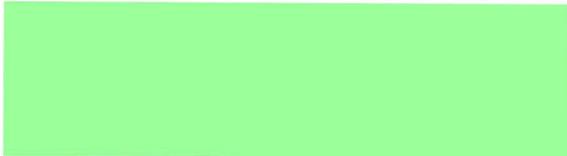




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OFFICE: NEBRASKA SERVICE CENTER

FILE:

OCT 24 2012

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an individual. He seeks to employ the beneficiary permanently in the United States as a property manager. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that he had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's May 21, 2009 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on September 13, 2007. The proffered wage as stated on the ETA Form 9089 is \$14.06 per hour (\$29,244.80 per year based on 40 hours per week). The ETA Form 9089 states that the position requires a bachelor's degree in commerce.

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.¹

The evidence in the record of proceeding shows that the petitioner is an individual. The petitioner's tax returns for 2005 and 2006 include a Schedule C, Profit or Loss From Business (Sole Proprietorship) and a Schedule C-EZ, Net Profit From Business, respectively, for activities involving property management as well as Schedules E, Supplemental Income and Loss for rental real estate activities, but the tax return for 2007, the year in which the priority date falls, does not contain a Schedule C. On the ETA Form 9089, signed by the beneficiary on October 1, 2007, the beneficiary claimed to have worked for the petitioner since April 1, 2007. No Forms W-2 or 1099 for wages paid to the beneficiary were submitted.

The petitioner must establish that his job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 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'l Comm'r 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'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that he 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 has not established that he employed and paid the beneficiary the full proffered wage from the priority date in 2007 onwards.

If the petitioner does not establish that he 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

¹ 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).

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), *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).

The petitioner is an individual. Therefore the individual's adjusted gross income, assets and liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their IRS Form 1040 federal tax return each year. Individuals must show that they can cover their existing expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, individuals must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record before the director closed on May 1, 2009, with the receipt of the petitioner's submissions in response to the director's request for evidence (RFE) of March 24, 2009. As of that date, an automatic extension had been applied for filing the 2008 tax return, and the tax return for 2007 was the most recent return available. In the instant case, the petitioner supported a family of two in 2007. The petitioner's tax returns reflect the following information for the following years:²

	<u>2005</u>	<u>2006</u>	<u>2007</u>
Petitioner's adjusted gross income (Form 1040, line 37)	\$60,987.00	\$79,060.00	\$97,260.00

The petitioner's adjusted gross income of \$97,260.00 in 2007 less the recurring monthly household expenses of \$92,185.92 leaves a balance of \$5,074.08 with which to pay the proffered wage of \$29,244.80. Therefore, it is improbable that the petitioner could pay the proffered wage with what remains after reducing the adjusted gross income by the amount required to pay recurring monthly household expenses.

On appeal, counsel submits copies of bank statements from accounts in the name of [REDACTED] as well as accounts in the name of [REDACTED]. Counsel asserts that: 1) the aggregate net balances each month reflected on the bank statements

² The petitioner's tax returns from 2005 and 2006 were submitted, but they represent years prior to the year in which the priority date falls, and thus are of little probative value concerning the petitioner's continuing ability to pay the proffered wage beginning on the priority date but may be considered generally.

demonstrate the availability of funds necessary to pay the proffered wage, and 2) the petitioner has access to an existing equity line of credit in the aggregate amount of more than one million dollars from the various banks due to the petitioner's ownership of the real estate properties.

The AAO notes that the bank accounts in the name of [REDACTED] indicate that the accounts belong to a corporate entity rather than the petitioner, who is an individual. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, 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. Thus the funds in the accounts in the name of [REDACTED] will not be considered. Further, it is noted that one of these accounts at Bank of America for [REDACTED] is named on the statement as a "payroll account." The AAO notes that the petitioner's tax return does not contain expenses for salaries and wages. Two other accounts for [REDACTED] one at Bank of America and one at Union Bank of California is named on the statement as a "DBA [REDACTED]" thus indicating that these accounts are related to an activity other than the petitioner's rental real estate activity as reported on Schedule E of the Form 1040. Another account at Union Bank of California is in the name of [REDACTED], thus indicating that it also is related to another activity.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In addition, the funds in the accounts in the name of [REDACTED] are likely shown on Schedule E of Mr. [REDACTED]; tax returns as rents received and expenses. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In addition, an analysis of the bank account statements in the name of [REDACTED] in the record for 2007 indicates that the accounts had average annual balances according to the table below.

Account

Average Annual Balance in 2007

(b)(6)

Bank of America
account ending in [REDACTED] \$1,763.48

Bank of America
account ending in [REDACTED] \$1,495.66

WaMu account (seven months
only) ending in [REDACTED] \$782.36

Average for all accounts for
[REDACTED]

\$ 1,347.17 (\$4,041.50 / 3 accounts)

In the instant case, where the petitioner has not established its ability to pay the proffered wage in the priority date year or in any subsequent year based on its adjusted gross income, the proprietor's statements must show an initial average annual balance, in the year of the priority date, exceeding the full proffered wage. Subsequent statements must show annual average balances which increase each year after the priority date year by an amount exceeding the full proffered wage. Here, the petitioner's cash assets as reflected in his accounts fail to establish the petitioner's continuing ability to pay the proffered wage.

In regard to counsel's assertion that the petitioner's line of credit should be considered, the AAO disagrees. 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 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'r 1971).

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).

Regarding the property values of the rental properties, a building is not a readily liquefiable asset. Further, it is unlikely that an individual would sell such a significant personal asset to pay the beneficiary's wage. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

USCIS may consider evidence relevant to the petitioner's financial ability that falls outside of his adjusted gross income in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).³ USCIS may consider such factors as any uncharacteristic expenditures or losses incurred by the petitioner, whether the beneficiary is replacing a former household worker or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The AAO notes that the bank account statements provided do not appear to identify any funds available to pay the proffered wage which were not already reported on the petitioner's tax return. Based on the evidence in the record, the funds in the petitioner's bank accounts for [REDACTED] appear to be included on the Schedule E on the IRS Form 1040. The net profit (or loss) is carried forward to page one of the petitioner's IRS Form 1040 and included in the calculation of the petitioner's adjusted gross income, which is insufficient to establish the petitioner's ability to pay the proffered wage. In the instant case, the petitioner's rental income from the properties varies. The petitioner indicated on the Form I-140 that it employs three people, but the petitioner's tax return does not appear to reflect any salaries and wages paid. While the petitioner has been in business over 35 years, the business does not appear to pay substantial compensation to the petitioner. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry.

³ 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.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that he had the continuing ability to pay the proffered wage.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.