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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: WAC-03-012-52046 Office: CALIFORNIA SERVICE CENTER Date: NOV 22 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.

For Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a restaurant and retail grocery. It seeks to employ the beneficiary permanently in the United States as a cook. 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. The director also determined that the petitioner failed to prove the beneficiary is qualified for the proffered position.

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 first issue to be discussed in this case is whether or not the petitioner established its continuing ability to pay the proffered wage.

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 23, 2001. The proffered wage as stated on the Form ETA 750 is $12.00 per hour, which amounts to $24,960 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 1993, to have a gross annual income of $880,420, and to currently employ nine workers. In support of the petition, the petitioner submitted its U.S. Corporation Income Tax Return on Form 1120 for the years 2001 and 2000.[1]

The tax return for 2001 reflects the following information:

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[1] As the priority date of the petition is in 2001, the financial information contained in the petitioner's 2000 tax return is not necessarily dispositive of the petitioner's ability to pay the proffered wage and will not be recited in this decision.

	2001
Net income	$302
Current Assets	$39,181
Current Liabilities	$9,689
Net current assets	$29,492

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on February 12, 2003, 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 annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Form 1120 Corporate tax returns for the year 2002 with a letter stating that the petitioner's owner would cut his salary to ensure payment of the proffered wage to the beneficiary.

The tax return for 2001 reflects the following information:

	2002
Net income	-$264
Current Assets	$42,066
Current Liabilities	$11,776
Net current assets	$30,290

In addition, counsel submitted copies of the petitioner's quarterly wage reports for the quarter ended March 31, 2002, June 30, 2002, September 30, 2002, and December 31, 2002. The quarterly wage reports do not show that the petitioner paid any wages to the beneficiary during the various quarters covered by the reports.

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 July 21, 2003, denied the petition.

On appeal, counsel asserts that the petitioner's gross receipts and the totality of its financial circumstances evidences its ability to pay the proffered wage. The petitioner submits proof of a line of credit and bank statements. Also, counsel cites a case called "Lowry," but provides no citation other than a brief synopsis of facts and assertion that the case was adjudicated by the Board of Alien Labor Certification Appeals (BALCA). Without the citation, the AAO cannot identify this case. The brief synopsis of facts provided by counsel, however, suggests that this case concerned a sole proprietor and not a corporate petitioner. This makes the case distinguishable from the petitioner's case. Finally, counsel has not demonstrated how BALCA case law serves as precedent over the AAO.

Counsel's reliance on the balance 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.

The proof of a line of credit contained in the record of proceeding is in the petitioner's owner's name, Nerses Tumanyan, and private address. Although unclear, apparently this is the petitioner's owner's asset (or liability, as will be discussed below), and not the petitioner's asset or liability. Counsel's reliance on the assets of Nerses Tumanyan is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

Even if Citizenship & Immigration Services (CIS) could pierce the corporate veil and consider the line of credit, 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).

The line of credit will not be considered for an additional 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).

In determining the petitioner's ability to pay the proffered wage during a given period, 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 or 2002.

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). 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 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. In 2001 and 2002, the petitioner reported income too low to prove its ability to pay the proffered wage.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If a corporation's 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 years in question, 2001 and 2002, were $29,492 and $30,290, both greater than the proffered wage of $24,960. As such, the director's failure to consider the petitioner's net current assets is simply gross error.[3]

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2001 or 2002. In 2001, the petitioner shows a net income of only $302, but net current assets of $29,402, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. In 2002, the petitioner shows a net income of -$264, but net current assets of $30,290, and has, therefore, demonstrated the ability to pay the proffered wage out of its net current assets. The petitioner has, therefore, shown the ability to pay the proffered wage during 2001 and 2002.

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[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.

[3] The director stated in his decision that the petitioner "does not show enough income or strong current net assets to substantiate the ability to pay the beneficiary's wage..." This statement does not concur with precedent and CIS's approach to determining the ability to pay the proffered wage. The meaning of "strong" current net assets is unclear. A petitioning entity's net current assets are either greater or less than the proffered wage.

The petitioner submitted evidence sufficient to demonstrate that it has the ability to pay the proffered wage during 2001 and 2002. Therefore, the petitioner has established that it has the continuing ability to pay the proffered wage beginning on the priority date.

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 23, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of cook. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	Blank
	Grade School	Blank
	High School	Blank
	College	Blank
	College Degree Required	Blank
	Major Field of Study	Blank

The applicant must also have two years of training in order to perform the job duties listed in Item 13, which states "Cook Russian and Mediterenian [sic] specialty dishes, desserts and other foods according to prescribed methods and recipes. Prepare meats, soups, sauces, vegetables and other foods prior to cooking. Season and cook foods. Portion and garnish food." Item 15 indicates that there are no special requirements.

The beneficiary set forth her credentials on Form ETA-750B under penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, she indicated that she was employed as a Cook for "Ani" restaurant in Armenia from August 1992 through February 1997. The description of her work for Ani restaurant is similar to the proffered position. While there is other employment listed, those experiences indicate self-employment, unemployment, and employment as a teacher, without any corroborating evidence.

With the initial petition, the petitioner submitted a translated experience letter from Ani restaurant. The letter, dated February 2001, is on Ani restaurant letterhead, signed by the restaurant director an cooperative president, and states that the beneficiary "has been working in the "Ani-99" Cooperative Company dba Ani Restaurant from August of 1992 to February of 1997 as a cook. She was on the part-time basis, working 25 hours per week."

The director requested additional evidence concerning the evidence of the beneficiary's qualifications on January 17, 2003. The director specifically requested a letter on the prior employer's letterhead showing the name and title of the person providing the information, as well as stating the beneficiary's title, duties, dates of employment experience, and hours worked per week. The director also stated that if the experience was gained from outside of the United States, that verifiable evidence such as work identification cards, pay stubs or tax returns be provided to corroborate the employment experience.

In response to the director's request for evidence, the petitioner provided the same experience letter submitted previously with an affidavit from the beneficiary and a statement from counsel. Counsel stated:

> The experience is from overseas, however we can not provide you with tax returns, pay stubs or work ID, since none of that is available in Armenia.
>
> After the breakup of the Soviet Union, everything changed in all former Soviet Republics, including Armenia. Numerous privates [sic] owned business entities were established. After Armenia declared its independence in 1991 there was no new constitution, no new legal system, and no taxation regulations. The country did not have any experience and/or knowledge in the private sector. The individuals were compensated on hourly or weekly basis by cash only. Even today there is no payroll system, and no one is paid by checks.
>
> [The beneficiary] tried to contact her former employer to see, if she can get anything else besides her experience letter. At that time she was informed that the restaurant went out of business and does not exist at present.

The affidavit provided by the beneficiary states that she "really have [sic] knowledge and experience as a cook," and that she was employed part-time as a cook with Ani restaurant from August 1992 to February 1997, where she was paid "only by cash, on weekly basis, along with all other employees of the restaurant," and was never issued any work ID or pay checks.

The director's decision stated that since the petitioner initially submitted an insufficient letter because it did not provide the employer's complete address nor describe the beneficiary's experience as a cook, the director requested additional evidence. In his decision to deny the petition for failure to establish the beneficiary's qualifications for the proffered position, the director further stated:

> [CIS] is not convinced that the [b]eneficiary has obtained the full two years experience based on the submitted experience letter since it is not on company letterhead and does not have a complete address. Therefore, [CIS] requested that the [p]etitioner to submit verifiable evidence in the form of work I.D., pay stubs or tax returns. The [p]etitioner failed to provide evidence to [CIS] that would substantiate the claimed experience of the [b]eneficiary.

On appeal, counsel provides an additional translation of the same previously submitted experience letter and states that the petitioner's address was on the letter but not translated properly. The new evidence on appeal reflects an address on the petitioner's letterhead.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO finds the letter pertaining to the beneficiary's qualifications to be acceptable evidence of two years of training as a cook. According to the guiding regulation, the training letter must provide the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien. The letter in the record of proceeding, with its two translations, provides the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.