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U.S. Citizenship
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: NOV 10 2008

LIN-07-009-53120

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:

SELF-REPRESENTED

INSTRUCTION1S:

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 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 IT consulting/software development company. It seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification application), approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a bachelor's degree or foreign equivalent degree as required on the ETA Form 9089. 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 August 27, 2007 decision, the primary issue in the current petition is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth on the ETA Form 9089, that is, whether the beneficiary possesses a four-year U.S. bachelor's degree in computer science or equivalent and five years of experience in the job offered.

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. Section 203(b)(3)(A)(ii) of the Act also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On appeal, the petitioner asserted that the beneficiary's three-year bachelor's degree is equivalent to a U.S. bachelor's degree according to private credential evaluations from [REDACTED] of Pace University (Dr. [REDACTED]), [REDACTED] of Career Consulting International (CCI), and Marquess Educational Consultants Limited (MEC), and therefore, the beneficiary qualifies under section 203(b)(3)(A) of the Act.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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. 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).

In the instant case, Part H of the ETA Form 9089 requires a bachelor's degree in "equivalent to computer science" and five years of experience in the job offered. The ETA Form 9089 indicates that the petitioner

would accept a foreign educational equivalent and an alternate combination of education and experience. However, it is noted that the alternate combination (consisting a bachelor's degree and five years of experience) set forth in Item 8 of Part H is the same as the basic requirements set forth in items 4 and 6. The ETA Form 9089 does not reflect any specific skills or other requirements in Item 14.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, the petitioner submitted an evaluation report dated July 3, 2007 from [REDACTED] of CCI (CCI July 3, 2007 evaluation), and an expert opinion from [REDACTED] of MEC (MEC July 2, 2007 opinion) and copies of the beneficiary's education previously submitted. Other relevant evidence in the record includes the beneficiary's Bachelor of Science degree in mathematics from Saurashtra University, transcripts from [REDACTED] Navalben Virani Science College, Higher Diploma in Software Engineering and Certificate of Accomplishment of a course in MCSE Training from APTECH Computer Education, certificates from Microsoft, and an academic evaluation dated August 14, 2006 from [REDACTED] (August 14, 2006 evaluation). Because the record does not contain any evidence that the beneficiary obtained a four-year U.S. bachelor's degree or foreign equivalent degree in a computer related field prior to the priority date, the AAO issued a request for evidence (RFE) on July 22, 2008 granting the petitioner 12 weeks to submit additional evidence to support the petition and appeal. However, the AAO has not received a response to the RFE from the petitioner and therefore, the AAO will examine and consider the evidence already in the record in adjudicating the instant appeal.

The original ETA Form 9089 was accepted on December 2, 2005 and certified on September 22, 2006. The ETA Form 9089 in the instant case was filed and certified for the position of computer programmer. DOL assigned the occupational code of 15-1021 to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=15-1021&g=Go> (accessed October 27, 2008) and its extensive description of the programmer analyst position, the position falls within Job Zone Four requiring "considerable preparation." According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See* <http://online.onetcenter.org/link/summary/15-1021.00#JobZone> (accessed October 27, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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).

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

Therefore, according to DOL's general assignment, a computer programmer position could be properly analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.² In this case, the petitioner checked box e in Part 2 of the I-140 form, which is for either a professional or a skilled worker. The Nebraska Service Center director evaluated the petition under the professional category pursuant to section 203(b)(3)(a)(ii) of the Act and regulations at 8 C.F.R. § 204.5(l)(3)(ii)(C). On appeal, the petitioner did not express any disagreement with the director's analysis under the professional category. Instead the petitioner argued that the beneficiary's three-year degree from India is equivalent to a four-year U.S. bachelor's degree according to private credential evaluations. Furthermore, CIS records show that the petitioner has been employing the beneficiary in the proffered position since November 26, 2002 as a specialty occupation under H-1B status.³ These H-1B petitions required a bachelor's degree as a minimum requirement. In addition, the AAO issued an RFE requesting the petitioner submit evidence of its intent concerning the actual minimum requirements of the position and copies of the H-1B petitions so that this office can determine whether the petitioner had intent to have the instant petition also analyzed under the skilled worker category. However, the petitioner declined to respond to our RFE. The requirements of a bachelor's degree and five years of experience qualify the proffered position for a professional one. Therefore, the AAO will analyze the instant petition under the professional category only.

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must

² A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that programmer analyst positions are not included in this section.

³ The I-129 nonimmigrant petitions (EAC-02-033-54484, EAC-04-203-53751 and EAC-07-189-53122).

produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary holds a Bachelor of Science degree in mathematics from Saurashtra University, and the degree and transcripts from the university show that the beneficiary's bachelor of science degree program is a three-year program. A U.S. bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the record does not establish that the beneficiary's degree can be considered a single source foreign equivalent degree.

On appeal, the petitioner asserted that the beneficiary's three-year bachelor of science degree alone is equivalent to a four-year U.S. bachelor's degree in computer science according to private credential evaluations from ██████████⁴ of CCI, and an expert opinion from ██████████⁵ of MEC. Both Dr. ██████████ and ██████████ conclude that the beneficiary completed 120 credits in his bachelor of science degree program at Saurashtra University, which would be the normal course requirement for a U.S. Bachelor's degree. From the information provided, it is not clear that a "contact hour" would be the same or directly equivalent to a U.S. "credit hour." In the Indian system, students spend more time in the classroom providing more "contact hours," whereas the U.S. system calculates time spent studying outside the classroom into the credit hour determination.⁶ The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable. ██████████ reaches this conclusion by assigning a total of 224.81 credits to the courses (5.45 credits to each of three English courses, 10.89 or 15.20 to each of non-English courses and 27.87 to Mathematics Practicals course) the beneficiary took in his bachelor of science degree program.⁷ While she explains that her "process" includes using "unit credits" or "clock hours of instruction" from academic records to determine the number of credits, the beneficiary's transcript in the record does not include either figure.

The record contains no published materials about the Indian education system that would support the above opinions. Yet, the petitioner did not submit copies of any of the contents of either publication that might support

⁴ ██████████ indicates that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but does not indicate the field in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, Ecole Superieure Robert de Sorbon awards degrees based on past experience.

⁵ ██████████ indicates he has a "canonical diploma of Sacrae Theologiae Professor" from St. David's Oecumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

⁶ U.S. students "are assumed to spend two hours of outside preparation for every 1 hour of lecture." Robert A. Watkins, The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," from http://www.handouts.accrao.org/am07/finished/F034p_M_Donahue.pdf (accessed on September 18, 2008). As the Indian system is not based on credits, but is exam based, transfer credits are based on a calculation of the number of exams taken multiplied to reach "a base line of 30" for credit conversion as the systems do not readily equate. *Id.*

⁷ ██████████ did not explain based on what documents she assigned certain credits to each course the instant beneficiary took in his bachelor of science degree program at Saurashtra University in India, nor did she provide any evidence to support her credit assigning method.

the evaluations contained in the record.⁸ The record in this matter contains no evidence the beneficiary received a CBSE or CISCE-Grade secondary school certificate before attending Saurashtra University. In all other situations, the *ADSEC News*⁹ opinion piece recommends only that a three-year baccalaureate in combination with a postgraduate diploma be considered for graduate admission. This opinion piece is not consistent with the evaluations asserting that the beneficiary's three-year degree alone is equivalent to a four-year baccalaureate in the United States. Regardless, the record contains no evidence that any peer-reviewed publication on evaluating Indian degrees has adopted the opinion expressed in the *ADSEC News* piece.

In his evaluation concluding that the beneficiary's three-year degree following 12 years of primary and secondary education is equivalent to 120 credits and a four-year degree in the United States, [REDACTED] relies on *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D. Or. 2006). The judge in that case, however, found that CIS is entitled to deference in interpreting its own regulatory definition of advanced degree. *Id.* at *11. More specifically, the judge found that CIS was entitled to interpret "a degree" in the context of a professional and advanced degree professional to exclude an individual with an Indian three-year degree followed by membership in the Institute of Chartered Accountants of India. *Id.* at *10-11.

Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Because of these reasons, the evaluations from CCI and MES cannot be considered as primary evidence to establish that the beneficiary's three-year bachelor of science degree from India alone is a single source degree equivalent to a four-year U.S. bachelor's degree.

⁸ *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka I80* (1986) provides that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The following chart states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." (Emphasis in original.) We note that the undergraduate placement recommendations provided in the 1986 PIER publication were adopted in *the P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Placement of Students in Educational Institutions in the United States* 43 (1997).

⁹ Newsletter published by Admission Section of National Association of Foreign Student Advisers (NAFSA).

The record also contains the August 14, 2006 evaluation, which stated that the beneficiary obtained a bachelor of science degree in mathematics, and has, as a result of progressively more responsible employment experiences, an educational background the equivalent of an individual with a bachelor of science degree, with a dual major in computer information systems and mathematics, from an accredited university in the United States. The August 14, 2006 evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

As mentioned in our RFE, in determining whether the beneficiary possesses a single U.S. bachelor's degree or a foreign equivalent degree in computer science, we have also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).¹⁰ AACRAO, according to its website, <http://www.aacrao.org>, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index.php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE provides a great deal of information about the educational system in India. While it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provide:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

¹⁰ The relevant EDGE materials were provided to the petitioner with the RFE.

The petitioner also submitted the beneficiary's Higher Diploma in Software Engineering and Certificate of Accomplishment of a course in MCSE Training from APTECH Computer Education, and certificates from Microsoft. However, the record does not contain any evidence to establish that either APTECH Computer Education or Microsoft is an accredited university or institution approved by AICTE. Nor does the record contain any evidence showing that the diploma and certificate from APTECH or certificates from Microsoft is a postgraduate or at least senior level education program approved by AICTE with entrance requirement of a three-year bachelor's degree, and thus is a postgraduate diploma described in EDGE. Therefore, neither the beneficiary's diploma and certificate from APTECH nor certificates from Microsoft is a postgraduate diploma issued by an accredited university or institution approved by AICTE and further, cannot be considered as a single source four-year U.S. bachelor's degree or a single foreign equivalent degree.

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

In addition, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), providing evidentiary requirements for "skilled workers," states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification." And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of the category sought, the beneficiary must have a four-year bachelor's degree or its foreign equivalent in computer science and five years of experience in the job offered. As the beneficiary lacks the degree required by the petitioner on the labor certification, the beneficiary cannot qualify under either the professional or the skilled worker category. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and counsel's assertions on appeal cannot overcome the grounds of denial in the director's August 27, 2007 decision. Therefore, the director's ground for denying the petition under the professional category must be affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO identified an additional ground of ineligibility and requested the petitioner to submit evidence to establish its continuing ability to pay the

proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence in our RFE dated July 22, 2008. However, the petitioner did not respond to the RFE. 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).

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a 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, CIS 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).

Here, the ETA Form 9089 was accepted on December 2, 2005. The ETA Form 9089 states the proffered wage of \$35.86 per hour (\$74,588.80 per year). Therefore, your organization must establish its continuing ability to pay the proffered wage of \$74,588.80 per year from 2005 to the present.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS 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 the beneficiary's paystubs and W-2 form for 2006, which show that the petitioner paid the beneficiary \$71,907 in 2006, which is \$2,681.80 less than the proffered wage that year. The petitioner did not submit the beneficiary's W-2 form or any other documentary evidence for his compensation from the petitioner in 2005 and 2007. Therefore, the petitioner failed to establish that it paid the beneficiary the full proffered wage for these relevant years. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$74,588.80 in 2005 and 2007, and the difference of \$2,681.80 in 2006 between the wages actually paid to the beneficiary and the proffered wage in each relevant year with its net income or net current assets.

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 reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses contrary to the petitioner's assertions. 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expense should be considered as cash is misplaced. 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 court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] 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.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2003 through 2005. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The tax returns for 2003 and 2004 are not necessarily dispositive since the priority date is in 2005. The tax return for 2005 demonstrates the following financial information concerning the petitioner's ability to pay the proffered wage of \$74,588.80 per year from the year of the priority date:

- In 2005, the Form 1120 stated a net income¹¹ of \$7,356.

Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the proffered wage

¹¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

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, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Therefore, counsel's assertion on appeal that loans to shareholders on Schedule L, line 7 are considered as the petitioner's current assets is misplaced. A corporation's 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 net current assets during 2005 were \$67,525.

Therefore, for the year 2005, 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 DOL, 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, its net income or its net current assets because the petitioner's 2005 tax return shows that the petitioner did not have sufficient net income or net current assets to pay the beneficiary the proffered wage, and the petitioner did not submit its tax returns or other regulatory required financial documents to establish its ability to pay for 2006 and 2007.

The record contains bank statements for the petitioner's checking account for months from December 2004 to August 2006. However, 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. In addition, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage.

The petitioner also submitted unaudited financial statements for 2006. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report

¹²According 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.

accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Furthermore, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been approved or pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its approved and pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

CIS records indicate that the petitioner filed 259 immigrant and nonimmigrant petitions including 16 I-140 immigrant petitions in 2005, eight immigrant petitions in 2006 and eleven in 2007. Therefore, the petitioner is obligated to establish its ability to pay the proffered wages to each of the beneficiaries of its approved and pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. The record does not contain evidence showing that the petitioner has already paid all proffered wages or that the petitioner had sufficient net income or net current assets to pay proffered wages as required by the regulation. In addition, it is also noted that you filed 37 I-129 nonimmigrant petitions in 2005, 40 in 2006, 42 in 2007 and 52 in 2008. It is the petitioner's responsibility to pay all these H-1B employees under the terms of labor condition applications. The record does not contain evidence showing that the petitioner had fulfilled its H-1B payment obligations. Without establishing that the petitioner has fulfilled its H-1B payment obligations, the AAO cannot determine whether the petitioner had the ability to pay the proffered wage for immigrant petitions for the relevant years. Therefore, the petitioner failed to establish its ability to pay proffered wages to all beneficiaries of its approved or pending immigration petitions.

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.