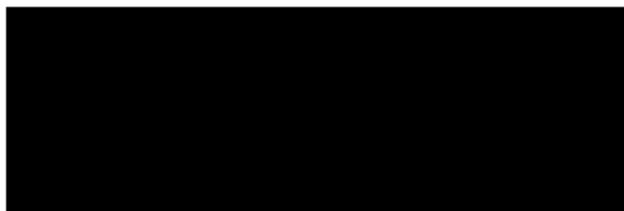


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



B6.

Date:
AUG 09 2012

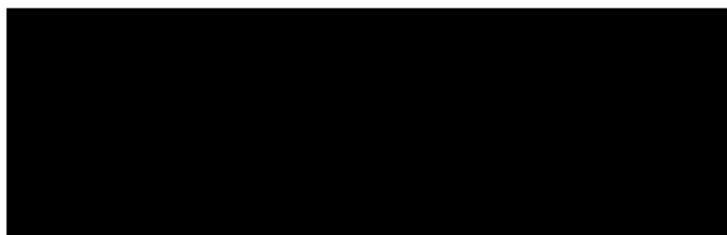
Office: TEXAS SERVICE CENTER

FILE: 

IN RE: 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:

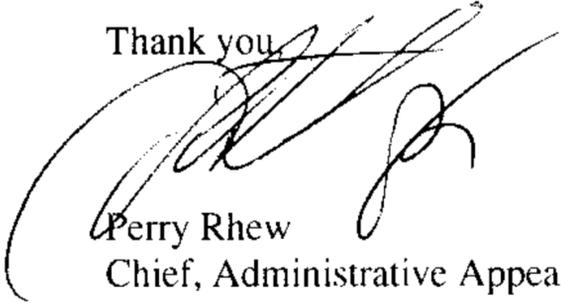


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you


Perry Rhew
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 metal working company. It seeks to employ the beneficiary permanently in the United States as a machine repairer. As required by statute, the Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not met its burden of proof and denied the petition accordingly.¹

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

The 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.

¹ The director denied the petition by decision dated July 17, 2008. Specifically, the director noted that the petitioner had not established that wages paid to an individual in the name of [REDACTED] were, in fact, wages paid to the beneficiary under the assumed name of [REDACTED]. As such, the director refused to consider those wages in determining the petitioner's ability to pay the proffered wage and denied the petition stating that the evidence weighed "more heavily toward a finding of ineligibility." The petitioner then appealed the denial to the AAO. The AAO issued a Notice of Intent to Deny (NOID) stating that the petitioner had not established its ability to pay the proffered wage and permitted the petitioner to submit additional evidence of its ability to pay the proffered wage. Specifically, the AAO asked the petitioner to submit: W-2 Forms for the beneficiary and [REDACTED] and proof of wages paid to the beneficiary in 2011; a statement from an authorized representative of the petitioner as to why wages were paid to two different individuals under a single social security number; and complete copies of the petitioner's tax returns for 2007 through 2010.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$17.43 per hour (\$36,254 per year). The Form ETA 750 states that the position requires two years of experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The record indicates that the petitioner is structured as a limited liability company and filed its tax returns on IRS Form 1065.³ 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 24, 2001, the beneficiary claimed to have worked for the petitioner from 1999 to the date of signature.

A 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, 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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

³ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner is a multi-member LLC and is considered to be a partnership for federal tax purposes.

affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining a 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 submitted copies of W-2 forms asserting wages to the beneficiary as follows:

- 2001 - \$24,109.63 (Wages paid to [REDACTED]⁴)
- 2002 - \$26,082 (Wages paid to [REDACTED])
- 2003 - \$25,072.88 (Wages paid to [REDACTED])
- 2004 - \$26,875 (Wages paid to the beneficiary)
- 2005 - \$27,257.75 (Wages paid to the beneficiary)

⁴ The petitioner submitted a letter from its accountant stating that the beneficiary was initially employed under the name of [REDACTED], and that the 2001, 2002 and 2003 W-2 Forms submitted for [REDACTED] represented wages actually paid to the beneficiary. The accountant provided no statement as to how he had knowledge that the wages paid to [REDACTED] were, in fact, wages actually paid to the beneficiary under the assumed name of [REDACTED]. The unsworn statement of the accountant is not sufficient to establish that [REDACTED] and the beneficiary are the same person. The petitioner submitted no additional evidence to establish that [REDACTED] and the beneficiary are the same person, such as affidavits of coworkers, photographs taken of the individuals during the claimed work period showing they are the same individual, or any other evidence which would establish that the two individuals are the same person. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). As such, the petitioner has not submitted sufficient evidence to establish that [REDACTED] and the present beneficiary are the same person and the 2001, 2002 and 2003 W-2 Forms submitted for [REDACTED] will not be considered in determining the petitioner's ability to pay the proffered wage from the priority date onward.

⁵ All W-2 Forms submitted, for wages paid to [REDACTED] and the beneficiary, contained the same social security number beginning with "119." The petitioner submitted copies of the beneficiary's federal tax returns for years 2001 through 2010 bearing a tax identification number beginning with 928. These additional discrepancies in the claimed social security number and paying taxes under a different taxpayer identification number further call into question the veracity of all of the W-2 Statements, as wages paid to the beneficiary, which cannot be accepted without explanation. 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 (BIA 1988).

- 2006 - \$29,530.76 (Wages paid to the beneficiary)
- 2007 - \$32,352 (Wages paid to the beneficiary)
- 2008 - \$35,703.75 (Wages paid to the beneficiary)
- 2009 - \$39,746.50 (Wages paid to the beneficiary)
- 2010 - \$40,546 (Wages paid to the beneficiary)
- 2011 - A pay stub showing wages paid year-to-date to the beneficiary, as of December 21, 2011 in the amount of \$40,404.

As footnoted previously, the wages paid to [REDACTED] will not be considered as the petitioner has not submitted sufficient evidence to establish that [REDACTED] and the beneficiary are the same person. Additionally, the petitioner must resolve the discrepancy between the social security number claimed and the tax payer identification number used before W-2 Forms for 2004 to 2010 can be accepted. The petitioner must, therefore, establish the ability to pay the full proffered wage in 2001, 2002 and 2003. Upon resolution of the issue above, the petitioner would be required to show the ability to pay the difference between wages paid to the beneficiary and the full proffered wage in all years where the wages paid were less than the proffered wage. Thus, the petitioner must establish its ability to pay the following sums:

- 2001 - \$36,254
- 2002 - \$36,254
- 2003 - \$36,254
- 2004 - \$9,379
- 2005 - \$8,996.25
- 2006 - \$6,723.24
- 2007 - \$3,902
- 2008 - \$550.25
- 2009 - The 2009 W-2 Form would state wages paid exceeding the proffered wage if the petitioner can resolve the issue related to the claimed social security number.
- 2010 - The 2010 W-2 Form would state wages paid exceeding the proffered wage if the petitioner can resolve the issue related to the claimed social security number.
- The pay stub submitted by the petitioner for year 2011 (through December 21, 2011) would state wages paid exceeding the proffered wage if the petitioner can resolve the issue related to the claimed social security number.

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); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). 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.

River Street Donuts at 118. "[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).

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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

The record before the director closed on June 3, 2008 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2007 federal income tax return was the most recent return available. As noted above, the AAO requested additional evidence of the petitioner's ability to pay on appeal, and the petitioner submitted tax returns for 2008 to 2010 in response. The petitioner's tax returns state its net income as detailed in the table below.

In 2001, the petitioner's Form 1065 stated net income of (\$88,577).⁶

⁶ For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income

- In 2002, the petitioner's Form 1065 stated net income of (\$122,844).
- In 2003, the petitioner's Form 1065 stated net income of \$8,690.
- In 2004, the petitioner's Form 1065 stated net income of \$81,509.
- In 2005, the petitioner's Form 1065 stated net income of \$43,882.
- In 2006, the petitioner's Form 1065 stated net income of \$73,893.
- In 2007, the petitioner's Form 1065 stated net income of \$30,760.
- In 2008, the petitioner's Form 1065 stated net income of \$74,112.
- In 2009, the petitioner's Form 1065 stated net income of \$183,145.
- In 2010, the petitioner's Form 1065 stated net income of \$432,045.

Therefore, for the years 2001, 2002 and 2003, the petitioner has not established its ability to pay the proffered wage, or the difference between the proffered wage and wages paid to the beneficiary, based upon the net income stated in its tax returns. The petitioner's 2004 through 2010 tax returns do state sufficient net income to pay the proffered wage or difference between wages paid to the beneficiary and the full proffered wage if those wages can be accepted upon resolution of the social security number issue. As previously noted, the pay stub submitted by the petitioner would show wages paid which exceed the proffered wage.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership'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 state its net current assets for years 2001 through 2006 as detailed in the table below:

- In 2001, the petitioner's Form 1065 stated net current assets of (\$106,902).
- In 2002, the petitioner's Form 1065 stated net current assets of (\$228,839).

Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner's Schedules K have relevant entries for additional income, credits, deductions and/or other adjustments and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of the Schedules K.

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

- In 2003, the petitioner's Form 1065 stated net current assets of (\$237,758).
- In 2004, the petitioner's Form 1065 stated net current assets of (\$157,415).
- In 2005, the petitioner's Form 1065 stated net current assets of (\$114,567).
- In 2006, the petitioner's Form 1065 stated net current assets of \$46,730.
- In 2007, the petitioner's Form 1065 stated net current assets of \$35,693.
- In 2008, the petitioner's Form 1065 stated net current assets of \$56,212.
- In 2009, the petitioner's Form 1065 stated net current assets of \$147,314.
- In 2010, the petitioner's Form 1065 stated net current assets of \$279,685.

Thus, the petitioner's tax returns do not state sufficient net current assets to pay the proffered wage, or difference between wages paid to the beneficiary and the full proffered wage in years 2001 through 2005. The tax returns do state sufficient net current assets to pay the full proffered wage, or the difference between wages paid to the beneficiary and the full proffered wage in 2006, 2008, 2009 and 2010 if the issue related to the beneficiary's social security number can be resolved. As previously noted, the pay stub submitted by the petitioner would show wages paid to the beneficiary in 2011 which exceed the proffered wage.

Thus, 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, or the difference between wages paid to the beneficiary and the full proffered wage, as of the priority date through an examination of wages paid to beneficiary, its net income or net current assets.

On appeal, counsel states that the director erred in requiring the petitioner to produce evidence to establish that [REDACTED] and the beneficiary are the same person as that evidence is not reasonably available. Counsel further states that any such evidence is irrelevant as the petitioner intends to employ the beneficiary in place of [REDACTED]. Additional evidence was submitted by the petitioner in support of the appeal in response to the AAO's NOID related to this issue.

Counsel's assertions regarding evidence to establish that [REDACTED] and the beneficiary are the same person for purposes of considering wages paid to [REDACTED] in analyzing the petitioner's ability to pay the proffered wage have been previously discussed herein, as well as a statement in this regard submitted by the petitioner's accountant. Even if the wages for [REDACTED] were accepted in 2001, 2002 and 2003, the petitioner still cannot establish that it can pay the difference between the wages paid and the proffered wage in these years based on its net income or net current assets based on the figures set forth above.

The petitioner submitted a summary sheet showing balances in the petitioner's bank accounts for January through December of 2001, 2002 and 2003. That summary sheet is of little evidentiary value as it is not supported by copies of the petitioner's bank records and represents only the assertions of management. 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)). Further, reliance on the balances in the petitioner's bank accounts is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, 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 its tax return, such as the petitioner’s taxable income (income minus deductions) or the cash specified on Schedule L that were considered above in determining the petitioner’s net current assets.

In a letter from the petitioner’s accountant dated December 10, 2007, the accountant stated that the petitioner was able to pay the beneficiary the prevailing wage in 2001, 2002 and 2003, despite its tax returns showing business losses in those years, with the use of “personal funds and obtaining lines of credit in order to pay their employees adequate wages.” The petitioner also submitted, on appeal, copies of 2011 bank records for one of the petitioner’s owners. Because the petitioner is a limited liability company and treated as a separate and distinct legal entity from its owners, the assets of its owners or of other enterprises cannot be considered in determining the petitioner’s ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, “nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.”

Further, a line-of-credit may not be considered when determining the petitioner’s ability to pay the proffered wage. 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 will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer

and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

USCIS may consider the overall magnitude of a petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's tax returns show negative net income in 2001 and 2002, as well as significant negative net current assets in 2001, 2002, 2003, 2004 and 2005. As discussed above, the petitioner has not established its ability to pay the proffered wage, or the difference between the proffered wage and wages paid to the beneficiary from the priority date onward. The record does not establish any extraordinary events which adversely affected the business operations of the petitioner. The record does not establish that the petitioner's reputation in the industry is such that it is more likely than not that the petitioner has maintained the continuing ability to pay the proffered wage from the priority date onward. The petitioner must also resolve the issues set forth above in claimed pay to the beneficiary before all the W-2 Statements can be accepted. 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 from 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.