U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 09 2009

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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.

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a medical center. It seeks to employ the beneficiary permanently in the United States as a health educator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The acting director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage for 2001, 2002, 2003 and 2004. The acting director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the acting director's August 22, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage.

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 who are members of the professions.

The regulation 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, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 30, 2001. The proffered wage as stated on the Form ETA 750 is $25.42 an hour ($52,873.60 per year). The Form ETA 750 states that the minimum level of education required for the position is four years of college and a bachelor's degree of science in nursing or medicine, four years of high school and eight years of grade school, and the minimum level of experience required is two years in the job offered or two years in a related registered nurse or doctor occupation.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] On appeal, relevant evidence submitted by counsel includes a brief; the petitioner's bank account statements from 2001 to 2004; a bank statement regarding the petitioner's line of credit; and a statement from [redacted] The record also includes copies of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001, 2002, 2003, 2004 and 2005.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on January 8, 1992 and to currently employ four workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, the beneficiary does not claim to have worked for the petitioner.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) failed to consider all of the evidence establishing the ability of the petitioner to pay the proffered wage.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 does not assert that it 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, USCIS 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). 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 the Immigration and Naturalization Service, now USCIS, 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 court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the 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. [USCIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record before the director closed on August 1, 2006 with the receipt by the acting director of the petitioner's response to the director's request for evidence (RFE). As of that date, the petitioner's 2006 federal income tax return was not yet due. The petitioner's tax returns demonstrate its net income for 2001, 2002, 2003, 2004, and 2005 as shown in the table below.

- In 2001, the Form 1120S stated net income[2] of -$8,178.00.
- In 2002, the Form 1120S stated net income of -$5,761.00.
- In 2003, the Form 1120S stated net income of -$7,367.00.
- In 2004, the Form 1120S stated net income of $37,717.00.
- In 2005, the Form 1120S stated net income of $96,495.00.

Therefore, for the years 2001, 2002, 2003 and 2004 the petitioner did not have sufficient net income to pay the proffered wage of $52,873.60 per year. The petitioner did have sufficient net income to pay the proffered wage in 2005.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001, 2002, 2003 and 2004.

- In 2001, the Form 1120S stated net current assets of -$15,348.00.
- In 2002, the Form 1120S stated net current assets of $0.
- In 2003, the Form 1120S stated net current assets of $52,422.00.
- In 2004, the Form 1120S stated net current assets of $8,505.00.

Therefore, for the years 2001, 2002, 2003 and 2004 the petitioner did not have sufficient net current assets to pay the proffered wage.

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS 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 (1997-2003) and line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2008, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed December 1, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions shown on its Schedule K for 2001, 2002, 2003 and 2004, the petitioner's net income is found on Schedule K of its tax returns.

[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.

Thus, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Counsel asserts that USCIS erred in failing to take into account the petitioner's president's personal income and wealth. Counsel states that an S-Type corporation is an individual seeking to gain benefits of a corporation while still being a small entity and that the petitioner is a flow-through entity that must distribute all its income or suffer tax penalties. *Id.* As such, the petitioner's president received sufficient flow through funds to cover the beneficiary's salary without affecting his basic salary. *Id.* In the instant case, [redacted] states that he owns 100% of Prism Medical Center and that he has the ability to pay the proffered wage to the beneficiary from his officer's compensation or through his personal income. Statement from [redacted], dated September 5, 2006. The owner of the corporation supports a family of four. The owner's Form 1040 U.S. Individual Income Tax Returns show an adjusted gross income of $263,844.00 for 2001, $273,470.00 for 2002, -$11,126.00 for 2003, and $84,900.00 for 2004. The AAO finds that for 2001 and 2002 the owner could support a family of four and pay the proffered wage of $52,873.60 to the beneficiary. In 2003, the owner did not demonstrate the ability to pay the proffered wage. The AAO notes that for 2004, it is improbable that the owner could support himself, his spouse and two children on $32,026.40 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net income to pay the proffered wage.

Counsel asserts that the petitioner's bank account statements show its ability to pay the beneficiary's proffered wage. 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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also notes that the petitioner's bank has established a line of credit for the petitioner, all of which remains untouched and available. In calculating the ability to pay the proffered salary, USCIS 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).

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). 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. 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, USCIS 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, USCIS 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 further asserts that the beneficiary is not an additional employee, but instead was being hired to fill an old position. The record does not, however, name this former employee, state his or her wages, verify his or her full-time employment, or provide evidence that the petitioner has replaced or will replace him or her with the beneficiary. In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position of the former employee involves the same duties as those set forth in the Form ETA 750. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

Counsel notes that a statement from the petitioner's accountant discusses the cash flows of the petitioner from 2001 through 2005 and finds that the petitioner always had the ability to pay the proffered wage. The AAO notes that the record includes a statement from [redacted], dated September 11, 2006. Although counsel refers to this individual as a **certified public accountant, there is nothing in the record to support such assertion.** Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. [redacted] report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Counsel states that the AAO should look at the totality of the circumstances and approve the instant petition. *Attorney's brief. Matter of Sonegawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001, 2002, 2003 and 2004 were uncharacteristically unprofitable years for the petitioner. The petitioner was established in 1992 and has four employees. The petitioner had gross receipts of $870,393.00 in 2001, $429,773.00 in 2002, $681,188.00 in 2003, and $474,712.00 in 2004. There is nothing in the record regarding the reputation of the petitioner. When looking at the totality of circumstances, the petitioner has not demonstrated its ability to pay the proffered wage.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.