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U.S. Citizenship  
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Services

B6



FILE:

[Redacted]  
EAC 02 002 51478

Office: VERMONT SERVICE CENTER

Date: **JAN 13 2005**

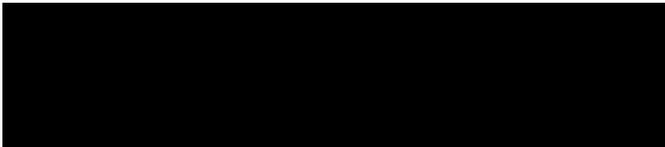
IN RE:

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 Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and computer consulting service. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. 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.

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

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 July 21, 2000. The proffered wage as stated on the Form ETA 750 is \$75,000 per year.

On the petition, the petitioner stated that it was established during 1996 and that it employs 75 workers. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since January 1999. Both the petition and the Form ETA 750 indicate that the petitioner will employ the beneficiary in Jamaica, New York.

In support of the petition, counsel submitted the petitioner's 2000 audited financial statements. The petitioner's statement of cash flows shows that the petitioner had net cash from operating activities of \$789,713 during that year.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on June 13, 2002, requested, *inter alia*, additional evidence pertinent to that ability. The Service Center also specifically requested a copy of the petitioner's 2001 tax return.

In response, counsel submitted an additional copy of the petitioner's audited 2000 financial statements and a copy of its unaudited 2001 financial statements.

In a letter dated July 24, 2002 counsel stated that the petitioner had not yet filed its 2001 returns but had filed a Form 7004 Automatic Extension of time to file. Counsel provided a copy of that Form 7004. Counsel also stated that the petitioner's financial statements show its continuing ability to pay the proffered wage beginning on the priority date.

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 January 17, 2003, denied the petition.

On appeal, counsel stated, "Please note that the Service Center erroneously rejected the immigrant visa petition and miscalculated the figures and did not consider all the available facts. We are going to submit a written brief within thirty days to the AAU directly."

The petitioner submitted copies of 2000 and 2001 Form W-2 Wage and Tax Statements showing that the petitioner paid the beneficiary \$32,336.57 and \$39,692.40 during those years, respectively. In a brief filed to supplement that appeal the petitioner argued that the evidence demonstrates that it has the ability to pay the proffered wage.

Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The petitioner's unaudited 2001 financial statements are not reliable evidence and cannot be used to show the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 has established that it employed and paid the beneficiary \$32,336.57 and \$39,692.40 during 2000 and 2001.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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 CIS 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* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

The proffered wage is \$75,000 per year. The priority date is July 21, 2000.

The petitioner established that it paid the beneficiary \$32,336.57 during 2000 and must now demonstrate the ability to pay the remaining \$42,663.43 of the proffered wage. During 2000 the petitioner had net cash from operations of \$789,713. That amount is sufficient to pay the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2000.

The petitioner established that it paid the beneficiary \$39,692.40 during 2001 and must now demonstrate the ability to pay the remaining \$35,307.60 of the proffered wage. The petitioner provided no reliable evidence pertinent to its 2001 finances. The petitioner has not demonstrated 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.

An additional issue exists in this case beyond that cited in the decision of denial. The Form ETA 750 states that the proffered position requires a bachelor's degree in computer science or engineering. Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the requisite qualifications stated on its Form ETA 750 Application for Alien Employment 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).

The evidence submitted demonstrates that the beneficiary has a three-year bachelor's degree in mathematics from the Maharaja Sayajirao University of Baroda, India and a three-year bachelor's degree in Engineering from the same university. Counsel submitted the report of an educational evaluator that states that the studies that led to those degrees are each equivalent to three years of study transferable to an accredited U.S. university. That report also states that the beneficiary's degrees are the equivalent of a bachelor's degree in computer science and engineering and a bachelor's degree in mathematics from an accredited U.S. university.

The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In this case, the educational evaluator states that each of the beneficiary's degrees was earned with three years of study and is the equivalent of three years of study in the United States. The evaluator also states that each of the beneficiary's degrees is the equivalent of a U.S. bachelor's degree.

A United States bachelor's degree, however, generally requires four years of education. A foreign three-year bachelor's degree is not a "foreign equivalent degree" to a United States bachelor's degree. *Matter of Shah*, 17, I&N Dec. 244 (Reg. Comm. 1977). Neither of the the beneficiary's three-year bachelor's degrees will considered the "foreign equivalent degree" to a United States bachelor's degree for purposes of this preference visa petition.

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. For this additional reason the instant petition, submitted pursuant to 8 C.F.R. §204.5(1), may not be approved.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.