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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

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APR 28 2010

FILE: [REDACTED]
LIN 07 095 53787

Office: NEBRASKA SERVICE CENTER

Date:

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

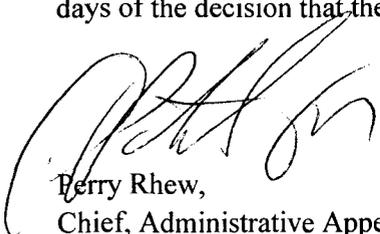
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:
[REDACTED]

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).


Perry Rhew,
Chief, Administrative Appeals Office

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

The petitioner is a computer development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a "Vice President" (Strategic Planning and Business Development). As required by statute, ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not demonstrated its continuing financial ability to pay the proffered wage beginning as of the priority date and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and maintains that the petitioner has had the continuing ability to pay the proffered wage.¹

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). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, at 1002 n. 9.

In this case, the AAO concurs with the denial of the petition based on the petitioner's failure to establish its continuing financial ability to pay the proffered wage. Additionally, and beyond the decision of the director, the petition will be denied based on the petitioner's failure to credibly establish that the beneficiary acquired the requisite work experience as set forth on the ETA Form 9089.

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 or seasonal 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), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

¹ 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.

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation at 8 C.F.R. § 204.5(1)(3) further provides in relevant part:

(ii) *Other documentation—*

- (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on September 15, 2006.² The proffered wage is stated as \$94,000 per year.

It is noted that Part H, 4-6 of the ETA Form 9089 indicates that the beneficiary must have a bachelor's degree in business administration and 60 months of work experience in the job offered or 60 months of experience in an alternate occupation defined as "Business/Mgmt Professional, Bus./Mkt. Development Executive, Bus. Manage." Part H, 10-10B. Part H, 8, 8-A, and 8C and 10-10B indicates that the petitioner will accept an alternate combination of education and experience in the job offered that will be accepted in lieu of the minimum education identified in question 4 of Part H. The beneficiary may have an associate's degree in business administration and 7 years of experience in the job offered or in the alternate occupation(s) as specified above. A foreign educational equivalent is acceptable.

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

On Part K of the ETA Form 9089 the instructions state that all jobs that the alien has held must be listed and also any other work experience that qualifies the alien for the certified position. The beneficiary signed the ETA Form 9089 on January 1, 2007. The beneficiary's most recent work experience is stated to be with the petitioner starting on January 1, 2005 and ending on September 15, 2006. Other documents, such as copies of Wage and Tax Statements (W-2s) submitted to the record suggest that her employment with the petitioner may have commenced earlier in 2004. The ETA Form 9089 claims that she was employed full-time with the petitioner as a business consultant. The other jobs listed on the ETA Form 9089 may be summarized as follows:

	Employer	Dates of Employment	Job
2.		4/1/04 to 12/04	
3.		12/2/02 to 3/31/04	
4.		6/1/01 to 11/30/02	
5.		11/1/00 to 5/31/01	
6.		9/19/98 to 10/31/00	
7.		12/19/97 to 9/18/98	

The employment verification letters submitted in support of the beneficiary's claimed experience in the above-listed positions may be summarized as follows:

1. A letter, dated January 12, 2005, on the letterhead of [REDACTED] from [REDACTED] indicates that the beneficiary worked with that business as a business development executive from April 2004 to December 2004 and describes her duties. It is unclear from the language used whether working with the firm indicates that she was a direct employee or an independent contractor.
2. A letter, dated April 9, 2004, on the letterhead of [REDACTED] written by [REDACTED], the president of this company, who states that the beneficiary was "in the service of the Company" and "worked on our off shore division" as a business development executive from December 2002 until March 2004. It is noted that the relevant online state corporation records indicate that this company is in bad standing and was administratively dissolved on November 11, 2003, thus raising a question of the credibility of this employment through March 2004 and the submission of such a letter. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

* * *

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

3. A letter, dated September 12, 2006, from [REDACTED] indicating that the beneficiary “worked with” this company from June 1, 2001 to November 30, 2002 as a business development executive. No description of her duties was included and no verification of full-time employment was indicated. Further, there is no indication as to whether her status was as a direct employee as represented on the Form ETA 9089 or something else.
4. A letter, dated August 23, 2006, from [REDACTED] signed by [REDACTED] stating that the beneficiary was “in the service” of the company as a business development executive from November 1, 2000 until May 31, 2001. No description of the beneficiary’s duties was stated in compliance with 8 C.F.R. § 204.5(1)(3) and the letter contained no verification if the employment was full-time or part-time. Further, government databases indicate that the beneficiary was admitted to the U.S. on April 8, 2001 and reported her final destination as the U.S. address listed on the letter from [REDACTED]. In addition to the other deficiencies of this letter, it raises a question as to the accuracy of the dates of employment stated for this employer.
5. A letter, dated May 30, 2002, from [REDACTED] of [REDACTED] stating that the beneficiary worked as a sales consultant from September 1998 to October 31, 2000. He verifies her as an asset to the company but fails to describe any of her duties.
6. A letter dated August 22, 2006, from [REDACTED] signed by [REDACTED] who states that the beneficiary worked “with us” from December 19, 1997 to September 18, 1998 as a marketing development executive. This letter contained no description of duties and no verification whether this was part-time or full-time work was mentioned in this letter.

It is additionally noted that the beneficiary submitted a biographic form (G-325A) in connection with her Application to Register Permanent Residence or Adjust Status (Form I-485). The G-325 was signed by the beneficiary under penalty of perjury, on June 28, 2007. The instructions request the applicant to list all employment for the last five years as well as the last occupation abroad if not shown above. The beneficiary claimed her job for the petitioning company, her job with [REDACTED], and with [REDACTED]. No occupation abroad was claimed. Public databases indicate that the beneficiary has incorporated four businesses in Delaware, and is the only registered agent and listed executive of these companies. None appear to be IT-related and one, [REDACTED] has acquired fifty-one (51) real estate properties since its inception in 2002. It is observed that this self-employment was not mentioned on the labor certification or on the G-325A.³

³See also *Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds;

The AAO finds that the petitioner failed to credibly demonstrate that the beneficiary acquired the requisite experience as set forth in the ETA Form 9089. The deficiencies, vagueness and inconsistencies contained in the letters and from the other sources cited undercut the reliability of other claims of employment experience as set forth on the ETA Form 9089. The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). We find that the record does not resolve the inconsistencies noted above, raises doubts about the beneficiary's claimed employment with the petitioner and other listed employers and does not sufficiently support the petitioner's assertion that the beneficiary has acquired seven years of employment in a related occupation as described above.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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 overall 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).

At the outset, it is noted that the director issued a request for evidence on November 15, 2007, directing the petitioner to provide proof of its ability to pay the proffered wage of \$94,000 per year. The director acknowledged receipt of an unaudited financial statement for 2006⁴ and bank

Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

⁴The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements

statements. He observed that the petitioner had filed multiple petitions and that several of them contained 2005 federal tax returns that featured different figures from other tax returns filed for the same years. Therefore, the director requested that the petitioner obtain the Internal Revenue Service (IRS) transcripts of the 2006 federal tax return.

In determining the petitioner's continuing financial ability to pay the proffered wage, 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 wage expense is misplaced. Showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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.

makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

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 financial documentation submitted to the record by the petitioner included partial copies of its Form 1120S, U.S. Income Tax Return for an S Corporation for 2006 and 2007. Only the 2006 return provided any IRS verification that it was filed with the IRS, and it only confirmed that the petitioner reported its ordinary income (line 21 of page 1) as stated but did not verify any other information contained on the petitioner’s tax return. The 2007 return submitted on appeal provides no such assurance as the petitioner did not submit IRS verification of this return. That said, the information provided on the returns submitted indicates the following:

	2006	2007
Net Income ⁵	\$128,753	\$401,454
Current Assets	\$ 86,602	\$260,385
Current Liabilities	\$377,686	\$304,962
Net Current Assets	-\$291,084	-\$ 44,577

As illustrated in the above table, besides net income and as an alternative method of reviewing a petitioner’s ability to pay a proposed wage, United States Citizenship and Immigration Services (USCIS) will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.⁶ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner’s year-end current assets and current

⁵ Where an S Corporation’s income is exclusively from a trade or business, United States Citizenship and Immigration Services (USCIS) considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006) and (2007) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional deductions shown on Schedule K for 2006 and 2007, the petitioner’s net income is found line 18 on Schedule K of its 2006 and 2007 tax returns.

⁶ 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner also submitted copies of W-2s reflecting that they were issued by the petitioner to the beneficiary in 2006 and 2007. These documents indicate:

Year	Amount of Wages	Difference from Proffered Wage of \$94,000
2006	\$56,665.00	-\$37,335
2007	\$69,560.83	-\$24,439.17

Generally, where a petitioner employs and pays wages to a beneficiary, those figures are considered in determining the petitioner's ability to pay the proffered wage during a given period. If a petitioner can show that it has paid the full proffered wage during a given period, it is considered *prima facie* evidence of the petitioner's ability to pay the proffered wage. If a petitioner's net income or net current assets can cover any shortfall between the proffered wage and the actual wages paid during a given period, then a petitioner's ability to pay the proffered wage may be established for that period of time.

The director denied the petition on March 25, 2008. He noted that in response to the director's request for evidence, the petitioner had submitted, federal tax returns, W-2s for the instant beneficiary and other beneficiaries, an incomplete list of other I-140's filed by the petitioner, bank statements, evidence of assets in India and a request that the petitioner's line of credit be considered in the determination of the petitioner's ability to pay the proffered wage. The director declined to consider the petitioner's bank statements, line of credit and holdings in India as determinative of the petitioner's ability to pay the proffered wage.

With respect to the evidence of other sponsored beneficiaries, the director noted that the petitioner's 2006 federal tax return showed \$128,702 in net income. Although the AAO has used the net income figure shown on line 18 of Schedule K, the difference of \$51.00 is negligible for this calculation. The director found that the nine beneficiaries accounted for as submitted by the petitioner, would require \$754,000 in wages in 2006. The same nine were paid wages of \$373,792 in 2006. Therefore, an additional \$380,207.52 would be needed to pay these nine beneficiaries. The evidence does not establish the petitioner's ability to pay these total wages owed for 2006 and does not establish the ability to pay the petitioner's proffered wage, as well. The director continued to determine that the list of all I-140 petitions filed or their beneficiaries had not been provided by the petitioner, which claimed only nineteen pending and a list of an additional eight that it desired to withdraw. The director noted that even accounting for the requested withdrawals, such a list would have included at least 50 I-140 petitions. As the petitioner must establish that every job offer is realistic and must demonstrate the ability to pay

each respective proffered wage until each beneficiary has obtained lawful permanent residence, then without a complete accounting, the petitioner's ability to pay the proffered wage has not been established.

The AAO concurs with the director and would further note that the petitioner has filed additional nonimmigrant and immigrant petitions subsequent to the priority date of the instant petition. USCIS electronic records indicate that as of January 13, 2010, the petitioner, Tekstrom Inc., has filed 529 nonimmigrant and immigrant petitions in the past six years.⁷ Of these, over 450 have been non-immigrant petitions. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-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. Thus, while it appears that the petitioner had sufficient funds to pay the proffered wage to the beneficiary in 2005 and 2006, as noted by the director and as indicated in the record, the petitioner has not demonstrated that it could have paid the beneficiary and all the additional sponsored beneficiaries during the relevant period out of its net income of \$128,753 in 2006 and its net income of \$401,454 in 2007. 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)).

It is noted that counsel asserts that the petitioner's payments to subcontractors in the amounts of \$978,476 in 2006 and \$1,078,967 in 2007 must be considered in the petitioner's ability to pay the proffered wage in this proceeding because had the beneficiaries of multiple I-140 petitions been employed, the funds covering the employment of subcontractors could have been expended to cover beneficiaries' salaries and not used to pay subcontractors. The AAO is not persuaded by this hypothesis. Undocumented assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is unclear exactly which beneficiaries to whom counsel is referring. Further, many of these beneficiaries may have already been employed by the petitioner in a non-immigrant status. As noted by the director, a complete accounting of the sponsored I-140 beneficiaries has not been made. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Additionally, the record does not identify any of the subcontractors to whom counsel is referring. The evidence does not state their wages, verify their full-time employment, duties, or provide evidence that the petitioner has replaced or will replace them with other sponsored beneficiaries. If that employee performed other kinds of work, then the beneficiary could not have replaced him or her.

⁷ The electronic records also indicate that [REDACTED] filed 82 petitions between 2001 and 2003.

Counsel asserts that the petitioner's line(s) of credit at two banks must be considered in support of its ability to pay the proffered wage. A letter from the PNC Bank, dated December 18, 2007, indicates that the petitioner established a \$200,000 line of credit on December 22, 2004. The available balance as of the date of the letter is \$70,118.00. Another undated letter from the WSFS Bank indicates that a \$150,000 line of credit was established on September 7, 2004. The current balance is \$75,509.71. Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 730 F. Supp. 441 (D.D.C. 1988), *rev'd in part*, 927 F.2d 628 (D.C. Cir. 1991) in support of his assertion that a petitioner may rely on a line of credit similar to a pledge of support from a larger church to a local church.

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 will not 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 a certified salary.

Further, counsel's reliance on *Full Gospel Portland Church v. Thornburgh* is misplaced. The case in *Full Gospel Portland Church v. Thornburgh* involved the consideration of whether an alien was a "professional" within the meaning of 8 U.S.C. § 1101(a)(32). With reference to the ability to pay the proffered salary, the court noted that a parish church may rely upon the financial support of the parent nation-wide church. In this matter, although the AAO may consider the guidance suggested in that case, it is noted that the rationale of *Full Gospel* is not binding in this regard, in cases arising outside of the facts of the particular case. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Moreover, the same district court, in a case involving the determination of whether an alien could be classified as a special immigrant religious worker, more recently found, that as the parent church organization would not be paying the local religious workers' salaries, the assets of the parent church were irrelevant in evaluating a local church petitioner's ability to pay the proffered wage.

Avena v. INS, 989 F. Supp. 1, 8 (D.D.C. 1997). In this matter, a line of credit does not represent an unrestricted pledge from a parent church where there is no obligation that it must be repaid.

With respect to the petitioner's bank statements submitted to support its ability to pay the proffered wage in 2006 and 2007, it is noted that bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Bank statements show the amount in an account on a given date, and do not generally show a sustainable ability to pay a proffered wage because they do not represent all of the petitioner's encumbrances that may affect its financial profile. Further, in this matter, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on the corresponding tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was already considered in determining the petitioner's net current assets.

Counsel renews the argument on appeal that the petitioner's Indian assets should be considered in its ability to pay the proffered wage to the beneficiary. This property purportedly consists of a 70% stock ownership in a company in India called "[REDACTED]". The documentation submitted indicates that "[REDACTED]" is a corporation. According to a letter, dated December 26, 2007, submitted on appeal, the value of the petitioner's investment is \$763,401. However, as noted by the director, there is no evidence in the record that establishes that the stock held in a separate foreign corporation could be easily liquidated making it readily available to pay wages in the U.S. or other current obligations. As noted by the director, corporations are distinct legal entities from its owners and shareholders, and the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

It is noted that counsel asserts that the petitioner established its ability to pay in 2006 because the proffered wage must be prorated as of the priority date of September 15, 2006. Counsel divides that proffered wage by 12 (months) and calculates that the petitioner was obliged to have the ability to pay \$31,333.32 of the annual proffered wage. With regard to a prorated calculation of the corporate petitioner's ability to pay the proffered wage in 2006, it is noted that in general, USCIS will not consider 12 months of income, as shown for example on the federal income tax return, towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains specific evidence of net income or, for example payment of the beneficiary's wages specifically covering that portion of the year that occurred after the priority date (and only that period), that is not the case here. Here, the evidence is the 2006 federal income tax return or, as stated above, the beneficiary's W-2, are documents which are both based on annual figures, and not on a prorated calculation.

It is noted that in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), as cited by counsel, is a case in which the appeal was sustained where other circumstances were found to be applicable in supporting a petitioner's reasonable expectations of increasing business and increasing profits despite evidence of past small profits. That case, however, relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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 noted above, the petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-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. Thus, while it appears that the petitioner had sufficient funds out of its net income to pay the difference between the actual wages that may have been paid to the beneficiary in 2006 and 2007 and the proffered wage, the petitioner has not demonstrated that the petitioner could have covered the additional sponsored beneficiaries in those years from its net income as shown above. In the present case, although the petitioner has shown an increase in gross receipts from approximately five million to seven million in 2006 and 2007, respectively, it must be viewed in the context of the hundreds of non immigrant and immigrant petitions that it has filed. It has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other factual circumstances similar to *Sonegawa* are applicable.

Further, it is noted that in a decision dated February 5, 2007, the Supreme Court of Delaware affirmed a Superior Court decision awarding damages to a former employee of the corporate petitioner for a variety of wrongful employment practices. *See Tekstrom, Inc. and Charan Minhas v. Sameer K. Savla*, (C.A. No. 05A-12-006). Looking at the record, as well as the petitioner's sponsorship of other multiple beneficiaries during this period and corresponding burden to demonstrate the ability to pay the proffered wage for all sponsored aliens as of each respective priority date, we do not conclude that this case is analogous to the circumstances set forth in *Sonegawa* or that the petition merits approval on this basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in

the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, at 1002 n. 9.

As noted above, the petitioner has also failed to demonstrate that the beneficiary had the requisite seven years of employment experience in a related occupation as required by the ETA Form 9089. Further, the petitioner has not established its continuing ability to pay the proffered wage pursuant to 8 C.F.R. 104.5(g)(2) and in view of the facts presented in this case. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.