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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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APR 14 2010

FILE: [Redacted]
LIN 07 224 51615

Office: NEBRASKA SERVICE CENTER

Date:

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a travel agency. It intends to employ the beneficiary permanently in the United States as a travel agent supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States 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, and thus, denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 4, 2008 denial, 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 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 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 10, 2001. The proffered wage as amended on the Form ETA 750 is \$20.25 per hour (\$42,120 per year). The Form ETA 750 states that the position

requires at least an associate degree in any field and 2 years of work experience as a travel or ticketing agent.

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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. The petitioner claimed to have been incorporated in 1979, to currently employ 10 people, and to have gross annual revenue of \$7.6 million during the most recent fiscal year (2007). According to the tax returns in the record, the petitioner's fiscal year runs from July 1 to June 30. On the Form ETA 750, signed by the beneficiary on March 29, 2001, the beneficiary indicated that she had never worked for the petitioner prior to the filing of this petition. Upon review, the AAO further notes that the record contains no evidence showing that the beneficiary was employed by the petitioner during any time before or after the petitioner filed the preference visa petition.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, United States 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 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 or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner indicated in its response to the director's request for additional evidence that it has never employed the beneficiary.

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

The record does not contain any evidence indicating that the beneficiary ever received any wages or salaries from the petitioner.

If the petitioner fails to 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 and wage expense 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.

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 court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on October 9, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for additional evidence. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2000, 2001, 2002, 2003, 2004, 2005, and 2006, as shown in the table below.

- In 2000, the Form 1120 stated net income of \$8,115.
- In 2001, the Form 1120 stated net loss of \$140,593.
- In 2002, the Form 1120 stated net income of \$34,303.
- In 2003, the Form 1120 stated net income of \$12,789.
- In 2004, the Form 1120 stated net income of \$15,877.
- In 2005, the Form 1120 stated net income of \$10,969.
- In 2006, the Form 1120 stated net income of \$16,406.

Based on the net income analysis as shown above, the petitioner did not have sufficient net income to pay the proffered wage beginning from the priority date in April 2001.

If the net income the petitioner demonstrates it had available during that period 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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.² 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 tax returns demonstrate its end-of-year net current assets for 2000, 2001, 2002, 2003, 2004, 2005, and 2006, as shown in the table below.

- In 2000, the Form 1120 stated net current assets of -\$106,834.
- In 2001, the Form 1120 stated net current assets of -\$252,501.
- In 2002, the Form 1120 stated net current assets of -\$218,473.
- In 2003, the Form 1120 stated net current assets of -\$182,696.
- In 2004, the Form 1120 stated net current assets of -\$172,269.
- In 2005, the Form 1120 stated net current assets of -\$296,750.
- In 2006, the Form 1120 stated net current assets of -\$331,457.

Since the stated net current assets showed negative amounts throughout the qualifying period from 2000 to 2006, the AAO concludes that the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, the petitioner asserts that the director has failed to consider the line of credit of \$100,000 that the company has had since the beginning of the priority date continuing until the present date. This line of credit, according to the petitioner, is available each year to cover operational expenses including expenses to pay salaries and wages of the employees, and it augments the company's financial position. The record contains various statements from Bank of America showing that the petitioner had a \$100,000 line of credit available each month from January 2001 through December 2006.

²According 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.

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. 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, if any, 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. Here, the petitioner has not submitted such documentary evidence. Additionally, USCIS gives 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. For these reasons, the petitioner's assertions on appeal cannot be accepted.

The petitioner also contends on appeal that the director has failed to consider the length of time the company has been in business and the significant impact of the "9/11" tragedy for the travel industry. The petitioner notes in his brief that the company has been in business for 33 years and has managed to employ 10 people despite the heavy economic loss caused by the 9/11 tragedy. The record contains evidence showing that the petitioner has been in travel business since January 30, 1974, although the tax returns indicate that the petitioner was incorporated in 1979.

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. 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 *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 this case, it appears that the petitioner has been in business for more than 30 years. The gross receipts according to the petitioner's tax returns vary between \$4.5 million and \$9.3 million from 2000 to 2006. Wages and salaries paid during that period also vary from \$132 thousand to \$233 thousand a year. The officers' compensation during the same period also varies from low \$40 thousand in 2001 to high \$117 thousand in 2005. No evidence, however, has been submitted to show how many people were employed and how much each employee made in wages and salaries during that period between 2000 and 2006. The record does not name these workers, state their wages, and verify their full-time employment or position in the company. Furthermore, given the modest amount of officer compensation paid each year, the officers' claims that they would, and could, forego the payment of compensation to pay the beneficiary the proffered wage is not credible. The officers would have needed to sacrifice most of their income in all years except 2005.

The record also does not contain any evidence reflecting the company's reputation or historical growth since 1974. Nor does it include any evidence or detailed explanation of the occurrence of any uncharacteristic business expenditures or losses due to the 9/11 tragedy. Merely stating that the petitioner has been in business for more than 33 years and has survived the 9/11 tragedy without providing any detailed explanation or evidence as stated above does not establish the reliability of the assertions and does not establish the petitioner's ability to pay the beneficiary the proffered wage. Crucially, the record is devoid of evidence explaining why all the years between 2000 and 2006 were uncharacteristically difficult or marginally profitable. 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 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.