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*Bto*



U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536

**U.S. Citizenship  
and Immigration  
Services**



**FILE: SRC 02 041 57022 Office: VERMONT SERVICE CENTER Date: MAR 22 2004**

**IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]**

**PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 103(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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner is a company engaged in the export and sale of computer software. It seeks to employ the beneficiary permanently in the United States as a financial analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification filed on February 26, 2001, and approved by the Department of Labor (DOL), on August 11, 2001. The director determined that the petitioner had not established that the beneficiary met the educational requirements of the labor certification as of the petitioner's priority date, the date the labor certification was initially filed with DOL.

On appeal, counsel submitted a brief in support of the appeal.

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

8 CFR § 204.5(l)(3)(ii) states:

(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.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Eligibility in this matter hinges on the petitioner demonstrating that the beneficiary has the qualifications stated on the ETA 750 labor certification. The ETA 750 labor certification submitted in this case clearly states that the proffered position requires that the beneficiary have a bachelor's degree in Business Administration.

With the petition counsel submitted the approved labor certification, evidence of the beneficiary's experience in the form of the original and a translation of a letter from [REDACTED] President of Segavica, an evaluation of the beneficiary's education and work experience prepared by Global Education Group, Inc., dated April 1997, and a copy of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation with schedules and attachments.

Because the evidence submitted did not demonstrate that the beneficiary has the requisite bachelor's degree, the Service Center, on March 25, 2002, requested additional evidence to demonstrate that the beneficiary has a bachelor's degree or an equivalent foreign degree in Business Administration. Specifically, the Service

Center noted that the evaluation submitted was deficient because it considered both educational background and work experience instead of being limited to formal education. The Service Center also requested additional evidence relating to the petitioner's ability to pay the proffered wage or salary of \$45,000 noting that the 1120S demonstrated a taxable income of \$17,694. In particular, the Service Center requested that the petitioner submit Form W-3 (Wage Transmittal Statement) demonstrating wages paid to all four employees identified in the I-140 for tax year 2000.

In response, counsel submitted various documents, including: 1) the petitioner's 2000 corporate tax return and W-3 statement; 2) petitioner's 2001 W-3 statement and an application for an extension to file the 2001 tax return; petitioner's bank statements; 4) an educational evaluation of the beneficiary's credentials concluding that the education and work experience equated to a U.S. bachelor's degree.

The director determined that the evidence submitted did not establish that the beneficiary has the minimum qualifications for the proffered position and, on September 5, 2002, denied the petition.

On appeal, counsel argues that the director erred in denying the petition because the Board of Immigration Appeals (BIA) has previously approved immigrant visa petitions for individuals as members of the professions notwithstanding the lack of a baccalaureate degree. Counsel emphasizes that the evaluation of the beneficiary's credentials conducted by Global Education Group, Inc. concluded that the beneficiary's "academic study and work experience are equivalent to a U.S. degree of Bachelor of Business Administration awarded by a regionally accredited university in the United States." The evaluation in the record used the rule to equate three years of experience for one year of education, but that calculation applies to non-immigrant HIB petitions, not to immigrant petitions. The beneficiary was required to have a bachelor's degree as noted on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The result in this matter is the same whether the petition is analyzed as a petition for a professional under Section 203(b)(3)(A)(ii) of the Act or as a petition for a skilled worker under Section 203(b)(3)(A)(i) of the Act. If the petition is for a professional then, pursuant to CFR § 204.5(l)(3)(ii)(C), the petitioner must show that the beneficiary has a bachelor's degree in the field of the proffered position which, in this case, is business administration, and that such a degree is a prerequisite for entry into the occupation. If the petition is for a skilled worker then, pursuant to 8 CFR § 204.5(l)(3)(ii)(B), the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA 750 which, in this case, includes a bachelor's degree in Business Administration or an equivalent foreign degree.

As noted above, counsel asserts that the BIA has found that an immigrant visa petition may be approved for an alien as a professional based on a combination of education and experience. In support of this position, counsel cites several BIA cases from the 1950s and 1960s. The principal cases she cites on the issue of substitution of experience for educational requirements are Matter of Bienkowski, 12 I&N Dec. 17 (DD 1966), and Matter of Devnani, 11 I&N Dec. 800 (ADD 1966). In both cases, counsel asserts, the BIA held that it was acceptable to qualify an individual for professional status based upon a combination of education and work experience. Although counsel is correct regarding the findings in these cases, counsel is no doubt also aware that the BIA was interpreting a predecessor to the current statute. The current statute, section 203(b)(3)(A)(ii) of the Act is explicit in its requirement that professionals are "qualified immigrants *who hold baccalaureate degrees* and

who are members of the professions.”<sup>1</sup> (Emphasis supplied). This change to the statutory provision came about as a result of section 121 of the Immigration Act of 1990, Public Law 101-649, November 29, 1990 (IIMMACT). Neither the statute nor the regulations allow the substitution of experience, in whole or in part, for the requisite education as stated on an approved labor certification, and counsel has offered no current authority in support of the position she espouses. In the absence of evidence that the beneficiary has a bachelor’s degree in business administration or an equivalent foreign degree, the instant petition may not be approved.

#### Ability to Pay the Proffered Wage

Beyond the director’s, decision this office will examine the issue of whether the evidence submitted by counsel establishes the ability of the petitioner to pay the wage. We note that although the Service Center requested additional evidence on this issue in its request for evidence dated March 25, 2002, and additional evidence was submitted, the director’s decision failed to address this important issue.

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 eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on February 26, 2001. The proffered wage as stated on the Form ETA 750 is \$45,000 per year.

This decision has previously identified the documents submitted with the original petition and those offered subsequent to the request for evidence. Specifically, the Service Center requested copies of the petitioner’s W-3 (Wage Transmittal Statements) demonstrating wages petitioner paid to its employees.

In response, on or about June 19, 2002, counsel submitted various documents in support of the ability to pay. The following is a discussion of the information contained in those documents.

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<sup>1</sup> We note that some of the cases cited by counsel are more accurately cited for the proposition that vocations beyond those defined in Section 101(a)(32) of the Act qualify as professions rather than as authority supporting the argument that a combination of education and work experience can satisfy the statutory requirements for what qualifies an individual as a professional under the statute.

### The 2000 Tax Returns

Counsel submitted a copy of the Form 1120S corporate tax return with various schedules and attachments, including the W-3 indicating wages paid of \$61,840 for tax year 2000.<sup>2</sup> Counsel argued that the petitioner had demonstrated the ability to pay the wage by virtue of its net income of \$17,000 coupled with \$1,348 in depreciation and the amount of officer compensation of \$27,813 which counsel argued resulted in a total of \$46,855 which could be accessed to pay the proffered wage. Counsel's basic assertion is that a corporation always has a choice about whether to distribute earnings to its officers. Counsel argues that instead of distributing earnings to its officers the petitioner could have chosen to reinvest those earnings into the business using them to pay the beneficiary. Although the director's decision did not address the arguments presented by counsel, the AAO is not persuaded that the petitioner has demonstrated the ability to pay the wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the INS, 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. *Supra* at 1084. The court specifically rejected the argument that the INS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

As counsel recognizes, the net income figure contained in the 2001 Form 1120 Corporate Tax Return does not further petitioner's case. The petitioner's taxable income figure shows a loss of \$17,694. Even an alternative method of comparing current assets to current liabilities, as opposed to examining taxable income, does not establish petitioner's ability to pay. When the current liabilities are subtracted from the current assets as reflected in Schedule L, the result is net current assets of \$9,992, an amount considerably less than the proffered wage of \$45,000.

Counsel's major argument in support of the petitioner's ability to pay the wage is that the petitioner could have elected to channel distributions to cover the beneficiary's wages, and is presumably willing to do so in the future. However, the amounts available for officer compensation in 2000 were used for that purpose and were obviously not used to pay the beneficiary's wages.

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<sup>2</sup> In addition to the W-3 for 2000, counsel also submitted the W-3 for the 2001 tax year reflecting wages paid of approximately \$63,389. Although the director requested information reflecting the employees to whom wages were paid and the amounts paid, the information supplied by the petitioner's counsel did not include this specific information. The I-140 reflects that the petitioner employed four employees and the position offered is not a new one. Consequently, the fact that petitioner has paid yearly wages of between \$61,000 to \$64,000 divided between four employees does little to advance the petitioner's case.

The Petitioner's May 2002 Bank Statement

The AAO will next consider counsel's evidence in the form of bank statements from the petitioner's business accounts at First Union Bank for May 2002. Counsel offers this single record of banking transactions and asserts that it reflects "petitioner's cash flow, frequent substantial deposits and ability to meet obligations."

Counsel's assertions regarding the business account's demonstration of ability to pay are over-stated. The May account statement demonstrates a closing balance of \$13,500.14, with deposits of approximately \$75,288 and checks executed of approximately \$46,814. Assuming that the closing balance is intended to reflect cash on hand and available to pay the proffered wage, this would form part of the petitioner's current assets for 2002 and would need to be compared with its current liabilities. As such, the information does not assist in determining the petitioner's ability to pay the wage.

Counsel failed to submit evidence sufficient to demonstrate that the petitioner had the ability to pay the proffered wage during 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on 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.