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U.S. Citizenship  
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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: 07/21/15  
EAC-04-039-52803

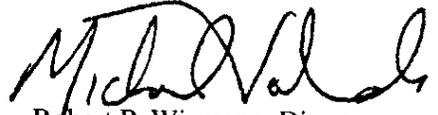
IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:  
[Redacted]

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 computer systems and database web/internet company. It seeks to employ the beneficiary permanently in the United States as a multi-media computer systems specialist. 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 January 12, 1998. The proffered wage as stated on the Form ETA 750 is \$41,000.00 per year. On the Form ETA 750B, signed by the beneficiary on January 11, 1998, the beneficiary claimed to have worked for the petitioner from February 1997 until January 1998.

The I-140 petition was submitted on November 19, 2003. On the petition, the petitioner claimed to have been established in May 1995 and to currently have two employees. In the items on the petition for the petitioner's gross annual income and its net annual income were written the words "See Attached." With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated January 29, 2004, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on April 26, 2004.

In a decision dated June 2, 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 in the form of a letter and duplicate copies of evidentiary documents previously submitted for the record. Counsel also submits a copy of an Interoffice Memorandum dated May 4, 2004 from [REDACTED] Associate Director for Operations to Service Center Directors and other CIS officials. That memorandum is not an evidentiary document but is submitted by counsel as legal authority in support of the petition.

Counsel states on appeal that the regulation at 8 C.F.R. § 204.5(g)(2) does not limit the forms of acceptable evidence which may be submitted to establish the petitioner's ability to pay the proffered wage, but rather lists certain types of documents as examples of types of acceptable evidence. Counsel further states that the director erred in refusing to consider evidence of corporate lines of credit of the petitioner. Counsel states that the issue of the petitioner's ability to pay the proffered wage is a part of the determination whether a bona fide job offer exists, and counsel states that the evidence in the record is sufficient to establish that a bona fide job offer exists in this petition.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

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 January 11, 1998, the beneficiary claimed to have worked for the petitioner from February 1997 until January 1998.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 1999, 2000, 2001, 2002 and 2003. The beneficiary's Form W-2's show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1998	not submitted	\$41,000.00	\$41,000.00
1999	\$26,000.04	\$41,000.00	\$14,999.96
2000	\$28,888.96	\$41,000.00	\$12,111.04
2001	\$36,010.00	\$41,000.00	\$4,990.00
2002	\$25,906.77	\$41,000.00	\$15,093.23
2003	\$41,000.00	\$41,000.00	\$0.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in the years 1998 through 2002. For 2003, the above information is sufficient to establish the petitioner's ability to pay the proffered wage.

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 1999, 2000, 2001, and 2002. The record contains no explanation for the absence of a tax return of the petitioner for the year 1998. The record before the director closed on April 26, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 should have been available, but it was not submitted for the record. The RFE was issued on January 29, 2004. As of that date the petitioner's tax return for 2003 was not yet due, and the RFE requested information only for the years 1998 through 2002. For the above reasons the years at issue in the instant petition will be considered to be 1998 through 2002. Nevertheless, the petitioner has demonstrated the ability to pay the proffered wage for 2003 by the beneficiary's Form W-2 for that year, which is discussed above.

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
1998	not submitted	\$41,000.00*	no information
1999	\$2,965.00	\$14,999.96**	-\$12,034.96
2000	\$8,224.00	\$12,111.04**	-\$3,887.04
2001	\$5,345.00	\$4,990.00**	\$355.00
2002	-\$37,928.00	\$15,093.23**	-\$53,021.23

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 1998.

\*\* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 1998, 1999, 2000, or 2002. Only for the year 2001 does the evidence establish that the petitioner's net income was greater than the wage increase needed to raise the beneficiary's actual compensation to the proffered wage.

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	
1998	not submitted	not submitted	\$41,000.00*
1999	-\$5,295.00	-\$9,108.00	\$14,999.96**
2000	-\$9,108.00	-\$5,128.00	\$12,111.04**
2001	-\$5,128.00	-\$5,143.00	\$4,990.00**
2002	-\$5,143.00	-\$3,134.00	\$15,093.23**

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in 1998.

\*\* Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The record also contains a letter dated April 22, 2004 from a certified public accountant. In the letter, the accountant calculates the year-end funds available to the petitioner for the years 1999 through 2000, based on the addition of non-cash expense depreciation to the petitioner's net income figures. For the year 2002 the accountant also states that accounts receivable amounted to \$36,158.86. The accountant also states that the petitioner's tax returns are prepared using the cash basis of accounting method.

While it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

Aside from depreciation deductions, some taxpayers may claim deductions on their tax returns for other non-cash items such as amortization of the cost of business start-up expenses, amortization of the cost of good will, and depletion of oil, gas and timber reserves. Such deductions raise similar issues to those discussed above concerning depreciation deductions. See *Id.*, at 2; *Instructions for Form 1120 and 1120A* (2004), at 14-15; *Business Expenses*, IRS Pub. 535 (2004), at 30-42, available at <http://www.irs.gov/pub/irs-pdf/p535.pdf>.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. See *Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, 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).

With regard to the petitioner's accounts receivable for the year 2002, the accountant states in her letter that the petitioner's accounts receivable at the end of 2002 were \$36,158.86, and that if those accounts are assumed to be fully collected in 2003 and if non-cash depreciation of \$4,693.00 is added, the petitioner's available year end funds would be \$2,923.86, rather than the loss of \$37,928.00 shown on the petitioner's tax return for that year. The accountant's statements on that point are in effect a request to consider accounts receivable for at the end of the year 2002 on an accrual basis of accounting.

The Schedules L attached to petitioner's Form 1120 tax returns for 1999 through 2002 show no amounts as trade notes or accounts receivable, a fact which appears to be consistent with the accountant's statement in her letter that the petitioner's tax returns are prepared on a cash basis. That is, on its tax returns the petitioner apparently counts as assets only payments which have actually been received, and not payments which the petitioner expects to receive in the future. The accountant's figure of \$36,158.86 in accounts receivable for the end of 2002 is presumably derived from financial records of the petitioner maintained on an accrual basis.

The evidence in the record provides no justification for considering the petitioner's year end accounts receivable for 2002 any differently from any of the other income and expense items as shown on the petitioner's tax returns. If the petitioner wished to submit financial information prepared on an accrual basis, the petitioner was free to

submit evidence in one of the other alternative forms of acceptable evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely copies of annual reports or copies of audited financial reports. However, the petitioner has not done so in the instant petition.

The record also contains a copy of an undated letter from the petitioner's president which was among the documents submitted by the petitioner on April 26, 2004 in response to the RFE. In that letter, the president makes similar statements regarding the petitioner's non-cash depreciation expenses as are mentioned in the accountant's letter of April 22, 2004 and which are discussed above. In his letter, the petitioner's president also states that the petitioner has \$90,000.00 in available funds based on five corporate lines of credit. The president also states that he is the owner of the petitioner and that he has over \$100,000.00 in available funds based on seven personal lines of credit.

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). 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.

Concerning personal financial resources of the petitioner's owner, 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 his letter submitted in support of the instant appeal, counsel states that the director erred in refusing to consider the evidence on lines of credit. Counsel states that the director referred to a general policy of CIS in declining to consider such evidence, but that the CIS has been inconsistent in its implementation of such a policy. Counsel cites the May 4, 2004 Interoffice Memorandum by [REDACTED] as evidence that the standard of review on the ability to pay issue has been inconsistent. Counsel acknowledges, however, that "[t]he May 4, 2004 Interoffice Memorandum, in its substance, does not favor the current application." (Letter from counsel, July 28, 2004, at 2). Moreover, the memorandum by [REDACTED] does not state that CIS adjudicators have been applying inconsistent standards when evaluating evidence of a petitioner's ability to pay. Rather, the memorandum states that some CIS adjudicators have been issuing requests for additional evidence in situations where the regulations do not require such requests, and the memorandum clarifies the situations where a request for evidence is not needed. The memorandum summarizes the types of evidence which may be accepted, and summarizes the methods of financial analysis to be used by CIS adjudicators.

Although counsel's letter submitted on appeal refers to lines of credit, nothing in the memorandum by William R. Yates addresses that issue.

The record contains no other evidence relevant to the petitioner's financial situation.

For the reasons discussed above, the evidence 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 1999, 2000, 2001 and 2002, and correctly calculated the petitioner's year-end net current assets for each of those years. The director found that those amounts failed to establish the petitioner's ability to pay the proffered wage in those years. The director also correctly declined to consider the petitioner's depreciation expenses as additional resources available to the petitioner. The director also correctly declined to consider lines of credit to be additional funds available to the petitioner to pay the proffered wage.

Although the director stated that the priority date in the instant petition is January 12, 1998, the director failed to note the complete absence of financial evidence pertaining to the year 1998. Although the analysis of the director was incomplete with regard to the year 1998, the decision of the director to deny the petition was correct. The assertions of counsel 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.