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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC-02-163-53668 Office: VERMONT SERVICE CENTER Date: NOV 01 2004

IN RE: Petitioner: [redacted]
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:

[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.

Michael Valde

for Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a bakery. It seeks to employ the beneficiary permanently in the United States as a baker. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, 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 a brief and additional evidence.

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, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 8, 2001. The proffered wage as stated on the Form ETA 750 is $11.87 per hour, which amounts to $24,689.60 annually.

With the petition, the petitioner submitted Form 1065 U.S. Return of Partnership Income for 2000. The Form 1065 reflected ordinary income of -$110,756. The petitioner submitted an income statement for eleven months ending November 30, 2001 and its commercial bank statements for the period February 28, 2001 through April 30, 2001.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on August 12, 2002, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of federal tax returns with schedules for 2001, evidence of the petitioner's continuing ability to pay the proffered wage, copies of the beneficiary's Form W-2 Wage and Tax Statement(s), if employed and evidence that the beneficiary possessed the required two years experience

In response, the petitioner submitted its Form 1065 tax returns for 2001. The tax returns reflect the following information for the following years:

	2001
Net income	-$74,643
Current Assets	$190,547
Current Liabilities	$179,711
Net current assets	$10,836

In addition, the petitioner submitted a letter from Jefe de Tienda, president of El Rosario bakery who stated that the beneficiary worked him as a baker from March 1996 to December 1998.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on March 4, 2003, denied the petition.

On appeal, counsel asserts that the petitioner has been in business since 1993 and has gross assets of over one million dollars. Counsel further states that in 2002 the petitioner paid $285,689 in salaries and wages. Counsel states that he is submitting a copy of the beneficiary's Form W-2 for 2002 reflecting that she worked for 28 weeks and three days during 2002. Counsel further states that the beneficiary did not work the rest of the year for personal reasons. The petitioner submits a letter from Southern Financial Bank indicating that the petitioner has a line of credit of $20,000 and checking account overdraft protection of $5,000. Counsel also submits the beneficiary's Form W-2 indicating that she earned $13,011.52 during 2002.

The petitioner's line of credit will not be considered for two reasons. First, 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). Second, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial 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 account 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that 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, now CIS, should have considered income before expenses were paid rather than net income.

If the petitioner submitted 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 present matter, the petitioner established that it had previously employed the beneficiary during a portion of 2002 only. The record reflects that during 2002 the beneficiary was paid $13,011.52. On appeal counsel indicates that the beneficiary worked 28 weeks three days. The record does not, however, indicate the number of hours worked by the beneficiary during this time. In the absence of such evidence it cannot be determined if the beneficiary worked the time indicated and, if so, the petitioner paid the beneficiary at the rate of proffered wage during the portion of 2002 she purportedly worked. Counsel's assertions on appeal do not constitute evidence. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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[1]. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of the

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

A partnership year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 15 through 17. If a partnership end-of-year 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 petitioner's net current assets during the year 2001 was $10,863. The petitioner could not pay the proffered wage out of this amount during 2001. Although specific evidence to the effect was requested by the director in the RFE, the petitioner has not submitted sufficient evidence of its ability to pay the proffered wage during 2002. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The record does not contain any evidence of individual assets held by the partners that could be used in the determination of the petitioner's ability to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage from the priority date and continuing.

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.

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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.