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

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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUL 23 2008

SRC 07 127 52958

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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 Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the Director, Vermont Service Center (the director), issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner purports to be a software design, implementation and sales business. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director's basis of revoking the approval of the petition was his determination 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. The director also questioned the specifics of the beneficiary's claimed experience and intent to work for the petitioner.

On appeal, counsel submits a brief and additional evidence. Counsel does not, however, submit the evidence found to be lacking in the notice of intent to revoke or address the director's concern regarding the large number of petitions filed by the petitioner. For the reasons discussed below, we uphold the director's concerns.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary

step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

The regulation at 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, the day 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). Here, the Form ETA 750 was accepted for processing on March 28, 2005. The proffered wage as stated on the Form ETA 750 is $84,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have an establishment date in 1993, a gross annual income of $16 million, a net income of "enough to pay alien's salary" and 160 employees. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120 U.S. Corporation Income Tax Returns for 2005 and 2006. That return reflects the following information:

	2005	2006
Net income	$530,783	$672,653
Current Assets	$2,936,519	$3,882,829
Current Liabilities	$1,718,248	$2,189,943
Net current assets	$1,218,271	$1,692,886

As noted by counsel on appeal, both the petitioner's purported net income and net current assets exceed the proffered wage of $84,000 in 2005 and 2006.[1]

In addition, the Form ETA 750, certified by DOL, reflects that the job requires a Master's degree or equivalent in Computer Science, Computer Information Systems, MIS or Engineering plus three

[1] On appeal, counsel prorates the proffered wage for 2005. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While Citizenship and Immigration Services (CIS) will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), the petitioner has not submitted such evidence.

years of experience in the job offered or in a related occupation "providing skills in described duties," which include designing and implementing innovative technology solutions. The Form ETA 750 also indicates that the petitioner will accept a "Bachelors or equiv." in the same fields plus five years of progressive experience.

The beneficiary obtained a three-year bachelor's degree from Nagarjuna University on March 1994, a two-year Master of Science in Computer Science from the same institution on March 1997 and an "Honours Diploma" in Computer Applications from the Center for Computer Information and Training in 1998. The petitioner submitted an evaluation of the beneficiary's education concluding that the beneficiary's Master degree is equivalent to a U.S. Master's degree in computer science. The petitioner also submitted an April 5, 2007 letter from [redacted] Chief Executive Officer (CEO) of Cambridge Resource Group, Inc., advising that the beneficiary had been working there as an IT consultant since February 2005. A February 10, 2005 letter from [redacted], President of Vision Soft, Inc., advises that the beneficiary worked there as a programmer analyst from August 2004 through January 2005. A 2002 letter from [redacted] Technical Manager at Computer Consultants, Inc., advises that the beneficiary has been working there as an IT consultant as of July 1999. A July 31, 1998 letter from [redacted] Director of Cutting Edge Software Solutions Pvt. Ltd. in Hyderabad, India, advises that the beneficiary worked there as a software engineer from June 1996 through July 1998.

Based on the above evidence, the Director, Texas Service Center, approved the petition.

On February 8, 2008, the Director, Vermont Service Center, issued an NOIR. The director advised the petitioner that it had filed more than 1,300 employment based petitions and that 16 Form I-140 petitions filed by the petitioner with priority dates in 2005 had been approved. The director stated that "due to the inordinate number of petitions," the petitioner was requested to submit IRS issued transcripts of its 2005 and 2006 tax returns and IRS issued transcripts of the petitioner's IRS Form 941 Employer's Quarterly Federal Tax Returns for the fourth quarters of 2005 and 2006. The director also requested IRS Forms 941 for 2005, 2006 and 2007.

In addition, the director noted that "public records" show that the beneficiary is actually the president of Computer Consultants, Inc.[2] and inquired as to how the beneficiary could have acquired experience as an IT consultant at that company while serving as its president. Finally, the director questioned the beneficiary's intent in working for the petitioner given that she is also the CEO and/or or president of at least three companies: Computer Consultants, Inc., Cyber Resource Group and Insign, Inc.

In response, counsel reviewed the petitioner's tax returns and concluded that the petitioner has the ability to pay the proffered wage. In addition, counsel asserted that the beneficiary has the necessary experience and that CIS can only look at the beneficiary's intent, not her current employment.

[2] The petitioner has not challenged this assertion. We note that the Massachusetts' Secretary of State's website, http://corp.sec.state.ma.us/corpsearch (accessed July 3, 2008), confirms that the beneficiary was the president of this company up until the time of its involuntary revocation on March 31, 2008.

Counsel does not contest that the beneficiary is the CEO or president of three companies as claimed by the director.

The petitioner submitted a letter dated February 28, 2008 from [redacted] HR Manager at Computer Consultants, Inc., affirming that the beneficiary held the position of IT consultant with Computer Consultants, Inc. from July 1999 to July 2004. [redacted] does not address the director's assertion that the petitioner was, and in fact continued to be through March 2008, the president of this company. The petitioner also submitted an affidavit from the beneficiary affirming her intent to move to New Jersey and work for the petitioner at their "main business place" in New Jersey upon her adjustment to permanent resident status.[3]

The director determined that the petitioner had not submitted the requested evidence, IRS issued transcripts of the petitioner's tax returns and quarterly returns, and that the beneficiary's affidavit expressing her intent to work for the petitioner was insufficient. Thus, the director revoked the approval of the petition on March 17, 2008.

On appeal, counsel reiterates previous assertions and submits previously submitted evidence and the petitioner's 2007 tax return.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), CIS will first examine whether the petitioner 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, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage at any time.

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly,

[3] The petitioner's tax returns list a New Jersey address. The alien employment certification, however, lists a New York address and indicates, on line 7, that the New York address is the location of the job. Part 1 of the petition lists a different address in New York that, according to Part 6, line 4, is also the address where the beneficiary will purportedly work. The alien employment certification is only valid for the particular job opportunity and for the area of intended employment stated on the alien employment certification. 20 C.F.R. § 656.30(c)(2). While not a basis of revocation, we simply note that the record does not resolve whether there is a current intent to employ the beneficiary in the job and location certified by DOL.

showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. 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. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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.[4] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

As discussed above and noted by counsel on appeal, the petitioner's 2005 and 2006 tax returns both reflect sufficient net income and net current assets to cover the proffered wage. Counsel does not, however, contest or even address the director's concern that the petitioner has filed over 1,300 employment-based petitions.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. 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 Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). 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

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

whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Regl. Commr. 1977). *See also* 8 C.F.R. § 204.5(g)(2). Moreover, we concur with the director that the number of other petitions filed by the petitioner is relevant to the realistic nature of the job offer and the petitioner's ability to pay the proffered wage. To hold otherwise would allow an employer to rely on the same funds to demonstrate its ability to pay multiple beneficiaries.

In light of the more than 1,300 petitions filed by the petitioner when it claims to employ only 160, the director's request for IRS-issued tax returns and specific quarterly returns as well as copies of other quarterly returns was inherently reasonable. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Without the IRS issued transcripts requested by the director, we cannot confirm the petitioner's ability to pay not only the proffered wage in this matter, but also the proffered wage of every beneficiary for whom the petitioner has petition with a priority date in 2005 and 2006. Thus, we uphold the director's finding regarding the petitioner's inability to demonstrate its ability to pay the beneficiary's proffered wage.

We acknowledge that the petitioner has submitted the required initial evidence set forth at 8 C.F.R. § 204.5(g)(1) to demonstrate that the beneficiary has the necessary experience.[5] The letters from Sai Sampath and [redacted] however, are inconsistent with the publicly available information indicating that the beneficiary was, in fact, the president of Computer Consultants, Inc. Specifically, neither letter reconciles the beneficiary's employment as president with the claim that she worked as an IT consultant and [redacted] indicates that the beneficiary's employment terminated in July 2004 even though she was the company's president beyond that date.

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[5] The director concluded that the petitioner had to demonstrate that the beneficiary had three years of experience, apparently accepting that the beneficiary's foreign Master's degree was equivalent to a U.S. Master's degree. We note that the evaluation from [redacted] of the Foundation for International Services reflects that she relies upon "A P.I.E.R. Workshop Report on South Asia." We have reviewed *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. These publications together indicate that a three-year bachelor's degree and a two-year Master's degree from India are comparable to a U.S. baccalaureate. While not a basis of revocation, the record does not resolve this inconsistency. 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). Thus, the petitioner would have to demonstrate that the beneficiary has five years of post-baccalaureate experience, which, in fact, is claimed.

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). The petitioner has made no attempt to resolve the inconsistencies between the publicly available information and the employment letters. Moreover, 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. *Id.* at 591. Thus, the remaining employment letters are also questionable.

In light of the above, the petitioner has not demonstrated that the beneficiary has the necessary experience.

Finally, counsel cites *Pei-Chi Tien v. INS*, 638 F. 2d 1324 (5th Cir. 1981), for the proposition that CIS can only look at the intent of the petitioner and the beneficiary. We note that in that matter, the alien had previously worked for the petitioner and, while she had also worked for other employers, was currently unemployed and willing to accept a previous offer. *Id.* at 1328. In this matter, the beneficiary is not unemployed, but is the president or CEO of three other businesses. We note that there is some precedent for looking at various factors beyond the beneficiary's declared intent to determine the likelihood of the beneficiary performing the employment for which she is being admitted. *See Matter of Shah,* 17 I&N Dec. 244, 246-47 (Regl. Commr. 1977); *Matter of Semerjian,* 11 I&N Dec. 751, 754 (Regl. Commr. 1966). We acknowledge that in both of these cases, the Regional Commissioner was examining the alien's history of working in the profession for which he was seeking admission. In the matter before us, the beneficiary claims to have worked continuously in the IT field, although publicly available records suggest that she has done so as an executive rather than an IT consultant as claimed. Nevertheless, these cases stand for the proposition that the beneficiary's declared intent must be consistent with other evidence. *See also Matter of Soffici,* 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Regl. Commr. 1972)). *See also* section 204(b) of the Act which requires approval of the petition only after a determination "that the facts stated in the petition are true."

In this matter, while the beneficiary has professed her intent to work for the petitioner in New Jersey, a different location than the one certified by DOL and the location listed on the petition, the beneficiary has never addressed how this will impact her position as CEO or president of three other companies. Even if we were to accept the beneficiary's declared intent as sufficient, which we do not, we uphold the director's other two grounds of revocation.

For the above stated reasons, considered both in sum and as separate grounds for revocation, the petition may not be approved.

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.