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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted]
EAC 04 163 52053

Office: VERMONT SERVICE CENTER

Date: **OCT 31 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 construction company. It seeks to employ the beneficiary permanently in the United States as a stone mason supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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. 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 the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 28, 2005 denial, the single 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)(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 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 DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$35.43 per hour (\$73,694.40 per year based on a 40 hour work week). The Form ETA 750 states that the position requires two years of experience in the job offered or four years of experience in a related field including stone mason, concrete mason or other masonry trade positions.

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 appeal.¹ On appeal, counsel submits a brief, a letter dated March 11, 2005 from the petitioner's CPA, the petitioner's amended IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2002, the beneficiary's previously submitted IRS Form W-2, Wage and Tax Statement, issued by the petitioner for 2002, the beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the petitioner for 2003, and the first page of the petitioner's previously submitted IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2003. Other relevant evidence in the record includes the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, a letter dated November 23, 2004 from the petitioner's CPA, the petitioner's IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2001, 2002 and 2003, and the beneficiary's IRS Form W-2, Wage and Tax Statement, issued by the petitioner for 2001. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1992 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 27, 2001, the beneficiary claimed to have started work for the petitioner as a stone mason in September 1999. The beneficiary does not state a date on which he left his job with the petitioner on Form ETA 750B.

On appeal, counsel asserts that the petitioner had adequate revenue to pay the proffered wage since it charged off payroll under its "costs of goods sold." Citing the March 11, 2005 letter from the petitioner's CPA, counsel states that the petitioner amended its 2002 federal income tax return and that the amended return demonstrates the petitioner's ability to pay the proffered wage in 2002. Counsel further states that the petitioner's net income and the wages paid by the petitioner to the beneficiary in 2003 establish the petitioner's ability to pay the proffered wage. In his March 11, 2005 letter, the petitioner's CPA asserts that the petitioner's depreciation expense and interest income should be added back to the petitioner's income in 2002. He further states that he incorrectly identified certain loans due to a related entity as short-term liabilities rather than long-term liabilities on the petitioner's 2002 federal income tax return and, therefore, the petitioner amended its 2002 tax return. In a letter dated November 23, 2004, the petitioner's CPA states that the petitioner's wage expense illustrates that the petitioner has the ability to pay the proffered wage. He asserts that the petitioner's profit projections for 2004 and 2005 show profits of \$125,000.00 and \$500,000.00, respectively. He states that the petitioner has bookings for future work into 2007 and that the petitioner's shareholder has access to a \$1,000,000.00 line of credit that the shareholder could use to infuse cash into the petitioner's business. Finally, the petitioner's CPA states that due to the nature of the petitioner's construction business, it often does not recognize income until later years when projects are completed. He states that the petitioner receives construction advances that equalize cash flow and enable the petitioner to pay its expenses.

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

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 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).

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 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 beneficiary's IRS Forms W-2 for 2001, 2002 and 2003 show compensation received from the petitioner, as shown in the table below.

- In 2001, the Form W-2 stated compensation of \$32,859.75.
- In 2002, the Form W-2 stated compensation of \$33,217.50.
- In 2003, the Form W-2 stated compensation of \$16,207.50.

Therefore, for the years 2001, 2002 and 2003, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages each year. Since the proffered wage is \$73,694.40 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$40,834.65, \$40,476.90 and \$57,486.90 in 2001, 2002 and 2003, respectively.

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 (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). The record contains the petitioner's IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2001, 2002 and 2003. The petitioner's CPA states that the petitioner's wage expense illustrates that the petitioner has the ability to pay the proffered wage. However, reliance on the petitioner's wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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 record before the director closed on November 26, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal

income tax return is the most recent return available. The petitioner's tax returns demonstrate its net income for 2001 and 2002, as shown in the table below.²

- In 2001, the Form 1120S stated net income³ of \$7,256.00.⁴
- In 2002, the Form 1120S stated net income of -\$188,883.00.⁵

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate 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 the difference between the petitioner's current assets and current liabilities.⁶ 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 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 tax returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of \$93,301.00.

² Despite the petitioner's CPA's explanation of the rationale for amending the petitioner's 2002 corporate tax return, because the petitioner amended its return in the middle of the proceedings, CIS would require an IRS-certified copy to corroborate the assertion that the amended return was actually processed by the IRS. The amended return submitted by the petitioner is not a certified copy. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). 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)). Thus, CIS will only examine the version of the petitioner's 2002 tax return that was initially submitted and not the amended version as submitted on appeal. Further, this office notes that the record does not contain Schedule K of the petitioner's 2003 federal income tax return. Therefore, the petitioner's net income may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in 2003.

³ 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. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional income and deductions shown on its Schedule K for 2001 and additional income shown on its Schedule K for 2002, the petitioner's net income is found on line 23 of Schedule K of its tax return.

⁴ The director erroneously stated that the petitioner's 2001 net income was \$22,127.00. However, this error does not alter the ultimate outcome of the appeal.

⁵ The petitioner's CPA is correct that the petitioner's interest income listed on line 4a of Schedule K of its 2002 IRS Form 1120S should be considered in the calculation of the petitioner's net income.

⁶ 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.

- In 2002, the Form 1120S stated net current assets of \$19,668.00.

Therefore, for the year 2001, the petitioner had sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage. For the year 2002, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.⁷

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets except for 2001.

On appeal, the petitioner's CPA asserts that the petitioner's profit projections for 2004 and 2005 show profits of \$125,000.00 and \$500,000.00, respectively. He also states that the petitioner has bookings for future work into 2007. 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. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). In addition, the petitioner has provided no evidence of its profit projections or future bookings. 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)).

On appeal, the petitioner's CPA asserts that the petitioner's shareholder has access to a \$1,000,000.00 line of credit that the shareholder could use to infuse cash into the petitioner's business.⁸ Contrary to counsel's

⁷ This office notes that the record does not contain Schedule L of the petitioner's 2003 federal income tax return. Therefore, the petitioner's net current assets may not be analyzed against the difference between the wages actually paid to the beneficiary and the proffered wage in 2003.

⁸ This office notes that the petitioner has provided no evidence of a line of credit for either the petitioner or its shareholders. 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 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 a line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that any unused funds from a 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

assertion, CIS may not “pierce the corporate veil” and look to the assets of the corporation’s shareholder 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 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.

Finally, the petitioner’s CPA states that due to the nature of the petitioner’s construction business, it often does not recognize income until later years when projects are completed. He states that the petitioner receives construction advances that equalize cash flow and enable the petitioner to pay its expenses. The petitioner’s tax returns were prepared pursuant to the accrual method, in which revenue is recognized when it is earned, and expenses are recognized when they are incurred. If revenues are not recognized in a given year pursuant to the accrual method then the petitioner, whose taxes are prepared pursuant to accrual, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Thus, the amounts shown on the petitioner’s tax returns shall be considered as they were submitted to IRS.

The assertions of the petitioner’s counsel and the petitioner’s CPA cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The evidence submitted does not 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.

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).