



U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 02 2007
WAC 04 201 53130

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:

[REDACTED]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the preference visa petition and dismissed a subsequent motion to reopen/reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting business. 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. As set forth in the director's April 25, 2005 decision denying the petition, and in the director's June 10, 2005 decision upholding his April 25, 2005 decision to deny, 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 continuing until the beneficiary obtains lawful permanent residence, that it exercised control over the beneficiary thereby qualifying as the beneficiary's employer, or that the beneficiary would be employed in a permanent, full-time position. The director denied the petition accordingly.

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

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, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

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 October 1, 2001.¹ The proffered wage as stated on the Form ETA-750 is \$45,000.00 annually.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, counsel submits a statement and a copy of the brief that was submitted with the motion to reopen/reconsider.

On the I-290B, signed by counsel on July 7, 2005, counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within six months. As no further documents were received by the AAO, a courtesy reminder was sent to counsel on December 27, 2006. No further documents, however, have been received by the AAO to date.

It is noted that CIS records show that an I-140 immigrant petition was approved for the beneficiary on December 9, 2005 for a full-time position as a programmer analyst for Technosoft Corporation, [REDACTED] March 30, 2007 CIS record check shows further that the beneficiary's adjustment of status to lawful permanent resident is pending.

Relevant evidence in the record includes copies of the following: the brief submitted by counsel with his motion to reopen/reconsider; the beneficiary's earnings statements and W-2 Wage and Tax Statements from the petitioner; a subcontracting agreement, dated July 28, 2003, between the petitioner and [REDACTED] a memo explaining the differences between cash basis of accounting and accrual basis of accounting, and a financial spreadsheet from the petitioner's accountant; the petitioner's DE-6 Quarterly Wage and Withholding Reports for 2001, 2002, 2003, and 2004; and the petitioner's federal income tax returns for 2001, 2002, 2003, and 2004. In the brief submitted by counsel with his motion to reopen/reconsider, counsel submits as legal authority, as opposed to evidentiary documentation, copies of the following: an Interoffice Memorandum, dated May 4, 2004, from William R. Yates, Associate Director of Operations, CIS, to Service Center Directors and other CIS officials, titled *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*; an article by Romulo E. Guevara, titled *Strengthening I-140 Financial Ability Evidence In The Dawn Of Denials Without RFEs*, Copyright © 2004, American Lawyers Association; and 11 AAO decisions. Other evidence submitted with the motion to reopen/reconsider includes: payroll records of the petitioner's employees and a list of 75 approved I-140 petitions for the petitioner from 2001 to 2005.

On appeal, counsel states, in part, that the proffered position and the financial commitment to pay the proffered wage are permanent in nature. Counsel states further that the petitioner has clearly demonstrated its ability to pay the proffered wage, as demonstrated by its net available funds "calculated through a combination of its income reported on federal tax returns, its available lines of credit, its bank balances and its statement of assets, minus the wages already paid to the [beneficiary] . . ."

¹ The instant beneficiary is being substituted for the initial recipient of the certified alien labor certification application. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA-750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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 June 16, 2004, the beneficiary claimed to have worked for the petitioner from March 1999 through July 2000, and from April 2004 to the present.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977)(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA-750). *See also* 8 C.F.R. § 204.5(g)(2).

CIS electronic records show that the petitioner uses the following four addresses to file I-140 and I-129 petitions:

Also shown is that the petitioner has filed a total of 259 I-140 petitions since 1995, over 35 of which were received in 2004 and 2005, and are currently pending. These records also show that the petitioner has also filed 2,537 I-129 nonimmigrant petitions since 1995. Therefore, the petitioner must show that it had sufficient income to pay all the wages at the priority date. In the brief submitted by counsel with his motion to reopen/reconsider, counsel submits a spreadsheet to show the net amount of funds needed to pay the proffered wages of 30 pending I-140 petitions that were filed in 2004, asserting that the petitioner's total funds available for 2001 through 2004 far exceeded the net amount of funds needed to pay the proffered wages to the beneficiaries of these 30 petitions. It is noted, however, that CIS records show that the petitioner filed over 35 I-140 petitions in 2004 and 2005. As such, the record does not account for the proffered wage commitments to the beneficiaries of all of the petitioner's immigrant and nonimmigrant petitions.

It is also noted that even if a petition has been withdrawn by the petitioner, the petitioner has the right to substitute a new beneficiary on an ETA-750 labor certification application by filing a new I-140 petition, supported by a new ETA-750B for the beneficiary. The ETA-750s underlying any withdrawn petitions remain valid, with the same priority dates. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996); *see* [REDACTED], *Immigration Law and Procedure*,

vol. 4, § 43.04 (Mathew Bender & Company, Inc. 2004)(available at “LexisNexis” Mathew Bender Online). Therefore, the certified ETA-750s underlying any withdrawn petitions retain potential relevance to the petitioner’s total proffered wage commitments for a given year. Similarly, for any petitions which have been denied, the underlying approved ETA-750 would remain available for a new I-140 petition for the same beneficiary or for a substituted beneficiary, provided that the reason for the earlier I-140 denial was one which could be cured by a new petition for the same beneficiary, or for a substituted beneficiary.

The instant I-140 petition states that the petitioner was established in 1993 and currently has “200+” employees. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner’s ability to pay the proffered wage. That regulation provides further: “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 establish the prospective employer’s ability to pay the proffered wage.” The language “may accept” in the above regulation indicates that CIS is not required to accept such as statement, but rather may exercise its discretion not to accept such a statement. *See* 8 C.F.R. § 204.5(g)(2).

The record contains a copy of a letter, dated June 30, 2004, from the petitioner’s president, who states, in part, as follows:

Ace Technologies, Inc. employs 200+ employees; and

Ace Technologies, Inc.’s annual revenues are approx. \$20+ million;

This clearly evidences our ability to pay [the beneficiary] the aforementioned salary of \$45,000 per year . . .

Given the record as a whole and the petitioner’s history of filing petitions, we find that CIS need not exercise its discretion to accept the June 30, 2004 statement from the petitioner’s president. As discussed above, CIS electronic records show that the petitioner has filed a total of 259 I-140 petitions since 1995, over 35 of which were received in 2004 and 2005, and are currently pending. These records also show that the petitioner has also filed 2,537 I-129 nonimmigrant petitions since 1995. Consequently, CIS must also take into account the petitioner’s ability to pay the petitioner’s wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Information on the Form I-140 reflects that the petitioner has “200+” employees. Given that the number of immigrant and nonimmigrant petitions reflects an increase of more than twelve hundred percent of the petitioner’s workforce, we cannot rely on a letter from the petitioner’s president referencing the ability to pay the beneficiary.

As we decline to rely on the letter from the petitioner’s president, we will examine the other financial documentation submitted. These documents do not clearly support the president’s contention. It is further noted that the June 30, 2004 letter does not state that the petitioner’s president is the petitioner’s financial officer, as required by the regulation at 8 C.F.R. § 204.5(g)(2).

The record contains a copy of the beneficiary’s 2004 Form W-2 Wage and Tax Statement. The beneficiary’s W-2 form for 2004 shows 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.
2004	\$11,418.02	\$45,000.00	\$33,581.98

Counsel requests that CIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. It is also noted that the beneficiary's name does not appear on the petitioner's 2004 quarterly wage reports. The record, however, contains no explanation for this inconsistency. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The above information is insufficient to establish the petitioner's ability to pay the beneficiary's proffered wage in 2004.

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. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); see also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2001, 2002, 2003, and 2004. The record before the director closed on March 9, 2005, with the receipt by the director of the petitioner's submissions in response to the director's request for additional evidence. The petitioner's tax return for 2004 is the most recent return provided by the petitioner.

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. The instructions on the Form 1120S U.S. Income Tax Return for an S Corporation state on page one, "Caution: Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. An S corporation's total income from its

various sources are reported on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

Similarly, some deductions appear only on the Schedule K. The cost of business property elected to be treated as an expense deduction under Section 179 of the Internal Revenue Code, rather than as a depreciation deduction, is carried over from line 12 of the Form 4562 to line 8 of the Schedule K. *See* Internal Revenue Service, Instructions for Form 4562 (2003), at 1, available at <http://www.irs.gov/pub/irs-prior/i4562--2003.pdf>; Internal Revenue Service, Instructions for Form 1120S (2003), at 22, available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>.

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 for the years 2001-2003, and on line 17e for the year 2004.

In the instant petition, the petitioner's tax return indicates income from activities other than from a trade or business or additional relevant deductions for 2001. Therefore the figures for ordinary income on line 21 of page one of the petitioner's Form 1120S tax return do not include portions of the petitioner's income or all of its relevant deductions for 2001. For this reason, the petitioner's net income must be considered as the total of its income from various sources as shown on the Schedule K, minus certain deductions which are itemized on the Schedule K. The results of these calculations are shown on Line 23 of the Schedule K for 2001.

In the instant case, the petitioner's tax returns show the following amounts for income on line 23, Schedule K for 2001, and on line 21 of page one for 2002, 2003 and 2004, as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage of the beneficiary only	Surplus or (deficit)
2001	\$194,258.00	0	\$149,258.00
2002	\$30,307.00	\$14,693.00	-\$14,693.00
2003	\$124,604.00	0	\$79,604.00
2004	\$89,909.00	0	\$56,327.02*

* Crediting the petitioner with the compensation actually paid to the beneficiary in that year.

The above information is insufficient to establish the petitioner's ability to pay the beneficiary's proffered wage in 2002. Further, when considering the record as a whole, that the petitioner has filed a total of 259 I-140 petitions since 1995, over 35 of which were received in 2004 and 2005, and are currently pending, and that the petitioner has also filed 2,537 I-129 nonimmigrant petitions since 1995, the above information is insufficient to establish the petitioner's ability to pay its proffered wage commitments in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current 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 attached to the petitioner's tax returns yield the amounts for year-end net current assets as shown in the following table.

Tax year	Net current assets	Wage increase needed to pay the proffered wage of the beneficiary only	Surplus or (deficit)
2001	\$660,713.00	0	\$615,713.00
2002	-\$238,247.00	\$283,247.00	-\$283,247.00
2003	-\$207,935.00	\$252,935.00	-\$252,935.00
2004	-\$146,119.00	\$191,119.00	-\$191,119.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2002, 2003, and 2004. Again, when considering the record as a whole, that the petitioner has filed a total of 259 I-140 petitions since 1995, over 35 of which were received in 2004 and 2005, and are currently pending, and that the petitioner has also filed 2,537 I-129 nonimmigrant petitions since 1995, the above information is insufficient to establish the petitioner's ability to pay its proffered wage commitments in any of the years at issue in the instant petition.

The record also contains a copy of a letter, dated May 5, 2005, from the petitioner's accountant, who states, in part, as follows:

Because [the petitioner] has used the Cash Basis as a method of accounting, this is the reason that the accounts receivable of the company at the end of the Tax Year are not considered in the Tax return. For the purposes of determining the employer's ability to pay the wages, this can be misleading and hence we are providing a detailed explanation and a comparison of the finances of the company when prepared using Accrual Basis.

The ability of the company to pay in future can be best ascertained by *Accrual Basis* because it is the method of recording the earnings and expenses as they occur or are incurred without regard to actual date of collection or payment.

The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to the IRS.

This office, however, is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared

pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments. If the accountant wished to persuade this office that accrual accounting supports the petitioner's continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

For an S corporation, however, there are other considerations. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The documentation presented here indicates that [REDACTED] held 100 percent of the company's stock in 2001, 2002, 2003, and 2004. According to [REDACTED] IRS Form 1120S Compensation of Officers, reported on Line 7 of page 1, he elected to pay himself \$199,477.00 in 2001, \$168,259.00 in 2002, \$150,000.00 in 2003, and \$150,000.00 in 2004.

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

In the present case, however, CIS would not be examining the personal assets of the petitioner's owner, but, rather, the financial flexibility that the employee-owner has in setting his salary based on the profitability of his corporation. It is noted that the officer's compensation for 2002 is \$153,566.00 greater than the proffered wage minus the ordinary income. The record of proceeding, however, does not contain evidence that would demonstrate that the sole officer could or would forego approximately nine percent of his officer's compensation in 2002 that could be redistributed towards having sufficient funds to pay the proffered wage in that year. Further, as discussed above, when considering the record as a whole, that the petitioner has filed a total of 259 I-140 petitions since 1995, over 35 of which were received in 2004 and 2005, and are currently pending, and that the petitioner has also filed 2,537 I-129 nonimmigrant petitions since 1995, the above information is insufficient to establish the petitioner's ability to pay its proffered wage commitments in any of the years at issue in the instant petition.

The record contains a copy of an Interoffice Memorandum, dated May 4, 2004, from William R. Yates, Associate Director of Operations, CIS, to Service Center Directors and other CIS officials, titled *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*. The Yates' memorandum provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." The AAO consistently adjudicates appeals in accordance with the Yates memorandum.

The regulation at 8 C.F.R. § 204.5(g)(2), however, requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is October 1, 2001, and continuing until the beneficiary obtains lawful permanent residence. As discussed above, in this case the petitioner has failed to establish its ability to pay the proffered wage, in addition to its other proffered wage commitments, in any of the years at issue in the instant petition.

Counsel also submits an article by _____ regarding a totality of circumstances test. Although CIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). The petitioner was incorporated in 1993 and employs approximately 200 employees. The petitioner's gross income for 2001, 2002, 2003, and 2004 was above \$15 million each year and the petitioner paid more than \$7 million in salaries and wages each of those years. When considering the record as a whole, and assessing the totality of circumstances, that the petitioner has filed a total of 259 I-140 petitions since 1995, over 35 of which were received in 2004 and 2005, and are currently pending, and also filed 2,537 I-129 nonimmigrant petitions since 1995, the above information is insufficient to establish the petitioner's ability to pay its proffered wage commitments in any of the years at issue in the instant petition.

Counsel also states that the petitioner had in place a line of credit agreement with a California bank. In calculating the ability to pay the proffered salary, however, 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 petitioner'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 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. 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 was considered herein in determining the petitioner's net current assets.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

For ascertaining whether or not the petitioner is the beneficiary's "actual employer," the regulations provide guidance at 20 C.F.R. § 656.3 as follows:

Employer means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

With respect to the permanent nature of the proffered position, counsel submits a copy of a contract showing that the beneficiary works on an extended contract with Infotech, Inc. Counsel states, in part, the following in his brief:

[The beneficiary] has been offered a permanent position with the Petitioner and works at a client site thru a contract with Infotech Incorporated.

This position is a permanent position with respect to the beneficiary, given that while this is a consulting position, whether this I-140 Beneficiary works at an end client site "A" or a client site "B", the beneficiary's position is permanent with respect to the Petitioner. It is the nature of the Petitioner's business to provide permanent employment and the Petitioner makes sure that the Beneficiary is constantly working on a permanent basis whether at one given project or another. This is inherent nature of consulting work and this is consistent with the business practices of IT Consulting companies all over the United States.

Fixed-term contracts were considered in *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968). In *Smith*, a secretarial shortage resulted in the petitioner providing a continuous supply of temporary secretaries to third-party clients. The petitioner in *Smith* guaranteed a British secretary permanent, full-time employment with its firm for 52 weeks a year with "fringe benefits." The district director determined that the petitioner was the beneficiary's actual employer because it was doing the following: providing benefits; directly paying the beneficiary's salary; making contributions to the employee's social security, workmen's compensation, and unemployment insurance programs; withholding federal and state income taxes; and providing paid vacation and group insurance. *Id.* at 773. Additionally, the petitioner in *Smith* guaranteed the beneficiary a minimum 35-hour work week, even if the secretary was not assigned to a third-party client's worksite, and an officer of the petitioning company provided sworn testimony that the general secretarial shortage in the United States resulted in the fact that the petitioner never failed to provide full-time employment over the past three years. *Id.*

Two cases falling under the temporary nonimmigrant H-1B and H-2B visa programs also provide guidance concerning the temporary or permanent nature of employment offers. In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers on a continuing basis with one-year contracts. The regional commissioner determined that permanent employment is established with a constant pool of employees are available for temporary assignments. *Id.* at 287. Additionally, *Ord* held that the petitioning firm was the beneficiary's

actual employer because it was not an employment agency merely acting as a broker in arranging employment between an employer and job seeker, but retained its employees for multiple outsourcing projects. *Id.* at 286. Likewise, *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), also addresses the issue of an employment offer's temporary or permanent nature. The commissioner held that the nature of the petitioner's need for duties to be performed must be assessed in order to ascertain the temporary or permanent aspect of an employment offer. In *Artee*, the petitioner was seeking to utilize the H-2B program to employ machinists temporarily to be outsourced to third-party clients. The commissioner referenced the occupation shortage of machinists in the U.S. economy to determine that the nature of the employment offered was permanent and not temporary. *Id.* at 366. The commissioner stated the following:

The business of a temporary help service is to meet the temporary needs of its clients. To do this they must have a permanent cadre of employees available to refer to their customers for the jobs for which there is frequently or generally a demand. By the very nature of this arrangement, it is obvious that a temporary help service will maintain on its payroll, more or less continuously, the types of skilled employee most in demand. This does not mean that a temporary help service can never offer employment of a temporary nature. If there is no demand for a particular type of skill, the temporary help service does not have a continuing and permanent need. Thus a temporary help service may be able to demonstrate that in addition to its regularly employed workers and permanent staff needs it also hired workers for temporary positions. For a temporary help service company, temporary positions would include positions requiring skill for which the company has a non-recurring demand or infrequent demand. *Id.* at 367-368.

Noted in the record is the petitioner's June 30, 2004 job offer to the beneficiary, and the statement by the petitioner's president that the petitioner will have complete control and direction over the terms of the beneficiary's employment. Also noted are the subcontracting agreement, dated July 28, 2003, between the petitioner and [REDACTED], and counsel's assertion that the beneficiary works on an extended contract at Infotech Consulting, Inc. The record, however, does not contain a work order and comprehensive description of the beneficiary's proposed duties from an authorized representative of In [REDACTED]. Without such evidence, the petitioner has not demonstrated that the petitioner would employ the beneficiary in a permanent, full-time position, or that it is the actual employer for the beneficiary. Additionally noted is that the record does not contain an employment agreement between the petitioner and the beneficiary. Further noted is that the record does not contain sufficient evidence of a demand for the petitioner's workers. In view of the foregoing, the petitioner has not met its burden of proof in these proceedings. The assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, as discussed above, when considering the record as a whole, that the petitioner has filed a total of 259 I-140 petitions since 1995, over 35 of which were received in 2004 and 2005, and are currently pending, and also filed 2,537 I-129 nonimmigrant petitions since 1995, the petitioner has not provided evidence that it has met its past contractual obligations to place its information technology employees at its client companies. As such, the petitioner has not established that the position offered is a permanent full-time position and that the petitioner is the actual employer for the beneficiary.

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.

Beyond the decision of the director, the evidence fails to establish that the beneficiary has met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.² On the ETA 750A submitted with the instant petition, block 14 describes the requirements of the offered position as a bachelor's degree in computer science, electrical engineering, or equivalent. Block 15 describes the equivalent requirements as a bachelor's degree in computer science, electronics engineering or equivalent, and 6 months of work experience in the job offered or in the related occupation of programmer analyst. The record contains a copy of the beneficiary's Bachelor of Engineering degree in computer science from Bangalore University in Bangalore, India. The record also contains a copy of an academic evaluation, dated April 4, 2000, by The Trustforte Corporation for the beneficiary. The evaluator concludes, in part, that the beneficiary's bachelor's degree is "the equivalent of a Bachelor of Science Degree in Computer Engineering from an accredited institution of higher education in the United States." It is noted that in this case, the beneficiary's transcripts reflect that he failed many of his college courses. As the evaluator does not address this issue, it is not clear how he reaches his conclusion that the beneficiary's foreign degree is "the equivalent of a Bachelor of Science Degree in Computer Engineering from an accredited institution of higher education in the United States." CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved.

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.

² 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).