

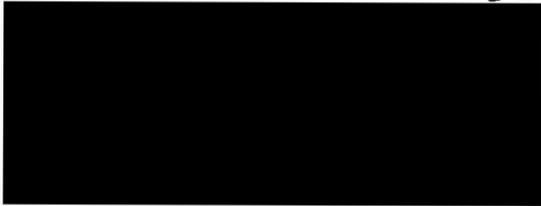


U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

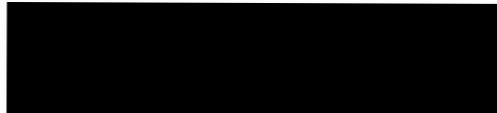
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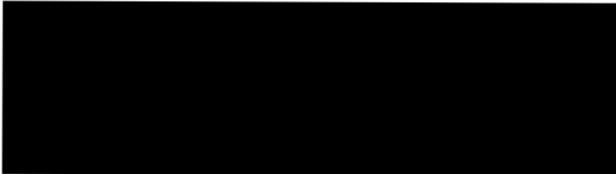
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a residential construction company. It seeks to employ the beneficiary permanently in the United States as a cabinetmaker. As required by 8 C.F.R. § 204.5(i)(3), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).

As set forth in the director's November 9, 2007 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

On appeal, counsel asserts that the director incorrectly relied solely on the petitioner's net current assets in determining whether the petitioner has the ability to pay the proffered wage. Counsel claims that the petitioner's tax planning strategy results in a net income figure that does not accurately reflect the petitioner's financial health. Counsel also claims that the director should have considered the funds the petitioner paid to other independent contractors as well as its retained earnings.

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.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding includes the following:

- Forms 1120, U.S. Corporation Income Tax Return, for 2001 through 2005.
- Forms 1099-MISC, Miscellaneous Income, issued by the petitioner to the beneficiary for the years 2001 through 2006.
- Forms 1099-MISC, Miscellaneous Income, issued by the petitioner to other individuals in 2002 and 2003.
- Letter from JPMorgan Chase Bank stating that the petitioner has had a \$75,000 credit line since January 31, 2002.

¹The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

- Experience letter stating that the beneficiary was employed as a carpenter from August 1995 to March 1999.

According to the tax returns in the record, the petitioner is structured as a C corporation with a fiscal year based on a calendar year. On the petition, the petitioner claimed to have been established in 1993 and to employ five employees. The labor certification was filed with the DOL on April 30, 2001. The proffered wage stated on the labor certification is \$20.06 per hour (\$41,724.80 per year). The labor certification states that the position requires two years of experience in the job offered or two years of experience in the related occupation of carpenter. On the labor certification, signed by the beneficiary on April 21, 2005, the beneficiary did not claim to have been employed by the petitioner.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 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 either 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 labor certification was accepted for processing by 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 the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for the petition based on it, 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, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed and paid the beneficiary during the required 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner is obligated to establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

The beneficiary's Forms 1099-MISC state the amounts paid by the petitioner for services as an independent contractor. These amounts are shown in the table below.

<u>Year</u>	<u>Wages Paid (\$)</u>	<u>Remaining Amount (\$)</u>
2001	31,586.50	10,138.30
2002	36,580.50	5,144.30
2003	21,111.50	20,613.30
2004	44,127.50	N/A
2005	45,454.00	N/A
2006	46,005.00	N/A

For the years 2001, 2002 and 2003, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales 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*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.²

<u>Year</u>	<u>Net Income (\$)</u>
2001	23,759.00
2002	-15,334.00
2003	-5,907.00

For the years 2002 and 2003, the petitioner did not have sufficient net income to pay the difference between the wage paid, if any, and the proffered wage.³

²For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120.

³It is noted that the director's July 9, 2007 request for evidence instructed the petitioner to provide a 2006 federal income tax return, annual report or audited financial statements to establish that the petitioner has the financial ability to pay the proffered wage. The petitioner filed its response on September 25, 2007. By that date, the petitioner's 2006 federal tax return would have been due. There is no evidence in the record that the petitioner requested an extension to file its 2006 tax return. The regulation 8 C.F.R. § 204.5(g)(2) states 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," and that the evidence of ability to pay "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis

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, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. 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, USCIS 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.⁴ If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its net current assets for the required period, as shown in the table below.⁵

<u>Year</u>	<u>Net Current Assets (\$)</u>
2002	-50,904.00
2003	-53,573.00

For the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the difference between the wage paid, if any, and the proffered wage.

Therefore, for 2002 and 2003, the petitioner has 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

added.). Although not the basis for the dismissal in this case, the petitioner's failure to provide this requested evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

⁴According 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.

⁵On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that the director erred by relying solely on the petitioner's net current assets in determining whether the petitioner has the ability to pay the proffered wage. This is incorrect. In the denial, the director clearly and explicitly considered the petitioner's net income and the amounts it paid the beneficiary in addition to its net current assets.

Counsel also claims that the director should have considered the amounts the petitioner paid to other independent contractors in 2002 and 2003. As is stated above, USCIS generally does not consider total payroll expenses in determining ability to pay the proffered wage. Further, since the petitioner paid the beneficiary as an independent contractor during the required period, this is not a case where the beneficiary would replace another employee or outsourced service. Therefore, the amounts the petitioner paid other independent contractors during 2002 and 2003 do not establish its ability to pay the beneficiary the proffered wage.

Counsel also recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

The record contains evidence of the petitioner's \$75,000 credit line. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142.

In addition to the preceding analysis, 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 Sonegawa*, 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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 claims to have been in business since 1993 and to employ five employees.⁶ The petitioner's tax returns show gross sales of \$1,433,683.00 in 2001, \$1,360,548.00 in 2002, \$623,165.00 in 2003, \$611,840.00 in 2004 and \$1,068,271.00 in 2005. This, by itself, is not sufficient to demonstrate the petitioner's continuing ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence that the beneficiary will be replacing a former employee or an outsourced service.

Counsel also claims that the petitioner's low annual net income is due to the petitioner paying out its profits to its officers as a tax reduction strategy. The petitioner's 2002 tax return states that the company was equally owned by [REDACTED] and [REDACTED]. In 2002, [REDACTED] received no compensation and [REDACTED] received \$160,000.00. The petitioner's 2003 tax return states the same ownership structure, with [REDACTED] again receiving no compensation and [REDACTED] receiving \$75,000.00. Counsel claims that [REDACTED] would have paid himself less money in 2002 and 2003 to meet the beneficiary's proffered wage. In this case, this would require Mr. [REDACTED] to have paid himself \$5,144.30 less in 2002 and \$20,613.30 less in 2003. In 2003, Mr.

⁶The petitioner's tax returns state that it paid no salaries from 2001 through 2005. It appears that the petitioner has exclusively used the services of independent contractors instead of employees.

██████████ compensation from the petitioner was reduced from \$160,000.00 to \$75,000.00. Counsel asserts, without any documentary support, that ██████████ would have been willing and financially able to reduce his 2003 compensation of \$75,000.00 by an additional \$20,613.30. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

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.