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U.S. Citizenship
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Services

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FEB 25 2005

FILE: WAC 02 289 52362 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
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:



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 service center director denied the employment-based petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a machine shop. It seeks to employ the beneficiary permanently in the United States as a tool and die maker. 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 states that Citizenship and Immigration Services(CIS) erred in not considering figures such as depreciation, bad debt, and amortization figures in its analysis of the petitioner's financial capability. Counsel submits no additional documentation.

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 Immigration and Nationality Act (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, 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 February 26, 2001. The proffered wage as stated on the Form ETA 750 is \$23.27 per hour, which amounts to \$48,401 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 February of 1998, to have three employees, and to have a net annual income of \$112,861. Based on its federal income tax return, it is structured as a domestic general partnership. In support of the petition, the petitioner submitted an IRS Form 1065, U.S. Return of Partnership Income, for 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 February 13, 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. The director specifically requested signed and certified copies of the petitioner's federal income taxes from 2000 to the present, with accompanying schedules and tables. In addition, the director requested California Form DE-6, quarterly wage reports for the petitioner's employees for the last four quarters, copies of business licenses for the petitioner, and evidence that the beneficiary possessed the seven years of experience listed on Form ETA 750. The director stated that the employment verification should be submitted on letterform by the previous employer, and should state the name, address, title and phone number of the person verifying the information as well as the beneficiary's title, job duties, dates of employment, and number of hours worked per week. The director also noted several errors on the Form I-140 and requested clarification on these items. The director also noted a date of employment on the Form ETA 750B with no information as to employer and asked if this date indicated employment of the beneficiary by the petitioner. If so, the director requested a W-2 form for the beneficiary.

In response, on May 8, 2003, counsel submitted the petitioner's federal tax returns for 2000 and 2001, a copy of the petitioner's business license, and a letter of verification from Curtimbres Copacabana & Cataluna S.A., Medellin, Colombia, with regard to the beneficiary's previous work experience. Counsel stated that the petitioner had no W-2 form for the beneficiary as he is unemployed and has never worked for the petitioner. Counsel also drew attention to the ETA 750 certification that stated the position is a full-time, 40 hours a week position. Finally counsel stated that the petitioner declined to provide the requested DE-6 forms as the request was overreaching, overly burdensome, and bore no reasonable relationship to whether the petitioner has the ability to pay the proffered wage. Counsel also submitted copies of a statement for a mortgage loan to [REDACTED] from Wells Fargo Bank, as well as monthly statements for a line of credit extended to the petitioner and Udo Hofmeister, from January 2000 to May 2003.¹

On June 12, 2003, the director sent a second request for evidence to the petitioner. The director stated that the letter from the [REDACTED] S.A. failed to indicate the author of the letter as well as this person's title and phone number. In addition, the director requested again that the petitioner clarify the beneficiary's employment status. Finally, the director requested the petitioner's 2002 federal income tax return.

In response, counsel submitted the petitioner's 2002 tax returns. Counsel noted that the tax return reflected a small loss for the year, but that on page four, the same tax return reflected items, such as bad debts, accumulated depreciation, and amortization, that totaled \$48,939 in non-cash losses. Counsel asserted that this figure is, in reality, a paper loss as allowed by the tax code. Counsel further asserted that when these non-cash losses are combined with a regular labor cost of \$156,430, the petitioner could demonstrate the financial strength and ability to pay the proffered salary. Counsel also stated that the petitioner did not presently employ the beneficiary. Counsel finally submitted a second letter from Curtimbres Copacabana & Cataluna, S.A. that contained the name and telephone number of the person who wrote the letter. This letter stated that the beneficiary worked full-time for the company from February 1989 to June 2000.

¹ Mr. Hofmeister is identified as one of two partners in the petitioner's federal tax form.

On September 22, 2003, the director denied the petition. In his decision, the director examined the federal income tax returns for the petitioner from the years 2001 and 2002. The director determined that the petitioner had established that it had the ability to pay the beneficiary the proffered wage of \$48,401 at the time of the priority date, based on its net current assets in 2001. However, the director also determined that the petitioner's net current assets of \$24,327 in 2002 were not sufficient to establish the petitioner's ability to pay the proffered wage in 2002. Therefore, the petitioner had not established the ability to pay the proffered wage from the priority date to the present.

On appeal, counsel reiterates her assertion with regard to the petitioner's paper losses being utilized to establish the petitioner's ability to pay the proffered wage. Counsel states that CIS failed to recognize the petitioner's paper losses although it has been established that paper losses may be taken into account when determining the employer's ability to pay. Counsel submits no further documentation.

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 from February 26, 2001 to the present.

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.² 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. Although the director requested the petitioner's tax return for 2000, it is noted that this tax return is not dispositive, as the priority date for the instant petition is February 26, 2001. Therefore only the petitioner's tax returns for 2001 and 2002 will be considered in these proceedings. These two documents reflect that the petitioner's net income for 2001 was \$8,600 and for 2002 was -\$16,115. Neither figure is sufficient to establish that the petitioner had sufficient net income to pay the beneficiary's salary from the priority date forward.

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,

² On IRS Form 1065, U.S. Return of Partnership Income, Line 22, ordinary income (loss) from trade or business activities, is considered the petitioner's net income.

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 On Form 1065, a corporation's current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). 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 tax returns reflect the following information for the following years:

	2001	2002
Net income	\$ 8,600	\$ -16,115
Current Assets	\$ 54,512	\$ 43,457
Current Liabilities	\$ 2,805	\$ 400
Net Current Assets	\$ 51,707	\$ 43,057

The director, in his examination of the petitioner's net current assets, correctly determined that the petitioner could pay the proffered wage as of the 2001 priority date. He also correctly determined that the petitioner lacked sufficient funds to pay the beneficiary's wage in 2002, however, the director's figure for the petitioner's net current assets in 2002 is incorrect.⁴ The petitioner's 2002 net current assets, as outlined above, were \$43,057. Thus, the petitioner lacked \$5,344 to have met the beneficiary's proffered wage in 2002.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 or that it paid the full proffered wage. The petitioner established that it had sufficient net current assets in 2001 to pay the proffered wage; however, in 2002, the petitioner did not demonstrate the ability to pay the proffered wage out of its net income or net current assets.

Although counsel asserts on appeal, that it has been established that the petitioner's paper losses can be utilized to establish the petitioner's ability to pay the proffered wage, counsel cites to no regulatory or statutory authority. The assertions of counsel, do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA

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.

⁴ The director neglected to add \$19,130, identified as cash on line 1D of Schedule L, in calculating the petitioner's current assets.

1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In addition, contrary to counsel's assertions, CIS and the AAO do consider Line 2b on Schedule L, less allowance for bad debts, when calculating the net current assets of petitioners.⁵ Furthermore, with regard to non-cash deductions, 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 537.

With regard to the documentation in the record as to one partner's home mortgage and line of credit from Wells Fargo, counsel submitted this documentation with no further explanation. As such, it does not sufficiently establish that this particular partner has sufficient financial resources to pay the remaining wage in 2002 that is not covered by the petitioner's net current assets. In addition, both the partner's income and personal liabilities would have to be considered as part of the partner's ability to pay the remaining wage.

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 one partner'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 partner's line of credit will not be considered for two reasons. 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 partner's liabilities and will not improve its overall financial position. Although counsel also submitted a statement with regard to the partner's home mortgage, without further explanation, this is also viewed as documentation of further debt, rather than documentation of assets that can be used to pay the proffered wage.

The petitioner established that it had the ability to pay the proffered wage as of the priority date in 2001; however, it failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage 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 and onward.

⁵ See previous discussion on net current assets and Note 2.

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.