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U.S. Citizenship  
and Immigration  
Services

FEB 18 2005

FILE: Office: CALIFORNIA SERVICE CENTER Date:  
WAC 02 285 52651

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn, and the matter remanded to the director for further consideration.

The petitioner is a technology consulting firm that is filing a petition as successor in interest to SignalTree Solutions, Inc., the beneficiary's former employer. SignalTree Solution acquired Metamor Global Solutions, Inc., the original petitioner listed on two certified ETA 750 forms in the record. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The original petitioner had substituted the beneficiary for the original beneficiary, [REDACTED]. The director determined that the petitioner had not established that the beneficiary had the qualifying education on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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

The regulation at 8 C.F.R. § 204.5(l)(3) (ii)(C) provides:

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 showing that the minimum of a baccalaureate degree is required for entry into the occupation. .

The petitioner must demonstrate the beneficiary had the requisite education and/or training 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). In the instant petition, the petitioner requested to amend the petition and substituted the beneficiary for another beneficiary, named [REDACTED]. The original Form ETA 750 for [REDACTED] was accepted for processing on September 28, 1999. On the Form ETA 750A, the petitioner indicated that the beneficiary needed to have a bachelor's degree in computer science, mathematics, physics or engineering, with no experience required. In support of the beneficiary's qualifications, the petitioner submitted an evaluation report from the Foundation of International Services, Bothell, Washington. This document stated that the copy of the beneficiary's diploma

from Bangalore University in Bangalore, India was the equivalent to a bachelor's degree in computer science and engineering from an accredited college or university in the U.S. The petitioner also submitted a letter from Sonu Mathew Abraham, Vice President, Engineering, Millennium Software Productions, Chennai, India. A second letter from Hari Aiyer, President, eCALYX India Private Limited, stated that the beneficiary worked with the company from August 1999 to March 2000 as a senior software programmer. Another letter from eCALYX, Inc., in Milpitas, California, stated that the beneficiary worked for the company on a full-time basis from March 6, 2000 as a programmer/analyst. A second letter from this company from [REDACTED] Human Resources Manager, stated that the beneficiary had been approved for H-1B visa status as a programmer analyst at eCALYX, Inc., in the United States. The petitioner also submitted a copy of the beneficiary's diploma for a bachelor's degree in engineering with a major in computer science from Bangalore University. This certificate is dated March 1998, and issued on July 3, 2000.

Because the director deemed the evidence submitted insufficient to demonstrate that the beneficiary possessed a bachelor's degree, the director requested additional evidence. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that original documents be provided of the beneficiary's bachelor of engineering certificate from Bangalore University, as well as the official college and university transcripts. The director also asked for clarification as to whether the beneficiary was working with an Indian company from August 1996 to August 1999, since the ETA-750 indicated that the beneficiary was attending school at this same period of time.

In response, the petitioner submitted the original certificate/degree document as well as the statements of marks for the beneficiary's university studies from 1992 to 1998. Counsel stated that the beneficiary completed his course work in engineering in 1995; however, he had several examination papers that still needed to be passed before the final degree was issued in 1998. Counsel also asserted that during the period of time from 1995 to 1998, the beneficiary was employed full time.

The director determined that the evidence submitted did not establish that the beneficiary had attended the BMS College of Engineering from July 1991 to March 1998, as stated in Part B of the ETA-750. The director reviewed the statement of marks and outlined the number of times during various semesters that the beneficiary had failed college subjects. Based on this review, the director determined that, although the petitioner had submitted a certificate issued by Bangalore University that showed the beneficiary had obtained a bachelor's degree in computer sciences, the degree could not be found to be equivalent to a U.S. bachelor's degree in engineering. The director also determined that the evaluator who submitted the educational credential evaluation from the Foundation for International Services, Inc, did not appear qualified or authorized to grant college level credit for training and/or experience. The director further stated that the petitioner currently employs the beneficiary as an H-1B nonimmigrant temporary worker in a specialty occupation, and that it appeared the beneficiary qualified for the H-1B classification based upon the provision outlined in 8 C.F.R. 214.2(h)(4)(ii)(D)(5), namely a combination of his education, work experience and training. The director stated that while the H-1B regulation allows for the education, training, and work experience to be considered when evaluating whether a beneficiary has the equivalent of a baccalaureate course of study, immigrant petitions do not make the same allowance.

On appeal, counsel asserts that the director did not take into consideration the documentation of the classes that the beneficiary retook and passed during his university studies. Counsel states that the beneficiary's college education was finalized in 1995 and that the beneficiary is not required to attend university thereafter on a full time basis but can take the failed parts of an examination at any time to complete the four-year degree. Counsel then reviews the list of courses taken by the beneficiary and notes that numerous courses failed earlier by the beneficiary were later passed or exempted in his latter years at Bangalore University. Counsel also submits an expert opinion written by [REDACTED], Seattle Pacific University, as well as a second evaluation report written by [REDACTED], Foundation for International Services. This report specifically mentions the beneficiary's statements of marks for his university studies, prior to stating that the beneficiary had the equivalent of a bachelor's degree in computer science from a U.S. accredited college.

In his letter, [REDACTED] notes that while the beneficiary failed many subjects, the subjects that were counted in the submitted degree equivalence evaluation were classes that the beneficiary either passed or was exempted from at some point in his education prior to receiving his bachelor's degree from Bangalore University. Dr. [REDACTED] also states that he had visited Bangalore University in 2002, and spoken to engineering professors, and that he doubts that any unqualified person would be granted a baccalaureate degree in engineering from the college. Counsel also states that there was no equivalence evaluation of work or training to academic credentials in the original I-140, and that the beneficiary holds a four-year bachelor's degree equivalent to that awarded by a U.S. university.<sup>1</sup>

With regard to the assertions of counsel, several are found to be unsubstantiated, and without merit. The assertions of counsel, do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988). First, counsel's assertion with regard to the beneficiary's finishing his coursework in 1995, without further clarification, is unsubstantiated. The documentation submitted by the petitioner lists the marks received by the beneficiary in various school years, rather than the courses undertaken in these same years. The record contains no actual transcript of classes taken, or explanation as to the relationship between marks received and classes taken. Counsel also makes assertions as to the beneficiary's ability to attend school part time, that are likewise unsubstantiated.

The analysis of the director is also in error. For example, the director presents no factual basis for his determination that the fact the beneficiary failed numerous courses during his extensive university stay, established that his bachelor's degree could not be the equivalent of a U.S. degree. As noted by [REDACTED] and counsel, although the beneficiary failed many courses, the statement of marks submitted by the petitioner indicates numerous relevant courses taken in relevant subjects that the beneficiary either passed or was exempted from. However, neither counsel, the petitioner, nor the educational evaluator commented on why the beneficiary would be exempted from so many classes.

Furthermore, the director's statement with regard to the evaluator's lack of authority to grant college level credit for experience is irrelevant. The role of educational evaluators, particularly with regard to immigrant petitions, is to examine and evaluate already existing academic credentials, not to evaluate work experience

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<sup>1</sup> It is not clear whether counsel refers to the instant I-140 petition or to the beneficiary's earlier I-129 visa petition for H-1B status.

or training for possible granting of college credits. As the director correctly pointed out, the educational equivalency criteria that exists for H-1B visa eligibility as outlined in 8 C.F.R. 214.2(h)(4)(ii)(D)(5) does not exist for immigrant petitions. In other words, the beneficiary must have a bachelor's degree as of the priority date, and no amount of either training and work experience can be used to establish the equivalent of a college degree. However, as counsel correctly points out, neither the petitioner nor counsel has ever raised the issue of examining the beneficiary's academic and work credentials to fulfill the regulatory criteria for immigrant professionals. Finally, the director's comments with regard to the prior adjudication of the beneficiary's H-1B visa being based on the beneficiary's combined work and educational credentials appears to be conjecture, since the record does not contain the original I-129 petition submitted by the petitioner for that visa.

Given the fact that the petitioner submitted the requested documentation, and the fact that the director did not find any of the original documentation fraudulent, but rather denied the petition on unsubstantiated assertions, the AAO finds that the documentation provided by the petitioner is sufficient to establish that the beneficiary attended a four-year Indian program in engineering with an emphasis of computer sciences. As such, the beneficiary does possess the requisite education for the proffered position. This part of the director's decision is withdrawn. However, there is an additional issue that was not addressed in the director's decision that will necessitate a remand of the decision to the director for further consideration.

Beyond the decision of the director, the petition raises the issue of successor-in-interest and the original petitioner's ability to pay the proffered wage, as of the priority date, namely, September 22, 1999. With regard to successor-in-interest, this status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

For purposes of this proceeding, the original petitioner is considered to be Metamor Global, Inc., as the priority date for the labor certification was in September 1999, prior to any sale of the original petitioner. With regard to the issue of whether the petitioner qualifies as a successor-in-interest to Metamor, Global, Inc., the original I-140 petitioner, the record contains an asset and liability purchase and sale agreement between Metamor Global Solutions, Inc., also identified as Metamor Netherlands Holdings 4 B.V., and SignalTree Solutions, Inc. This agreement was for the purchase of the original petitioner by SignalTree Solutions as of February 21, 2001. The agreement on page 7 explicitly states that SignalTree Solutions will assume all assets and liabilities of the seller (Metamor, among others), and specifically addressed the buyer's obligations toward H-1B and L-1 employees. The record also contains a letter from counsel to the legacy INS dated April 8, 2002 that stated that Metamor Global Solutions changed its name to PSINet, and that thereafter PSINet changed its name to SignalTree Solutions, Inc., as a successor in interest. Counsel stated that no change in location of companies, type of business, jobs titles or duties, salary or job sites had occurred.

The record also contains a Form 10-K submitted to the Security and Exchange Commission by the present petitioner, [REDACTED]. On page three, this document stated that, on March 15, 2002, [REDACTED] acquired SignalTree Solutions, a U.S.-based corporation with two development facilities in India. On page 43, the

document stated that Keane, Inc, paid approximately \$65.5 million in cash for the acquisition. Thus, the documentation submitted by the instant petitioner is sufficient to establish a successor in interest relationship between itself and the interim and original petitioners.

With regard to retention of the original priority date by the instant petitioner, the instant petitioner also has to establish that the original petitioner had the ability to pay the proffered wage, as of the priority date. As mentioned previously, the record contains no financial or other documentation to establish the ability of Metamor Global, Inc., the original petitioner, to pay the proffered wage, as of the priority date. Without such information, the petitioner has not established that it can retain the original priority date on the Form ETA 750A originally submitted by the predecessor petitioner, Metamor Global, Inc.

With regard to the ability of the instant petitioner, to pay the proffered wage as of the priority date, Form 10-K submitted by [REDACTED], to the SEC, previously mentioned in this proceeding, contains the audited consolidated balance sheets for Keane, Inc. These records indicate that [REDACTED] had a net income of \$73,000,000 in 1999, \$20,354,000 in 2000, and \$17,387,000 in 2001. Such net income is sufficient to establish the current petitioner's ability to pay the proffered wage of \$60,000, as of the priority date

With regard to the ability of SignalTree Solutions to pay the proffered wage, the vice president of that company submitted a letter to the record on November 14, 2001, that SignalTree Solutions stated its annual 2000 revenues were approximately \$59 million, and that it had a workforce of over 350 employees. This statement suffices to establish the ability of SignalTree Solutions to pay the proffered wage, as of the priority date. Nevertheless, as previously stated, there is insufficient documentation on the record to establish that the original petitioner, Metamor Global Inc, had sufficient resources to pay the beneficiary the proffered wage as of the priority date, namely, September 28,1999.

Therefore the petitioner has only established in part that it is a successor in interest. It has not established that the original petitioner had the ability to pay the proffered wage as of the priority day. Until this issue is resolved, the petitioner has not established that it is the successor in interest.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for further consideration of the ability of the original petitioner to pay the proffered wage, as of the priority date. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.