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

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File: [REDACTED] Office: TEXAS SERVICE CENTER Date: 03 2009
SRC 07 058 51502

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

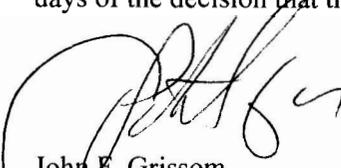
Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a marble installation business. It seeks to employ the beneficiary permanently in the United States as a tile and marble setter. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record demonstrated that the appeal was properly filed, timely and made 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.

As set forth in the director's denial dated September 12, 2007, the single 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.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of 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).

Here, the Form ETA 750 was accepted on April 19, 2001. The petitioner filed the Form I-140 on December 26, 2006, and the petitioner identified on that form is [REDACTED]. The proffered wage as stated on the Form ETA 750 is \$26.50 per hour (\$55,120.00 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, certified by DOL; the petitioner's 1998 business license; the petitioner's State of California contractor's license with an expiration date of October 1998; the petitioner's earning statements issued by the petitioner to the beneficiary for October 6, 2006, October 20, 2006, and November 3, 2006; Wage and Tax Statements (W-2) issued by the petitioner to the beneficiary in 2001, 2003, 2004, 2005, and 2006; the beneficiary's personal joint federal Form 1040 tax return for 2002; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2001, 2002, 2003, 2004, and 2005; an exhibit entitled "Proof of Ability to Pay by Employer" prepared by the petitioner; and, copies of documentation concerning the beneficiary's qualifications.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the tax returns submitted, the petitioner claimed to have been established in 1997. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750, signed by the beneficiary on April 7, 2001, the beneficiary did claim to have worked for the petitioner since May 2000.

On appeal, counsel asserts that:

1. The denial failed to consider other factors, such as depreciations claimed, which were paid in full earlier and therefore were not out of pockets [sic] at

¹ The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

subsequent years, which should be, therefore, added back to subsequent years in concerning appellant's ability to pay.

2. The denial also failed to consider other factors in this case, such as the company has [a] sole owner and there existed a flexibility of the owner to be able to take more or less bonus compensation in responding to the need for necessary expenses incurred and in allocating the amounts of double taxes that the company and the owner need to pay respectively.
3. The [petitioner] will produce evidence of other financial resources to support [its] ability to pay, such as credit line available throughout the years from 2004 to this date which are sufficient to pay any difference in salary during these periods of time.

According to the appeal statement, counsel stated he would submit a legal brief and/or evidence within thirty days of the appeal date. The regulation at 8 CFR §§ 103.3(a)(2)(vii) and (viii) states that an affected party may make a written request to the AAO for additional time to submit a brief and that, if the AAO grants the affected additional time, it may submit the brief directly to the AAO. The appeal was filed in October 2007. As of this date, the AAO has received nothing further.

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, 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 (BIA 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 W-2 statements or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

Counsel submitted W-2 statements from the petitioner to the beneficiary for years 2001, 2003, 2004, 2005, and 2006 which shows that the petitioner paid the beneficiary the following amounts: 2001-\$32,833.50;² 2003-\$32,186.00; 2004-\$41,987.50; 2005-\$43,135.00; and 2006-\$43,799.00. Counsel has also submitted the beneficiary's personal joint federal Form 1040 tax return for 2002 without a

² The beneficiary's 2002 personal federal tax return states wages \$37,528.00. However, without a W-2 statement, it is not clear that the petitioner paid the beneficiary these wages, or all of these wages.

W-2 statement. Counsel asserts that the petitioner paid the beneficiary additional compensation in 2006 over that stated in the 2006 W-2.³ The petitioner must establish that it can pay the beneficiary the differences between wages actually paid and the proffered wage from the priority date until the beneficiary receives permanent resident status.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date as noted above. Since the proffered wage is \$55,120.00 per year, the petitioner must establish that it can pay the beneficiary the difference between wages actually paid and the proffered wage, which for 2001, 2003, 2004, 2005, and 2006 is \$22,287.00, \$17,592.00, \$22,934.00, \$13,132.50, \$11,985.00, and \$11,321.00 respectively. As already stated, no wage, salary or other compensation evidence was provided demonstrating payments to the beneficiary from the petitioner in 2002.

In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in years 2001, 2002, 2003, 2004, 2005, and 2006.

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, 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., 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 gross sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's net income:⁴

- In 2001, the Form 1120 stated net income⁵ of \$20,399.00.
- In 2002, the Form 1120 stated net income of \$16,923.00.

³ There are no additional W-2 or Misc-1099 statements issued by the petitioner to the beneficiary, or other documentary evidence in the record to support that the petitioner paid these wages to the beneficiary. 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)).

⁴ The petitioner's 2006 federal tax return was not submitted.

⁵ As found on Line 28 of the Form 1120 tax returns for 2001, 2002, 2003, 2004, and 2005.

- In 2003, the Form 1120 stated net income of \$11,618.00.
- In 2004, the Form 1120 stated net income of <\$7,706.00>.⁶
- In 2005, the Form 1120 stated net income of <\$30,800.00>.

Since the proffered wage is \$55,120.00 per year, the petitioner did not have sufficient net income to pay the proffered wage or the difference between wages actually paid and the proffered wage for years 2001, 2002, 2003, 2004, and 2005.

If the net income the petitioner demonstrates it had available during the 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 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.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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 2001, 2002, 2003, 2004, and 2005 were \$16,064.00, \$19,879.00, \$14,847.00, \$6,326.00, and <\$2,749.00> respectively.

Therefore, the petitioner cannot show its ability to pay the proffered wage based on its net current assets, even if the petitioner's net current assets for each year is considered together with wages paid in those years from the petitioner to the beneficiary.

⁶ The symbols <a number> indicate a negative number designated as a 'shortfall' in the above table, or in the context of a tax return or other financial statement, a loss.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

Accordingly, from the priority date or when the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage through an examination of wages paid to the beneficiary, or its net income or net current assets for years 2001, 2002, 2003, 2004, and 2005. The petitioner did not submit its 2006 federal tax return.

The petitioner has provided an exhibit entitled "Proof of Ability to Pay by Employer" in which he stated under the title "Totality of Circumstances: Depreciation Approach:" a calculation including depreciation, not as an expense, but as an asset that when combined with net income (Form 1120, Line 28) is evidence of the petitioner's ability to pay the proffered wage. The petitioner's computations are misplaced.

The petitioner's appellate argument that its depreciation expenses should be considered as cash is misplaced. 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 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).

Based on the foregoing, counsel's contention that the petitioner's depreciation deduction should be included in the calculation of its ability to pay the proffered wage is unconvincing. A depreciation deduction does not require or represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a tangible long-term asset. It may be taken to represent the diminution in value of buildings and equipment, or to represent the accumulation of funds necessary to replace perishable equipment and buildings. But the cost of equipment and buildings and the value lost as they deteriorate is an actual expense of doing business, whether it is spread over more

years or concentrated into fewer. While the expense does not require or represent the current use of cash, neither is it available to pay wages. The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. Further, amounts spent on long-term tangible assets are a real expense, however allocated. Counsel appears to be asserting that the real cost of long-term tangible assets should never be deducted from revenue for the purpose of determining the funds available to the petitioner. Such a scenario is unacceptable. *See River Street Donuts*, at 116.

Further, counsel asserts in his appeal statement accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁸ copies of annual reports, federal tax returns, or audited financial statements are the means by which the petitioner's ability to pay is determined.

The totality of the petitioner's circumstances should be considered to determine the ability to pay the proffered wage. *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

The petitioner's tax returns state that the petitioner was established in 1997. The petitioner failed to list the number of its employees on the Form I-140 petition. The petitioner's size, number of employees, and business reputation, are essential elements of this examination. In this instance the petitioner has only submitted corporate tax returns and W-2 statements for us to examine. There is no data in the record relating to the petitioner's operations including its good will, business reputation or employee roster.

The petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2001, 2002, 2003, 2004, and 2005 stated gross receipts of \$649,744.00, \$689,248.00, \$690,336.00, \$1,069,002.00, and \$1,039,326.00. Already noted, the petitioner has generated only nominal net income or losses and had low or negative net current assets for 2001, 2002, 2003, 2004, and 2005. Despite the petitioner's

⁸ 8 C.F.R. § 204.5(g)(2).

gross receipts, the petitioner's tax returns show a decline of both net income and net current assets for the five year period for which tax returns were provided.

According to counsel, the company has a sole owner and that owner may in his discretion take "more or less bonus compensation" in responding to the need for necessary expenses incurred and in allocating the amounts of double taxes that the company and the owner need to pay respectively.

A review of the tax returns submitted indicates that because of compensation withdrawn by the sole shareholder of the petitioner as officers' compensation in each year, the petitioner's net income is reduced. The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120 U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner in some instances, in addition to its figures for ordinary income.

The documentation presented here indicates that the owner holds 100 percent of the company's stock. According to the petitioner's IRS Form 1120 Schedule E (Compensation of Officers) for 2001, 2002, 2003, 2004, and 2005, the owner elected to pay himself \$62,692.00, \$65,200.00, \$60,185.00, \$67,708.00 and \$141,454.00 respectively. We note here that the compensation received by the company's owner during the period 2001 to 2004 was on average constant despite the company's net income decline. However, while the records reflects the owner's compensation, the record contains no statement that the petitioner's sole shareholder is or was willing to accept less compensation since 2001 in order to pay the beneficiary's proffered wage. Accordingly, the petitioner cannot establish its ability to pay through officer compensation.

Counsel asserts on appeal, but has failed to produce evidence, that a "credit line available throughout the years from 2004 [exists] which are [sic] sufficient to pay any difference in salary during these periods of time." The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Assuming for the sake of argument that a credit line was available, 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 beneficiary has not established that the unused funds from the line of credit are available at the time of filing the petition. 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. Additionally, the petitioner has not submitted 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).

In examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977). Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has not established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The evidence submitted fails to establish that the petitioner has 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.