

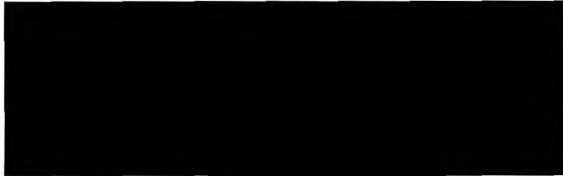
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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: [Redacted]
SRC 07 110 51724

Office: TEXAS SERVICE CENTER Date: **NOV 03 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

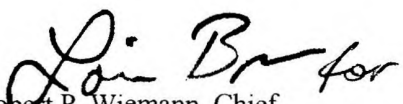
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment based visa petition was denied by the Director, Texas Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The case will be remanded to the director for further investigation and entry of a new decision.

The petitioner is an engineering and construction management services firm. It seeks to employ the beneficiary permanently in the United States as an Engineer, Industrial-Power Plants. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its financial ability to pay the proffered salary.

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).

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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:

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must establish that its ETA 750 job offer to the beneficiary is realistic. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that the ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). 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 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. Here, the ETA 750 was accepted for processing on April 30, 2004. The proffered wage as stated on Part A of the ETA 750 is \$35.55 per hour, which amounts to \$73,944 per year. On Part B of the ETA 750, signed by the beneficiary on April 15, 2004, the beneficiary claims to have worked for the petitioner since December 2001.

On Part 5 of the Immigrant Petition for Alien Worker, Form I-140, which was filed on February 26, 2007, the petitioner states that it was established on July 19, 1993 and employs 8-10 workers.

As evidence of its continuing financial ability to pay the proposed wage offer of \$73,944 per annum and in response to the director’s request for evidence, the petitioner provided copies of its Form 1120, U.S. Corporation Income Tax Return for 2004, 2005, and 2006. The returns indicate that the petitioner files its tax returns using a standard calendar year. The returns also contain the following information:

	2004	2005	2006
Net Income ¹	-\$ 25,334	\$ 9,986	\$ 16,186
Current Assets	\$ 59,171	\$ 26,985	\$ 19,022
Current Liabilities	\$ 1,498	\$ 25,928	\$ 3,751
Net Current Assets	\$ 57,673	\$ 1,057	\$ 15,271
Total tax (line 31)	-0-	-0-	-0-

Besides net income and as an alternative method of reviewing a petitioner’s ability to pay a proposed wage, CIS will examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.² 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 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.

¹ For the purpose of this review of the petitioner’s Form 1120 corporate tax returns, the petitioner’s net income is found on line 28. (taxable income before net operating loss deduction and special deductions) CIS uses a corporate petitioner’s taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner’s total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, CIS examines a petitioner’s taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

² 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.

The petitioner also provided copies of 2004, 2005, and 2006 Wage and Tax Statements (W-2s) issued by the petitioner to the beneficiary. They reflect the following:

Year	Wages Paid	Difference from Proffered Wage of \$73,944
2004	\$36,040	-\$ 37,904
2005	\$65,510	-\$ 8,434
2006	\$43,631.94	-\$30,312.06

The petitioner additionally submitted copies of the beneficiary's payroll records indicating that as of October 7, 2007, he had received \$55,901 in compensation. The petitioner further supplied copies of its bank statements covering the first nine months of 2007, as well as a copy of a letter from its bank, dated October 19, 2007, indicating that the petitioner has had an open commercial line of credit of \$75,000 since 2003, which has been paid as agreed.

Following a review of the petitioner's net income and net current assets,³ as well as compensation paid to the beneficiary, the director determined that although the petitioner had demonstrated the ability to pay the proffered wage of \$73,944 in 2004, it had not established its ability to pay the proposed wage offer in 2005 or 2006. The director denied the petition on November 9, 2007.

On appeal, the petitioner, through counsel submits additional evidence including copies of the beneficiary's remaining 2007 pay stubs from the petitioner indicating that he had earned slightly more than the proffered wage in that year; copies of the petitioner's bank statements reflecting an ending balance of approximately \$51,000 on December 31, 2005 and approximately \$28,600 on December 31, 2006; copies of tax returns and documents related to the individually held assets of the sole shareholder; copies of the petitioner's state quarterly wage reports and copies of various contracts that are asserted to represent aged receivables.

A copy of a letter from the petitioner's certified public accountant, [REDACTED], is also submitted on appeal. Referring to line 30, taxable income of the 2005 and 2006 tax returns, [REDACTED] states that the respective losses were partly due to the fact that the petitioner is a cash basis taxpayer in which income is reported when the check is actually received and not when the payer is billed. She states that in the latter part of 2004 and in 2005, contract billings were delayed and contractor checks were not received until the following year. She adds that aging reports for the petitioner's accounts receivables are submitted to illustrate the petitioner's actual financial standing. Ms. [REDACTED] also asserts that shareholder loans should also be added back to the current asset calculation because the principal shareholder had the ability to pay back those loans.

Counsel further submits amended federal income tax returns for 2005 and 2006 filed by the petitioner with the Internal Revenue Service (IRS) on January 7, 2008. Counsel states that the petitioner requested its accountant to review the originally filed 2005 and 2006 returns during the preparation of the appeal and the resulting amended

³ The director erroneously used the figures reflected as taxable income on line 30 rather than line 28 of the petitioner's corporate income tax returns.

returns demonstrate the petitioner's ability to pay the proffered salary of \$73,944. The 2005 and 2006 amended returns each state on Form 1120X that the income received in that year was inadvertently excluded. The returns also contain the following:

	2005	2006
Net Income	\$ 22,854	\$ 27,184
Current Assets	\$ 39,853	\$ 43,217
Current Liabilities	\$ 25,928	\$ 3,751
Net Current Assets	\$ 13,925	\$ 39,466
Total tax (line 31)	-0-	\$ 2,493

Counsel asserts on appeal that the director erred in not considering the petitioner's bank statements balances in demonstrating the petitioner's ability to pay the proffered wage. Counsel contends that the fact that they were submitted should be interpreted as a demonstration that the tax returns were an inaccurate reflection of the petitioner's financial profile. Counsel also cites a previous AAO decision from 2002 in which bank balances were considered in determining the petitioner's ability to pay the proffered wage.

It is noted that while 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions, such as those cited by counsel are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The petitioner's bank statements show only a portion of a petitioner's financial profile and do not reflect other current liabilities and encumbrances that may affect a petitioner's ability to pay the proffered wage such as set forth on an audited financial statement or a corporate tax return. Further, cash assets should also be shown on the corresponding federal tax return as part of the listing of current assets on Schedule L. As such, they are already balanced against current liabilities and included in the calculation of a petitioner's net current assets for a given period. Counsel provided no evidence that demonstrated that the funds reported on the petitioner's bank statements, which correlate to the periods covered by the tax returns, somehow show additional available funds that would not already have been reflected on the corresponding tax return such as Cash, reflected on line 1 of Schedule L. In this case, we do not conclude that the bank statements should be accepted as probative of the petitioner's ability to pay the proffered wage in lieu of the data set forth on the tax returns as required by 8 C.F.R. § 204.5(g)(2).

Counsel also asserts that because the petitioner is a cash basis tax payer, the tax returns do not adequately reflect the petitioner's ability to pay the proffered wage given that they do not reflect accounts that have been billed but not received as is explained by the accountant's letter. At the outset, it is noted that with reference to the discussion of accounting methods employed to represent the petitioner's ability to pay the proffered wage, counsel cites no authority by which the election of a particular accounting method should be determinative of a petitioner's ability to pay the proffered wage. We would also note that in calculating the ability to pay the proffered salary, the petitioner's net income or net current assets will not be augmented by adding the line of credit mentioned above. 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). Documentation submitted with the bank letter indicating the existence of a \$75,000 line of credit also indicates that the petitioner's balance owed has ranged from approximately \$6,000 to approximately \$74,000. Additionally, 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 a credit card, CIS will give less weight to the acquisition of debt as a means of paying a proffered salary since the debts will increase the firm's liabilities and will not improve its overall financial position.

Counsel alternately refers to the petitioner as a professional service corporation or a personal service corporation which is accorded special tax treatment by the IRS. Citing a prior AAO decision, counsel asserts that the petitioner is a personal service corporation and is held to a higher corporate tax structure. Therefore, the sole shareholder and officer distributes the profits as wages to himself in order to avoid double taxation as illustrated by his fluctuating compensation from year to year. As noted by the Internal Revenue Code (IRC), a qualified personal service corporation is an entity that performs services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). If the entity is designated as a personal service corporation, it is not permitted to use the same graduated tax structure that other C corporations are allowed, but is taxed at a flat rate of 35% of the corporation's taxable income.⁴

In this case, the record does not support counsel's assertions that the petitioner is a qualified personal service corporation. Neither the original nor amended tax returns provided to the record indicate its designation as personal service corporation on line 2 of Form 1120. Additionally, looking at the 2006 amended tax return, the petitioner calculated its own tax liability on line 31 as \$2,493. This amount represents 15% of the petitioner's taxable income of \$16,617, not 35% as required of a personal service corporation. It is also consistent with the rate for a C corporation reflecting a taxable income from 0 to \$50,000. See Corporations, Publication 542 (rev. February 2006). 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)).

Moreover, with regard to the individual assets belonging to the principal shareholder of a corporate petitioner, CIS (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 Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations will not be considered in determining the petitioning corporation's ability to pay the proffered wage. Additionally, the petitioner who filed the Immigrant Petition for Alien Worker (I-140) in this case is the corporation, not the principal shareholder, individually. Therefore, only the corporate petitioner's assets and liabilities will be considered. It is also noted that the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. The petitioner in that case was a closely held family business organized as a corporation. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage.

⁴ See Instructions for Form 1120 (2007); <http://www.irs.gov/instructions/i1120/index.html>.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period. Here, the record indicates that the petitioner paid the beneficiary wages of \$36,040 in 2004; \$65,510 in 2005 and \$43,631.94 in 2006. This represents \$37,904 less than the proffered wage of \$73,944 in 2004; \$8,434 less in 2005 and \$30,312.06 less than the proffered wage in 2006.

Based on the original returns submitted to the record, the petitioner established its ability to pay in 2004 because the shortfall of \$36,040 could be covered by its net current assets of \$57,673. Its ability to pay the proffered wage in 2005 was demonstrated because its net income of \$9,986 could cover the \$8,434 difference between the actual wages paid and the proffered wage. In 2006, the originally filed return did not reflect that either the petitioner's \$16,186 in net income, nor its \$15,271 in net current assets could cover the \$30,312.06 difference between the actual wages of \$43,631.94 paid to the petitioner and the proffered wage of \$73,944.

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, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit to pay the proffered wage. It is also noted that reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (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); *River Street Donuts, LLC v. Chertoff*, Slip Copy, 2007 WL 2259105, (D. Mass. 2007).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, 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.

The submission of the amended tax returns on appeal raises a question of the evidentiary weight to be accorded to the amended figures given for 2006. As set forth above, the petitioner's revised figures representing its current assets results in net current assets of \$39,466, an amount sufficient to cover the \$30,312.06 difference between the proffered wage and the actual wages paid to the beneficiary in 2006 and establish the petitioner's ability to pay the proffered wage. Although it is noted that the return was filed with the IRS and even resulted in an additional tax payment, we believe that the petitioner is obligated to further clarify the inconsistent figures by further

corroborative documentation as set forth on the original tax returns submitted and the ones submitted after the director's decision *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Simply asserting that income received in 2006 was inadvertently excluded in the 2006 reported income is not sufficient where this evidence appears after CIS points out the deficiencies and inconsistencies in the I-140. The case will be remanded to the director to request the petitioner to provide copies of negotiated checks or credible evidence of such payments representing income received but inadvertently omitted as well as an explanation of the derivation of the amended figures appearing on the amended Form 1120 including Schedule L of the 2005 and 2006 tax returns submitted on appeal.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to conduct further investigation and request any additional evidence from the petitioner pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action consistent with the foregoing and entry of a new decision, which is to be certified to the AAO for review.