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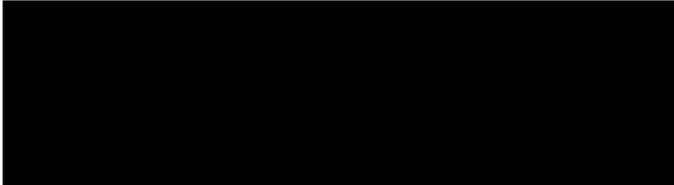
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
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Services

**PUBLIC COPY**

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FILE:

SRC 06 072 50146

Office: TEXAS SERVICE CENTER

Date: JUL 15 2008

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.

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 petitioner is a computer programming services provider.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a computer programmer. 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). 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 discrepancies in the record regarding the beneficiary's social security number.<sup>2</sup> The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 15, 2006 denial, the primary 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 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.

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).

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<sup>1</sup> The petitioner's corporate status in the state of South Carolina was forfeited on June 30, 2006. The petitioner's corporate status was subsequently reinstated on March 3, 2008. *See* <http://webprod.cio.sc.gov/SCSOSWeb/registeredAgentDetail.do?CORPID=32568++++++> (accessed July 15, 2008).

<sup>2</sup> Counsel did not address this issue on appeal.

Here, the Form ETA 9089 was accepted on October 5, 2005. The proffered wage as stated on the Form ETA 9089 is \$27.96 per hour (\$58,156.80 per year). The Form ETA 9089 states that the position requires a master's degree in computer science or, in the alternative, a bachelor's degree in computer science and five years of experience in the proffered position.

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>3</sup> On appeal, counsel submits a letter dated June 7, 2006 from [REDACTED], Secretary of the petitioner, regarding the petitioner's ability to pay the proffered wage; the petitioner's profit and loss statements for 2004 and 2005; the petitioner's account records for 2002, 2004 and 2005; and the petitioner's payroll journals for various periods in 2005 and 2006. Relevant evidence in the record includes the beneficiary's IRS Form W-2 issued by the petitioner for 2005.<sup>4</sup> The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the petition, the petitioner claimed to have been established in July 1999, to have a gross annual income of \$500,000.00, to have a net annual income of \$9,015.00 and to currently employ seven workers. On the Form ETA 9089, signed by the beneficiary on December 30, 2005, the beneficiary claimed to have worked for the petitioner as a computer programmer since December 2, 2001.

On appeal, counsel asserts that the petitioner has the ability to pay the proffered wage.

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

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<sup>3</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). 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>4</sup> The record contains evidence relating to the petitioner's ability to pay the proffered wage prior to the priority date in 2005. Evidence preceding the priority date is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

instant case, the beneficiary's IRS Form W-2 for 2005 shows compensation received from the petitioner of \$15,300.00. Therefore, for the year 2005, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages that year. Since the proffered wage is \$58,156.80 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$42,856.80 in 2005.

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.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> 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 record before the director closed on April 27, 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 2006 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 is the most recent return available. However, the petitioner provided none of the documentation specified at 8 C.F.R. § 204.5(g)(2) required to illustrate a petitioner's ability to pay a proffered wage for tax year 2005. Therefore, for the year 2005, the petitioner did not establish that it had sufficient net income or net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage.

Counsel asserts on appeal that the petitioner has the continuing ability to pay the proffered wage from the priority date. On appeal, counsel submits the petitioner's profit and loss statements for 2005, the petitioner's account records for 2005 and the petitioner's payroll journals for various periods in 2005 and 2006 as

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<sup>5</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

evidence of the petitioner's continuing ability to pay the proffered wage from the 2005 priority date. However, annual reports, federal tax returns, or audited financial statements are required by 8 C.F.R. § 204.5(g)(2) to illustrate a petitioner's ability to pay a proffered wage. Therefore, counsel's reliance on unaudited financial records is misplaced. As there is no accountant's report accompanying the statements submitted by counsel on appeal, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, on appeal, counsel submits a letter dated June 7, 2006 from [REDACTED], Secretary of the petitioner, regarding the petitioner's ability to pay the proffered wage. Mr. [REDACTED] indicates that the petitioner's revenues have doubled in the last two years, that the petitioner is developing additional products and has competitive prices and that the petitioner will be able to generate more revenue in future years. However, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Counsel's assertions and the petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

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

Beyond the decision of the director, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.<sup>6</sup> 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

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<sup>6</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

minimum education, training, and experience that an applicant must have for the position of computer programmer. In the instant case, Section H describes the requirements of the proffered position as follows:

4. Education	Master's
4-B. Major Field of Study	Computer Science
5. Training	No
6. Experience	No
7/7A. Alternate Field of Study	Computer Science
8/8A/8C. Alternate Combination of Education and Experience	Bachelor's and five years of experience

The Form ETA 9089 states that a foreign educational equivalent is acceptable. Section H, Item 14 of Form ETA 9089 lists the following special requirements: Java, Oracle, JDBC, Applets, Servlets, JSP, Beans, AWT, SWING, RMI, HTML, DHTML, JavaScript, EJB, WEBLOGIC, C++, and MS-Access.

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 Master's degree in mathematics from Osmania University in 1997.

The record contains copies of the beneficiary's Bachelor of Arts degree in English from Osmania University, the beneficiary's Master of Science degree in Mathematics from Osmania University and the beneficiary's transcripts from Osmania University. The record also contains a credentials evaluation dated April 26, 2006 from Foundation for International Services, Inc. The evaluation states that the beneficiary:

has the equivalent of graduation from high school in the United States and three years of university-level credit in economics, mathematics and statistics plus a master's degree in mathematics from a regionally accredited college or university in the United States and 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 information systems from a regionally accredited college or university in the United States. Furthermore, [the beneficiary] has as a result of his having the equivalent of a U.S. baccalaureate degree followed by at least five years of progressive experience in the specialty, an educational background the equivalent of an individual with a master's degree in computer information systems from a regionally accredited college or university in the United States.

The evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to nonimmigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).<sup>7</sup> 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 the instant case, the beneficiary's bachelor's degree and master's degree from Osmania University are in the fields of English and Mathematics, respectively.<sup>8</sup> The ETA 9089 requires

<sup>7</sup> We also note that the credentials evaluation equates the beneficiary's education and employment experience to the attainment of degrees in computer information systems, not computer science as required by the ETA 9089.

<sup>8</sup> The beneficiary's transcripts from Osmania University indicate that the beneficiary took no computer

either a master's degree in computer science or a bachelor's degree in computer science plus five years of experience in the proffered job. The beneficiary's degrees are not in the field of computer science as required by the labor certification application and, therefore, the petitioner has failed to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.