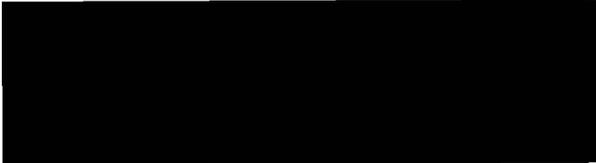


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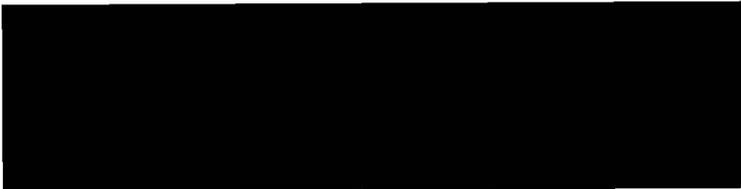
IN RE:

Petitioner:

Beneficiary:

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 a 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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

  
John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based visa petition was denied by the Director, Nebraska Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a food service manager. As required by statute, an ETA Form ETA 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and asserts that the petitioner has demonstrated its financial ability to pay the proffered salary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

*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 establish that its ETA Form 9089 job offer to the beneficiary is realistic. A petitioner's filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition subsequently filed based on the approved ETA Form 9089. The priority date is the date that the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). 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. Here, the ETA Form 9089 was accepted for processing on May 1, 2006. The proffered wage as stated on Part G of the ETA Form 9089 is \$24.75 per hour, which amounts to \$51,480 per year.<sup>1</sup> There is no evidence on the ETA Form 9089 that the petitioner has employed the beneficiary.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on August 2, 2006, the petitioner states that it was established on December 30, 1990, reports \$439,758 in annual gross income and currently employs fourteen workers.

As evidence of its continuing financial ability to pay the proposed wage offer of \$51,480 per annum and in response to the director's request for evidence, dated November 27, 2006, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return, for 2004 and 2005. The returns indicate that the petitioner files its tax returns using a fiscal year beginning on August 1st and ending on July 31<sup>st</sup> of the following year. Together, the 2004 and 2005 tax returns cover the period from August 1, 2004 until July 31, 2006. "Dragon Garden Restaurant" filed both tax returns, using the same tax identification number as the petitioner. Copies of a municipal permit and an alcoholic beverage license suggest that the petitioner's name is a fictitious business name under which the Dragon Garden Restaurant operates. The tax returns also contain the following information:

	2004	2005
Net Income <sup>2</sup>	-\$ 29,806	\$ 6,075
Current Assets	\$ 36,577	\$ 47,150
Current Liabilities	\$ 398,963	\$ 400,331
Net Current Assets	-\$ 362,386	-\$ 353,181

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, CIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> It represents a measure of liquidity during a given period and a possible

<sup>1</sup>This calculation is based on a 40 hour workweek and a 52 week year. The director's calculation appears as \$51,975.

<sup>2</sup> The petitioner is a C corporation. For the purpose of this review of the petitioner's Form 1120 corporate tax returns, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). CIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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

resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Following a review of the petitioner's net income and net current assets as contained in its 2005 corporate tax return, the director denied the petition on April 9, 2007. He concluded that neither the petitioner's net income nor its net current assets were sufficient to demonstrate its ability to pay the proffered wage.

On appeal, the petitioner, through counsel, contends that the petitioner has the ability to pay the proffered salary and submits additional evidence. They consist of a copy of a bank statement indicating that the petitioner's owner, [REDACTED], maintains a credit line of \$300,000 at the Bank of America and a statement signed by Mr. [REDACTED]. As indicated on the 2004 tax return, [REDACTED] is the petitioner's sole shareholder. His statement claims that the \$353,181 (shown as 2005 negative net current assets as set forth above) is actually funds that he has advanced to operate the business and not a loan from an outside financial institution. He also states that the business has maintained a healthy five figure balance in its bank accounts and that the petitioner owns a property that has been extended a \$300,000 credit line upon which no withdrawal has been made.

The evidence submitted by counsel on appeal is not convincing. With regard to the credit line, the credit is issued in the individual name of [REDACTED]. As noted above, the petitioner is a corporation. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." It is further noted that in calculating the ability to pay the proffered salary, CIS will not augment a 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).

Additionally, [REDACTED]'s statement submitted on appeal suggesting that CIS should ignore his funds advanced to the corporate petitioner, which are characterized as current liabilities on Schedule L of the corporate tax returns, is also not persuasive. It remains that the corporate petitioner has elected to declare these amounts as current liabilities as set forth on Schedule L of its corporate return(s). As such, they must be balanced against the current assets also claimed on Schedule L in order to calculate the petitioner's net current assets. It is also noted that Mr. [REDACTED] statement related to the petitioner's bank balances is not accompanied by any of the petitioner's bank statements. Going on record without supporting documentary evidence is not sufficient for purposes of meeting

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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.

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)). Moreover, while the regulation at 8 C.F.R. § 204.5(g)(2) allows additional material to be submitted “in appropriate cases,” bank records generally show only a portion of a petitioner’s financial status and do not reflect other liabilities and encumbrances that may affect a petitioner’s ability to pay the proffered wage. Further, the petitioner has not established that its bank balances represent funds in addition to the cash assets listed on line 1 of Schedule L, already considered in calculating the petitioner’s net current assets. [REDACTED] generalized assertion that the petitioner maintains healthy bank balances does not outweigh the evidence reflected on the petitioner’s corporate tax returns or should be accepted as probative of the petitioner’s ability to pay the proffered wage in lieu of the information set forth on the corporate tax returns as required by 8 C.F.R. § 204.5(g)(2).

In determining the petitioner’s ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner’s ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner’s net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, nothing in the record suggests that the petitioner has employed the beneficiary.

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 (or net current assets) as reflected on the petitioner’s federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net income to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well supported by federal case law. *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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

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.

As set forth above, if an examination of the petitioner’s net income or wages paid to the beneficiary fail to successfully demonstrate an ability to pay the proposed wage offer, CIS will review a petitioner’s *net current*

*assets* as an *alternative* method of reviewing a petitioner's ability to pay the proffered salary because they represent cash or cash equivalent readily available resources.

In this case, for the fiscal year (8/01/05 to 7/31/06) represented by the 2005 tax return, neither the petitioner's net income of \$6,075 nor its net current assets of -\$353,181 was sufficient to pay the proffered wage of \$51,480 and demonstrate its ability to pay in that year. Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage.

Finally, counsel's brief statement on the notice of appeal asserts that the petitioner is willing and capable of hiring the beneficiary in order to improve the operation of the business using the beneficiary's educational and training background. This assertion is not supported by the evidence in the record, which contains no evidence that would specifically demonstrate how this would be accomplished. We note that the 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).

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.