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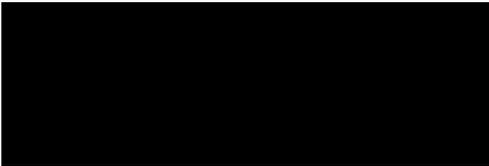


FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **JUL 06 2005**
SRC-04-011-52317

IN RE: Petitioner: [REDACTED]
Beneficiary [REDACTED]

PETITION: 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. 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 had not established that the beneficiary had the required qualifications for the offered position. The director therefore denied the petition.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). No original Form ETA 750, Application for Alien Employment Certification was initially submitted with the petition, but an original Form ETA 750, approved by the Department of Labor, was later submitted in support of the petition. The priority date in the instant petition is December 27, 2001. The proffered wage as stated on the Form ETA 750 is \$65,000.00 per year. The instant petition is for a substituted beneficiary. On the Form ETA 750B for the substituted beneficiary, signed by the beneficiary on November 30, 2004, the beneficiary claimed to have worked for the petitioner beginning in August 2004 and continuing through the date of the ETA 750B.

The I-140 petition was submitted on October 14, 2003. On the petition, the petitioner claimed to have been established in 1999, to currently have 12 employees, to have a gross annual income of one million dollars, and to have a net annual income of "[§]150000 Projected." (I-140 Petition, Part 5, Item 2). The petitioner submitted supporting evidence with the petition.

In a Notice of Intent to Deny, (ITD) dated August 4, 2004, the director afforded the petitioner thirty days in which to submit evidence that the petitioner was a successor in interest to a company named [REDACTED]

In response to the ITD, counsel submitted a letter dated September 1, 2004 and additional evidence. Counsel's submissions in response to the ITD included the original Form ETA 750 filed by the petitioner and approved by the Department of Labor. The petitioner's response to the ITD was received by CIS on September 2, 2004.

In a decision dated October 29, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The director also determined that the evidence did not establish that the beneficiary had the qualifications required by the ETA 750. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that an evaluation of the petitioner's complete financial situation establishes the petitioner's ability to pay the proffered wage, under the principles of *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). Counsel also asserts that the beneficiary has the education and experience required by the ETA 750.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, however, none of the documents submitted for the first time on appeal were specifically requested by the director. In the proceedings before the director, the director did not issue any request for evidence, and the ITD made no requests for any specific documents. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered in evaluating the instant appeal.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612.

In the ITD, the director had requested evidence to show that a successor in interest relationship existed between the petitioner and Computer Learning Institute, Inc. In his letter of September 1, 2004 submitted in response to the ITD, counsel stated that the petitioner was not claiming to be a successor in interest to Computer Learning Institute, Inc. Counsel stated that the instant petition was for a substituted beneficiary and that the petition raised no issue concerning a successor in interest.

In considering the evidence in the record, no evidence suggests that the instant petition involves a successor in interest. The ETA 750 was filed in the name of the petitioner, using the same name as appears on the I-140 petition. Nothing in the record of the instant petition nor in CIS electronic records suggests any relationship between Computer Learning Institute, Inc., and the petitioner. The only evidentiary documents pertaining to Computer Learning Institute, Inc., are the ETA 750B for the current beneficiary and copies of training

certificates of the current beneficiary, documents which indicate that the beneficiary studied computer software developing and programming with the Computer Learning Institute, Inc., from March 1999 until January 2000. In his decision of October 24, 2004, the director made no reference to Computer Learning Institute, Inc., or to the issue of a successor in interest. After receiving counsel's letter of September 1, 2004 and after reviewing the evidence, the director apparently determined that the instant petition does not involve the issue of a successor in interest.

As noted above, the instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on November 30, 2004, the beneficiary claimed to have worked for the petitioner beginning in August 2004 and continuing through the date of the ETA 750B.

The record contains copies of Form W-2 Wage and Tax statements of the beneficiary. The beneficiary's Form W-2's stated compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$3,076.94	\$65,000.00	\$61,923.06
2002	\$17,815.15	"	\$47,184.85
2003	no W-2 submitted	"	\$65,000.00

The record before the director closed on September 2, 2004 with the submission of the petitioner's response to the ITD. As of that date the beneficiary's Form W-2 Wage and Tax Statement for 2003 should have been available. However a copy of that Form W-2 was not submitted in evidence.

The above figures fail to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns state the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$9,350.00	\$61,923.06*	-\$52,573.06
2002	-\$29,498.00	\$47,184.85**	-\$76,682.85
2003	\$10,194.00	\$65,000.00***	-\$54,806.00

* Crediting the petitioner with the wages actually paid to the beneficiary in 2001.

** Crediting the petitioner with the wages actually paid to the beneficiary in 2002.

*** The full proffered wage, since no evidence was submitted of any wage payments made to the beneficiary in 2003.

The above figures fail to establish the ability of the petitioner to pay the proffered wage in any of the years at issue.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	\$215,854.00	\$112,463.00	\$61,923.06*
2002	\$112,463.00	\$12,696.00	\$47,184.85**
2003	\$12,696.00	-\$35,383.00	\$65,000.00***

* Crediting the petitioner with the wages actually paid to the beneficiary in 2001.

** Crediting the petitioner with the wages actually paid to the beneficiary in 2002.

*** The full proffered wage, since no evidence was submitted of any wage payments made to the beneficiary in 2003.

The petitioner's net current assets for the end of 2001 were greater than the amount of wage increase needed to have paid the beneficiary the full proffered wage. For 2002, the petitioner's net current assets at the end of the year were less than the needed wage increase. For 2003, the petitioner's net current assets at the end of the year were negative. The figures for the petitioner's end-of-year net current assets for 2002 and 2003 therefore fail to establish the petitioner's ability to pay the proffered wage in those years.

The record also contains copies of unaudited financial statements. Unaudited financial statements 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 evidence of a petitioner's financial condition and of its 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.

The record also contains copies of bank statements and credit union statements. However, bank statements and credit union statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as acceptable evidence to establish a petitioner's ability to pay a proffered wage. While that 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. Moreover, monthly account statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Funds used to pay the proffered wage in one month would reduce the monthly ending balance in each succeeding month. In the instant case, the statements covered certain months in the year 2002 for business accounts of the petitioner and personal accounts of the petitioner's majority owner and his wife. The information on those account statements covers only certain months on different accounts, and it therefore fails to provide significant information to help establish the petitioner's ability to pay the proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements and credit union statements show additional available funds that are not reflected on its tax returns, such as the cash specified on Schedule L that is considered in determining a corporate petitioner's net current assets.

Counsel's reliance on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), is misplaced. That case relates to a petition filed during uncharacteristically unprofitable or difficult years, but only within a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and, also, a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time*

and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances, parallel to those in *Sonegawa*, have been shown to exist in this case, nor has it been established that 2002 and 2003 were uncharacteristically unprofitable years for the petitioner.

In his decision, the director correctly noted that the only tax return then in the record was the petitioner's tax return for the year 2002. The director correctly found that the petitioner's net income for that year was insufficient to establish the petitioner's ability to pay the proffered wage. The director correctly calculated the petitioner's net current assets for the end of 2002, and found that they were also insufficient to establish the petitioner's ability to pay the proffered wage. The director correctly found that the evidence then in the record failed to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, CIS electronic records indicate that the petitioner has filed other one other I-140 petition which has been pending during the time period relevant to the instant petition.¹ If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2).

In the instant petition, the evidence fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of this petition. For this reason it is not necessary to reach the issue of whether the evidence establishes the petitioner's ability to pay the proffered wage to the beneficiary of the other I-140 petition submitted by the same petitioner.

The other issue raised by the evidence is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). As noted above, the priority date in the instant petition is December 27, 2001.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien 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.*

¹ I-140 receipt number SRC-04-195-50393.

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).

The Form ETA 750 states that the position of programmer/analyst requires a bachelor's degree in a major field of study of computer science, computer information systems, management information systems, business administration, engineering, or science, or a foreign equivalent degree. The ETA 750 states that the position requires one year of experience in the offered position or in the related occupation of "any related occupation." (ETA 750, block 14.) The ETA 750 also states that the employer "[w]ill accept 3 years of college and 3 years of related experience which included experience in the required skills in lieu of the required education & experience," and that the beneficiary "[m]ust have experience using Oracle, Developer 2000, VB, Win2000 and Java Technologies." (ETA 750, block 15).

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

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of 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.

The evidence pertaining to the beneficiary's qualifications includes a copy of a Secondary School Certificate Examination for 1989 issued to the beneficiary on January 13, 1972 by the Board of Secondary Education, Karachi; a copy of a Statement of Marks for studies at the Dehu Govt. College issued to the beneficiary on September 23, 1991 by the Board of Intermediate Education, Karachi; copies of three training certificates dated in 1995, 1999 and 2000 showing the beneficiary's successful completion of computer software courses; a copy of a Bachelor in Science in Marketing degree awarded to the beneficiary on June 25, 2000 by Southeastern University, Washington, D.C., with attached course transcript; and a copy of an academic evaluation of the beneficiary's education by the Trust Forte Corporation dated April 18, 2001. The academic evaluation finds that the beneficiary's education is equivalent to a United States Bachelor of Science Degree in Marketing with coursework in computer science.

Marketing is not one of the major fields of study listed on the ETA 750 as acceptable for the purpose of satisfying the bachelor's degree requirement for the offered position. However, the fact that the beneficiary has a United States bachelor's degree is sufficient to satisfy the alternative requirement of three years of college. To satisfy the petitioner's alternative qualifications, the beneficiary must also have three years of related experience.

Concerning the beneficiary's work experience, the record contains a copy of a letter dated December 1, 1999 from an official with Litton PRC, Reston, Virginia, stating the beneficiary's experience with that company as an Oracle Developer/Programmer from December 1998 to September 1999; and a copy of a letter dated March 30, 2001 from the vice president of operations of Matchtek, Alexandria, Virginia, stating the beneficiary's experience with that company as a Programmer Analyst from October 6, 1999 through March 2001.

The beneficiary's experience with Litton PRC totaled nine months, and his experience with Matchtek totaled seventeen months, or one year and five months. The beneficiary's total experience with the two companies was twenty six months, or two years and two months. That length of experience fails to satisfy the petitioner's alternative experience requirement of three years of related experience.

In his decision, the director correctly analyzed the evidence pertaining to the beneficiary's education and experience. The director found that the evidence failed to establish that the beneficiary held a bachelor's degree in one of the major fields of study listed on the ETA 750. The director found that under the petitioner's alternative criteria, the evidence showed that the beneficiary had three years of college, but failed to establish that the beneficiary had three years of related experience. The director's finding that the evidence failed to establish that the beneficiary had the qualifications required by the ETA 750 was correct. The director's decision to deny the petition was correct.

The assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director with regard to the petitioner's ability to pay the proffered wage or with regard to the beneficiary's qualifications.

In summary, the evidence fails to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and fails to establish that the beneficiary had the required qualifications for the offered position as of 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.