



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

B6



FILE: [REDACTED]
EAC-04-062-51233

Office: VERMONT SERVICE CENTER

Date: DEC 21 2005

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:



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

The petitioner is a commercial cleaning business. It seeks to employ the beneficiary permanently in the United States as a janitorial supervisor. 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.

On appeal, counsel submits a brief and additional 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 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 30, 2001. The proffered wage as stated on the Form ETA 750 is \$12.21 per hour, which amounts to \$25,396.80 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of April 1999.

On the petition, the petitioner claimed to have been established on September 3, 1999, to have a gross annual income of \$803,584, and to currently employ 40 workers. In support of the petition, the petitioner submitted its 2001 corporate tax return.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 12, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director noted that the petitioner's 2001 tax return reflected insufficient net income and net current assets to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and requested any evidence of wages actually paid to the beneficiary or annual reports for 2001 and 2002 accompanied by audited or reviewed financial statements.

In response, the petitioner submitted a bank statement for March 2004; an unaudited balance sheet for March 2004; unaudited profit and loss statements from June 2003 through March 2004, July 2001 through June 2002, and July 2000 through June 2001; and W-2 forms issued by the petitioner to the beneficiary in 2001, 2002, and 2003 reflecting wages paid in the amounts of \$8,378.73, \$9,967.45, and \$10,809.60 for each year, respectively. An accompanying letter from the petitioner to counsel states that the beneficiary "has been working on a part-time basis for our firm," that their corporate year ends June 2004 at which time their accountant will audit their books and file corporate tax returns, and that bonuses are declared at the end of the corporate year which is "why are assets were depleted as of that date."

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 1, 2004, denied the petition.

On appeal, counsel asserts that there is a mere \$5,000 shortfall in 2001 and \$13,000 shortfall in 2002 between the difference between wages actually paid to the beneficiary and the proffered wage and the petitioner's net current assets. Counsel claims that the petitioner's financial viability is better than the petitioning entity in *Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), and if the petitioning entity had utilized an accrual basis for reporting its income to the IRS instead of a cash basis, it would have had sufficient cash assets from accounts receivables. Additionally, counsel states that the petitioner could easily obtain a revolving line of credit that also demonstrates its continuing ability to pay the proffered wage beginning on the priority date.

On appeal, the petitioner submits a letter from [REDACTED] (Mr. [REDACTED] of Rexroad & Associates, LLC, a certified public accountant, who explains how the petitioner would have had more reported net current assets if it had utilized an accrual basis for reporting instead of a cash basis. Mr. [REDACTED] also urges Citizenship and Immigration Services (CIS) to consider depreciation as a non-cash expense that reduces net income and that the petitioner's "growth, assets and revenues leave no doubt they are prime candidates to easily obtain a line of credit from a bank for well in excess of [the proffered annual wage]." The petitioner also submits bank statements and its 2000¹ and 2002 corporate tax returns.

The petitioner's tax returns reflect the following information for the following years:

	<u>2001</u>	<u>2002</u>
Net income ²	\$2,913	-\$3,772
Current Assets	\$35,761	\$7,334
Current Liabilities	\$23,714	\$4,936
Net current assets	\$12,047	\$2,398

Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to

¹ Evidence preceding the priority date in 2001 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in any relevant year, but did establish that it paid partial wages in the amounts of \$8,378.73, \$9,967.45, and \$10,809.60 in 2001, 2002, and 2003, respectively. Since the proffered wage is \$25,396.80, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$17,018.07, \$15,429.35, and \$14,587.20³.

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, CIS will next 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). Showing that the petitioner's gross receipts 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 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng* at 537.

³ The record of proceeding closed without the submission of the petitioner's 2003 corporate tax return so its net income and net current assets may not be analyzed against the difference between wages actually paid to the beneficiary and the proffered wage.

The petitioner's net incomes of \$2,913 and -\$3,772 in 2001 and 2002, respectively, are less than the difference between the wages actually paid to the beneficiary and the proffered wage and fail to demonstrate the petitioner's continuing ability to pay the proffered wage out of its net income in either year.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's end-of-year 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 petitioner's net current assets of \$12,047 and \$2,398 in 2001 and 2002, respectively, are less than the difference between the wages actually paid to the beneficiary and the proffered wage and fail to demonstrate the petitioner's continuing ability to pay the proffered wage out of its net income in either year.

Contrary to counsel and Mr. [REDACTED] appellate assertions, the petitioner's election of a cash basis for reporting its taxes to the IRS cannot overcome the insufficient showing of net income and net current assets in its tax returns. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

petitioners continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In calculating the ability to pay the proffered salary, CIS will also 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 beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. 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. at 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 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).

The petitioner has not demonstrated that it paid the full proffered wage to the beneficiary in either 2001 or 2002. In both years, the petitioner shows net income and net current assets that are less than the difference between the actual wages paid to the beneficiary and the proffered wage and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, there is no evidence in the record of proceeding that the beneficiary is qualified to perform the duties of the proffered position⁵. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 30, 2001. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of janitorial supervisor. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of experience in the proffered position or in the related occupation of commercial cleaner in order to perform the job duties listed in Item 13, which states "Supervise and coordinate activities of workers engaged in cleaning and maintaining premises of commercial, residential and industrial sites. Supervise workers' progress, train new employees, and order cleaning supplies." Item 15 indicates there are special requirements such as references and late night work.

The beneficiary set forth her credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she worked for the petitioner since April 1999. Prior to that, she indicated that she was employed as a commercial cleaner for Executive Building Maintenance, Inc., in Bethesda, Maryland from June 1997 through April 1999 and in housekeeping for Laurens Hoppenbrower in Washington, D.C. from June 1996 through September 1996.

⁵ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The record of proceeding does not contain a letter conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3) from Executive Building Maintenance, Inc. or Laurens Hoppenbrower and thus does not demonstrate that the beneficiary has the requisite two years of experience in the proffered position or in the related occupation of commercial cleaner. There is no evidence at all in the record of proceeding concerning the beneficiary's employment experience. Thus, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.