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U.S. Citizenship
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FILE: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: **MAR 04 2006**

IN RE: Petitioner:
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:

[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.

Robert P. Wiemann, 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 graphic designers/digital firm. It seeks to employ the beneficiary permanently in the United States as a graphic designer. As required by statute, a Form ETA 750, Application for Alien 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 contends 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.

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 are members of the professions.

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 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 it has the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm.

1971). Here, the ETA 750 was accepted for processing on April 16, 2003. The proffered wage as stated on Part A of the ETA 750 is \$50,000 per year. On Part B of the ETA 750, signed by the beneficiary on April 8, 2003, the beneficiary claims to have worked for the petitioner since March 2003.

On Part 5 of the I-140, which was filed on October 6, 2006, the petitioner states that it was established on July 26, 1996, currently employs thirteen workers, reports an annual gross income of \$925,000, and an annual net income of \$21,000.

With the petition, the petitioner provided copies of its Form 1120S U.S. Income Tax Return for an S Corporation for 2003, 2004 and 2005. The returns contained the following information:

	2003	2004	2005
Net Income ¹	-\$ 10,098	-\$ 21,862	-\$ 21,634
Current Assets	\$ 26,998	\$ 66,118	\$ 72,150
Current Liabilities	\$102,545	\$112,080	\$176,121
Net Current Assets	-\$ 75,547	-\$45,962	-\$103,971

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.² It represents a measure of liquidity during a given period and a possible 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.

The petitioner also supplied copies of Wage and Tax Statements (W-2s) that it issued to the beneficiary for the years 2003, 2004, and 2005. They indicate that the following compensation was paid to the beneficiary:

Year	Wages
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¹ 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 IRS 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, credits, deductions or other adjustments, net income is found on line 23* (2003) and line 17e* (2004-2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this case, the petitioner's net income is found on line 21 of page one of its tax returns for 2003, 2004 and 2005.

² 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.

2003	\$27,872
2004	\$29,525
2005	\$29,900

Following a review of the evidence submitted, the director denied the petition on October 11, 2006, concluding that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage, noting that the documentation failed to establish that the petitioner had the ability to pay the proffered wage in 2003, 2004, and 2005.

On appeal, the petitioner, through counsel, submits a compilation of financial statements prepared by the petitioner's accountant consisting of a balance sheet and profit and loss statement representing the petitioner's financial data as of October 30, 2006. A copy of a balance sheet of the principal shareholders' individual resources summarized as of October 15, 2006, also was provided. Further submitted on appeal is a copy of a bank statement indicating the existence of a \$75,000 business line of credit held by the petitioner as of the October 5, 2006 date of the statement, and copies of the petitioner's four bank statements covering a period from May 11, 2006 to August 31, 2006.

Counsel contends on appeal that the petitioner demonstrated its ability to pay the proffered wage. Counsel asserts that had the beneficiary been employed full-time, he would have been paid the full proffered wage of \$50,000 per year. He also cites the petitioner's survival of the economic downturn as a result of the September 11, 2001, World Trade Center attacks in New York and asserts that claims of depreciation should be considered. Counsel also states that because the petitioner is organized as a Subchapter S corporation, the principal shareholders' personal assets may be included in the review of the petitioner's ability to pay the proffered salary. Counsel further argues that the financial statements on appeal demonstrate the petitioner's ability to pay the proffered wage. He additionally asserts that somehow a five percent variable or reduction of the proffered wage may be considered based on the DOL salary survey guidelines. Counsel finally states that the petitioner was using temporary outside help whose wages will be saved by applying them to the beneficiary's proposed salary.

We do not find counsel's assertions to be persuasive. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its *continuing* financial ability beginning at the priority date. If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the *bona fides* of a job opportunity as of the priority date, including the petitioner's ability to pay the certified wage set forth in the alien labor certification that the petitioner submitted to the DOL is clear. In this case, the priority date is April 16, 2003.

Counsel's contention that the principal shareholders' personal assets should be included in the review of the corporate petitioner's ability to pay the proffered wage because of its tax status as a Subchapter S corporation is not persuasive. 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.”³

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 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage because his employment was less than full-time or because his wages were less than the proffered wage is not relevant to this calculation. Actual amounts will be considered if they are supported by the documentation contained in the record. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner’s net income or net current assets for a given year, then the petitioner’s ability to pay the full proffered wage for that period will also be demonstrated. The record in this case indicates that the shortfall between the actual wages paid to the beneficiary and the proffered wage during 2003, 2004 and 2005 may be reflected as follows:

2003	-\$22,125
2004	-\$20,475
2005	-\$20,100

Counsel’s theory that the calculation of the prevailing wage should be reduced an additional 5% is not applicable to this case. Under the regulations in effect prior to the implementation of the PERM Labor Certification System on March 28, 2005, the DOL would certify a prevailing wage in some applications for permanent alien labor certifications if the wage proposed was within 5 percent of the average rate of wages. *See* 20 C.F.R. § 656.40(a)(2)(i) (2003). This never applied to the CIS consideration of the proffered wage in the immigrant visa process except when the employer was requesting a visa under the Schedule A Blanket Labor Certifications, and it doesn’t apply to Schedule A petitions filed after March 28, 2005. As discussed above, the proffered wage, which represents the rate of pay as set forth on item 12 of the DOL approved labor certification including any DOL consideration of a 5% variable is the wage that CIS considers in determining the petitioner’s continuing financial ability to pay. In this case the proffered wage is \$50,000 per year.

The assertion is also made that the petitioner could eliminate payments to temporary outside help if the beneficiary is hired to replace such worker(s). This contention is not persuasive. No direct evidence was provided in support of this contention which identifies the worker, the job performed, the wages received or the dates of employment. 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).

Counsel’s reliance on the copies of the petitioner’s four 2006 bank statements submitted on appeal is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required

³ In *Avena v. INS*, 989 F. Supp. 1, 8 (D.D.C. 1997), the court noted that as the parent church organization would not be paying the local religious workers’ salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner’s ability to pay the proffered wage.

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 such as the provision of an audited financial statement for covering the first ten months of 2006. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The petitioner's compiled financial statements covering the first ten months of 2006 are also not probative in establishing its continuing ability to pay the proposed wage offer of \$50,000. 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 accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

It is also noted that 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). Further, since the line of credit is a "commitment to loan" and not an existent loan, the record has not established that the unused funds from the line of credit were available as of the priority date of April 16, 2003. 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the relevant period, CIS will next examine the net income figure (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 profit 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 established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*; 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.

It is noted that depreciation will not be added back to a petitioner's net income. This figure recognizes that the cost of a tangible asset may be taken as a deduction to represent the diminution in value due to the normal wear and tear of such assets as equipment or buildings or may represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate represents a real expense of doing business, whether it is spread over more years or concentrated into fewer. With regard to depreciation, the court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that 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.

(Original emphasis.) *Chi-Feng Chang* at 536.

We note that the record of proceeding contains no evidence specifically connecting the petitioner's financial profile to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that it survived economically after the events of September 11, 2001, does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date of April 16, 2003. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In this case, the petitioner failed to demonstrate that either its net income of -\$10,098 or its -\$75,547 in net current assets could cover the payment of the \$22,125 difference between the actual wages paid to the beneficiary in 2003 and the proffered salary of \$50,000. The petitioner did not demonstrate its ability to pay the proposed wage offer in 2003.

In 2004, neither the petitioner's net income of -\$21,862 nor its net current assets of -\$45,962 could cover the \$20,475 difference between the beneficiary's actual wages of \$29,525 and the proffered salary of \$50,000. The petitioner did not establish its ability to pay the certified wage for this year.

Similarly, in 2005, neither the petitioner's net income of -\$21,634 nor its net current assets of -\$103,971 could cover the difference of \$20,100 between the beneficiary's actual wages and the certified wage of \$50,000, or demonstrate the ability to pay for this year.

In this matter, the documentation submitted does not satisfy the requirements set forth in 8 C.F.R. § 204.5(g)(2) and does not establish the petitioner's continuing financial ability to pay the proffered salary beginning at the priority date.

Beyond the decision of the director, it is further noted that the petitioner failed to submit any evidence of its ability to pay the proffered wage during 2006 to the director, although the documentation provided on appeal related to 2006. For the reasons stated above, and based on the requirements of 8 C.F.R. 204.5(g)(2), we do not conclude that the evidence relevant to this year established its financial ability to pay the proffered wage.

It is additionally noted that as the record currently stands, it may not be concluded that the petitioner has demonstrated that the beneficiary obtained the educational credentials required by the terms of the labor certification. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that for a skilled worker visa classification, the beneficiary's educational qualifications must meet the terms required by the labor certification. If the classification sought is for a professional under 8 C.F.R. § 204.5(l)(3)(ii)(C), the petitioner must show that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree as evidenced by an official record which reflects the date the degree was awarded and which shows the concentration of study. The petitioner must also demonstrate that a minimum of a baccalaureate degree is required for entry into the occupation.

In this case, the petitioner has not demonstrated that a minimum of a baccalaureate degree is required for entry into the occupation based on relevant DOL occupational standards, although item 14 of the ETA 750A states that an applicant for the certified position of graphic designer must have four years of college culminating in a BA degree. No field of study is designated on item 14 of the ETA 750A, and there is no indication that the petitioner would accept anything less than a four-year foreign equivalent baccalaureate degree. The only evidence contained in the record of proceedings which relates to the beneficiary's educational credentials is a copy of a diploma from the University of Chittagong in Bangladesh indicating that the beneficiary received a bachelor of arts degree in 1984 and was placed in the second division. No area of study is designated and there is no indication of the length of time of the academic study is indicated on the diploma. The record does not contain a grade transcript. The only indication of the length of academic study is set forth on Part B of the ETA 750B, which was signed by the beneficiary. He describes his attendance at the University of Chittagong as beginning in July 1982 and ending in July 1984, thus describing a two-year B.A. degree program.⁴ Therefore, as the record exists, it may not be concluded that the

⁴ This office has also reviewed credentials evaluations information available at the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the information found on the online registration page for EDGE, <http://accraoedge.aacrao.org/register/index/php>, EDGE is a "web-based resource for the evaluation of foreign educational credentials." The AACRAO EDGE database indicates that "a two-year Bachelor's degree represents attainment of a level of education comparable to 2 years of university study in the United States." A copy of that description is attached herein.

beneficiary possesses a four-year bachelor of arts degree or satisfies the terms of the labor certification for either visa classification based on the requirements set forth on the labor certification.⁵

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 petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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.

⁵ CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).