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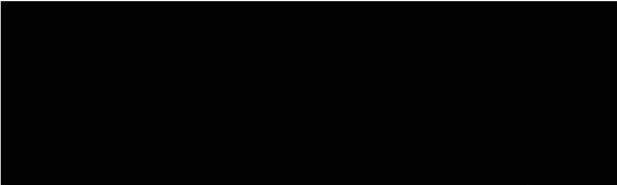
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted] Office: TEXAS SERVICE CENTER Date: JAN 07 2008  
SRC 06 035 51701

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

The nature of the petitioner's business is IT (intellectual technology) consulting services. It seeks to employ the beneficiary permanently in the United States as a management analyst. As required by statute, the petition is accompanied by a Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor. 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.

The record demonstrated that the appeal was properly filed, timely and made 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 denial dated September 1, 2006, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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 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(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 Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment system of the U.S. Department of Labor. 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 Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on August 25, 2005. The proffered wage as stated on the Form ETA 9089 is \$45,500.00 per year.<sup>1</sup>

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>

Relevant evidence in the record includes copies of the following documents: the original Form ETA 9089 Application for Permanent Employment Certification approved by the U.S. Department of Labor; letters from counsel dated October 25, 2005, December 22, 2005 and July 27, 2006; the beneficiary's U.S. Internal Revenue Service Form 1040 tax return for 2004; the beneficiary's Wage and Tax Statement from another employer in 2004; a 1099-MISC statement to the beneficiary for 2004 from the petitioner in the amount of \$21,144.62; the petitioner's U.S. Internal Revenue Service Form 1120 tax returns for 2004 and 2005; the petitioner's certificate of incorporation; a share certificate issued to the sole owner of the petitioner; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as an C corporation. On the petition dated September 25, 2005, the petitioner claimed to have been established in 1999 and to currently employ two workers.<sup>3</sup> According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. There was no net income and gross annual income stated on the petition. On the Form ETA 9089 signed by the beneficiary on October 20, 2005, the beneficiary did claim to have worked for the petitioner (in the capacity of a contractor according to counsel) as a business analyst since December 15, 2001.

On appeal, the petitioner asserts that the petitioner had the ability to pay the proffered wage "based on its net assets,<sup>4</sup> and the adding back of deductions<sup>5</sup> into the company's total available income."

On appeal, counsel did not submit a legal brief or additional evidence.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 Application for Permanent Employment Certification establishes a priority date for any

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<sup>1</sup> In the director's decision of September 1, 2006, she misstated the priority date and proffered wage but correctly stating them in the notice of intent to deny on November 19, 2005.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

<sup>3</sup> According to a letter from counsel dated December 22, 2005, the petitioner's two "employees" are the owner and the beneficiary.

<sup>4</sup> Net current assets must be off-set against net current liabilities so counsel's reliance solely on net assets to demonstrate the petitioner's ability to pay the proffered wage is misplaced.

<sup>5</sup> No precedent exists that would allow the petitioner to add back to the company's total available income the depreciation expense charged for the year or any other expense item. *See Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989).

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 (BIA 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.

Counsel submitted IRS Form 1099-MISC from the petitioner to the beneficiary as a contractor for year 2004 in the amount of \$21,144.62. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of August 25, 2005 as noted above.<sup>6</sup>

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 that exceeded the proffered wage 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 tax return<sup>7</sup> demonstrates the following financial information concerning the petitioner's ability to pay:

- In 2005, the Form 1120 stated net income of <\$14,676.00>.

Since the proffered wage is \$45,500.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for calendar year 2005.

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<sup>6</sup> Since the priority date is in 2005, compensation paid the beneficiary as a contractor in 2004 is not independent objective evidence of the petitioner's ability to pay the proffered wage from the priority date. The difference between compensation actually paid the beneficiary for the services of business analyst and the proffered wage established in 2005 is \$24,355.38.

<sup>7</sup> Tax returns submitted for years prior to the priority date have little probative value in the determination of the ability to pay from the priority date. In 2004, the Form 1120 stated net income (Line 28) of \$54,081.00.

If the net income the petitioner demonstrates it had available during the 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.<sup>8</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its 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 <\$3,439.00>.

Therefore, from the date the Form ETA 9089 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 as of the priority date through an examination of compensation paid to the beneficiary or its net income<sup>9</sup> or its net current assets in 2005.

The evidence submitted fails to establish that the petitioner had the continuing ability to pay the proffered wage from the priority date.

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.

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<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.

<sup>9</sup> However even adding the petitioner's net current assets for 2004 and the compensation paid the beneficiary as an independent contractor in that year would not have equate to the proffered wage.