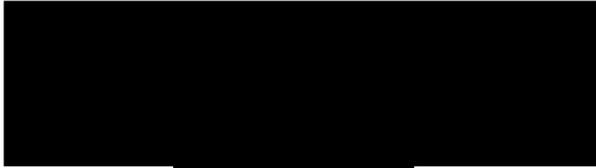


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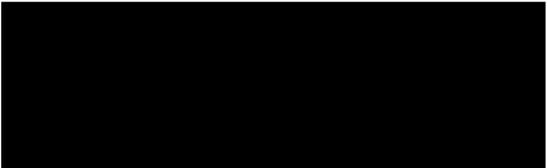
File: [Redacted]
SRC-06-067-51853

Office: TEXAS SERVICE CENTER Date: **SEP 20 2007**

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 Director, Texas Service Center (“director”), denied the immigrant visa petition. The petitioner appealed, and the appeal is now before the Administrative Appeals Office (“AAO”). The AAO will remand the decision back to the director for further consideration in accordance with the instructions below.

The petitioner operates a seafood processing, packing, and shipping company and seeks to employ the beneficiary permanently in the United States as a mechanical engineer. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s May 30, 2006 decision, the petition was denied based on the petitioner’s failure to demonstrate that it could pay the beneficiary the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

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

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, 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).

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.

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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on December 23, 2002. The proffered wage as stated on Form ETA 750 is \$49,539 per year, based on a 40 hour work week. The labor certification was approved on July 13, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on December 27, 2005. The petitioner listed the following information on the I-140 Petition: date established: March 26, 1999; gross annual income: \$7,483,440.00; net annual income: \$1,814,781; and current number of employees: thirty-five.

On January 12, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to submit evidence of its ability to pay the proffered wage, including a copy of the beneficiary's W-2 Forms for the years 2002, 2003, 2004, and 2005, along with the beneficiary's individual tax returns for those years. The petitioner responded. On May 30, 2006, the director denied the case finding that the petitioner did not establish its ability to pay the beneficiary the proffered wage from the priority date until the beneficiary obtained permanent residence. The petitioner appealed and the matter is now before the AAO.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on December 18, 2002, the beneficiary listed that he has been employed with the petitioner since April 2002. In response to the RFE, counsel provided that the beneficiary was unable to submit his 2002, 2003, or 2004 W-2 Forms,² and individual tax returns as the beneficiary's home was damaged by Hurricane Katrina.³ As the petitioner did not submit any evidence of prior wage payment to the beneficiary, the petitioner is unable to establish its ability to pay the beneficiary the proffered wage based on prior wage payment.

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, Citizenship & Immigration Services ("CIS") will next examine the net income figure reflected on the petitioner's federal income tax return. 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).

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.

² Counsel does not provide that the petitioner's records were similarly destroyed. As the beneficiary lists that he has been employed with the petitioner since 2002, the petitioner should have been able to provide copies of Forms W-2, or Forms W-3 for the petitioner, including the beneficiary's wages for the years in question.

³ Counsel provides in the RFE response that she is submitting the beneficiary's 2005 W-2 Form, and individual tax return. The record before us, however, does not contain this documentation, which appears to have been left out of the submission.

The record demonstrates that the petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$24,396
2003	\$33,961
2002	-\$131,135

Based on the foregoing, the petitioner cannot establish its ability to pay the beneficiary the proffered wage in any of the above years.

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 the difference between the petitioner's current assets and current liabilities.⁴ 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, or, if filed on Form 1120-A, on Part III. 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, and, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	\$319,637 ⁵
2003	-\$232,242
2002	-\$238,147

Based on the foregoing, the petitioner could pay the proffered wage from its net current assets in 2004, but it had negative net current assets in both 2002, and 2003, and cannot demonstrate its ability to pay in those two years.

We additionally note the following from the petitioner's tax returns:

<u>Tax year</u>	<u>Gross Receipts</u>	<u>Salaries Paid</u>	<u>Costs of Labor</u>
2004	\$7,483,440	\$0	\$0
2003	\$8,421,087	\$0	\$0
2002	\$10,624,164	\$0	\$280,590

⁴According 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.

⁵ We note that the petitioner's net current assets were held mainly in inventory (\$5,595,845 in 2004), and that storage and maintenance of such inventory might reduce the inventory's overall value as an asset.

The petitioner also provided a letter from its accountant. The accountant provides that the petitioner's gross annual profit since 2002 has exceeded \$1.5 million. Further, he provides that the petitioner had the following assets:

<u>Year Ended</u>	<u>Liquid assets</u>	<u>Other assets</u>	<u>Total assets</u>
2005	1,995,842	3,037,224	5,033,066
2004	6,209,297	2,924,485	9,133,782
2003	4,529,547	2,930,528	7,460,075
2002	3,809,760	2,862,661	6,672,421

Further, the accountant provides that the company's outlook is "quite good," and that the petitioner's annual income and cash flows have been sufficient to pay the proffered wage since 2002.

The petitioner's assets would have been considered under the net current assets analysis. While the petitioner's tax returns do reflect sizeable assets, the tax returns additionally reflect significant liabilities, which are reflected in the net current assets analysis above. Therefore, the accountant's letter provided must be analyzed in its full context, and accordingly, when considering the petitioner's outstanding liabilities would not demonstrate the petitioner's ability to pay the proffered wage.

The petitioner additionally submitted an unaudited balance sheet dated March 31, 2006, which listed its current assets as \$1,191,527.58, and the petitioner's total property and equipment as \$3,100,689, for total assets in the amount of \$4,292,216.63. The petitioner also submitted an unaudited income statement for the three months ending March 31, 2006, as well as 2002, 2004, and 2005 unaudited balance sheets. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements submitted with the petition are not persuasive evidence. The statements are in a compilation format rather than audited. Statements produced pursuant to a compilation are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner also submitted a letter from [REDACTED] dated April 7, 2006. The letter provided that the petitioner has had business accounts with the bank since 1999, and that as of December 2005, the petitioner's accounts totaled \$183,746.44. First, we note that bank statements, or information related to bank accounts are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." We note that the letter would reflect only the amount that the petitioner had in its account at the end of 2005, and would not demonstrate the petitioner's ability to pay the proffered wage from 2002 onward. As such, the letter would not be reliable evidence to show that the petitioner could pay the proffered wage continuously from the time of the priority date.

On appeal, the petitioner contends that it can pay the proffered wage, and that CIS should consider the totality of the petitioner's circumstances. Counsel cites to the May 4, 2004 Memorandum from William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2) (May 4 Yates Memo). The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary.

Counsel contends that the petitioner's net current assets in 2002 and 2003 were greater than the proffered wage. In support of this contention, counsel provides a letter from the petitioner's accountant, which provides that "certain . . . liabilities included in Petitioner's annual tax returns were amounts which were owed to the company president and did not require debt servicing or payment. As such, those amounts were not true liabilities and should not have counted against Petitioner's assets." Counsel then asserts that, based on this revised calculation, the petitioner's current assets would exceed its "true liabilities" in 2002 and 2003.

The accountant's letter⁶ attached provides that the petitioner's tax returns include certain loans and notes due to the petitioner's president who "has substantial interests in the company," and that "these amounts owed [to the president] were subordinated to bank financing and did not require payment." The accountant lists that these amounts would include: 2002: \$483,838; 2003: \$483,838; 2004: \$1,082,304.00; and 2005: \$1,095,304, and that the foregoing amounts should be subtracted from the petitioner's liabilities in calculation of the petitioner's net current assets. After subtraction of these amounts, the petitioner would be able to demonstrate its ability to pay the proffered wage.

The petitioner's president provided a letter that his:

Family has a major investment in [the petitioner] and as President of the company I lent money to the company from time to time for mainly capital improvements. From 2002 to 2005 a total of \$1,095,304 was lent to [the company] with the intention of acquiring more shares in the company. The money lent were posted in [the petitioner's] books as "loans & Notes" due to [the president]. As of today, the above mentioned loans and notes have been turned into equity of the company and I have obtained more shares in the company.

Loans from shareholders are not considered in the net current asset analysis, so that the loans, whether repaid or not, reclassified or not, would not change the net current asset analysis, and would not change the petitioner's ability to pay the proffered wage.

The petitioner provided a letter from another bank, dated June 28, 2006, which provided that the petitioner has had a relationship with the bank since July 2001, and that in 2002, the bank issued the petitioner a line of credit in the amount of \$3,000,000. Further, the letter provides that during the time period from 2002 to 2004, the company "managed the line of credit in a satisfactory manner. The deposit relationship was also handled satisfactorily" with an average ninety-day balance of \$75,959 in June 2002, \$373,534 in April 2003, and \$110,289 in March 2004.

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).

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

⁶ The accountant provides that his relationship with the petitioner is "one of complete independence. The services that I have preformed for this company, both tax services and financial reporting services, have been conducted strictly in my capacity as an independent certified public accountant." The director had questioned the accountant's relationship to the petitioner in her decision.

assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

However, in examining the petitioner's entire circumstances, the petitioner can demonstrate that it can pay the proffered wage in one year, 2004, based on its net current assets, and its net income is only \$15,578 below the proffered wage in 2003. The year 2002 is more problematic as the petitioner reflects negative net income, and negative net current assets in those years, but also exhibits gross receipts over \$10 million, and close to \$300,000 in labor costs paid. Based on the petitioner's length of time in business (over seven years), high gross receipts, and demonstration that it can pay the wage in one year, sizable line of credit, and banking history, we conclude that the factors taken together would exhibit the petitioner's ability to pay the proffered wage. This part of the director's decision is accordingly withdrawn.

Although not raised in the director's decision, we find that the petitioner must address who will be the beneficiary's actual employer. 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).

The petitioner claims that it employs over 35 employees, but this is not evidenced by the petitioner's tax returns. The tax returns do not reflect evidence of any wages paid to employees, or payment of any costs of labor. Further, the returns reflect low expenses for employee benefits, which would not be at a level in accordance with employing 35 individuals. It is unclear that the petitioner intends to employ the beneficiary as an "employee" in accordance with the terms of the labor certification. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). Further, the petitioner failed to provide any evidence that it has employed and paid the beneficiary, which while not required, would evidence that the petitioner would be the actual employer of the beneficiary.

In determining the actual employer, the regulation at 20 C.F.R. § 656.3 provides:

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.

Further, 20 C.F.R. § 656.3 provides that employment means, "Permanent full-time work by an employee for an employer other than oneself."

In *Matter of Smith*, 12 I&N Dec. 772 (1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its

clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* At 773.

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 to third-party clients on a continuing basis with one-year contracts. In *Ord*, the Regional Commission determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects.

In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner sought to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner again determined that where a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc. The staffing service rather than the end-user is the actual employer. *Id.*

As this issue was not raised in either the director's RFE, or in the decision, the petitioner should have an opportunity to address this issue on remand. In accordance with the foregoing, we will remand the petition to the director to issue an RFE to obtain documentation that the petitioner will be the actual employer. The petitioner should provide evidence that it directly employs its workers, including employment contracts or offer letters, personnel records, and/or information that it pays its workers, and provides benefits. Further, the petitioner should produce Forms W-3 to exhibit wages paid to the beneficiary as well as to other workers in addition to any other documentation that the director may request. The petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Following issuance of the RFE and upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which is to be certified to the AAO for review.