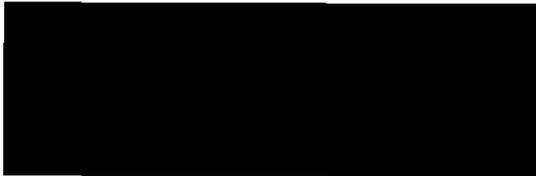


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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

DATE: **AUG 13 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,

for John Vaughan
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition, as well as a motion to reopen and a motion to reconsider, were denied by the Director, Texas Service Center (Director). The matter is now before the Chief, Administrative Appeals Office (AAO), on appeal. The appeal will be dismissed.

The petitioner is a computer consulting and software development company which seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the Form I-140, Immigrant Petition for Alien Worker, is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (USDOL).¹ The director determined that the petitioner had not established it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.

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.

Section 203(b)(3)(A)(i) of 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. 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 who are members of the professions.

¹ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the USDOL at the time of filing this petition. USDOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, USDOL processed substitution requests pursuant to a May 4, 1995 USDOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). USDOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services based on a Memorandum of Understanding, which was rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). USDOL's final rule became effective July 16, 2007, and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

The regulation at 8 C.F.R. § 204.5(g)(2) provides 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 USDOL. *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 USDOL 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 that was accepted for processing on May 23, 2003 shows the proffered wage as \$72,000 per year.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The petitioner is structured as a C corporation and claims to have been established in 2001 and to employ 55 workers when the petition was filed. Its IRS Forms 1120, U.S. Corporation Income Tax Returns, reflect that it operates on a calendar year basis. On an uncertified but informational Form ETA 750, Part B, statement of qualifications of alien, signed by the beneficiary on July 7, 2007, he stated that he began employment with the petitioner as a programmer analyst in June 2007.

A certified labor certification establishes a priority date for any immigrant petition later based on the Form ETA 750. Therefore, 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 a 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).

USCIS first examines whether the petitioner employed and paid the beneficiary from the priority date onwards. A finding that the petitioner employed the beneficiary at a salary equal to or greater than the proffered wage is considered *prima facie* proof of the petitioner's ability to pay the wage.

The record before the Director closed on August 8, 2008 with the receipt of the petitioner's motion to reopen/reconsider. On appeal, counsel argues that the salary of the original person listed on the Form ETA 750 should be considered as he worked for the petitioner as a full-time programmer analyst from February 1, 2003 to March 31, 2004. The record shows that this person earned \$37,975.94 in 2003 and \$12,648 in 2004 from the petitioner. Counsel attaches a chart of sub-contractors and argues that the salaries paid to these individuals should be considered as salary for the proffered position during the three years after the original person left the position and before the beneficiary started working for the petitioner in 2007. No evidence has been submitted establishing that the work performed by the sub-contractors was the same as that performed by a person working in the proffered position for the three year period referred to by counsel. The beneficiary's IRS Form W-2, Wage and Tax Statement, shows he earned \$36,495 from the petitioner in 2007.

In this case, the petitioner has not established that it employed and paid the beneficiary or anyone else occupying the proffered position the full proffered wage from the priority date of May 23, 2003 onward.

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 figures reflected on the petitioner's federal income tax returns, 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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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*, *supra*, at 1084, the court held that 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).

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).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. As stated above, the record before the director closed on August 8, 2008 with the receipt of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 was the most recent return available. The petitioner’s IRS Form 1120 tax returns demonstrate its net income for the years 2003-2007 as follows:

Year	Net Income
2003	\$21,431
2004	\$8,390
2005	\$107,063
2006	-\$441,762
2007	\$87,923

Therefore, for the years 2003, 2004 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner’s ability to pay the proffered wage, USCIS may 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

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

on Schedule L, lines 1 through 6. 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 net current assets for the years 2003-2007 as shown in the table below:

<u>Year</u>	<u>Net Current Assets</u>
2003	\$9,608
2004	-\$33,047
2005	\$166,696
2006	-\$385,105
2007	-\$457,871

Therefore, for the years 2003, 2004, 2006 and 2007, 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 USDOL, 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, counsel asserts that the Director's decision is in error as a matter of law and fact, as the Director failed to apply the appropriate standard of review to the evidence that was submitted and the petitioner is able to provide sufficient evidence to overcome the Director's grounds for denial.

Counsel argues that the petitioner continuously maintained a substantial line of credit with which it could have met any temporary obligations. 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 petitioner'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 John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 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 were 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'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and

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

will be fully considered in the evaluation of the petitioner'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 petitioner'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'l Comm'r 1977).

Counsel further states that the couple who own the petitioner have considerable personal assets independent of their interest in the company and have made substantial past capital investments in the corporation and forwards evidence of their personal assets. Because a corporation is a separate and distinct legal entity from its owners and shareholders, 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'r 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."

Shareholders of a corporation have the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the tax return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

The record shows that [REDACTED] and [REDACTED] each hold 50% of the company's stock and serve as president and vice president. In separate statements dated February 13, 2009, both affirmed that in any year had additional funds been required, they were willing to pay the proffered wage of \$72,000 by foregoing part of their annual officer compensation. The amounts that they paid themselves for the years 2003-2007 are listed on Schedule E, Compensation of Officers, of the petitioner's IRS Form 1120 tax returns for the years 2003-2007 as follows:

Year	[REDACTED]	[REDACTED]
2003	\$48,600	None
2004	None	\$43,200
2005	None	\$20,000
2006	\$91,000	\$47,999
2007	\$78,000	\$134,000

Even had the owners been willing to contribute their entire compensation earned in 2003 and 2004 to cover the difference between the corporation's net income and the proffered wage, there would have been a shortfall of \$13,792 in 2003 and \$61,847 in 2004. Nor is the AAO persuaded that the two officers would have been willing to contribute half of their combined compensation in 2006, which is what it would have taken to pay the proffered wage that year.

Counsel's assertions on appeal cannot overcome the evidence presented in the tax returns submitted by the petitioner which demonstrates that the petitioner could not pay the proffered wage from the priority date onward.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*. The petitioning entity in *Sonegawa* had been in business for over 11 years. 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, the petitioner has not established an ability to pay the beneficiary the proffered wage through net income or net current assets. The petitioner has also not established long-term historical growth, the occurrence of any uncharacteristic business expenditures or losses in the years 2003, 2004, and 2006, or its reputation within its industry. The AAO concludes that the petitioner has not demonstrated adequate financial strength through its net current income, net current assets, or any other means to demonstrate its continuing ability to pay the beneficiary the proffered wage from the priority date onward.

It is noted that the petitioner has filed multiple petitions for additional beneficiaries that were pending during the requisite period. Petitioners must produce evidence that its job offers to each beneficiary are realistic and that it has the ability to pay the proffered wages to all of the beneficiaries of its pending petitions as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall, supra*.

See also 8 C.F.R. § 204.5(g)(2). 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 onward.

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.