

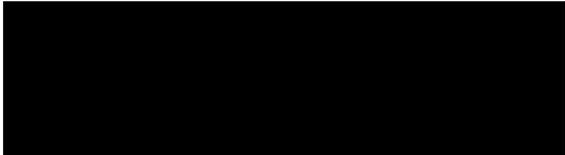
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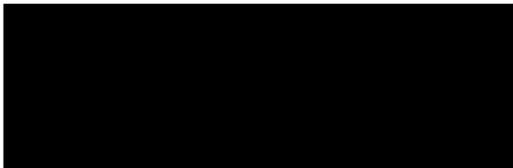
Office: VERMONT SERVICE CENTER

Date: SEP 20 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:



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 Director, Vermont Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner operates a computer consulting business, and seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s November 30, 2005 decision, the case was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered labor certification wage from the priority date until the beneficiary obtains permanent residence.

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>

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact.<sup>2</sup> 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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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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).

<sup>2</sup> The petition was denied on November 30, 2005. A petitioner is allowed 33 days to appeal if the decision is mailed under 8 C.F.R. § 103.5a, so that the petitioner was allowed until January 2, 2006 to file the appeal. The petitioner’s appeal filed is date stamped January 3, 2006. The appeal was initially rejected as untimely filed. However, January 2, 2006 was a federal holiday, and the federal offices would have been closed as January 1 New Year’s Day fell on a Sunday that year. Therefore, the petitioner had until January 3, 2006 to timely file the appeal.

*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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on December 12, 2001.<sup>3,4</sup> The proffered wage as stated on Form ETA 750 is \$76,000 per year,<sup>5</sup> based on a 40 hour work week. The labor certification was approved on March 5, 2004, and the petitioner filed the I-140 on the

<sup>3</sup> We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

<sup>4</sup> We note that the beneficiary's husband shares the same surname as the petitioner's owner. It is unclear whether the beneficiary is therefore related to the owner through marriage. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See also* [redacted] Corporation, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in *Young Seal* that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not *bona fide* or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification." It is unclear whether there is a relationship between the two parties, but if there is a relationship and the petitioner failed to disclose this to DOL during the labor certification process, then the *bona fides* of the job offer may be in question.

<sup>5</sup> The petitioner initially listed a wage of \$40,000 per year, but DOL required that the petitioner increase the wage to \$76,000 per year prior to certification.

beneficiary's behalf on October 21, 2004. On the I-140, the petitioner listed the following information: date established: 1995; gross annual income: \$660,000; net annual income: not listed; and current number of employees: eight.

On January 25, 2005, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit documentation to demonstrate that the beneficiary had the prior work experience required by the certified Form ETA 750. The petitioner responded and provided evidence that the beneficiary had the required prior work experience.

On July 20, 2005, the director issued a second RFE for the petitioner to submit further evidence of its ability to pay the proffered wage from the priority date to the present, including the beneficiary's W-2 statement if the petitioner employed the beneficiary. The petitioner responded. Following consideration of the petitioner's response, on November 30, 2005, the director denied the case as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

We will examine the petitioner's ability to pay based on information in the record and then consider the petitioner's additional arguments on appeal. First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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 case at hand, on Form ETA 750B, signed by the beneficiary on July 23, 2004, the beneficiary did not list that she was employed with the petitioner. The petitioner did not submit any evidence that it employed or paid the beneficiary. Therefore, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

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. 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). 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 record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue

Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner did not submit its entire tax returns with all relevant schedules. From the documentation submitted, the petitioner lists only income from its business and, thus, CIS evaluates the petitioner's net income based on line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$60,944
2003	\$42,355
2002	\$48,648
2001	\$51,689
2000 <sup>6</sup>	\$94,965

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004 <sup>7</sup>	no Schedule L
2003	no Schedule L
2002	\$12,874
2001	\$35,551
2000	\$38,236

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in any of the above years based on net current assets as well.

The petitioner also provided several bank statements. First, we note that bank statements, and funds in bank accounts are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. Further, cash assets in the petitioner's bank account should already have been accounted for as cash on the petitioner's Form 1120S Schedule L and included in

<sup>6</sup> As the priority date is December 2001, the petitioner's 2000 federal tax return would not demonstrate the petitioner's ability to pay from the time of the priority date. However, we will consider the tax return generally.

<sup>7</sup> The petitioner's federal tax returns did not contain Schedule L for the years 2003 and 2004 so that we are unable to calculate the petitioner's net current assets for these two years.

net current assets analysis above. The petitioner did not provide evidence to show that the funds in the petitioner's account represent funds beyond those listed on the petitioner's Forms 1120S federal tax returns.

If we examined the statements, the statements showed variation in the petitioner's account. The statements reflected a low balance of \$26,454.08 (as of June 30, 2005), and a high balance of \$39,977.71 (as of April 29, 2005). The statements for the limited time period provided would not demonstrate the petitioner's ability to pay from December 2001 to the present, but rather would represent only the amount that the petitioner had in its account as of the statement dates submitted.

The petitioner also provided quarterly wage statements, Forms 941, for the first three quarters of 2005. While the Forms 941 do exhibit wage payments, payments made to other workers generally cannot be considered to demonstrate the petitioner's ability to pay the proffered wage. The petitioner did not provide any paystubs or W-2 statements to show that any of the wages paid were paid to the beneficiary.

The petitioner's accountant additionally provided several letters, which provided that, in addition to the petitioner's employees paid, the petitioner also used the services of subcontractors paid on Forms 1099. Similar to the Forms 941, wages paid to subcontractors in this instance cannot be considered to demonstrate the petitioner's ability to pay the proffered wage. The letters do not indicate that the beneficiary will replace a terminated subcontractor or employee, and work in the same position as the terminated worker.

On appeal, the petitioner provided more specific information. The petitioner contends that as the initial beneficiary of the labor certification left the company, the petitioner required the use of an outside contractor to complete the client project initiated. The petitioner paid that worker at a higher rate of \$60 per hour, or \$84,000 for the year 2002, documented by Form 1099. The petitioner also asserts that payment of the higher subcontracting wages contributed to the petitioner's lower net income for the years 2003 and 2004. In support, the petitioner provided a copy of the contract, a description of the subcontractor's job duties, and Form 1099 to document the 2002 wages paid to the individual. The contract provided for work over a twelve month time period to finish the project, which the initial beneficiary began. Wages paid to others are generally not considered to show the petitioner's ability to pay the beneficiary the proffered wage. However, the petitioner has documented that the subcontracted worker was to perform similar job duties as the initial beneficiary who left the company, which is the beneficiary's anticipated position. Accordingly, we will accept that the petitioner can demonstrate its ability to pay in the year 2002 based on the wages paid to the subcontracted worker. However, the petitioner did not clearly document replacement wages in any of the other years as the letters fail to provide what duties the subcontracted workers performed, or that the beneficiary would replace the terminated subcontracted worker. Accordingly, the petitioner is unable to show that it can pay the proffered wage in all the years since the priority date.

On appeal, the petitioner provides that its business is information technology services, and that it provided consulting services to one client, WEBbuilders Corporation, in 2001 and 2002, in the amount of \$268,830. WEBbuilders, then, however, filed for bankruptcy in June 2002. As the petitioner was unable to collect funds from WEBbuilders, the petitioner's net income was reduced by \$134,415 in 2001, and for approximately the same amount in 2002. The petitioner contends that its 2001 and 2002 net income was, therefore, considerably lower in those years.

Further, the petitioner contends that as a result of the loss of revenue from WEBbuilders, the petitioner had to obtain a line of credit in the amount of \$100,000, and that repayment of the loan contributed to the petitioner's "unforeseen expense in the subsequent years that followed i.e. 2002, 2003, and 2004."

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).<sup>8</sup>

As CIS will not augment the petitioner's net income based on a line of credit remaining available, CIS will not augment the petitioner's net income based on income expended. The petitioner's loan would be reflected in the net current assets calculation above as a liability.

The petitioner additionally submitted financial statements for the time period ending December 29, 2005. 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. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner further cites to the May 4, 2004 William R. Yates, Associate Director for Operations, Determination of Ability to Pay under 8 CFR 204.5(g)(2), Memo (May 4 Yates Memo) in support of this premise. The May 4 Yates Memo provides that CIS should examine the petitioner's: (1) net income; (2) net current assets; or (3) the petitioner's employment of the beneficiary.

The petitioner contends that it would have had a net income of \$186,104 from the amount WEBbuilders owed combined with the petitioner's net income in 2001, and, therefore, can demonstrate its ability to pay for that year. In 2002, the petitioner adds its net income, to the WEBbuilders amount owed, and wages paid to outside labor, which the petitioner asserts would result in a net income of \$279,837. The petitioner continues

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<sup>8</sup> 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. The letter from Fleet Bank regarding the line of credit is dated June 25, 2002, after the priority date. 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, 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).

that in 2003, the petitioner's net income with the unforeseen loan repayment would result in an amount of \$119,581.31. In 2004, the petitioner's net income and loan repayment would amount to \$102,382.90. In 2005, the petitioner asserts that based on the accountant's report, its net assets combined with net income would result in funds of \$196,778.

A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Essentially, the petitioner asserts that it could have paid the proffered wage, if certain events had not happened. Such reasoning is insufficient to demonstrate the petitioner's ability to pay the proffered wage. Businesses frequently experience unexpected costs or events based on circumstances beyond their control. The petitioner has not demonstrated that the impact severely affected the business in one year alone, but instead the petitioner points to ongoing reductions in income from various events over multiple years. The petitioner cannot show its ability to pay the proffered wage in any of the relevant years, therefore, we are not persuaded by the petitioner's reasoning.

We note that the petitioner has filed for multiple beneficiaries in the same time frame,<sup>9</sup> or overlapping with the same time as the petitioner filed for the beneficiary. The petitioner would need to demonstrate that it has the ability to pay all the beneficiaries the proffered wage from the relevant priority dates until the beneficiaries obtain permanent residence.

The petitioner has failed to establish its ability to pay the beneficiary the proffered wage from the priority date onward, and the petition was properly denied. 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.

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<sup>9</sup> CIS records reflect that the petitioner has filed 20 petitions, including eight I-140 petitions, and at least four of those during the time period that the petition on behalf of the beneficiary would have been pending.