years were less than the proffered wage. The director found that the beneficiary had not worked for the petitioner. The director's conclusion that the record lacked Form W-2's for the beneficiary was correct. The evidence submitted prior to the director's decision did not include copies of the beneficiary's P1 visas or of his O1 visa, not did it include a copy of the petitioner's tax return for 2003 or copies of bank statements of the petitioner or of a line of credit statements of the petitioner. All of those documents were submitted for the first time on appeal. Based on the evidence in the record prior to the director's decision, the director's conclusion was correct, that the evidence failed to establish the petitioner's ability to pay the proffered wage during the relevant period.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director.

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.