



U.S. Citizenship
and Immigration
Services

BE

identifying data utilized to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



FILE: [REDACTED]
EAC-04-071-52018

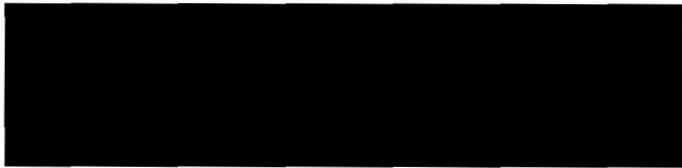
Office: VERMONT SERVICE CENTER

Date: MAR 29 2006

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:



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 software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 September 27, 2001. The proffered wage as stated on the Form ETA 750 is \$76,000.00 per year. On the Form ETA 750B, signed by the beneficiary on September 13, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on September 2, 2003.

The I-140 petition was submitted on January 13, 2004. On the petition, the petitioner claimed to have been established in 1996, to currently have 7 employees, and to have a gross annual income of \$301,555.00 in 2002. With the petition, the petitioner submitted supporting evidence.

In a decision dated October 15, 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 and additional evidence.

Counsel states on appeal that CIS is required to look at the totality of circumstances, and the petitioner's line of credit, its bank statements, officer compensation and depreciation as shown on its tax returns, letters submitted by its sole officer and its payroll processing service, and its financial statements are all evidence of the petitioner's financial strength and ability to pay the proffered wage. Evidence submitted on appeal includes a letter confirming the petitioner's lines of credit, copies of the petitioner's bank statements, copies of the beneficiary's Form W-2 Wage and Tax Statements for 2001 and 2002, a letter from the petitioner's sole officer, a letter from the petitioner's payroll processing service, unaudited financial statements, copies of the Form W-2 Wage and Tax Statements for 2001, 2002, and 2003 for the petitioner's sole officer, a copy of the petitioner's certificate of incorporation, and copies of the petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002 which are already part of the record.

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 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).

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).

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 September 13, 2001, the beneficiary claimed to have worked for the petitioner beginning in January 2000 and continuing through the date of the ETA 750B.

The record contains copies of the beneficiary's Form W-2 Wage and Tax Statements. The beneficiary's Form W-2's for 2001 and 2002 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
2001	\$28,816.69	\$76,000.00	\$47,183.31
2002	\$38,476.34	\$76,000.00	\$37,523.66

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002.

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 (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 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.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2000, 2001, and 2002. The record before the director closed on January 13, 2004 with the receipt by the director of the petitioner's submission of the I-140 petition and supporting evidence. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available.¹

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

The petitioner's tax returns show the amounts for taxable income on line 23 of the Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$12,229.00	\$47,183.31*	-\$34,954.31
2002	-\$6,815.00	\$37,523.66*	-\$44,338.66

* 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 2001 and 2002.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current

¹ Even though the petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2000 appears in the record, it is irrelevant because the petitioner has to establish its ability to pay the beneficiary the proffered wage beginning on the priority date, which is September 27, 2001.

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 End of year	Wage increase needed to pay the proffered wage
2001	\$1,548.00	\$47,183.31*
2002	-\$595.00	\$37,523.66*

* 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 2001 and 2002.

Counsel states that CIS "either overlooked or is not in possession of all the necessary facts to make a definitive decision on [the petitioner's] I-140 petition." The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence, and the director found the record in this case to be complete in terms of the required initial evidence. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can, and did, file an appeal and submit a brief and additional evidence.

Counsel likewise states that "[CIS's] strict adherence to looking just at the net income tax figures for [the petitioner] is overly restrictive." The AAO agrees with counsel that looking at the petitioner's net income is only one of the means used to determine whether the petitioner has the ability to pay the proffered wage. As demonstrated above, the AAO also looks at whether the beneficiary was employed at a salary equal to or greater than the proffered wage, the petitioner's net current assets, and will review the totality of circumstances.

Counsel also states that the petitioner "has experienced a period of sustained growth as compared to other start-up companies . . . [and the petitioner] secured two lines of credit." No evidence supports counsel's assertion that the petitioner experienced sustained growth as compared to other similar companies, and going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In fact, evidence in the record suggests the opposite because the petitioner's gross receipts have gone down from \$668,332.00 in 2000 to \$379,970.00 in 2001, and again to \$301,555.00 in 2002. Evidence in support of the assertion that the petitioner secured two lines of credit includes a letter stating the petitioner's 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).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner 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 further states that "[a]s the bank statements illustrate, [the petitioner] clearly possessed sufficient funds on hand to cover its employees' salaries during that time period." Evidence in support of this assertion includes the petitioner's bank statements for 2001 and 2002.

Counsel's reliance on the balances in the petitioner's bank accounts 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.² 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 has been considered above in determining the petitioner's net current assets.

Counsel states that "[CIS] should also consider the federal income tax return deductions of Compensation of Officers, and Depreciation/Amortization by [the petitioner's] corporate accountants as sources of available funds with which to compensate [the beneficiary]." Evidence in support of this assertion includes copies of the petitioner's 1120S U.S. Income Tax Return for an S Corporation for 2001 and 2002, the Form W-2 Tax and Wage Statements for 2001 and 2002 for the petitioner's sole officer, and a letter from the petitioner's certified public accountants.

² Counsel does state that "[CIS's] strict adherence to looking just at the net income tax figures for [the petitioner] is overly restrictive, and as a result, overlooks the bigger financial picture." However, counsel's statement does not address why the petitioner's income tax returns are not applicable or paints an inaccurate financial picture of the petitioner.

Regarding depreciation, 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 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. Plaintiff’s argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

Regarding compensation of officers, 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. However, CIS, in looking at the totality of circumstances, may examine the financial flexibility that the owners have in setting their salaries based on the profitability of their corporation. In this case, the petitioner is owned by one officer. According to the record, the beneficiary was paid \$28,816.69 in 2001, and the petitioner had a net income of \$12,229.00 in 2001. After combining the wage paid to the beneficiary in 2001 with the net income, the petitioner still needed \$34,954.31 to meet the proffered wage.³ In 2001, the one officer was compensated \$106,700.00. \$34,954.31 is 32.8% of the total compensation, and AAO finds that it is unlikely that an officer would forego one-third of his compensation in order to pay the salary of an employee. The beneficiary was paid \$38,476.34 in 2002, and the petitioner needed an additional \$37,523.66 to meet the proffered wage because the petitioner had a negative net income and negative net current assets in 2002. The officer was compensated \$103,200.00 in 2002. \$37,523.55 is 36.4% of the total compensation, and AAO again finds that it is unlikely that an officer would forego over one-third of his compensation in order to pay the salary of an employee. In addition, there is no evidence in the record besides counsel’s statements that the officer could have or would have given up such significant percentages of his compensation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel notes that “in 2003, [the officer] voluntarily drew less salary . . . with a rate of \$46,500.00.” Evidence submitted in support of this assertion includes the officer’s Form W-2 Tax and Wage Statement for 2003. However, the fact that the officer was compensated less than two previous years, without other evidence showing the circumstances in 2003, is insufficient to demonstrate the likelihood that he would forgo a large amount of his compensation in order to pay the beneficiary’s wage.

The letter from the petitioner’s certified public accountants indicating that a more thorough review of the petitioner’s income tax returns would demonstrate the petitioner’s financial ability is in effect an unaudited financial statement. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner’s financial condition and of its ability to pay the proffered wage, those statements must be audited.

³ The AAO is combining the wage paid to the beneficiary in 2001 with the net income instead of net current assets because the petitioner’s net income in 2001 is higher than its net current assets in 2001.

Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel also submits a letter from the petitioner's sole officer and a letter from the petitioner's payroll processing service as additional evidence that the petitioner "is ready and willing to offer [the beneficiary] the proffered wage." The letters merely indicate that the petitioner is ready and willing to offer the beneficiary the proffered wage; there is no evidentiary proof that the petitioner is being paid the proffered wage. In fact, according to the letter from the payroll processing service dated November 4, 2004, "[a]t this present moment we are continually cutting checks for this employee based on a yearly salary of \$72,000 on a semi-monthly basis." The proffered wage is \$76,000.00, not \$72,000.00.

Counsel states that "when evaluating a company's financial ability to pay the proffered wage to its employee, [CIS] is required to look at the totality of evidence and circumstance of a company's financial figures." 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). *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2001 and 2002 were uncharacteristically unprofitable years for the petitioner. In addition, the fact that the one officer owning the petitioner was compensated \$46,500.00 in 2003, which is considerably less compared to 2001 and 2002, calls into question whether 2003 was also an unprofitable year for the petitioner. Moreover, the record includes the beneficiary's earning statements from the petitioner. According to the statements, as of November 15, 2003, the beneficiary had been paid \$52,500.00 for the year, and the beneficiary's salary was \$2,500.00 for 80 hours. Based on this information, the beneficiary would have only been paid \$65,000.00 for all of 2003, which is \$11,000.00 below the proffered wage. Hence, the earning statements also call into question the petitioner's ability to pay the proffered wage in 2003 and its profitability in 2003.

Counsel also states that "with the long-term contribution of [the beneficiary], the outlook for exponential growth in these next few years is great." In essence, counsel is stating that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. Counsel has not, however, provided any standard or criterion for the evaluation of such earnings.

After a review of the evidence, it is concluded that the petitioner has not established its ability to pay the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

In her decision, the director erred in only addressing the petitioner's net income when determining whether the petitioner had the ability to pay the proffered wage. Despite this error, the decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted 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.