

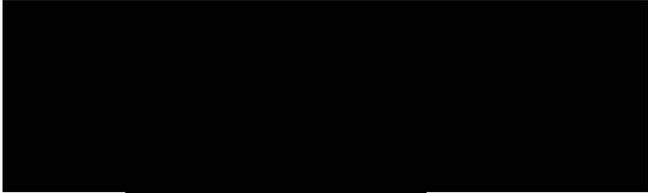
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: DEC 04 2008
LIN 06 247 52254

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.

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).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a software development and consultancy business, and seeks to employ the beneficiary permanently in the United States as a programmer analyst (Systems Analyst). 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 August 16, 2007 decision, the petition was denied on the basis that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage.

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).¹

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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).

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

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).

shall either be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted on March 18, 2002.² The proffered wage as stated on Form ETA 750 is \$65,000 per year based on a 40 hour work week.³ The labor certification was approved on February 13, 2006, and the petitioner filed the I-140 on the beneficiary's behalf on August 30, 2006. The petitioner represented the following information on the I-140 Petition: date established: 2000; gross annual income: \$6.2 million; net annual income: "(\$0.45 Million);" and current number of employees: 25.

With the petition, the petitioner submitted its 2005 IRS Form 1120, U.S. Corporation Income Tax Return. On April 17, 2007, the director issued a Request for Evidence (RFE) for the petitioner to submit additional documentation regarding the petitioner's ability to pay from the priority date of March 18, 2002 onward, to include the petitioner's 2002 to 2004, and 2006 federal tax returns, audited financial statements, or annual reports, as well as to provide the beneficiary's Form W-2 or Form 1099 if the petitioner employed the beneficiary. Further, the RFE requested that the petitioner provide evidence that the beneficiary had the required degree to meet the educational requirements of the certified labor certification. The petitioner responded and provided the following evidence regarding its ability to pay the proffered wage: IRS Forms 1120, U.S. Corporation Income Tax Returns, for 2002, 2003 and 2004; IRS Forms 941, Employer's Quarterly Federal Tax Returns, for all four quarters of 2006; the petitioner's unaudited profit and loss sheet for January through March of 2007;⁴ the beneficiary's pay statements issued by the petitioner for the months ending December 2006, January 2007, February 2007, March 2007, April 2007, and May 2007; and the beneficiary's IRS Form W-2 issued by the petitioner for 2006. Following review, the director denied the petition on August 16, 2007 on the basis that the petitioner failed to establish its ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

On appeal, counsel submits a brief; a copy of the petitioner's [REDACTED] "Score Summary;" a letter from Wachovia bank and an account summary dated January 8, 2007 confirming the petitioner's line of credit; the petitioner's IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2001, 2002, 2005 and 2006; evidence relating to the petitioner's incorporation and stock ownership; a fact sheet regarding the petitioner; and IRS Forms 1120S, U.S. Income Tax Return for an S Corporation, for Uniplus Consultants, Inc. for 2002, 2003, 2004, 2005 and 2006.

² The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary filed prior to July 16, 2007 retains the same priority date as the original ETA 750. Memo. From [REDACTED], Acting Associate Director, Domestic Operations, United States Citizenship and Immigration Services (USCIS), to Regional Directors, *et al.*, *Interim Guidance Regarding the Impact of the [DOL's] final rule, Labor Certification for Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity, on Determining Labor Certification Validity and the Prohibition of Labor Certification Substitution Requests*, <http://www.uscis.gov/files/pressrelease/DOLPermRule060107.pdf> (accessed December 1, 2008).

³ In a letter dated July 21, 2006 submitted with the petition, [REDACTED] Human Resources Manager for the petitioner, indicated that the petitioner will pay the beneficiary a salary of \$85,000.00 per year.

⁴ Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payments to the beneficiary, if any. 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. On Form ETA 750, signed by the beneficiary on July 28, 2006, the beneficiary listed that he has been employed with the petitioner as a systems analyst since June 2006. The petitioner provided the following evidence of wage payments to the beneficiary: 2006 W-2 statement, which showed wages paid in the amount of \$47,153.06; pay statements exhibiting monthly wages of \$7,083.33 for the month ending December 2006; and pay statements exhibiting monthly wages of \$7,500 for the months ending January 2007, February 2007, March 2007, April 2007, and May 2007.

Wages paid to the beneficiary in 2006 will be considered as partial payment of the proffered wage, although, the wages paid would be insufficient alone to document the petitioner's ability to pay the proffered wage. The petitioner must show that it can pay the difference between the wages paid and the proffered wage in 2006, and that it can pay the full proffered wage for the years 2002 through 2005.

Next, we will examine the net income figure reflected on the petitioner's federal income tax returns. 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 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 petitioner is a C corporation. For a C corporation, USCIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of IRS Form 1120, U.S. Corporation Income Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

<u>Tax year</u>	<u>Net income or (loss)</u>
2006 ⁵	not submitted
2005	-\$45,945
2004	-\$443,468
2003	-\$80,461
2002	\$34,768

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

We additionally note that USCIS records reflect that the petitioner has filed to sponsor 21 other individuals for permanent residence. The petitioner would be required to demonstrate that it could pay the proffered wage for all sponsored workers.⁶

⁵ The petitioner provided that its 2006 federal tax return was not available at the time it responded to the RFE.

⁶ Further, the petitioner has filed multiple H-1B petitions. The petitioner would be obligated to pay each H-

As an alternative means of determining the petitioner's ability to pay the proffered wages, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ 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. 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, thus, would evidence the petitioner's ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net Current Assets</u>
2006	not submitted
2005	-\$303,109
2004	not submitted
2003	-\$3,216
2002	\$93,179

Similarly, the petitioner's net current assets would be insufficient to demonstrate the petitioner's ability to pay the proffered wage with the exception of the year 2002. However, the petitioner's net current assets in that year would be insufficient to demonstrate the petitioner's ability to pay for all sponsored beneficiaries.

On appeal, counsel asserts that USCIS is in error as USCIS based its conclusion on, "a selective sampling of financial indicators that do not reflect the overall financial health, longevity, stability, credit record, and available financial resources of the petitioner." Instead, counsel asserts that other financial analysis, such as a company's credit rating, or Dunn & Bradstreet rating, would provide a greater picture of the petitioner's financial status.

The petitioner submitted a copy of its Dunn & Bradstreet "Score Summary." The summary provided the company's "financial stress score" between the dates of March 2, 2007 and May 31, 2007; its commercial credit score for the same dates; its "PAYDEX;" and its D&B rating.

As the Dunn & Bradstreet report submitted covers only a small three-month time period, the rating, regardless of how Dunn & Bradstreet rated the company, would not exhibit the petitioner's ability to pay the proffered wage from the priority date to the time that the beneficiary obtains permanent residence. Further, the methods used to arrive at the scores provided are unclear.

Counsel further provides that the petitioner has a \$50,000 line of credit, which a bank issued to the petitioner on October 11, 2001. Counsel asserts that this line of credit would have been available to pay the beneficiary the proffered wage from the priority date onward. In support, the petitioner submitted a letter from the bank confirming its line of credit, the total amount, and the date the line of credit was issued. The letter further

1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.

⁷According 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.

provides that the “line has been used as agreed.” Attached to the letter, the petitioner provided a one-page account summary that showed as of January 8, 2007, the petitioner had the full line of credit available for use.

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).

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).

Further, the letter from the bank does not specify how much of the line of credit the petitioner had available from the priority date until January 8, 2007. The account statement submitted would reflect only the available balance as of that date, and not from the priority date until 2007.

Counsel provides that the petitioner has been 75% owned and controlled by its parent company, [REDACTED] from its incorporation through 2006. Further, he provides that the parent company, [REDACTED], has been in business since 1988, and that the parent company’s tax returns show that the parent had significant revenue, and annual income “well in excess of any of the losses, which were occasionally reported by their subsidiary.” Contrary to counsel’s assertion, USCIS 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.

Counsel additionally argues that USCIS did not adequately consider “the nature of the petitioner’s business,” providing information technology services. He argues that in contrast to a manufacturing company, which would be more heavily capitalized, an information technology company would instead of capital, depend on the ability to generate more projects and earn revenue. Further, the ability to generate revenue would depend on the employment of people to generate more revenue.

We note that the petitioner is presently employing the beneficiary in H-1B status, so that employment of the beneficiary would not be expected to generate further revenue for the petitioner. Additionally, we find counsel’s argument flawed in that a manufacturing company would similarly depend on future contracts as would an IT company. The manufacturer would need to produce items in order to generate revenue.

Counsel provides that the petitioner's tax returns demonstrate that the petitioner's annual revenues have grown considerably over the years and would "be objective proof of their ability to obtain and complete revenue generating IT consulting services projects over a sustained period of time." USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 2000. The petitioner's most recent IRS Form 941 in the record, for the last quarter of 2006, shows that the petitioner has 26 employees. The petitioner's gross receipts totaled \$2,361,264; \$2,332,141; \$7,320,658; and \$6,211,629 in 2002, 2003, 2004 and 2005, respectively, and the petitioner paid wages and salaries of \$1,316,776; \$1,372,629; \$1,478,416; and \$1,559,831 in 2002, 2003, 2004 and 2005, respectively. The petitioner has not established the occurrence of any uncharacteristic business expenditures or losses or the petitioner's reputation within its industry.

As noted previously, USCIS electronic records show that the petitioner filed 21 other I-140 petitions which have been pending during the time period relevant to the instant petition. Further, the petitioner has filed 72 I-129 petitions during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). Many of the other petitions submitted by the petitioner have been approved. The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Thus, although the petitioner had substantial gross receipts from 2002 through 2005 and paid considerable salaries and wages during that period, assessing the totality of the

circumstances in this individual case, it is concluded that the petitioner has not established that it has the continuing ability to pay the proffered wage for all sponsored beneficiaries.

Based on the foregoing, the petitioner has failed to establish its ability to pay the proffered wage. 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.