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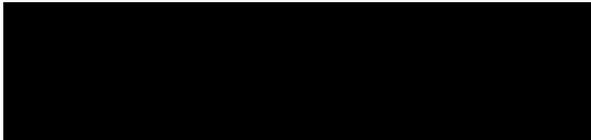
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2005
WAC 03 039 50083

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

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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

The petitioner is a health care provider and respiratory therapy business. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, accompanies 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.

On appeal, the petitioner submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on January 16, 1998. The proffered salary as stated on the labor certification is \$916 per week or \$47,632 per year.

With the petition, the petitioner failed to submit any evidence of its continuing ability to pay the proffered wage from the priority date. On January 22, 2003, the director requested evidence of the petitioner's ability to pay the proffered wage from January 16, 1998 and continuing to the present to be in the form of copies of annual reports, federal tax returns with appropriate signature(s) and all schedules and attachments, or audited financial statements. The director specifically requested copies of the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports, for all employees for the last four quarters that were accepted by the state of California to include the names, social security numbers and number of weeks worked for all employees.

In response, counsel provided copies of the petitioner's 1998 and 2001 Forms 1120A, U.S. Corporation Short-Form Income Tax Returns, copies of the petitioner's 1999 and 2000 Forms 1120, U.S. Corporation Income Tax Returns, and a copy of Form DE-6, Quarterly Wage and Withholding Reports, for the quarter



ended March 31, 2003. The Form DE-6 shows that the beneficiary worked for the beneficiary in the first quarter of 2003. The 1998 tax return reflected a taxable income before net operating loss deduction and special deductions of \$18,223 and net current assets of \$40,558. The 1999 tax return reflected a taxable income before net operating loss deduction and special deductions of \$15,237 and net current assets of -\$14,116. The 2000 tax return reflected a taxable income before net operating loss deduction and special deductions of \$6,471 and net current assets of \$12,596. The 2001 tax return reflected a taxable income before net operating loss deduction and special deductions of \$7,483 and net current assets of \$2,073.

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. On May 10, 2003, the director denied the petition.

On appeal, counsel submits a copy of the petitioner's 2002 Form 1120A, U.S. Corporation Short-Form Income Tax Return and certification from the petitioner of the company's credit lines with Wells Fargo and Capitol One. The 2002 tax return reflected a taxable income before net operating loss deduction of \$11,392 and net current assets of \$12,604. The certification shows credit lines with Wells Fargo totaling \$52,500, and the Capitol One credit line totaled \$2,000. Counsel states:

Petitioner's business of providing medical and health care services through pulmonary therapy, has been in existence since 1993. During all those years, until the present, petitioner is able to pay its employees the prevailing wage as required by United States law. Needless to say, there are situations that the company may encounter hardships or may not be doing well in generating healthy profits. However, until this time, the company is still in existence and has been continuously operating in providing medical and health care services. . . .

* * *

. . . Anyhow, in the event of a shortfall in revenue by the petitioner-employer, it has a sizeable credit line to enable it to meet the payroll needs of the company. As such, the capacity to pay is not and should not be the only basis for the approval or denial of this petition.

In addition, as what petitioner has elucidated in its original certified Form ETA 750 (Application for Alien Employment Certification), that the purpose for which the beneficiary shall be employed is, "there is no one who is performing the tasks described in the job offered. Our company is currently retaining the services of a CPA firm to handle the bookkeeping requirements as well as prepare and finalize the financial statements, federal and state tax liabilities. Due to the increasing amount of accounting work and auditing procedures, which need to be established and developed in our increasingly expanding business, **the CPA firm will be charging our company a lot of money.** As such, we have decided that, it is about time to hire a full-time accountant. Besides, it will help ensure the confidentially and immediate availability of our

accounting records.” The petitioner further justified, “**due to the expensive services of the CPA firm**, we believe that we could be better off in hiring our own accountant to perform the tasks as described in the job offered. Besides, we anticipate hiring more physical therapists in the future due to the increasing number of patients in the medical facilities to which we provide respiratory services.”

Therefore, when the alien beneficiary becomes an employee of the petitioner, the latter will no longer hire the expensive services of the CPA firm who used to be paid wages for the services being rendered. On the other hand, such compensation or wages would subsequently be paid to the alien beneficiary, which will demonstrate the financial viability of the employer or the petitioner’s ability to pay.

In determining the petitioner’s ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 1998 through 2002.

As an alternative 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, 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. 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 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 during 1998 through 2002 were \$40,558, -\$14,116, \$12,596, \$2,073, and \$12,604, respectively. The petitioner could not have paid the proffered wage in 1998 through 2002 from its net current assets.

Finally, if the petitioner does not have sufficient net income or net current assets to pay the proffered salary, CIS may consider the overall magnitude of the entity's business activities. Even when the petitioner shows insufficient net income or net current assets, CIS may consider the totality of the circumstances concerning a petitioner's financial performance. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In *Matter of Sonogawa*, the Regional Commissioner considered an immigrant visa petition, which had been filed by a small "custom dress and boutique shop" on behalf of a clothes designer. The district director denied the petition after determining that the beneficiary's annual wage of \$6,240 was considerably in excess of the employer's net profit of \$280 for the year of filing. On appeal, the Regional Commissioner considered an array of factors beyond the petitioner's simple net profit, including news articles, financial data, the petitioner's reputation and clientele, the number of employees, future business plans, and explanations of the petitioner's temporary financial difficulties. Despite the petitioner's obviously inadequate net income, the Regional Commissioner looked beyond the petitioner's uncharacteristic business loss and found that the petitioner's expectations of continued business growth and increasing profits were reasonable. *Id.* at 615. Based on an evaluation of the totality of the petitioner's circumstances, the Regional Commissioner determined that the petitioner had established the ability to pay the beneficiary the stipulated wages.

As in *Matter of Sonogawa*, CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that 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 CIS deems to be relevant to the petitioner's ability to pay the proffered wage. In this case, however, the petitioner's taxable income in the pertinent years (1998 through 2002) has been consistently below the proffered wage and does not show that the business has met all of its obligations in the past or establish its historical growth. There is also no evidence of the petitioner's reputation throughout the industry.

¹ 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.

Counsel points to the petitioner's lines of credit as evidence of its ability to pay the proffered wage. However, 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).

The petitioner's line of credit will not be considered for two reasons. First, 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. 45, 49 (Comm. 1971). Second, 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).

Counsel contends that the wages paid to the CPA firm the petitioner is currently employing could be paid to the beneficiary. Counsel has not, however, provided evidence of the wages paid to the CPA firm. Wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The record contains no evidence directly relating the tax return figures for the CPA firm to accounting services the beneficiary may perform.

Moreover, there is no evidence that the position currently fulfilled by the CPA firm involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the positions, duties, and termination of the workers who performed the duties of the proffered position. If the CPA firm performed other kinds of work, then the beneficiary could not replace it. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's 1998 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$18,223 and net current assets of \$40,558. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 1998.

The petitioner's 1999 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$15,237 and net current assets of -\$14,116. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 1999.

The petitioner's 2000 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$6,471 and net current assets of \$12,596. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2000.

The petitioner's 2001 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$7,483 and net current assets of \$2,073. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2001.

The petitioner's 2002 federal tax return reflects a taxable income before net operating loss deduction and special deductions of \$11,392 and net current assets of \$12,604. The petitioner could not have paid the proffered wage from either its taxable income or its net current assets in 2002.

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.