

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B5

FILE:

[REDACTED]  
LIN 07 038 51856

Office: NEBRASKA SERVICE CENTER

Date: **MAY 06 2008**

IN RE:

Petitioner:  
Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

The petitioner is a software design and development company. It seeks to employ the beneficiary permanently in the United States as a lead software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that the beneficiary had the necessary five years of progressive experience, that the job required a member of the professions holding an advanced degree or that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. Thus, the director denied the petition accordingly without issuing a request for additional evidence. As the petitioner was not previously requested to submit specific evidence, we will consider all new evidence on appeal.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, while the director's concerns were valid at the time the decision was issued and some of counsel's assertions are not persuasive, the new evidence submitted on appeal overcomes all of the director's concerns. In reaching this conclusion, we will first examine whether or not the beneficiary is even eligible for the classification sought. We will next examine whether the job certified by the Department of Labor (DOL) requires a member of the profession holding an advanced degree. Finally, we will examine whether the petitioner has now demonstrated its ability to pay the proffered wage.

### **The Beneficiary's Eligibility for the Classification Sought**

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at

least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

The beneficiary earned a four-year Bachelor of Engineering from Bangalore University in August 1997. The petitioner submitted an evaluation of the beneficiary's education equating it with a U.S. baccalaureate. The director did not contest that the beneficiary's four-year Bachelor of Engineering is a foreign equivalent degree to a U.S. baccalaureate and we are satisfied that it is. Rather, the director determined that the petitioner had not submitted the required initial evidence to demonstrate the beneficiary's five years of post-baccalaureate experience.

The regulation at 8 C.F.R. § 204.5(g)(1) provides, in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable*, other documentation relating to the alien's experience or training will be considered.

(Emphasis added.)

Initially, the petitioner submitted a letter from ██████████ Controller at NDS Systems, LC, asserting that the beneficiary worked for that company as a program analyst from March 2003 through March 2006. The petitioner also submitted two affidavits from former employees at Ace Technologies, Inc., asserting that the beneficiary worked there as a program analyst from November 1999 through February 2003. It is not clear from either affidavit that the affiants remained at Ace Technologies through February 2003 such that they have first hand knowledge of the beneficiary's continued employment there. In support of these affidavits, the petitioner submitted an employment contract between the beneficiary and Ace Technologies dated November 25, 1998 and some pay statements issued by Ace Technologies to the beneficiary in 2000, 2001, 2002 and 2003. Finally, the petitioner submitted the beneficiary's 2001 Form W-2 Wage and Tax Statement issued by Ace Technologies.

The director concluded that the evidence submitted to establish the beneficiary's more than three years of employment with Ace Technologies was not the type of evidence specified at 8 C.F.R. § 204.5(g)(1) and that the letter from ██████████ did not provide the beneficiary's exact dates of employment.

On appeal, counsel correctly notes that ██████████'s letter establishes at least two years and ten months of employment. Counsel then asserts at length that the affidavits and supporting documentation should have been considered sufficient to establish the beneficiary's employment with Ace Technologies. Counsel is not persuasive. The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of experience "shall" be in the form of letters from employers (not former

coworkers) and only permits the consideration of other evidence of experience if letters from employers are unavailable. The petitioner has never demonstrated that a letter from Ace Technologies was unavailable. Thus, the director was not obligated to consider other evidence. On appeal, however, the petitioner submits a letter from [REDACTED] Manager at Ace Technologies, confirming that the beneficiary worked for that company from November 18, 1999 through February 28, 2003. As the director did not issue a request for additional evidence in this case, we will consider this new evidence on appeal. As [REDACTED]'s letter conforms with the requirements of 8 C.F.R. § 204.5(g)(1), the petitioner has now established that the beneficiary has the required five years of progressive post-baccalaureate experience.

In light of the above, the beneficiary clearly qualifies as a member of the professions holding an advanced degree. The next question is whether the job requires a member of the professions holding an advanced degree.

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.)

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. As noted by counsel on appeal, it is important that the ETA Form 9089 be read as a whole.

Moreover, Citizenship and Immigration Services (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, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See generally Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated

on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor’s degree is the minimum level of education required. Line 6 reflects that 12 months of experience in the job offered are required. Line 8 reflects that a combination of education or experience is acceptable in the alternative. Specifically, lines 8-A through 8-C reflect that a Master’s degree plus no years of experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable and Line 10 reflects that experience in an alternate occupation is not acceptable.

While these terms on their face are insufficient given that the minimum expressed in Part H is a bachelor’s degree plus one year of experience, the petitioner elaborates and clarifies this part in an addendum to Part H, Line 14. The addendum provides:

ELABORATION OF LINE H-4, H-6, H-6A, H-8, H-8A AND H-8C:

Applicants need to have a B.S./B.A. (Or Foreign Equiv.) in Computer Science / Related Field / Math / Engineering / Business Administration / Related Field / Accounting / Finance or Science and 5 years of progressive post Baccalaureate experience including as specified in Line H-6A, at least 12 months of experience in Job Offered, or alternately, a Master’s (Or Foreign Equiv.) in any of the above specified majors and 3 years experience including at least 9 months experience in Job Offered.

While the ETA Form 9089 does not appear to require such a convoluted addendum to express the petitioner’s job requirements, we are persuaded that, given all the language used, the most reasonable interpretation of the alien employment certification is that the job requires, at a minimum, a baccalaureate plus five years of progressive post baccalaureate experience. We note that the director did not contest that the job required five years of experience. Rather, the director was concerned with the next addendum, which provides:

Employer determines foreign educational equivalence on basis of a program’s credit (contact) hours rather than the length of time taken to complete the program. Employer seeks assistance of independent credential evaluation agencies such as Career Consulting International, etc. to determine foreign equivalence. Employer does not require single source degrees, but accepts combination of degrees/diplomas for the purpose of equivalence to Bachelor’s or Master’s degrees.

The director concluded that this language revealed that the job did not require a baccalaureate or foreign equivalent degree based on the following analysis:

[CIS] maintains that an equivalent foreign degree is a degree awarded by an institution outside the U.S. for a course that is similar in complexity and length to a course of study for which an institution in the U.S. would grant a bachelor's degree. This does not include experience gained through employment, nor does it include coursework that does not lead to an actual degree or a series of diplomas or certificates.

On appeal, counsel submits notes from an April 12, 2007 meeting between the service center and the American Immigration Lawyers Association (AILA) indicating that the service center acknowledged that a three-year baccalaureate plus a two-year Master's degree may be deemed equivalent to a U.S. baccalaureate. Thus, counsel asserts that CIS does not require a single source degree.

The comments made by service center employees during outreach meetings are not binding on the AAO. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center had approved an identical immigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at \*3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

Ultimately, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

While the addendum language raises some concern, overall we are persuaded that the job requires a member of the professions holding an advanced degree. We note that the addendum does not permit the consideration of experience in lieu of education. Had the beneficiary in this matter not possessed a foreign equivalent degree to a U.S. baccalaureate, the petitioner's assertions that it intended to require such a degree would be far less credible. As discussed above, however, the beneficiary in this matter does possess a foreign equivalent degree.

We emphasize, however, that our finding in this matter is in no way intended to suggest that a petitioner could rely on similar language to classify an otherwise ineligible alien under section 203(b)(2) of the Act. Specifically, while the petitioner may choose to rely on a specific evaluator in considering whether an alien is eligible for the position, CIS is not bound by that evaluation in considering whether the alien is eligible for a specific classification. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of

letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

For the reasons stated above, we are satisfied that in this particular case, the petitioner's expressed intent to consider evaluations in evaluating whether a prospective employee has the necessary education is not per se evidence that the petitioner intended to accept education that was less than a foreign equivalent degree to a U.S. baccalaureate.

### **Ability to Pay the Proffered Wage**

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

(Bold emphasis added.)

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on March 28, 2006. The *proffered* wage as stated on the ETA Form 9089 is \$91,000 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of March 22, 2006.

On the petition, the petitioner claimed to have an establishment date in 1998, a gross annual income of \$3,300,000, a "viable" net income and 40 employees. In support of the petition, the petitioner submitted evidence that as of September 22, 2006, the petitioner had paid the beneficiary \$27,460.88 in year to date wages. The petitioner also submitted its 2005 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation. Finally, the petitioner submitted copies of the petitioner's checking account statements for January through September 2006 and several months in 2005.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and denied the petition. In addition to expressing concerns that the petitioner did not demonstrate sufficient net income or net

current assets on its 2005 tax return, the director also stated that the petitioner “has filed numerous additional I-140 immigrant petitions. A petitioner must establish the ability to pay in all immigrant petitions.”

On appeal, the petitioner submits its 2006 tax return, which reflects the following information:

Net income	(\$53,051)
Current Assets	\$112,539
Current Liabilities	\$8,436
Net current assets	\$104,103

The petitioner also submits the beneficiary’s 2006 Form W-2 reflecting that the petitioner paid the beneficiary \$40,322.43 during that year. Finally, the petitioner submits the beneficiary’s pay stubs for 2007 reflecting that as of December 24, 2007, the petitioner had paid the beneficiary \$93,449.19 in year to date wages.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 did not establish that it employed and paid the beneficiary the full proffered wage in 2006, although the petitioner did pay the beneficiary more than the prorated prevailing wage for the portion of 2006 that follows the priority date.<sup>1</sup> The difference between the proffered wage and the wages in paid in 2006 is \$50,677.57.

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. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner’s ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff’d*, 703 F.2d 571 (7th Cir. 1983). 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 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

---

<sup>1</sup> While we will not consider payment of wages or net income over a 12-month period as evidence of an ability to pay the proffered wage during a lesser period, all of the wages paid to the beneficiary in 2006 were paid after the priority date.

specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. 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>2</sup> A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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 out of those net current assets.

The petitioner paid the beneficiary more than the proffered wage in 2007. The petitioner has demonstrated that it paid \$40,322.43 in wages to the beneficiary during 2006. In 2006, the petitioner shows net current assets of \$104,103 and has, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net current assets.

As noted by the director, the petitioner has filed additional Form I-140 petitions for other beneficiaries in 2006 and 2007. Our review of CIS electronic records reveals 11 such petitions, three of which are pending, seven of which were approved and one of which was withdrawn. We concur with the director that the petitioner must demonstrate its ability to pay the beneficiaries of all of the petitions it has filed. Moreover, the ability to pay a beneficiary is relevant to the adjudication of petitions for other beneficiaries. To hold otherwise would allow an employer to use the same net income or net current assets to demonstrate its ability to pay more than one beneficiary. In this matter, however, the petitioner has demonstrated its ability to pay the proffered wage mostly through evidence of wages actually paid. The petitioner need only rely on a small portion of its net current assets in 2006 to demonstrate its ability to pay the proffered wage in that year. Thus, we are not concerned that the petitioner is relying on funds already used to demonstrate an ability to pay other beneficiaries.

---

<sup>2</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.

The petitioner submitted evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 2006 and subsequently. Therefore, the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden.

**ORDER:** The decision of the director is withdrawn. The appeal is sustained and the petition is approved.