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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 25 2006
WAC 04 133 51972

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

PETITION: Immigrant Petition for Other Worker Pursuant to § 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, Chief
Administrative Appeals Office

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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 garment manufacturer and wholesaler of denim jeans. It seeks to employ the beneficiary permanently in the United States as an inspector, tester, and sorter. 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. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 1, 2005 denial, the only issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, 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. 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 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 CFR § 204.5(d). The priority date in the instant petition is November 8, 2001. The proffered wage as stated on the Form ETA 750 is \$6.70 per hour or \$13,936 annually.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. Relevant evidence submitted on

¹ 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

appeal includes a copy of pages 713 and 714 of *Kurzban's Immigration Law Sourcebook*, 9th Edition, a copy of the petitioner's Article of Incorporation, a copy of a \$100,000 line of credit from Hanmi Bank for 2003 and 2004, a copy of a \$250,000 business loan agreement with Hanmi Bank, copies of the petitioner's 2001 through 2003 bank statements from Pacific Union Bank, a copy of the petitioner's Form 7004, Application for Automatic Extension of Time to File Corporation Income Tax Return, for tax year 2004, copies of the petitioner's 2001 through 2003 Forms W-3, Transmittal of Wage and Tax Statements, and a partial copy of a CIS interoffice memorandum entitled *Determination of Ability to Pay under 8 CFR 204(g)(2)*, dated May 4, 2004, by William R. Yates, Associate Director for Operations. Other relevant evidence includes copies of the petitioner's 2001 through 2003 Forms 1120, U.S. Corporation Income Tax Returns, copies of the petitioner's 2003 Forms DE-6, EDD Quarterly Wage Report, a copy of the petitioner's 2004 payroll journal, and a copy of the beneficiary's 2004 Form W-2, Wage and Tax Statement. The record does not contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

The petitioner's 2001 through 2003 tax returns reflect a taxable income before net operating loss deduction and special deductions or net income of -\$2,906, -\$17,481, and \$4,518, respectively. The petitioner's 2001 through 2003 tax returns also reflect net current assets of -\$8,416, -\$21,979, and -\$11,797, respectively.

The petitioner's 2001 through 2003 bank statements reflect balances ranging from a low of \$2,391.25 to a high of \$189,605.32.

The petitioner's 2003 Forms DE-6 confirm that the beneficiary was not employed by the petitioner in 2003.

The petitioner's 2001 through 2003 Forms W-3 reflect wages paid of \$105,085.36, \$124,479.64, and \$148,881.92, respectively. The petitioner's 2001 through 2003 tax returns reflect wages and compensation of officers paid of \$106,463, \$133,653, and \$144,127, respectively.

The petitioner's 2004 payroll journal and the beneficiary's 2004 Form W-2 reflect wages issued by the petitioner to the beneficiary of \$8,370 in 2004.

On appeal, counsel states that the petitioner has established its ability to pay the proffered wage of \$13,936 based on the petitioner's \$100,000 line of credit and \$250,000 business loan with Hanmi Bank, its bank statements, its Forms W-3, the Memorandum from William R. Yates, and on a non-precedent decision quoted in *Kurzban's Immigration Law Sourcebook*, 9th Edition.

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 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).

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).

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, but undated, the beneficiary did not include the petitioner as a past or present employer. However, the petitioner has provided the beneficiary's 2004 Form W-2, Wage and Tax Statement, issued by the petitioner for the beneficiary indicating that the petitioner employed the beneficiary in 2004, but not in 2001 through 2003. The Form W-2 indicates that the beneficiary was compensated \$8,370 in 2004. The petitioner is obligated to establish that it had sufficient funds to pay the difference between the proffered wage of \$13,936 and the actual wages paid of \$8,370 or \$5,566.

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.² 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

² 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.

current assets. The petitioner's net current assets in 2001 through 2003 were -\$8,416, -\$21,979, and -\$11,797, respectively. The petitioner could not have paid the proffered wage of \$13,936 in 2001 through 2003 from its net current assets.

Counsel references a quote from *Kurzban's Immigration Law Sourcebook*, 9th Edition where the sole shareholder of a medical corporation or professional (personal) service corporation minimized its taxable income by taking it as compensation to avoid double taxation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the personal service corporation status as a relevant factor to be considered when determining its ability to pay.

Unlike a personal service corporation, the petitioner, in the instant case, is not engaged in the performance of personal services; and, therefore, may utilize the graduated tax rates for C-corporations and is not subject to the 35% flat tax rate as personal service corporations are subject.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, 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. Therefore, the owner's compensation of officers may not be considered when determining the petitioner's ability to pay the proffered wage of \$13,936.

Counsel contends that the petitioner's \$100,000 line of credit and \$250,000 business loan establishes the petitioner's ability to pay the proffered wage of \$13,936. 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 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). 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).

Counsel asserts that the petitioner's bank statements prove that the petitioner had the ability to pay the proffered wage of \$13,936 at the priority date and continuing to the present. Counsel's reliance on the balances in the petitioner's bank account 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 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel points to a Memorandum, issued on May 4, 2004, from William R. Yates, Associate Director for Operations, entitled *Determination of Ability to Pay under 8 CFR 204.5(g)(2)* and contends that, based on the Memorandum, the petitioner has established its ability to pay the proffered wage through its net current assets (cash assets) and its employment of the beneficiary as verified by the beneficiary's 2004 Form W-4. Counsel is mistaken. Cash assets are only one part of current assets which are used in conjunction with current liabilities when determining net current assets (Please see explanation of net current assets above.). In addition, the petitioner is obligated to demonstrate that it has sufficient funds to pay the difference between the proffered wage of \$13,936 and the actual wages paid of \$8,370 to the beneficiary or \$5,566 in 2004. Since the petitioner, was unable to submit its 2004 tax return, it is difficult for the AAO to determine if the petitioner had sufficient funds to pay the difference of \$5,566 between the proffered wage of \$13,936 and the actual wages paid of \$8,370 to the beneficiary in 2004. In addition, counsel is mistaken that the petitioner need not establish that it has sufficient funds to pay the proffered wage from the priority date if it has employed the beneficiary and paid the beneficiary the proffered wage subsequent to the priority date. The petitioner is compelled to establish its ability to pay the

proffered wage from the priority date of November 8, 2001 and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g).

Furthermore, the Yates' memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If CIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is November 8, 2001. Thus, the petitioner must show its ability to pay the proffered wage not only in 2004, when counsel claims it actually began paying the proffered wage rate, but it must also show its continuing ability to pay the proffered wage in 2001 through 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

Counsel states that the petitioner's Forms W-3, Transmittal of Wage and Tax Statements, should be considered when CIS determines the petitioner's ability to pay the proffered wage. However, the mere fact that the petitioner has paid wages, totaling over \$100,000 per year does not equate to the petitioner's ability to pay the beneficiary's additional salary. Likewise, the mere fact that the petitioner enjoyed gross receipts of over \$2 million in the pertinent years does not establish the petitioner's ability to pay the proffered wage of \$13,936. Gross receipts will not be considered alone when determining the petitioner's ability to pay the proffered wage, but must be viewed in association with all appropriate deductions.

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, the petitioner has provided tax returns for the years 2001 through 2003, which is not enough evidence to establish that the business has met all of its obligations in the past or to establish its historical growth. In fact, all three tax returns show net incomes and net current assets below the proffered wage of \$13,936 with only the 2003 tax return reflecting a positive net income. There is also no evidence of the petitioner's reputation throughout the industry.

The petitioner's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$2,906 and net current assets of -\$8,416. The petitioner could not have paid the proffered wage of \$13,936 from either its net income or its net current assets in 2001.

The petitioner's 2002 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of -\$17,481 and net current assets of -\$21,979. The petitioner could not have paid the proffered wage of \$13,936 from either its net income or its net current assets in 2002.

The petitioner's 2003 tax return reflects a taxable income before net operating loss deduction and special deductions or net income of \$4,518 and net current assets of -\$11,797. The petitioner could not have paid the proffered wage of \$22,089.60 from either its net income or its net current assets in 2003.

The petitioner did not submit its 2004 tax return, but it is obligated to pay the difference between the proffered wage of \$13,936 and the actual wages paid to the beneficiary of \$8,370 or \$5,566. The petitioner has not done so.

After a review of the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was appropriate based on the evidence in the record before the director.

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

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.