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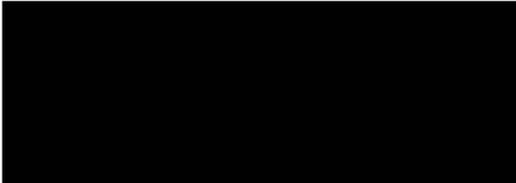


U.S. Citizenship  
and Immigration  
Services

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FILE: [REDACTED]  
LIN 07 108 53163

Office: NEBRASKA SERVICE CENTER

Date:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the 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 company. It seeks to employ the beneficiary permanently in the United States as a Telecommunication Sales Manager. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the 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 also determined that the petitioner failed to demonstrate that the beneficiary met the educational requirements of the proffered position. The director denied the petition accordingly.

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.

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 labor 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 labor 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 labor certification was accepted on November 22, 2006. The proffered wage as stated on the labor certification is \$1,646.80 per week (\$85,633.60 per year). The labor certification states that the position requires an associate's degree in electronics, business administration, or marketing plus five years experience or a bachelor's degree in the same fields plus three years of experience in the proffered position or as a Telecommunication Sales Supervisor/Director.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual

income of \$587,037.00, and to currently employ two workers.<sup>1</sup> According to the tax returns in the record, the petitioner's fiscal years last from January to December. On the ETA Form 9089, signed by the beneficiary on February 23, 2007, the beneficiary did not claim to have worked for the petitioner.

Relevant evidence in the record of proceeding includes the following: the petitioner's Form 1120 tax returns for 2005 and 2006 and the petitioner's bank statements from 2006 and 2007.

On appeal, counsel asserts that U.S. Citizenship and Immigration Services (USCIS) should not look to its net income from one year to determine ability to pay a salary and references General Motors as a company that lost \$10.4 billion in 2005, but still paid the salaries of 327,000 employees.<sup>2</sup> The petitioner also asserts that USCIS should include bank statements within its analysis of the company's ability to pay the proffered salary and that USCIS should consider that the beneficiary will add more income to the company than his wages will subtract. The petitioner submits no other evidence for consideration.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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

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<sup>1</sup> The AAO notes that this information was on the petition filed in March 2007. However, on the appeal filed in April 2007, counsel claims that the petitioner employs five workers. The tax returns do not show any salaries or wages paid, wages paid to subcontractors, or any officers' compensation paid in 2006. In 2005, officers' compensation and salaries and wages paid were each \$13,000, and both combined are less than one third of the proffered wage for the beneficiary.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

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.

Counsel has not addressed these inconsistencies within the evidence.

<sup>2</sup> The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel did not submit any evidence to support these assertions. 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)). The AAO also notes that General Motors is currently part of an economic bailout plan by the U.S. Department of the Treasury. CNN, *GM gets \$4B loan, Chrysler waits*, available at [http://money.cnn.com/2008/12/31/autos/GM\\_check\\_in\\_mail/index.htm](http://money.cnn.com/2008/12/31/autos/GM_check_in_mail/index.htm) (last visited February 12, 2009).

petitioner's ability to pay the proffered wage. There is no evidence in the record that the petitioner employed and paid wages to the beneficiary.

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, USCIS 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 receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS, 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. [USCIS] 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$85,633.60 per year from the priority date.

In 2005<sup>3</sup>, the Form 1120 stated net income<sup>4</sup> of -\$25,031.00.

In 2006, the Form 1120 stated net income of \$18,481.00.

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<sup>3</sup> Evidence preceding the priority date of November 22, 2006 is not necessarily dispositive of the petitioner's ability to pay the proffered salary, but will be considered generally within this analysis.

<sup>4</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Therefore, for the years 2005 through 2006, the petitioner did not have sufficient net income to pay the proffered wage. In 2005, the petitioner reported a net income of -\$25,031.00. In 2006, the petitioner reported a net income of \$18,481.00, \$67,152.60 less than 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, USCIS 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, USCIS 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> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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 the year 2005 in question were -\$32,464.00. The petitioner's net current assets during the year 2006 in question, were -\$14,550.00.

Therefore, from the date the labor certification was accepted for processing by the U. S. Department of Labor, which was on November 22, 2006, 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 its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel states that USCIS should include bank statements within its analysis of the company's ability to pay the proffered salary. The petitioner has submitted corporate bank statements from 2006 and 2007, the majority of which evidence a balance greater than the beneficiary's proffered wage of \$1,646.80 per week or \$6,587.20 per month. 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

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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.

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 petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

Counsel also states that USCIS should consider that the beneficiary will add more income to the company than his wages will subtract when making its analysis. Counsel asserts that the beneficiary's expertise is in sales and that his employment with the company is accordingly expected to add more income to the company than his salary will subtract. Counsel provides no additional information to support this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in Time and Look magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 2005 or 2006 were uncharacteristically unprofitable years for the petitioner.

Counsel argues that consideration of the beneficiary's potential to increase the petitioner's revenues is appropriate, and establishes with even greater certainty that the petitioner has more than adequate ability to pay the proffered wage. The petitioner has not, however, provided any standard or criterion for the evaluation of such earnings. For example, the petitioner has not demonstrated that the beneficiary will replace less productive workers, or has a reputation that would increase the number of customers.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrate that the petitioner could not pay the proffered wage from the day the labor certification was accepted for processing by any office within the employment system of the Department of Labor.

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

Furthermore, the beneficiary does not meet the educational requirements of the labor certification. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which is November 22, 2006. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the ETA Form 9089 reflects the following requirements for the position of Telecommunication Sales Manager:

H.4. Education: Minimum level required: Associate's degree

4-A. Provides "if other indicated in question 4 [in relation to the minimum education], specify the education required."

The petitioner left this blank.

4-B. Major Field Study: Electronics

7. Is there an alternate field of study that is acceptable?

The petitioner checked "yes" to this question.

7-A. If yes, specify the major field of study:

Business Administration/Marketing

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "yes" to this question.

8-A. If yes, specify the alternate level of education required:

Bachelor's degree

9. Is a foreign educational equivalent acceptable?

The petitioner listed “yes” that a foreign educational equivalent would be accepted.

6. Experience: 60 months (five years) in the position offered

10. or three years in the position offered or as a Telecommunication Sales Supervisor/Director

14. Specific skills or other requirements: Knowledge in reading and analyzing data reception and transcripts. Knowledge of the technical capabilities of optic fiber, satellites, microwaves, telecommunication platforms, and satellite dishes.

The beneficiary set forth his credentials on the labor certification under penalty of perjury. On Part K, eliciting information of the beneficiary’s work experience, he indicated that he has not yet worked for the petitioner. He indicated that he has been employed as a Director of Sales for [REDACTED] in Miramar, Florida since July 10, 2005. He also indicated that he was employed as a Telecommunication Sales Manager for [REDACTED] in Pembroke Pines, Florida from December 16, 2004 through July 9, 2005 and as a Telecommunication Sales Manager for [REDACTED] in Los Angeles, California from August 16, 2004 through December 15, 2004. The description of his work for all three of these positions show skills akin to the duties of the proffered position.

With the initial petition, the petitioner submitted four experience letters on letterhead for the beneficiary. The first letter is signed by [REDACTED] who states she was the Human Resources Manager for Latinet Group while the beneficiary worked for that company and its subsidiary as a Director of Sales since January of 2000. The second letter is signed by [REDACTED] who states she was the Human Resources Manager for Comstat Venezuela while the beneficiary worked for that company as a Sales Manager and a Regional Sales Manager from 1996 to 1999. The third letter is signed by [REDACTED] who states he was the General Manager for Comunicaciones EDOTT C.A. while the beneficiary worked for that company as Executive President from 1990 to 1993. The fourth letter is signed by [REDACTED] who states he was the General Director for Union Radio while the beneficiary worked for that company as a Technical Manager from 1981 to 1987.

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,

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.

The AAO finds the letter from Comstat Venezuela pertaining to the beneficiary's qualifications to be acceptable evidence. According to the guiding regulation, the training letter must provide the name, address, and title of the trainer or employer and a description of the training received or the experience of the alien. The letter from Comstat Venezuela states that the beneficiary worked as a Sales Manager for approximately three years. However, the letter from Union Radio states that the beneficiary worked as a Technical Manager, which is not a position in sales. The other letters in the record of proceeding from Latinet Group and Comunicaciones EDOTT also do not provide the address of the employers. Furthermore, the letter from Comunicaciones EDOTT states that the beneficiary worked as an Executive President, which is not a position in sales. Thus, the letters fail to provide a description of the training received or the experience of the alien as required by 8 C.F.R. § 204.5(l)(3)(ii)(A) and therefore are not acceptable evidence that the beneficiary has the qualifying five years of experience as required by the proffered position.<sup>6</sup>

Additionally, the director noted in his decision letter that the petitioner had failed to submit any evidence in the form of diplomas or transcripts that the beneficiary had the education required on the ETA Form 9089. In his brief on appeal, counsel failed to include any additional evidence to this effect. Within the record, the petitioner has just included resumes, which state the beneficiary's educational background but do not indicate which degree(s) the beneficiary may have obtained. Therefore, the AAO affirms this portion of the director's decision. The petitioner failed to demonstrate that the beneficiary meets the educational requirements of the labor certification.

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.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.

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<sup>6</sup> The AAO notes that the director did not specifically address the beneficiary's experience within his March 12, 2007 decision letter. However, 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*, 299 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).

**ORDER:** The appeal is dismissed.