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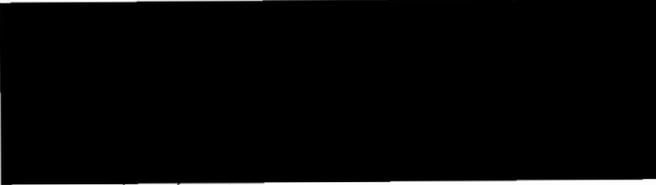
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U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BC



FILE: WAC 04 031 52168 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2006**

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

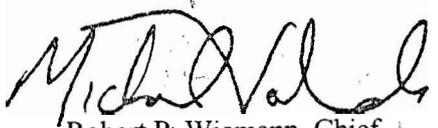
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a corporation whose business is software development. It seeks to employ the beneficiary permanently in the United States as an applications programmer (medical software). As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the Alien Employment Certification accompanying the petition specified, and, 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. The director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

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

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* 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.

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

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

“Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

Professionals. 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.

Here, the Form ETA 750 was accepted on May 22, 2001.¹ The proffered wage as stated on the Form ETA 750 is \$33.22 per hour (\$69,098.00 per year). The Form ETA 750 A, Section 14 states that the position requires a Bachelor of Science (BS) college degree in the major field of study of computer science or equivalent.

If the petition is for a professional pursuant to 8 C.F.R. §204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to 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. Here, the Form ETA 750 was accepted for processing on May 22, 2001. The petitioner selected in Part 2, box “e” of the I-140 petition. That selection states, “A skilled worker (requiring at least two years of specialized training or experience) or professional”

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & 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, Form ETA 750 A, item 14 describes the requirements of the proffered position and occupation of applications programmer (medical software) as follows:

14.	Education (enter number of years)	
	Grade School	<u>8</u>
	High School	<u>4</u>
	College	<u>4</u>
	College Degree Required	<u>BS degree [Bachelor of Science]</u>
	Major Field of Study	<u>Computer Science or Equivalent</u>
	Training	Blank
	Experience	
	Job Offered	
	Number –Years Mos.	Blank
	Related Occupation	
	Number –Years Mos.	Blank
	Related Occupation	
	Specify	Blank

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states “The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.”

The employer who is the petitioner has prepared the above ETA 750 A as an essential part of the labor certification process used to support a preference visa petition that is employment based. The employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria. In the present case, the above requirements state that the occupation of applications programmer (medical software) has a Bachelor of Science college degree or in the computer science or equivalent major field of study field.

Along with the petition and labor certification, counsel submitted copies of the following documents: U.S. corporate tax returns for 2001 and 2002; a financial statement for 2003; information concerning the company assets; corporate bank account statements; and, quarterly wage and withholding report statement.

With Form ETA 750, Part A, set forth above, the employer also is required to submit Form ETA 750, Part B that is a "Statement of Qualifications of Alien." Part B identifies the alien, specifies his current and prospective address in the United States, his education including trade and vocation training, and lists his work experience.

The Form ETA 750 Part B prepared by the beneficiary states the following education history:

Block 11

Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

English Language High School

Field of Study	Blank
From ...[mo./yr]	<u>09 [September] 1985</u>
To ...[mo./yr.]	<u>06 [June] 1990</u>
Degrees or Certificates Received	<u>Diploma</u>

Medical University, Varna, Bulgaria

Field of Study	<u>Medicine</u>
From ...[mo./yr]	<u>09 [September] 1990</u>
To ...[mo./yr.]	<u>11 [November] 1996</u>
Degrees or Certificates Received	<u>Medical Doctor</u>

The director issued an intent to deny the petition on September 15, 2004. Based upon the evidence submitted, the director stated that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the Alien Employment Certification accompanying the petition specified and the director stated 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.

Therefore, the director requested additional evidence of the beneficiary's education and training on the institution's stationery and the beneficiary's official transcript.

Additionally, the director requested evidence in the form of copies of annual reports, U.S. federal tax returns with signatures, and audited financial statements for 2003, and, the director requested the petitioner provide copies of

the beneficiary's personal tax returns W-2 Wage and Tax Statements for that date until the present. The director requested in the alternative the beneficiary's Social Security Administration detailed earnings statement.

On October 14, 2004, the petitioner submitted copies of the following documents in response to the director's request: an explanatory letter; an education evaluation report dated May 19, 1999, mentioned below; a letter from [REDACTED] of the Medical University of Varna dated April 25, 1999; an undated letter from [REDACTED] of the Bureau for Science Information, Medical University of Varna; an article from the publication, *Dis Colon Rectum*, January 1997, co-authored by the beneficiary; the beneficiary's diploma from the University of Varna, in the Specialty of Medicine qualifying the beneficiary as a physician; the beneficiary's transcript; an employment and job experience reference dated April 12, 1999, from ASTI-Varna, LLC; an employment and job experience reference dated April 15, 1999, from TEREM PLC; a statement dated April 14, 1999, that he at the time of the statement was the owner of ChrisSoft, private company; a letter and statement given by Isi Mitrani, **Professor of Computing Science**, University of Newcastle, UK; a letter dated October 13, 2004, a letter from [REDACTED] dated October 13, 2004; approximately 57 pages of documents concerning the owner of the petitioner and the owner's spouse personal assets and personal worth; copies of the beneficiary's U.S. personal tax returns and W-2 statements for the years 2001, 2002, and 2003; a letter dated October 12, 2004 from the petitioner dated October 12, 2004; from [REDACTED] Irvine, California; and, the beneficiary's Social Security Administration detailed earnings statement.

The director denied the petition on November 30, 2004, finding that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the Alien Employment Certification accompanying the petition specified, and, 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.

On appeal, counsel asserts that the director has not "properly considered all of the submitted in accordance with applicable law." Specifically, counsel asserts that the director did not properly evaluate the "beneficiary's equivalent education" since the labor certifications requirements state that the occupation of applications programmer (medical software) requires a Bachelor of Science college degree or in the computer science or *equivalent major field of study field* [emphasis added].

Counsel asserts that the beneficiary has been previously approved for a non-immigrant temporary worker visa, H-1B, because the beneficiary has a "baccalaureate degree or its equivalent in the specialty occupation, therefore the beneficiary has met the minimum requirement under the labor certification in this visa preference classification.

Counsel makes the statement on appeal that "some employers who use computer [sic] for scientific or engineering purpose seek applicants with degrees in computer or information science, engineering, mathematics, or the physical sciences...." Counsel states that the petitioner has submitted an educational evaluation equating the beneficiary's medical degree as a physician with a degree in computer science, and the beneficiary "... has the necessary exposure to physical sciences ..." that therefore the beneficiary "... is well qualified for the position of applications programmer.

Counsel refers to and distinguishes two case precedents that the director relied upon in his decision, *Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm 1966), and, *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977) as set forth below.

Further, counsel states that since the beneficiary was paid more than the proffered wage in 2003 and 2004, and, that this is evidence of the petitioner's ability to pay the proffered wage for those years. This is correct. Counsel, also states that since the corporation is a Subchapter S company, that the owners' total assets are also evidence of the proffered wage. This is incorrect as will be explained below.

On appeal counsel provided copies of the following documents as additional evidence: a legal brief; an educational evaluation report from International Service Inc.; the beneficiary's educational transcripts; an excerpt from the U.S. Department of labor Occupational Outlook handbook; the beneficiary's W-2 statements from 2003 and 2004; a letter from the petitioner dated October 12, 2004; and, "Calculation of Mrs. [REDACTED]"

As mentioned, the director determined that the petitioner had not established that the beneficiary had the college degree in the major field of study (Computer Science or Equivalent) required by the preference classification for which the Alien Employment Certification accompanying the petition specified and denied the position accordingly on November 30, 2004.

On appeal, counsel asserts that the director did not properly evaluate the "beneficiary's equivalent education" since the labor certifications requirements state that the occupation of applications programmer (medical software) requires a Bachelor of Science college degree or in the computer science or equivalent major field of study field.

Further by the evidence presented of the beneficiary's work experience, counsel asserts that the beneficiary's combined professional experience and educational background equates to a Bachelor's degree in computer science. While counsel does not directly state this issue, there are abundant statements submitted in the record of proceeding directly stating this position.

Petitioner's clear intent is expressed in the certified Alien Employment Application. A bachelor's of science college degree is required in the computer science field of study. Note that even if this petition were considered under the skilled worker regulations, the result would be the same. While it is clear that regulations governing the skilled worker classification do not contain a baccalaureate degree requirement, CIS is still bound by the regulations and above-cited case law to require the petitioner and beneficiary to meet the requirements specified on the ETA-750. See 8 C.F.R. § 204.5 (l)(3)(ii)(B). Regardless of classification, the ETA-750 contains the requirements that the beneficiary must have a bachelor's of science college degree is required in the computer science field of study or equivalent. Counsel has made the statement on appeal that "... some employers who use computer [sic] for scientific or engineering purpose seek applicants with degrees in computer or information science, engineering, mathematics, or the physical sciences." We agree. Counsel is correct in his statement. The major fields of study he stated, computer science, information science, engineering, mathematics, or the physical sciences could be equivalent major fields of study depending whether the major fields of study related to the job description.

A plain reading of the university course transcript submitted into evidence states of the 40 educational courses the beneficiary undertook at the Medical University in Varma, Bulgaria, from the specialty of Medicine Facility, only four, computer skills (which appears to be a non-credit course) physics, chemistry and biophysics could be construed to relate the aforementioned equivalent in computer or information science, engineering, mathematics, or the physical sciences major fields of study.

The petitioner submitted an educational evaluation report dated May 19, 1999, by [REDACTED] of the beneficiary's foreign schooling and education received in the Bulgaria as it equates to a higher

education offered in the United States. After stating that the beneficiary's education is "equivalent to a doctor of medicine degree from an accredited United States college or university, the evaluator also stated in pertinent part:

... [The beneficiary] ... has, as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from ... [an] university in the United States.

The subject Form ETA 750 Part A requires a degree from a college and the completion of baccalaureate of science studies in computer science. CIS regulations for a third preference immigrant visa petition do not provide that a combination of education and experience may be accepted in lieu of a four-year degree. While the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) do state that the "relevant post secondary education may be considered as training for the purposes of this paragraph;" there is no regulation that would allow for a converse, that the experience may be considered for education requirements.

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). In this instance, by petitioner's credential evaluator, the beneficiary has the equivalent of doctor of medicine degree from a university in the United States. This matter is not in dispute.

However, CIS and the AAO does not accept the evaluator's further opinion that a combination of education and experience equate to a Bachelor of Science degree in computer science as "... a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from ... [an] university in the United States."

Counsel contends that job experience together with the above mentioned diploma course taken at the Medical University at Varma satisfies the educational requirement for the preference category. Despite counsel's arguments, CIS will not accept a degree equivalency when a labor certification plainly and expressly requires a Bachelor of Science degree in computer science, as is the present case.

The regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(l)(2) and 8 C.F.R. § 204.5(l)(3)(ii)(C). Although certain regulations for temporary worker status allow a combination of education and experience, the immigrant visas (employment based third preference) regulations do not. Therefore, the fact that the beneficiary's education and work experience was acceptable to obtain a non-immigrant visa, it is not acceptable under the regulations and case precedent to obtain an immigrant visa.

The above regulations at 8 C.F.R. § 204.5(l)(3)(ii)(C) use a singular description of foreign equivalent degree. Thus, for professionals, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must 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.²

²Certain nonimmigrant visas do allow a combination of education and experience. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(5).

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a Bachelor of Science college degree in the computer science or equivalent major field of study field.

A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). According to counsel, the beneficiary already "possessed the necessary education" and that the *Matter of Katigbak* case and another case, *Matter of Wing's Tea House*, dealt with education and experience gained after the filing of the labor application.

Counsel is making an erroneous supposition, that the beneficiary has the education required by the subject labor certification, a Bachelor of Science degree in computer science or equivalent, which is in error based upon the evidence submitted. Further, counsel is asserting contrary to regulation, that education and experience may be substituted for the degree required by the labor certification. It is also a misapprehension relating to the regulatory criteria and requirements of non-immigrant and immigrant preference visa petitions as already described above. Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience.

The petitioner has not established by the evidence submitted that the beneficiary has the college degree in the major field of study, computer science or equivalent major field of study required by the preference classification for which the Alien Employment Certification accompanying the petition specified.

A second issue in the case is the director 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.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. Evidence was submitted to show that the petitioner employed the beneficiary. W-2 statements for the years 2001, 2002, 2003 and 2004, were submitted. The petitioner paid the beneficiary \$37,000.00, \$43,000.00, \$92,000.00, and \$84,000.00 in the years 2001, 2002, 2003 and 2004 respectively. In 2003 and 2004, the petitioner paid the beneficiary more than the proffered wage.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, 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, (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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$69,098.00 per year from the priority date of May 22, 2001:

- In 2001, the Form 1120S stated taxable income of \$20,028.00.
- In 2002, the Form 1120S stated taxable income of \$14,582.00.

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.

- In 2001, the Form 1120S stated taxable income of \$20,028.00. The petitioner paid the beneficiary \$37,000.00 in 2001. The proffered wage is \$69,098.00 per year. The sum of the taxable income and the wages paid is less than the proffered wage.
- In 2002, the Form 1120S stated taxable income of \$14,582.00. The petitioner paid the beneficiary \$43,000.00 in 2002. The proffered wage is \$69,098.00 per year. The sum of the taxable income and the wages paid is less than the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2001 through 2002 for which the petitioner's tax returns are offered for evidence. Also, in the subject case the petitioner has not paid the beneficiary the proffered wage in tax years 2001 and 2002.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. 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.

Examining the Form 1120S U.S. Income Tax Returns submitted by the petitioner, Schedule L found in each of those returns indicates the following:

- In 2001, petitioner's Form 1120S return stated current assets of \$4,679.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$4,679.00 in net current assets. The proffered wage is \$69,098.00 per year. The petitioner's net current assets are less than the proffered wage.
- In 2002, petitioner's Form 1120S return stated current assets of \$7,063.00 and \$0.00 in current liabilities. Therefore, the petitioner had \$7,063.00 in net current assets. The

³ 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.

proffered wage is \$69,098.00 per year. The petitioner's net current assets are less than the proffered wage.

Therefore, for the period 2001 through 2002 from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its net current assets.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,⁴ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel, also states that since the corporation is a Subchapter S company, that the owners' total assets are also evidence of the proffered wage. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) 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."

Counsel has submitted business checking account statements as noted above as evidence of the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, 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. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel has submitted financial statements as evidence of the ability to pay the proffered wage. Counsel cites no legal precedent for the admissibility of the financial statement, and, according to regulation, copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined. There is no evidence that the statements submitted are audited⁵ statements.

⁴ 8 C.F.R. § 204.5(g)(2).

⁵ A compilation is limited to presenting in the form of financial statements information that is the representation of management. An audit is conducted in accordance with generally accepted auditing standards to obtain reasonable assurance whether the financial statements of the business are free of material misstatement. A review is a financial statement between an audit and a compilation. Reviews are governed by the AICPA's (American Institute of Certified Public Accountants) Statement on Standards for Accounting and Review Services (SSARS) No.1. Accountants only express limited assurances in reviews. A compilation is the management's representation of its financial position. Evidence of the ability to pay shall be, *inter alia*,

There is a letter from the petitioner dated October 12, 2004, in the record of proceeding. In the letter, the petitioner's owner offers her personal assets to pay the proffered wage. As already stated herein, contrary to the owner's offer, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980).

The instant petition, submitted pursuant to the regulation at 8 C.F.R. §204.5(1)(2), 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 had not established that the beneficiary has the requisite education, a Bachelor of Science degree in computer science or an equivalent major field of study as stated on the labor certification petition. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date in years 2001 and 2002.

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.

in the form of copies of audited financial statements with a declaration of the maker indicating their manner of preparation and certifying the financial statements to be audited. Non-audited financials have limited evidentiary weight in Service deliberations in these matters. The statements presented were not audited.