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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
WAC-03-268-52539

Office: CALIFORNIA SERVICE CENTER

Date: AUG 09 2007

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:

[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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment-based 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 dismissed.

The petitioner is a care facility. It seeks to employ the beneficiary permanently in the United States as a restaurant cook (cook). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. As set forth in the director's April 27, 2006 denial, the director determined that a permanent full-time position does not exist for a cook with this petitioner. The 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.

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 Form ETA 750 states a different capacity than the one in which the petitioner intends to employ the beneficiary. The petitioner is not in compliance with the terms of the Form ETA 750 and has not established that the employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

The beneficiary must engage in the profession relevant to the Form ETA 750 and applicable to this Immigrant Petition for Alien Worker (I-140). As stated in *Matter of Semerjian*, 11 I&N Dec. 751, 754 (Reg. Comm. 1966):

It does not appear to have been the wish of the Congress to award such a preference to an alien who, although fully qualified as member of the professions, had no intention of engaging in his profession or, at least, in a related field for which he was fitted by virtue of his professional education or experience.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>1</sup>. On appeal, counsel submits a brief without any additional evidence. Other relevant evidence in the record includes the petitioner's license, copy of Fictitious Business Name Statement, Form 1120 U.S. Corporation Income Tax Return filed by [REDACTED] for 2002, W-2 forms issued by [REDACTED] to [REDACTED]

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<sup>1</sup> 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).

and [REDACTED] in 2001, and a letter from Bank of America regarding [REDACTED] \$50,000 Advantage Business Credit Line. The record does not contain any other evidence showing that the petitioner's job offer is realistic and that a permanent, full-time cook position exists.

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, was filed on August 14, 2001 and the job offer consists of the name of job title: "Cook"; number of working hours per week: 40; the wage offered: \$10.09 per hour; the name of employer: "G [REDACTED]", the instant petitioner; the location of the employment: "[REDACTED]"; and the duties:

Prepare and cook foods according to diets prescribed for residents: Prepare, clean, measure & mix ingredients following dietary recipes; Observe and test foods being cooked; Adjust temperatures of ovens, broilers, grills and steam kettles; Bake, roast, boil, broil and steam fish, meats and vegetables following the recipes; Weigh portions and supervise the preparation of trays as needed; Estimate food consumption and supplies needed; Follow weekly menu guide to prepare and cook foods per prescribed diets for patients' individual trays.

The labor certification was approved for the beneficiary to fill the full-time cook position with the petitioner at the location mentioned above to perform the above quoted duties. However, the petition does not include any evidence to establish that the petitioner's job offer to the beneficiary is a *bona fide* and realistic one. The petitioner claimed to employ three workers on the petition, however, it did not indicate whether or not the three workers include the two shareholders/owners of the petitioner, nor did it submit any documentary evidence, such as Form 940, Form 941 or payroll records, to establish its number of employees. While the petitioner did not indicate how many residents were currently taken care of at the petitioner's facility, the license shows that the petitioner's facility's total capacity is six residents. The petitioner also indicates on the petition that the proffered position is not a new position, but it did not provide any information on the current or previous employee. It is doubtful that the petitioner had the permanent full-time position of cook at the priority date.

The record shows that Citizenship and Immigration Services (CIS) conducted interviews with the petitioner and the beneficiary on October 4, 2005. During the interviews the petitioner stated that it had three residential homes and six employees on payroll; the Department of Social Services generally requires a staff of two employees for six residents; the beneficiary works and will continue to work at one of residential homes licensed for six residents; the petitioner confirmed that the beneficiary is designated as a cook, but is also used as one of the two individuals needed to maintain required levels of staffing. The petitioner estimated that the beneficiary would spend forty percent of her working time cooking and cleaning up after cooking, however, the petitioner placed the estimate at seventy to seventy-five percent later when asked to estimate the time the beneficiary would spend on all cooking related tasks. The beneficiary confirmed that if she noticed a resident needing help, she would interrupt her cooking duties to render assistance. The record contains inconsistent information on the number of employees, the beneficiary's employment and her grocery shopping tasks. The petitioner stated during the interview that it had six employees on payroll while it claimed to employ three workers on the petition. The petitioner confirmed at the interview that the beneficiary works for the petitioner at [REDACTED] as a full-time cook, however, the beneficiary claimed to have worked for [REDACTED] at [REDACTED]

as an administrator on the Form G-325A signed on July 14, 2003. During the interviews the petitioner initially stated that the owners of the business do the grocery shopping, and then stated that grocery shopping was one of the tasks the beneficiary currently does in support of her cooking duties, and later stated that a coming change in business practice would require the beneficiary to do shopping, however, did not provide additional information when asked to explain how this would be a change. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve these inconsistencies. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

On appeal counsel asserts that there is no requirement that the alien have ever been employed by the petitioner while the I-140 and /or I-485 was pending, and thus, inasmuch as the beneficiary has not yet been granted legal permanent residency, any discussion that focuses on her current job duties is an incorrect application of CIS law and procedure respecting the adjudication of the I-140 petition and/or I-485 application and denying the I-140 petition on that basis is error. While the AAO concurs with counsel's argument that the beneficiary is not required to be employed in the proffered position while the I-140 and/or I-485 is pending, we also note that the director did not deny the petition because the beneficiary did not work as a full-time cook for the petitioner, but because a permanent full-time position does not exist for a cook with this petitioner. The director clearly stated in his decision that: "[i]t is noted that a beneficiary generally is not required to be working full-time for a petitioner at this stage in the immigration process. However, the record of evidence indicates that this beneficiary has not been working full-time as a cook because a permanent full-time position does not exist for a cook with this petitioner." Counsel's assertion is misplaced. The petitioner must establish that a permanent, full time cook position exists and the job offer is *bona fide* and thus, must resolve the inconsistencies in the record including statements made at the interviews.

Counsel also asserts that the interviewer did not ask any questions looking prospective to the time when the beneficiary would be granted lawful permanent residence status. Had the interviewer so inquired, Mrs. Feliciano would have testified that the beneficiary would be working full-time as a cook when and if she would be granted lawful permanent residence status. The record does not show that counsel attended the interviews. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel did not submit any affidavit of the petitioner and the beneficiary regarding their statements during the interviews and regarding the existence of a full-time cook position at the petitioner at the priority date. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm. 1989).

In addition, the issue in the instant case is not whether the beneficiary is currently working as a full-time cook for the petitioner, nor is whether the beneficiary will be working full-time as a cook when and if she is granted lawful permanent residence status. The issue is whether or not the petitioner had and continues to have a full-time cook position, and thus, the petitioner's job offer is realistic and *bona fide* from the priority date and continuing to the present. Although the beneficiary is not required to work full-time in the proffered position before her lawful permanent residence status is granted, the beneficiary's employment as a full-time cook to perform each of duties set forth on the Form ETA 750A is *prima facie* evidence that the petitioner offers a permanent, full-time cook position to the beneficiary, and that the petitioner's job offer is realistic and *bona fide*. The record shows that the beneficiary is not working as a full-time cook to perform the duties set forth on the Form ETA 750A. Although the petitioner indicated on the petition that the proffered position is not a new position, the record does not contain any evidence that any employee had performed the full-time cook duties from the priority date of August 14, 2001 until the beneficiary started her employment as a part-time cook with the petitioner, nor does it contain any evidence that the petitioner has another employee working as a part-time cook for the facility to share the full-time cook duties with the beneficiary since she has been performing part-time cook duties. Therefore, the petitioner failed to submit sufficient evidence to establish that a permanent full-time cook position existed on or before it offered the job to the beneficiary, and further failed to demonstrate that its job offer was and has been a realistic and *bona fide* one from the priority date until the present.

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. Counsel's reliance on prospective full-time performance of the cook duties as set forth on the Form ETA 750A to establish the petitioner's realistic and *bona fide* job offer as of the priority date is misplaced. Moreover, the facility is licensed for 6 residents and the petitioner runs the facility with full capacity of 6 residents. Since the petitioner's current full capacity operation cannot provide the beneficiary a full-time cook position at the facility, the petitioner could not have offered any more duties as a cook to the beneficiary. Further, the petitioner failed to provide any information on any future change to the job offer during the interviews. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel's assertions on appeal cannot overcome the grounds of the director's denial. The AAO concurs with the director's decision that the petitioner failed to establish that the full-time permanent cook position existed when the labor certification application was filed and continues to exist presently. Accordingly the director's April 27, 2006 decision is affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility. We will discuss whether or not the petitioner has demonstrated that it had the continuing ability to pay the proffered wage beginning on the priority date to the present. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See*

*Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 U.S. Department of Labor. *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 U.S. Department of Labor 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 August 14, 2001. The proffered wage as stated on the Form ETA 750 is \$10.09 per hour (\$20,987.20 per year). On the petition, the petitioner claimed to have been established in 1998, and to currently employ 3 workers, but did not provide information about its gross annual income and net annual income. On the Form ETA 750B, signed by the beneficiary on July 05, 2001, the beneficiary did not claim to have worked for the petitioner. However, during the interview on October 4, 2005 the beneficiary claimed to have worked for the petitioner since July 19, 2005.

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, Citizenship and Immigration Services (CIS) 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 submitted its owners' W-2 forms for 2001. However, in general, wages already paid to others including the owners of the petitioner 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. The petitioner did not submit any evidence, such as W-2 forms, 1099 forms, paystubs, cancelled paychecks or other documentary evidence, for the petitioner to show that it hired and paid the beneficiary any amount of compensation during the relevant years from 2001 to the present. During the interviews held on October 4, 2005, both the petitioner and the beneficiary claimed that the beneficiary had worked for the petitioner since July 2005. However, the record does not contain any evidence to show that the beneficiary was paid by the petitioner since then. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has not established that it paid the beneficiary the full proffered wage from the priority date in 2001 onwards. The petitioner is obligated to demonstrate that it could pay the full proffered wage in 2001 through the present with its net income or its net current assets.

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 contrary to the petitioner's assertions. 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 total income and wage expense is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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. [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.

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

The record contains copies of a Form 1120, U.S. Corporation Income Tax Return, filed by [REDACTED] for 2002. [REDACTED]'s 2002 tax return demonstrates the [REDACTED] and [REDACTED] own 51% and 49% of the company's common stock respectively. A license to operate and maintain a residential-elderly facility under name of [REDACTED] at [REDACTED] Torrance, CA 90504 was issued by California Department of Social Services to [REDACTED]. Fictitious Business Name Statement filed by [REDACTED] indicates that one of fictitious business names they are doing business as is [REDACTED]. It is also noted that C [REDACTED], the petitioner, and [REDACTED] are identified with a same tax identification number. Therefore, the AAO will accept and review [REDACTED]'s tax return and other financial documents as belonging to the petitioner. [REDACTED]'s 2002 tax return demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$20,987.20 per year:

- In 2002, the Form 1120 stated a net income<sup>2</sup> of \$15,580.

Therefore, for the year 2002, the petitioner did not have sufficient net income to pay the full proffered wage that year.

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.<sup>3</sup> 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 net current assets during 2002 were \$166.

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<sup>2</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

<sup>3</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

Therefore, for the year 2002, the petitioner did not have sufficient net current assets to pay the full proffered wage that year.

In addition, the priority date in the instant case is August 14, 2001 and the regulation clearly requires that the petitioner must demonstrate its ability to pay the proffered wage at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Therefore, the petitioner in the instant case must establish its ability to pay the proffered wage from 2001, the year of the priority date. However, the petitioner did not submit any regulatory-prescribed evidence of the ability in the form of copies of annual reports, federal tax returns, or audited financial statements for 2001. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner failed to establish its ability to pay the proffered wage in 2001 because it did not submit its tax return or other regulatory-prescribed evidence.

Counsel submitted a letter from Bank of America regarding [REDACTED]'s \$50,000.00 Advantage Business Credit Line. 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).

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, 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 also submitted Form SSA-1099 for 2001 for [REDACTED]. As previously discussed, the petitioner, Golden Sunset Haven, is doing business under a corporation structure of [REDACTED]. Therefore, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17

I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Even if the petitioner's business were operated as a sole proprietorship by [REDACTED] the petitioner would have had to submit [REDACTED]'s individual tax returns to demonstrate that [REDACTED] had sufficient gross adjusted income to pay the proffered wage as well as to cover their family's living expenses in 2001 onwards. CIS would consider the sole proprietorship's income and his liquefiable assets and personal liabilities as part of the petitioner's ability to pay, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. However, in any event, the social payment in the amount of \$11,588 in 2001 cannot establish the petitioner's ability to pay the proffered wage and to cover the living expenses in 2001 onwards.

In addition, the fictitious business name statement filed by [REDACTED] indicates that they are also doing business as two names other than [REDACTED] one of the two other names is [REDACTED]. CIS record shows that the petitioner, [REDACTED], using the tax identification number [REDACTED] (same as the one used in the instant case), filed another Immigrant Petition for Alien Worker (Form I-140) for one more worker (WAC-03-123-52340) on April 7, 2003 which was denied because of fraud on December 2, 2003; and that [REDACTED], using the same tax ID [REDACTED], filed another I-140 immigrant petition (WAC-03-031-50286) on October 31, 2002, which was denied on February 14, 2003 and the subsequent appeal was dismissed on June 12, 2006. It is doubtful whether or not the petitioner had the ability to pay all the proffered wages to each of the beneficiaries from the priority date for each of cases to each of the petitions was terminated.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, 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, its net income or its net current assets.

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.

**ORDER:** The appeal is dismissed.