

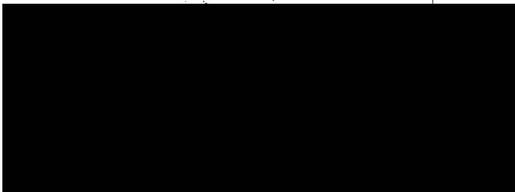
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

B6

PUBLIC COPY



FILE: [Redacted]
EAC 03 152 52365

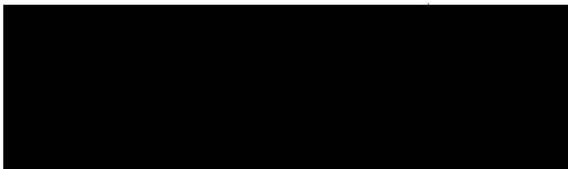
Office: VERMONT SERVICE CENTER

Date: OCT 06 2006

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

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

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 Travel Agency. It seeks to employ the beneficiary permanently in the United States as a Supervisory International Travel Agent. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). 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. Therefore, the director denied the petition.

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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set out in the director's September 27, 2004 denial, the single issue in this case is whether 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)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) 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 is accepted for processing by any office within the employment system of the DOL. See 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the DOL accepted the Form ETA 750 for processing on May 5, 2000. The proffered wage as stated on the Form ETA 750 is \$46,696 annually. The Form ETA 750 states that the position requires two years of experience in the proffered position.

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 on appeal.¹

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which

The petitioner submitted the following evidence in support of its claim that it has the ability to pay the beneficiary the proffered wage: the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2000; a letter from [REDACTED] dated October 7, 2004 which indicates that, based on the petitioner's financial standing, it would have been in keeping with the overall policy of lending at [REDACTED] to have loaned the petitioner \$100,000 in 2000 and in 2004; a statement from counsel indicating that Citizenship and Immigration Services (CIS) should consider the petitioner's eligibility for a \$100,000 loan as outlined in HAB's letter as evidence that the petitioner had an additional \$100,000 available to pay the proffered wage; a statement from the petitioner's president dated July 19, 2004 which indicates that the beneficiary will assume the president's responsibilities at the company, and that the president's annual salary of \$18,200 will shift to the beneficiary; this statement also indicates that because the petitioner has a 60-day grace period before it must pay the amount listed on the Form 1120, Schedule L, Line 16, End of tax year, Accounts payable, that CIS should not consider this amount a current liability, but instead view it as cash available to pay the proffered wage; this statement also indicates that CIS should add the petitioner's net current assets to its net income when determining the petitioner's ability to pay the beneficiary the proffered wage. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1978, to employ three workers and to have a gross annual income of over \$2,000,000. According to the tax return in the record, the petitioner's fiscal year coincides with the calendar year. On the Form ETA 750B, signed by the beneficiary on April 26, 2000, the beneficiary did not claim to have worked for the petitioner.

On appeal, counsel asserts that the petitioner does have the ability to pay the proffered wage. He indicates that the director erred: when calculating the petitioner's net current assets and when she failed to add the petitioner's net current assets to its net income when determining the petitioner's ability to pay the proffered wage. Counsel also asserts that CIS should consider the petitioner's president's salary of \$18,200 as available to pay the proffered wage. Counsel indicates that the fact that [REDACTED] determined that the petitioner would have been eligible for a loan of \$100,000 during 2000 and 2004 demonstrates that it has the ability to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that Form 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 this

are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this 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).

case, the record does not contain any evidence to establish that the petitioner employed and paid the beneficiary the full proffered wage from the priority date onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant 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 (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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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.

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

The tax return in the record demonstrates the following financial information concerning the petitioner's ability to pay the proffered annual wage of \$46,696 from the priority date:

- The Form 1120 for 2000 states a net income² of \$2,513.

Therefore, for the year 2000, the petitioner did not have sufficient net income to pay the 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. As such, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

²Ordinary income (loss) from trade or business activities as reported on Line 28 of the Form 1120.

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 the Form 1120, Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18 of Schedule L. Contrary to assertions made by the petitioner and its counsel, the amount listed on Schedule L, line 16, End of tax year, Accounts payable, is part of a petitioner's current liabilities, regardless of whether the petitioner enjoys a 60-day grace period at the end of the year and/or throughout the year during which it is not obligated to pay this debt. 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.

The petitioner's net current assets during 2000 were \$17,911.

Thus, for the year 2000, the petitioner did not have sufficient net current assets to pay the proffered wage.

The petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date onwards through an examination of wages paid to the beneficiary, or an examination of its net income or net current assets in 2000.

It is noted that, contrary to the assertions of the petitioner and its counsel, net current assets and net income may not be combined when determining a petitioner's ability to pay the proffered wage. This is because net income and net current assets are not two separate sets of funds available to pay the wage. Rather, net income and net current assets represent two different ways to view the funds available to the petitioner. Net income views the petitioner's funds for the year retrospectively, and net current assets view the petitioner's funds for the year prospectively. As such, a net income that is greater than the amount of the proffered wage indicates that a petitioner could have paid the beneficiary the wages during the year out of its income. Net current assets that are greater than the proffered wage indicate that the petitioner anticipates receiving roughly one-twelfth of that amount each month, and that it anticipates being able to pay the proffered wage out of those funds. Therefore, the amount of the petitioner's net income shall not be added to the amount of the petitioner's net current assets when determining the petitioner's ability to pay the proffered wage.

The petitioner's president indicated in his statement dated July 19, 2004 that the beneficiary would be assuming all of his duties at the company, and that he would, in turn, be shifting his annual salary of \$18,200, as listed on the Form 1120 at line 12, Compensation of officers, to the beneficiary's salary. However, this assertion by the president was not in the form of a duly notarized, sworn statement. Going on record with such assertions that are not supported by a notarized, sworn statement is not sufficient for purposes of meeting the burden of proof in these proceedings. See *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's assertion that CIS should add in loans for which the petitioner would have been eligible, during the relevant period of analysis, when determining the petitioner's ability to pay the proffered wage is misplaced. In analyzing a petitioner's ability to pay the proffered wage, CIS will not augment the petitioner's net income or net current assets by adding in lines of credit or loans for which the petitioner may have been eligible. A "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified

³According 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.

maximum during a specified time period. A line of credit or eligibility for a loan is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Where the petitioner is eligible for a loan rather than in possession of an existent loan, the petitioner has not established that it has additional funds available at the time of filing the petition. Yet, a petitioner must establish eligibility at the time of filing; a petition may not be approved based on a new set of facts that arise on a date subsequent to the priority date by which the petitioner appears to become eligible. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

If the petitioner submits documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that a line of credit or a loan otherwise obtained will augment and not weaken its overall financial position, such funds may be considered in the analysis of the petitioner's ability to pay. Such documentation was not submitted in this case.

The petitioner's existent loans may be considered in the evaluation of his or her ability to pay. However, CIS will give less weight to loans as a means of paying salary since such debts increase the proprietor's liabilities and do not tend to 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).

Finally, CIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). 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.

Accordingly, CIS may, in 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 relevant to the petitioner's ability to pay the proffered wage. In this case, however, the only evidence provided by the petitioner which is directly relevant to its ability to pay the beneficiary is its tax return for 2000. Such evidence is not sufficient to establish that the petitioner has met all of its obligations in the past or to establish its historical growth. In addition, such evidence is not sufficient to establish whether unusual circumstances exist in this case to parallel those in *Sonogawa*, nor to establish whether 2000 was an uncharacteristically unprofitable year for the petitioner.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.