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

BE

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: APR 18 2005

LIN-03-119-52086

IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Handwritten signature of Robert P. Wiemann in black ink.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, who dismissed a subsequent motion to reopen, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides investment management services for high net worth individuals. It seeks to employ the beneficiary permanently in the United States as a comptroller/accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. 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 and denied the petition accordingly. The director also determined that the petitioner failed to establish that the beneficiary was qualified for the proffered position.

On appeal, counsel submits the same argument and evidence as submitted with its motion to reopen.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The first issue to be discussed in this case is whether or not the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 13, 2002. The proffered wage as stated on the Form ETA 750 is \$55,515.00 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$200,000, and to currently employ one worker. In support of the petition, the petitioner submitted no evidence of its continuing ability to pay the proffered wage beginning on the priority date.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 10, 2003, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested

that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response, the petitioner submitted its Form 1120 Corporate tax return for 2001, and counsel's accompanying letter states that the petitioner's 2002 tax return had not been filed yet and was unavailable¹. The tax returns reflect the following information for the following years:

	<u>2001</u>
Net income ²	\$0
Current Assets	\$1,496
Current Liabilities	\$476
Net current assets	\$1,020

The petitioner also submitted unaudited financial statements; documents establishing the petitioner's legitimacy as a business, such as a copy of the petitioner's business advertisement, bills, incorporation papers, and W-3 form.

In addition, counsel submitted copies of the petitioner's checking account statements; the petitioner's owner's checking account statements; quarterly federal tax return; and a W-2 form issued to an employee other than the beneficiary. Counsel's accompanying letter stated that the beneficiary is not currently employed by the petitioner.

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, on August 1, 2003, denied the petition.

The petitioner subsequently and concurrently filed both a motion to reopen and an appeal. In this filing, counsel asserts that the petitioner's bank statements evidence sufficient funds to pay the proffered wage; that the petitioner handles Fidelity investments and over \$5 million in accounts; and that the petitioner is attempting to acquire an accounting firm which would be an income-generating event, and that the beneficiary would "generate income through the additional client base opportunities" from such acquisition.

The petitioner submits additional bank statements; an unaudited portfolio summary; the petitioner's application to register as an investment adviser; documents called "accounting acquisition targets," and documents called "potential accounting firms." The petitioner also submits a letter from its owner detailing the steps undertaken to initiate the business and providing details to counsel's assertions.

The director affirmed his previous decision on December 15, 2003, finding the petitioner's efforts to expand its business optimistic and speculative, and its banking account reserves too small to continuously pay the proffered wage. The AAO concurs with the director.

The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as

¹ The petitioner also submitted its 2000 tax return, but evidence preceding the priority date in 2002 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Since the petitioner's 2002 tax return is unavailable, however, its situation in 2001 is the most probative and relevant evidence available.

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel's reliance on the balances in the petitioner's bank accounts 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 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 cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

Counsel's apparent reliance on the assets of the petitioner's owner is not persuasive. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. See *Sitar Restaurant v. Ashcroft*, 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002.

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). 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 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. 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.³ 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 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's net income for 2001 was zero and its net current assets \$1,020, and thus the petitioner could not pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. 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. The petitioner has merely submitted copies of correspondence about businesses it wishes to acquire, but does not provide a business plan, audited projections of future earnings, the source of its capital to invest, or any other independent corroborative evidence to overcome the speculative nature of this assertion. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Additionally, a petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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

The second issue to be discussed in this case is whether or not the petitioner established that the beneficiary is qualified for the proffered position.

The director's August 1, 2003 decision found that the petitioner did not establish the beneficiary's qualifications for the proffered position because the beneficiary completed a three-year baccalaureate program which "is not similar to a four-year degree that is equivalent to an [sic] U.S. baccalaureate degree." The director's December 15, 2003 decision affirmed its prior findings, reiterating that different regulations govern two visa categories, and that the petitioner cannot request the skilled worker category since the underlying ETA 750A's proffered position requires an individual with the equivalent of a U.S. baccalaureate degree.

On appeal, the petitioner's counsel contends that it is inconsistent for three-year degrees to be accepted under the H-1B non-immigrant visa category but not for the third preference employment-based immigrant visa category, and requests consideration under the skilled worker category instead of professional category.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.

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.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 8 C.F.R. § 204.5(d). In this case, that date is September 13, 2002.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of comptroller/accountant. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	4
	College Degree Required	B.A.
	Major Field of Study	Accounting

The applicant must also have five years of employment experience in the job offered or the related occupation of finance/accounting. The proffered position's duties are as follows:

- The Comptroller/Accountant position requires the following responsibilities:
- Making entries for all sales, purchases, cash, account transactions, and balancing the ledger;
 - Making accounts receivable, aged accounts receivable, accounts payable, and aged accounts payables;
 - Corresponding with required personnel;
 - Managing international banking and investment transactions and having them reconciled with the general ledger; and
 - Accounting for investment: buys, sells, and swaps to update portfolio gains and losses.

Item 15 indicates that there are no special requirements.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended the University of Bombay in the field of Accounting, from June 1983 through June 1986, culminating in the receipt of a BA in Business Administration. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. In corroboration of the Form ETA-750B, the petitioner provided a copy of his diploma from the University of Bombay, with accompanying transcripts, and letters verifying his prior employment experience. The ETA-750B on Part 15 lists the beneficiary's prior employment experience.

A credential evaluation drafted by Globe Language Services, Inc. was also initially submitted with the petition and stated the following:

In summary, it is the judgement [sic] of globe Language Services, Inc. that [the beneficiary] has the equivalent of three years of formal undergraduate education and an additional year of undergraduate education by way of employment and the practice of a profession that together represent the equivalent of a Bachelor's Degree in Business Administration with a concentration in Accounting in the United States.

The record of proceeding does not contain any additional evidence pertaining to the beneficiary's qualifications.

The AAO concurs with the director's findings. There is no provision permitting the petitioner to alter the visa classification sought upon its initial filing. Additionally, it is noted that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The petitioner's counsel clearly requested the petition to be classified under Section 203(b)(3)(A)(ii) of the Act as a "professional," not under Section 203(b)(3)(A)(i) as a "skilled worker." Counsel cannot materially change the analysis in the middle of proceedings upon an apparent realization that changing categories may result in an approved petition. Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a "professional" because the regulation requires it and for a "skilled worker" because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," states the following:

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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, the beneficiary must have a bachelor's degree or its foreign equivalent.

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). In the instant case, 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 four-year bachelor's degree in accounting.

In this case, the labor certification clearly indicates that the proffered position requires a degree, not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year bachelor of science degree from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," 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, or an equivalent foreign degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent foreign degree to a U.S. bachelor's degree.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the beneficiary's formal education consists of less than a four-year curriculum. The evaluation submitted with the evidence in this proceeding suggesting that a combination of the beneficiary's education and employment experience should be considered as the equivalent of a baccalaureate degree is not accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United States bachelor's degree because it includes employment experience in the evaluation. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Additionally, the petitioner has not indicated that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification, or that experience could be

accepted in lieu of educational accolades. Thus, the combination of education and experience, and experience alone, may not be accepted in lieu of education. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Based on the evidence submitted, we concur with the director that the petitioner has not established that the beneficiary possesses a bachelor's degree as required by the terms 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.

ORDER: The appeal is dismissed.