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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: LIN 06 069 51573 Office: NEBRASKA SERVICE CENTER

Date: OCT 31 2007

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:



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.

A handwritten signature in black ink, appearing to read "Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a telecommunications, computer sales and software company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a user support specialist. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the Director's May 17, 2006 denial, 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 also noted that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position. 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.

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

#### Ability to Pay

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 demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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<sup>1</sup> This office notes that the petitioner's corporate status in the state of Florida was inactive on the priority date of October 3, 2005. The corporation was administratively dissolved by the Florida Department of State on September 16, 2005 for failure to file an annual report. See <http://sunbiz.org/corinam.html> (accessed September 26, 2007).

Here, the Form ETA 9089 was accepted on October 3, 2005. The proffered wage as stated on the Form ETA 9089 is \$46,800.00 per year.

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.<sup>2</sup> On appeal, counsel submits a brief, the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by Entec Software for 2004 and 2005, the beneficiary's paystubs issued by Entec Software for 2005 and a portion of 2006, the petitioner's previously submitted Form 10-KSB Annual Report for 2005, web page articles relating to generally accepted accounting principles (GAAP), a previously submitted printout of checking account monthly balances from Bank of America, and a letter dated July 17, 2006 from the petitioner's Chief Executive Officer. Relevant evidence in the record includes a letter dated December 20, 2005 from the petitioner's Chief Executive Officer, a business plan for Nettel Global Communication, Inc.,<sup>3</sup> and the petitioner's Form 10-QSB Quarterly Report for the quarterly period ending September 30, 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established in 1998 and to currently employ five workers. On the Form ETA 9089, signed by the beneficiary on November 30, 2005, the beneficiary claimed to have worked for the petitioner as a user support specialist starting on February 13, 2004.

On appeal, counsel asserts that the petitioner paid the beneficiary a portion of the proffered wage in 2004, 2005 and 2006, that the petitioner's net loss in 2005 was due to research and development expenses relating to development of software and general and administrative expenses, that nearly two million dollars of the software development expense was a non-cash charge for the market value of common stock issued to engineers for their services, and that without these transactions, the petitioner's net income would have been sufficient to pay the proffered wage.<sup>4</sup> Counsel further states that the petitioner's stock based compensation valued at \$2,107,883 should be added back to the petitioner's net loss in 2005 because the issuance of stock is a non-cash transaction. Counsel argues that a common non-GAAP calculation of adjusted net income is to add back non-cash stock-based compensation expenses.<sup>5</sup> Counsel also states that the petitioner's cash and cash equivalents and the balances in its bank account are further evidence of its ability to pay the proffered wage.<sup>6</sup>

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<sup>2</sup> 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).

<sup>3</sup> The business plan submitted by the petitioner is for a corporation other than the petitioner. Therefore, it is not relevant to the petitioner's ability to pay the proffered wage.

<sup>4</sup> Counsel has not demonstrated that these expenses are uncharacteristic expenses for the petitioner.

<sup>5</sup> This office notes that the petitioner's financial statements are prepared using GAAP. This office is not persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on financial statements prepared pursuant to GAAP, but then seeks to change the calculation of the petitioner's net income as convenient to the petitioner's present purpose. The amounts shown on the petitioner's financial statements shall be considered as they were submitted, not as amended pursuant to counsel's non-GAAP adjustments.

<sup>6</sup> The petitioner's cash and cash equivalents listed on its balance sheet are included in the calculation of the petitioner's net current assets.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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, Citizenship and Immigration Services (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).

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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2005 or subsequently.<sup>7</sup>

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<sup>7</sup> On appeal, the petitioner submits the beneficiary's IRS Forms W-2, Wage and Tax Statements, issued by Entec Software (federal tax identification number 20-1134111) for 2004 and 2005 and the beneficiary's paystubs issued by Entec Software for 2005 and a portion of 2006. In a letter dated July 17, 2006, the petitioner's President states that Entec Software is a wholly-owned subsidiary of the petitioner and that the beneficiary has been paid by Entec Software since he started employment on February 13, 2004. However, the petitioner has provided no evidence to establish the relationship between the petitioner and Entec Software. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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." In addition, the petitioner's Form 10-QSB Quarterly Report for the quarterly period ending September 30, 2005 states that the petitioner "has not paid salaries to its employees and has accrued \$112,433 in payroll liabilities for the past two years." Finally, in a request for evidence (RFE) dated February 1, 2006, the Director requested that the petitioner submit its Forms W-2 and/or pay vouchers for the beneficiary. The purpose of the RFE 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). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the Forms W-2 and pay vouchers to be considered, it should have submitted the documents in response to the Director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the beneficiary's Forms W-2 and pay vouchers submitted on appeal.

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. 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.

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 before the Director closed on April 25, 2006 with the receipt by the Director of the petitioner's submissions in response to the Director's request for evidence. As of that date, the petitioner's 2005 federal income tax return was due, but was not provided by the petitioner. Instead, the petitioner provided its audited financial statements for 2005. The financial statements show that the petitioner incurred a net loss of -\$1,779,854 in 2005. Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the 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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</sup> If the total of a corporation's end-of-year net current assets and the wages paid to the

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Therefore, payments made to the beneficiary by Entec Software will not be credited to the petitioner in the determination of the petitioner's ability to pay the proffered wage.

<sup>8</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

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 balance sheet for 2005 stated net current assets of -\$246,417. 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 9089 was accepted for processing by the 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, or its net income or net current assets.

Counsel's reliance on the balances in the petitioner's bank account is misplaced. 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. Further, 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 balance sheet, such as the petitioner's taxable income (income minus deductions) or the cash specified on the balance sheet that was considered in determining the petitioner's net current assets.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the audited financial statements as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.<sup>9</sup>

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

#### Beneficiary's Qualifications

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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).

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the instant case, the Form ETA 9089, Section H, Items 4-6, set forth the minimum education, training, and experience that an applicant must have for the position of user support specialist. In the instant case, Section H describes the requirements of the proffered position as follows:

4. Education

Bachelor's

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<sup>9</sup> This office notes that the petitioner's accountant, in its independent auditor's report dated April 10, 2006 and attached to the petitioner's audited financial statements for 2005, states that the petitioner's net losses and accumulated deficit "raise substantial doubt about the Company's ability to continue as a going concern."

4-B. Major Field of Study	Information Systems
5. Training	No
6. Experience	24 months experience in the proffered job
7/7A. Alternate Field of Study	Business Administration: Information Systems or related field
10. Alternate Experience	24 months experience as an IT Support Manager

The Form ETA 9089 states that a foreign educational equivalent is not acceptable. Section H, Item 14 of Form ETA 9089 does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA 9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At Section J, the beneficiary indicated that he received a Bachelor's degree in business administration: information systems from Portland State University in 2001.<sup>10</sup> At Section K, eliciting information of the beneficiary's work experience, he represented that he has worked full-time for the petitioner as a user support specialist since February 13, 2004.<sup>11</sup> He also indicated that he worked full-time as an IT Support Manager for the Far East Hotel in Russia from December 1, 1996 to February 15, 1999. He does not provide any additional information concerning his employment background on that form.

Relevant evidence in the record includes a copy of the beneficiary's Bachelor of Arts degree in Business Administration: Information Systems from Portland State University,<sup>12</sup> and the beneficiary's resume. The Director noted in his decision that the record does not document that the beneficiary meets the experience requirements for the proffered position.

On appeal, counsel submits a letter dated July 17, 2006 from the petitioner's Chief Executive Officer confirming that the beneficiary has been employed by the petitioner as a user support specialist since February 13, 2004, and a letter dated April 2, 2005 from the Deputy Director of the Ministry of Health of the Russian Federation certifying that the beneficiary was employed by the Far East Hotel as an IT support manager from December 1, 1996 to February 15, 1999.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(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,

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<sup>10</sup> Although the record does not contain the beneficiary's transcripts from Portland State University, it appears that the beneficiary earned a second bachelor of arts degree from Portland State University in 2001 after one year of post-baccalaureate study at the university.

<sup>11</sup> This office notes that the Form ETA 9089 indicates that the beneficiary did not gain any of the qualifying experience with the petitioner in a position substantially comparable to the proffered job.

<sup>12</sup> The degree was issued on December 8, 2001.

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.

While the letter dated April 2, 2005 from the Deputy Director of the Ministry of Health of the Russian Federation certifies that the beneficiary was employed by the Far East Hotel as an IT support manager from December 1, 1996 to February 15, 1999, the letter does not certify that the beneficiary worked full-time during that period. Further, the beneficiary represented on his resume that he obtained his bachelor of arts degree in accounting from the State Academy of Economics and Law in Russia in June 2000. The record does not contain the beneficiary's diploma or transcripts from the State Academy of Economics and Law. Without these documents, the record is not clear as to how the beneficiary obtained his first bachelor of arts degree in Russia while working full-time at the Far East Hotel. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). If the petitioner further pursues this matter, it must address the inconsistencies in the evidence relating to the beneficiary's qualifications.

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.