

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

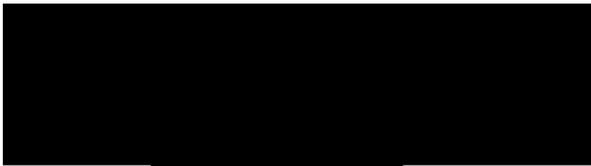
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

B6

**PUBLIC COPY**



FILE: [Redacted]  
EAC 02 281 50995

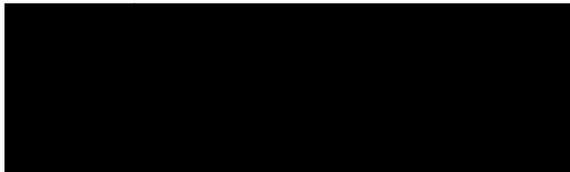
Office: VERMONT SERVICE CENTER

Date: MAR 28 2007

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

PETITION: 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.

*Kevin S. Poulos for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is an information technology consulting business. It seeks to employ the beneficiary permanently in the United States as a database administrator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. As set forth in the director's May 9, 2005 decision denying 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.

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

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

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is June 28, 2000. The proffered wage as stated on the Form ETA 750 is \$60,559.60 annually.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal.

In the instant appeal, the petitioner submits a letter and additional evidence.

Relevant evidence submitted on appeal includes a general agreement between the petitioner and Computech International, Inc. (CTI); a work statement attached to this general agreement naming the beneficiary as a consultant; and information pertaining to CTI, including brochures and unaudited financial statements. Other relevant evidence in the record includes: the petitioner's 2001 federal income tax return; the 2002 individual income tax return of the petitioner's president; and a letter, dated January 28, 2005, from the petitioner's president explaining the petitioner's reduction in force.

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 appeal, the petitioner states that after undergoing a reduction in force, the petitioner is negotiating with various contractors, including CTI, to provide information technology services. She states further that CTI entered into a standing agreement with the petitioner for the services of U.S. citizens and/or permanent residents, including the beneficiary.

At the outset, the AAO notes that the general agreement between the petitioner and CTI, dated October 4, 2004, post-dates the priority date. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Thus, while the petitioner may show evidence of future profiting, the general agreement does not assist it with establishing its continuing ability to pay the proffered wage beginning on the priority date in 2000. Further, the record contains financial statements for CTI. CIS, however, would not be examining the assets of the petitioner's potential client, but, rather, the ability of the petitioner to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

The 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). For each year at issue, the petitioner's financial resources generally must be sufficient to pay the annual amount of the beneficiary's 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).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the

instant case, on the Form ETA 750B, signed by the beneficiary on June 3, 2000, the beneficiary did not claim to have worked for the petitioner.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. 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 (9<sup>th</sup> Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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 (7<sup>th</sup> Cir. 1983). In *K.C.P. Food Co., Inc.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); see also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a limited liability company (LLC). It filed its federal income tax returns as a partnership in 2001 and as a sole proprietorship in 2002. The record contains copies of the petitioner's Form 1065 U.S. Return of Partnership Income for 2001, and Form 1040 U.S. Individual Income Tax Return of the petitioner's single member for 2002. The record before the director closed on February 3, 2005 with the receipt by the director of the petitioner's submissions in response to the request for evidence. The petitioner's tax return for 2002 is the most recent return provided by the petitioner.

Where a partnership's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 22 of page one of the petitioner's Form 1065. In the instant petition, the petitioner's tax return shows the following amount for net income on line 22 of page one of the petitioner's Form 1065 as shown in the table below.

Tax year	Net income or (loss)	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2001	\$102,164.00	0*	\$41,604.40

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in that year.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage in 2001.

As discussed above, the petitioner is an LLC. Although structured and taxed as a partnership in 2001 and as a sole proprietorship in 2002, its owners enjoy limited liability similar to owners of a corporation. An LLC, like a corporation is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.<sup>1</sup> An investor's liability is limited to

<sup>1</sup> 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

his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds.

For a single-member limited liability company taxed as a sole proprietorship, CIS considers net income to be the figure shown on Schedule C, line 31, Net profit (or loss), of the member's Form 1040 U.S. Individual Income Tax Return. The member's tax return shows the following amount for net income:

Tax year	Net income	Household expenses	Wage increase needed to pay the proffered wage	Surplus or (deficit)
2002	\$42,139.00	(not provided)	\$18,420.60*	-\$18,420.60

\* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in that year.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2002.

Further noted is that the record of proceeding is incomplete. There is no regulatory-prescribed evidence for 2000, which is the priority date year, or for 2003, which was due as of the February 3, 2005 receipt date of the petitioner's response to the director's request for evidence. The petitioner has the burden to prove it could pay the wage in those years as well.

The record contains no other evidence relevant to the petitioner's financial situation.

Based on the foregoing analysis, the evidence in the record fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

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, an LLC formed under Maryland law, is considered to be a partnership for federal tax purposes in 2001 and a sole proprietorship for federal tax purposes in 2002.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence fails to establish that the beneficiary has met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.<sup>2</sup> On the ETA 750A submitted with the instant petition, blocks 14 and 15 describe the requirements of the offered position as a bachelor's degree in computer science and two years of experience as a database administrator. On the Form ETA 750B, signed by the beneficiary on June 3, 2000, the beneficiary specifies his field of study at the University of Kerala as computer science. Copies of the beneficiary's degree and transcript from the University of Kerala, however, reflect that the beneficiary received a Bachelor of Arts degree with no computer studies. 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). 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). The record contains an evaluation from Credential Evaluator, Inc., a company that specializes in evaluating academic credentials. The credentials evaluator concludes that the beneficiary's combined academic coursework is equivalent to a "Bachelors in Computer Applications, a Masters in Arts and a Doctoral Degree in Arts" from an accredited U.S. university. Although the evaluator bases this conclusion, in part, on the beneficiary's Master of Philosophy and Doctor of Philosophy degrees from Vikram University in India, the record contains no evidence of such degrees or the correspondent transcripts. Moreover, although the evaluator further concludes that the beneficiary has received the equivalent of "three years of post-secondary education in Computer Science, equivalent to a Bachelor's in Computer Applications", based, in part, on the number of years of his computer-related course work, the evaluator does not specify the number of years of the beneficiary's computer-related course work. It is noted that the majority of the computer training certificates do not indicate the length of training. Nor do any of these certificates specify the number of training hours. Thus, the number of years of the beneficiary's computer-related course work is unclear. 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)). CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K.*

---

<sup>2</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

*Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). For this additional reason, the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.