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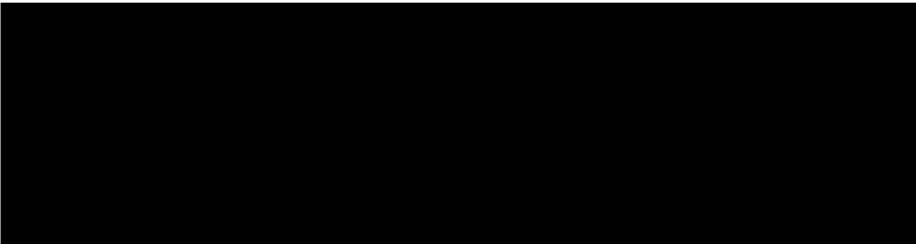
FILE: LIN 03 176 50814 Office: NEBRASKA SERVICE CENTER Date: **MAR 03 2006**

IN RE: Petitioner:
Beneficiary



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a jewelry store. It seeks to employ the beneficiary permanently in the United States as a jewelry designer. 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. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on July 1, 2002. The proffered wage as stated on the Form ETA 750 is \$15 per hour (\$31,200 per year).

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of \$323,000, and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal years last from January 1 to December 31. On the Form ETA 750B, signed by the beneficiary on June 14, 2002, the beneficiary claimed to have worked for the petitioner since January 9, 2002.

With the petition, the petitioner submitted the following documents:

- An original ETA 750;
- The petitioner's Form 1120-A;
- The petitioner's year-end, internal balance sheets for 2001, 2002 and 2003; and,
- The petitioner's monthly business bank statements accounts for late 2002 and early 2003.

On January 7, 2004, the director issued a Request for Evidence for additional proof 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.

In response, the counsel submitted:

- The petitioner's bank statements for all of 2003 and for early 2004;

The petitioner's quarterly report of wages for the first two quarters of 2002, reporting payment of \$3,800 in wages to the beneficiary for the first quarter, and \$5,200 for the second quarter;¹ and,

- The beneficiary's W-2 Wage and Tax Statement the petitioner issued for 2002.

On June 29, 2004, the director issued a second RFE for additional proof pertinent to that ability. The director specifically requested the petitioner's federal income tax return for 2003.

In response, on September 7, 2004, counsel submitted:

- The petitioner's Form 1120-A for years 2001–2003.

The director denied the petition on September 29, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. In the decision the director indicated, from the petitioner's Form 1120-A for 2002, the petition, after taking a net operating loss deduction of \$12,399, had "no taxable income." Continuing, the director states:

The petitioner does not indicate that the beneficiary is a current employee.

On September 7, 2004 the petitioner submitted a copy of its 2003 tax return which indicates total income of \$208,311, cash assets of \$48,265, and a taxable income of \$18,147.

Although it appears that the petitioner had sufficient financial ability to pay the proffered salary in 2003, it did not appear to have sufficient funds at the time of filing in 2002.

On appeal, counsel first asserts the director abused his discretion as to the petitioner's financial condition in the year 2002 by failing to take into account the petitioner's line of credit in determining the petitioner's ability to pay the proffered wage. Second, counsel asserts the director erred by failing to consider the value of the petitioner's retail inventory "in determining the petitioner's total assets."

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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 2002 or 2003. Instead, the petitioner paid partial wages in the amounts of \$9,000 in 2002, and \$0 in 2003, which is \$22,200 less than the proffered wage in 2002. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage.

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

¹Counsel notes that based upon the beneficiary's approved H-2B visa petition, the beneficiary had work authorization, from January 9, 2002, until June 1, 2002, after which it appears he ceased working for the petitioner.

(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). Despite the director's references to "total income" and taxable income, reliance on the petitioner's gross receipts and wage expense is misplaced. 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. Further, the director's reliance upon taxable income, calculated after deducting net operating losses, is inapt in that it improperly takes net operating loss carry-forwards into account. Instead, the director should determine ability to pay from taxable income before net operating loss deduction, located on Line 24 of the Form 1120-A.

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. (Original emphasis.) *Chi-Feng* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's continuing ability to pay the proffered wage of \$31,200 per year from the priority date.

In 2003, the Form 1120-A stated taxable income before net operating loss deduction² of \$19,614.
In 2002, the Form 1120-A stated taxable income before net operating loss deduction of \$12,399.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the proffered wage, as to the year 2003, or to pay the difference between the wage paid and the proffered wage, as to the year 2002.

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. We reject, however, counsel's idea that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. 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.³ A corporation's year-end current assets are shown on Part III of the Form 1120-A, lines 1 through 6. Its year-

² Taxable income before net operating loss deduction and special deductions as reported on Line 24. Consistent with counsel's statements on appeal, the AAO uses Line 24 of Form 1120-A's as one method for determining ability to pay.

end current liabilities are shown on lines 13 and 14. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.⁴ The petitioner's net current assets during 2002 were \$36,589, which is sufficient to pay the proffered wage for 2002. During 2003, however, the petitioner's net current assets were \$8,155, which is less than the proffered wage and therefore not sufficient to pay the proffered wage for 2003.⁵

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established, through an examination of wages paid to the beneficiary, or its net income or net current assets, that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date, or for 2002, that it had the continuing ability to pay the difference between the wage paid and the proffered wage.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay, and asserts that the director failed to take into account the petitioner's line of credit, citing *Masonry Masters, Inc. v. Thornburgh*, 742 F. Supp. 82, 686-87 (D.D.C. 1990). Counsel maintains that it was through the petitioner's line of credit that it increased its inventory by \$65,088 in 2002, and which can otherwise increase the amount of the petitioner's net current assets.

Counsel cites to the portion of [REDACTED] which states:

As the foregoing demonstrates, there is no genuine issue of material fact concerning the conclusion that the applications and supporting documentation on behalf of [REDACTED] were, for all practical purposes, identical. By reaching diametrically opposed results on the two applications without explaining the patent inconsistency, the defendants acted arbitrarily and abused their discretion.

As so stated, counsel asserts *Masonry Masters, Inc.*, in the instant case to assert the director acted inconsistently without following prior precedent or considering all relevant factors.

The director referred only to petitioner's cash assets of \$21,587 in finding that for 2002 the petitioner lacked sufficient funds to pay the proffered wage. 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).

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

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.

⁴ It is noted that current assets, as herein formulated, takes into account the value of an employer's inventory in a manner consistent with counsel's assertions on appeal.

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).

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's assertions on appeal have not overcome the director's finding in his decision to deny the petition. The evidence submitted fails to establish that the petitioner had the continuing ability to pay the proffered wage beginning on the 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.