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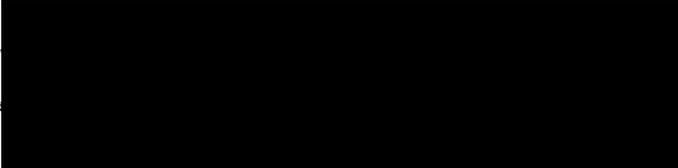


U.S. Citizenship
and Immigration
Services

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JUN 14 2005



FILE: [REDACTED]
EAC-02-144-50387

Office: VERMONT SERVICE CENTER

Date:

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

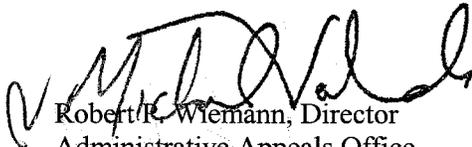
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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 R. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner's business is computer systems integration. It seeks to employ the beneficiary permanently in the United States as a systems engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it selected the appropriate visa category corresponding to the requirements of the proffered position on the Form ETA 750A.

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 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. Additionally, section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The only issue raised by the director in her decision concerned whether or not the petitioner had established that it selected the appropriate visa category corresponding to the requirements of the proffered position on the Form ETA 750A.

On the initial petition, the petitioner selected box "E" which corresponds to a skilled worker or professional. As noted above, a skilled worker category requires at least two years of training or experience and a professional category requires a bachelor degree.

In the instant case, 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 systems engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Blank
	High School	Blank
	College	0
	College Degree Required	None
	Major Field of Study	N/A

In addition, Item 14 indicates the years of experience in the job offered required in order to perform the job duties listed in Item 13 of the Form ETA 750, which will not be restated in this decision since it is incorporated into the record of proceeding. Under years of experience appears to be a typed "3" with a handwritten "1" over it.

Because the evidence was insufficient, the director requested additional evidence concerning the category the petitioner was seeking to classify the visa petition on June 19, 2002. The director stated the following, in pertinent part:

It does not appear that your petition is approvable to classify the beneficiary as a third preference "skilled worker" alien under section 203(b)(3)(A)(ii) of the INA because the [Form ETA 750], establishes that one year of experience [sic] systems engineer in required to perform the job duties. To classify the beneficiary as a skilled worker, the job must require at least two years of education, experience or training. As per the [Form ETA 750], the position as a systems engineer appears approvable to be classified as Third preference "other worker" under 203(b)(3)(A)(iii), which has a minimum qualification of less than two years of education, experience or training. If you wish to change the requested preference classification, please place an "X" next to the sentence below. Also indicate the new preference number and classification that you are seeking, and sign where indicated.

In response to the director's request for evidence, the petitioner did not mark the director's notice as requested, and counsel submitted a letter, which states the following, in pertinent part:

It appears that your office was incorrect in stating that the Forms ETA 750 submitted by our office on behalf of the petitioner stated that "one year of experience is required to perform the job duties . . ."

Our file copy of the forms ETA 750 submitted to your office has a "2" written in the "Experience" box of the Forms ETA 750 (see copy, attached). It appear [sic] that this number was initially written as a "3" and then corrected to a "2." It was probably written mistakenly initially as a "3" because the Affidavit of prior work experience submitted with the ETA 750 and the I-140 petition also indicated three years of experience. It is a "2" however, and this fact is supported both by the petitioner's internal job posting, which asks for two years experience (attached), and the newspaper ads placed in the Daily News, which also called for two year's experience (copy attached). Please amend your records accordingly.

Based upon the I-140 petitioner's requirement of at least two years' work experience, we hereby content that the above-reference I-140 petition is approvable to classify the beneficiary as a "skilled worker."

Counsel submitted a copy of an internal job posting notice and a newspaper advertisement that he claimed corresponded to the case. The internal job posting is dated December 27, 2001 and the newspaper advertisement has an affidavit of publication indicating that the ads were placed on "2/4, 5, 6," which presumably refers to February 4, 5, and 6 of 2001, but it is unclear. The Form ETA 750 was certified by DOL in January 2002. The posting notice and advertisement's job description, requirements, and information concerning the petitioner correspond to the Form ETA 750 except for the years of experience, which state "2 yrs/exp."

The director denied the petition on January 7, 2004, stating that the Form ETA 750 requires only one year of experience as a systems engineer and "[t]herefore, the alien can only be properly classified as an "other worker" under 203(b)(3)(A)(iii)." The director noted the following, in pertinent part:

It is unclear when the amendment was made because it is the practice of the Department of Labor to stamp and date any corrections/amendments made prior to certification. A correction to

the rate of pay was made and approved by the Regional Office on December 27, 2001, two weeks before the form was certified. If the correction to the experience field was made prior to the certification, it stands to reason that it would have been stamped and dated by the DOL as well. However, since the correction was not stamped as approved by the Department of Labor, and because there is a discrepancy relating to the required experience, [Citizenship and Immigration Services (CIS)] cannot grant the petition the requested classification.

On appeal, counsel reasserts his past arguments and claims that since the beneficiary is qualified as a skilled worker, the petitioner does not want to classify him "simply as an 'other worker.'" Counsel also states that they sent correspondence to DOL seeking clarification on January 16, 2004, and would forward their response to the AAO. A copy of correspondence from counsel to the DOL is in the record of proceeding with a copy of a mail receipt.

To date, the AAO has received no additional correspondence or evidence from counsel or the petitioner so the matter will be adjudicated based upon the current state of the record of proceeding.

The AAO agrees with the director that the discrepancy is a cause for concern since the Form ETA 750 clearly reflects either three (3) or one (1) year(s) of experience as the requirement for the proffered position. Two years of experience is clearly not typed or handwritten in the box. The other concern is the lack of an amendment stamp from DOL. There is no evidence connecting the advertisement and posting notice to this specific petition since the complete documentation associated with the DOL's process was not submitted¹.

While the discrepancy is a cause for concern, however, the AAO notes that the beneficiary would be eligible to qualify for the proffered position in either category. The AAO also notes that it will accept three years of experience as the initial experience requirement since it has not been established that DOL accepted the amendment from three years of experience to one year of experience. Thus, the AAO will determine that the preference visa petition should be categorized as a skilled worker petition under the third preference immigrant visa category. Thus, the AAO will analyze the petition substantively based on the skilled worker category.

The AAO cannot sustain this appeal because there are evidentiary deficiencies in the record of proceeding with respect to the petitioner's continuing ability to pay the proffered wage beginning on the priority date and the beneficiary's qualifications. The following discussion will highlight those deficiencies and remand the petition back to the director to obtain additional evidence and make another determination accordingly.

The first issue to be discussed in this case is whether or not the petitioner established that it has the 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

¹ For example, the petitioner could have filed multiple Forms ETAs for other system engineer positions with different experience requirements. Additionally, if the petitioner filed the Form ETA following a reduction in recruitment procedure, it would have filed advertisements and a posting notice pre-dating the priority date since its recruitment phase would have preceded filing. However, if the petitioner filed the Form ETA following a non-reduction in recruitment procedure, it would have followed explicit instructions and guidance from DOL, which are not contained in the record of proceeding. The date of the newspaper advertisement was unclear.

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 March 14, 2001. The proffered wage as stated on the Form ETA 750 is \$79,310 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of February 1999.

On the petition, the petitioner claimed to have been established on June 1, 1990, to have a gross annual income of \$1.5 million, and to currently employ nine workers. In support of the petition, the petitioner submitted the petitioner Form 1120, U.S. Corporation Income Tax Return for 2000², and a W-2 form issued from the petitioner to the beneficiary in 2001 reflecting wages paid in the amount of \$67,316.31 in that year. The tax return reflects the following information:

	<u>2000</u>
Net income ³	\$4,373
Current Assets	-\$34,451
Current Liabilities	\$15,146
Net current assets	-\$49,597

In determining the petitioner's ability to pay the proffered wage during a given period, 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 2001. The petitioner established that it paid the beneficiary \$67,316.31, which is \$11,993.69 less than the proffered wage. Thus, the petitioner must demonstrate that it could pay the difference between what it actually paid the beneficiary and the proffered wage, which is \$11,993.69, in 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, 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

² Evidence preceding the priority date is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date. However, since the petitioner's 2000 corporate tax return is the only regulatory-prescribed evidence in the record of proceeding relating to the petitioner's continuing ability to pay the proffered wage since the director never requested any additional evidence, it will be analyzed in this decision.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

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.⁴ 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 has not demonstrated that it paid the full proffered wage to the beneficiary in 2001. In 2000⁵, the petitioner shows a net income of only \$4,373 and negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage out of its net income or net current assets, since both amounts are less than \$11,993.69. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2001.

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. 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, which is March 14, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

⁴ 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.

⁵ *See* note 2, *supra*.

The requirements of the proffered position were set forth in detail above in this decision. The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner from 1999 to the present as a systems engineer, and from February 1996 to February 1999 as a systems engineer for Dugi-Com Group, Inc. with a description of job duties similar to the proffered position.

With the initial petition, the petitioner submitted a sworn and notarized letter from [REDACTED] Mr. [REDACTED] who states that he was the president of Digi-Com Group, Inc.⁶ and certifies that the beneficiary was employed from 1996 to 1999 as a systems engineer.

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.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(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.

The affidavit from Mr. [REDACTED] does not specifically meet the evidentiary requirements delineated at 8 C.F.R. § 204.5(l)(3) since the format is not a letter on Digi-Com Group, Inc. letterhead; however, it otherwise meets the requirements. The AAO has no adverse information that would otherwise indicate that the affidavit from Mr. Conti does not illustrate that the beneficiary has the required three years of experience as a systems engineer.

⁶ Presumably Dugi-Com Group, Inc. was a typographical error on the ETA 750B.

In any further proceedings in this matter, the petitioner should provide any additional evidence, correspondence, or clarifying documentation concerning the discrepancy pertaining to the years of experience set forth on the Form ETA 750, particularly the response counsel received from DOL and a complete copy of the record of proceeding during the labor certification process before DOL. Additionally, the petitioner should provide updated corporate tax returns and any other relevant regulatory-prescribed evidence for further analysis of its continuing ability to pay the proffered wage, and explain the unavailability of a letter from Digi-Com Group, Inc. on letterhead and independent, corroborating evidence of actual employment, such as evidence of wages received.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. 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.

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.