U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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MAR 17 2005

[redacted]

FILE: WAC 03 153 51777 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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: SELF-REPRESENTED

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

CC: [redacted]

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 Iranian weekly magazine. It seeks to employ the beneficiary permanently in the United States as a typesetter. 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, the petitioner[1] submits additional evidence and asserts that the director misinterpreted the information contained on the petitioner's federal tax returns.

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) provides:

> *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. 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)].

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[1] The record contains a G-28, Notice of Entry of Appearance as Attorney or Representative signed by "Noga N. Assil" of the "California Legal Center." There is no indication in the record, pursuant to 8 C.F.R. §§ 103.2(a)(3), 1.1(f), 292.1(a)(4), or 292.1(a)(2)(i), (iii) and (iv), that Mr. or Ms. Assil or the California Legal Center is an accredited representative. Neither appears to be listed as accredited representatives on the rosters maintained by the EOIR. As the petitioner signed the appeal (Form I-290B), the petitioner will be considered as self-represented. For future reference, this representative should submit evidence that he or she qualifies to represent any alien pursuant to the above provisions. Until appropriate evidence is submitted, CIS cannot recognize either Mr. or Ms. Assil or the California Legal Center as an accredited representative. A copy of this decision will be sent to Noga N. Assil.

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 June 29, 1998. The proffered wage as stated on the Form ETA 750 is $2,000 per month or $24,000 per year.[2] On the Form ETA 750B, signed by the beneficiary on June 4, 1998, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, the petitioner claims to have been established in 1991, have a gross annual income of $606,343, and to currently employ three workers. In support of its continuing ability to pay the proffered wage, the petitioner initially submitted copies of its 1998, 1999, 2000 and 2001, Form 1120S, U.S. Income Tax Return for an S Corporation. The petitioner also provided copies of Internal Revenue Service (IRS) printouts of data contained on its federal quarterly tax returns. The income tax returns show the following:

	1998	1999	2000	2001
Net income	$ 18,179	$ 22,337	$25,771	$38,041
Current Assets	$ 16,671	$ 5,636	$12,004	$47,607
Current Liabilities	$ 1,379	$ 1,473	$ 1,187	$ 1,183
Net current assets	$ 15,292	$ 4,163	$10,817	$46,424

As set forth above, besides net income, CIS will examine a petitioner's net current assets in determining the ability to pay a proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of a petitioner's liquidity during a given period.[3] A corporation's year-end current assets and current liabilities are shown on Schedule L of its federal tax return. 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.

On September 2, 2003, the director requested additional evidence from the petitioner pertinent to its continuing ability to pay the proffered wage. The director advised the petitioner that such evidence must include completed signed copies of its federal tax returns, annual reports, or audited financial statements. The director further instructed the petitioner to submit this evidence for the year 2002.

In response, the petitioner resubmitted copies of its corporate tax returns including a copy of its 2002 return. It reflects that the petitioner declared net income of -$26,115. Schedule L of the return shows that the petitioner had $3,443 in current assets and $884 in current liabilities, resulting in $2,559 in net current assets.

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[2] The director misstated the proffered wage as $26,000 per year.

[3] 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.

The director denied the petition on October 30, 2003. 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 appeal, the petitioner resubmits a copy of its 2002 federal tax return. It also submits a copy of its magazine, as well as two September 2003 statements from the Bank of America. One shows the petitioner's balance of $17,474 owed on an automobile loan and the other shows the petitioner's $0.00 credit available on a $25,000 line of credit. The petitioner further provides copies of various statements reflecting two automobile loans, a home mortgage, a line of credit balance and two bank accounts held personally by the petitioner's sole shareholder. The petitioner claims that its sole shareholder's status as a personal guarantor of the petitioner's ability to pay should be taken into consideration, stating that the lines of credit taken out in the petitioner's name and in the sole shareholder's name support the petitioner's business activities as well as its ability to hire and pay the beneficiary's proffered salary.

The petitioner's assertion that its sole shareholder's individual assets should be considered is not persuasive. 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. 1980). In no legal sense can the business of a corporation be said to be that of its individual stockholders or officers. 18 Am. Jur. 2d *Corporations* § 44 (1985). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL [redacted] D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Moreover, there is no provision in the employment-based immigrant visa statutes, regulations, or precedent that permits a personal guarantee to be utilized in lieu of proving ability to pay through prescribed financial documentation. In any event, a guarantee is a future promise of payment and does nothing to alter the immediate eligibility of the instant visa petition. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

With regard to the petitioner's line of credit, it is noted that CIS will not augment the petitioner's net income or net current assets by adding in 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 T*erms, 45 (1998). In this case, the petitioner's 2003 statement shows that the petitioner's $25,000 existent loan based on its line of credit represents the acquisition of debt and a potential liability. It will not be treated as cash or as a cash asset available to pay the proffered wage. Moreover, the statement also suggests that the line of credit was not established until 2003 and as such, does not support the petitioner's ability to pay the proffered wage beginning on the priority date in June 1998. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner must establish its continuing ability to pay a proffered wage beginning at the priority date through its federal tax returns, audited financial statements, or annual reports.

The petitioner also asserts that a $30,014 expense taken for outside services on its 2002 tax return reflects typesetting services that were significantly higher than it would have had to pay if the beneficiary's services had been employed. It further claims that various professional service fees were incurred as a result of lawsuits and will not be a reoccurring expense. The petitioner cites no legal authority that such expenses should be added back to the petitioner's net income and this argument is rejected. It is further noted that the record does not contain any specific documentation of such services provided under these expenses. Simply going on record without the

appropriate documentary evidence, as specified by the regulation, is not sufficient for a petitioner to meet its burden of proof. *See Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Also, monies already expended on payment to others are generally 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. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during that period. If the petitioner establishes by credible 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. To the extent that a petitioner may have paid the beneficiary less than the proffered wage, consideration will be given to those amounts. If the shortfall can be covered by either the petitioner's net income or net current assets, the petitioner is deemed to have the ability to pay the full proffered salary during a given period. In this case, the record contains no evidence that the petitioner has employed the beneficiary.

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 or some sort of cumulative average of net current assets and net income as suggested by the petitioner. 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.

As set forth above, although the petitioner's net income was sufficient to pay the proffered wage of $24,000 per year in 2000 and 2001, the petitioner's other financial data failed to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and continuing until the present. In 1998, neither its net income of $18,179, nor its net current assets of $15,297 was enough to cover the certified salary. Similarly, in 1999, neither the petitioner's net income of $22,337, nor its net current assets of $4,163 was enough to pay the proffered wage. Finally, in 2002, neither the petitioner's net income of -$26,115, nor its net current assets of $2,559 was sufficient to cover the proffered wage.

Upon review of the evidence contained in the record and upon further consideration of the evidence and argument presented on appeal, the AAO concludes that the petitioner failed to submit evidence sufficient to demonstrate that it had the continuing ability to pay the proffered wage as of the petition's priority date.

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.