U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: EAC-02-153-53526 Office: VERMONT SERVICE CENTER Date: NOV 26 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]

PUBLIC COPY identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, who subsequently denied a motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. 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 statement.

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 April 12, 2001. The proffered wage as stated on the Form ETA 750 is $79,000 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of September 1997.

On the petition, the petitioner claimed to have been established in 1976 and to currently employ eight workers. In support of the petition, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2000[1]. The petitioner also submitted a Form W-2, Wage and Tax Statement, reflecting that the petitioner paid $56,732.22 in wages to the beneficiary in 2001.

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 July 10, 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 annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director specifically requested the petitioner's 2001 federal tax return.

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[1] Because 2000 precedes the priority date of 2001, the petitioner's financial situation as reflected in its 2000 federal tax return is not necessarily dispositive of its continuing ability to pay the proffered wage as of the priority date.

In response, the petitioner submitted its Form 1120S, U.S. Income Tax Return for an S Corporation for the year 2001. The tax return reflects the following information for the following years:

	2001
Net income[2]	-$97,779
Current Assets	$443,403
Current Liabilities	$857,285
Net current assets	-$413,882

In addition, counsel submitted copies of the petitioner's Merrill Lynch WCMA investment account statements for the entire year of 2001 and a listing of aged receivables. Counsel states that the petitioner's revenues were adversely impacted by declining travel after September 11, 2001, but recovered thereafter. Counsel also states that its clients pay slowly, which is evidenced by aged receivables of $488,910 towards the end of 2001. Finally, counsel pointed out the petitioner's $200,000 substantially unused line of credit.

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 February 20, 2003, denied the petition. In addition to noting its reported loss in 2001 and negative assets, the director stated that the documents provided in response to his request for evidence shows that the petitioner's "purchasing power" of its line of credit was reduced to $10,119. Also, the director stated that no supporting evidence illustrates that the "aged receivables" were collected in 2002 as counsel asserted.

On a motion to reconsider, counsel submits a letter from [redacted] the petitioner's accountant, who states in pertinent part, the following:

> I can attest to the fact that [the petitioner] had sufficient resources in their line of credit, as of [the priority] date, and that any downturn occurred only in the fourth quarter of 2001 and has since been reversed. At the end of 2001 the [petitioner] claimed $488,910 in receivables. With the exception of $20,000, the entire amount had been collected by the first quarter of 2002. Additionally, the total line of credit was repaid and became available again.

Counsel asserts that "the funds were fully available in April 2001 when the petition was filed," and both she and [redacted] state that the petitioner's only financial troubles were isolated to the end of 2001. Counsel also submits a Form W-2, Wage and Tax Statement, showing that the beneficiary was paid $74,276.77 in 2002. Counsel also submits copies of the petitioner's bank account statements and a print-out from the petitioner's account with Merrill Lynch showing a line of credit of $200,000.

The director denied the motion to reconsider on June 12, 2003 stating that the motion failed to provide evidence connected to the 2001 priority date.

On appeal, counsel asserts that the director erred and failed to correctly consider evidence provided with her motion to reconsider. Although counsel states that additional evidence and a brief would be submitted in thirty days, nothing further has been received by the AAO. The appeal was filed on July 14, 2003 and over one year has

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[2] Ordinary income (loss) from trade or business activities as reported on Line 21.

elapsed. Thus, the appeal will be adjudicated based upon the evidence currently contained in the record of proceeding.

At the outset, counsel's reliance on the balances in the petitioner's bank and investment accounts 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 established that it employed and paid the beneficiary $56,732.22 in 2001, which is $22,267.78 less than the proffered wage. In 2002, the petitioner established that it employed and paid the beneficiary $74,276.77, which is $4,723.23 less than the proffered wage.

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.

The petitioner's net income in 2001 was -$97,779 and it could not pay the $22,267.78 of remaining wages out of negative net income. The petitioner did not provide regulatory-proscribed evidence concerning its net income in 2002.

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.[3] 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 year in question, 2001, however, were negative. As such, the petitioner could not demonstrate its continuing ability to pay the remaining wage out of its net current assets in 2001. The petitioner did not provide documentation concerning its net current assets in 2002.

The petitioner demonstrated that it paid $56,732.22 in wages to the beneficiary in 2001. In 2001, the petitioner shows negative net income and negative net current assets and has not, therefore, demonstrated the ability to pay the remaining wage of $22,267.78 out of its net income or net current assets. In 2002, the petitioner demonstrated that it paid $74,276.77, which is $4,723.23 short of the proffered wage, but failed to provide regulatory-proscribed evidence concerning its net income or net current assets to prove it could cover the $4,723.23 shortfall.

The petitioner has not demonstrated that any other funds were available to pay the proffered wage. Counsel asserts that the petitioner is aided by its line of credit. However, 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 T*erms, 45 (1998).

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. 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).

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[3] 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.

Additionally, the AAO concurs with the director that the evidence submitted on motion to reconsider do not demonstrate that the petitioner has the ability to pay the proffered wage as of the priority date in 2001. Mr. or Ms. Vogler states that the petitioner's receivables were received in 2002, not 2001. 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 at 49. Thus, contrary to counsel's assertion, these additional funds were not available to the petitioner in 2001. The petitioner's tax returns in 2001 do not reflect additional funds available to it in 2001 aside from what is reported.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2001 or subsequently during 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.