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U.S. Citizenship  
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EAC-02-241-53269

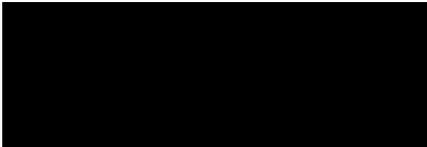
Office: VERMONT SERVICE CENTER

Date: JUN 14 2005

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 P. Wiemann, Director  
Administrative Appeals Office

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

The petitioner develops software. It seeks to employ the beneficiary permanently in the United States as a product support 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 denied the petition because he determined that the beneficiary did not present evidence that he had the foreign equivalent of a United States bachelor's degree. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that the beneficiary's credentials are sufficient to meet the requirements of the labor certification and submits 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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. The petitioner did not indicate on the visa form or correspondence which category it was filing the petitioner under.

The regulation at 8 C.F.R. § 204.5(i)(3)(ii)(C) 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.

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. 8 C.F.R. § 204.5(d). In this case, that date is February 5, 2001.

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 product support analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education

Grade School	
High School	
College	4
College Degree Required	Bachelor's degree, or equiv.
Major Field of Study	Computer Science or related field

The applicant must also have two years of employment experience in the job offered or the related occupation of MUMPS technology. The proffered position is described in Item 13 as follows: "Provide technical support to customers, supervise product support specialists, assist in the resolution of complex product support problems, engage in technical development of staff, provide advanced high-level training and education both internally and to customers." Additionally, Item 15 modifies the related occupation experience with "Other Special Requirements" as follows: "Min. 2 years of experience with MUMPS; skills and abilities in DTM, ISM, DSM, and MSM; and various operating systems, to include Unix and Windows."

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 Pontificia Universidade Catolica in Rio de Janeiro, Brazil, studying data processing technology from 1977 to 1982 culminating in a certificate in 1998. Subsequently, he represented that he studied computer courses at Seminarios Tecnicos de Informatica, in Sao Paulo, Brazil, from 1985 to 1986 culminating in certificates. He also indicated that he took computer courses at SERVIMEC, BASE, IBM Brazil, in Rio de Janeiro, Brazil, during miscellaneous dates, culminating in certificates. He provided no further information concerning his educational background on this form, which was signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. With its initial filing, the petitioner failed to provide corroboration of the Form ETA-750B representations with evidence.

Because the evidence was insufficient, the director requested additional evidence on June 9, 2003, specifically requesting a copy of the beneficiary's education through official school records and a credential evaluation.

In response to the director's request for evidence, the petitioner submitted employment experience letters, a credential evaluation prepared by the Foundation for International Services, Inc., and copies of transcripts issued by Pontifical Catholic University of Rio de Janeiro in Portuguese without an English translation that is certified. One page of the transcripts appears to have been translated without a certification. The credential evaluation stated the following, in pertinent part:

Copy of an Atestado (Certificate) from the Pontificia Universidade Catolica do Rio de Janeiro (Pontifical Catholic University of Rio de Janeiro) in Brazil and the certified translation of that document certifying that [the beneficiary] completed the course of Tecnologo em Processamento de Dados (Data Processing Technology) and graduated on October 7, 1998. This document which was dated November 25, 1998 was signed by the Director of Admissions and Registration and is equivalent to three years of university-level credit in data processing and computer science from an accredited college or university in the United States. A copy of the Historico Escolar (Academic Transcript) and the certified translation of that document listing the courses

completed from 1977 to 1982, including the credits and grade for each, were also submitted. (It indicated that he completed his coursework in 1982, but graduated in 1998).

\* \* \*

In summary, it is the judgment of the Foundation that [the beneficiary] has the equivalent of three years of university-level credit in data processing and computer science from an accredited college or university in the United States and has, as a result of his educational background, professional training and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

The acting director denied the petition on October 15, 2003, finding that the Form ETA-750 requires the beneficiary to have, as a minimum, a bachelor's degree or equivalent in computer science or a related field; however, no evidence of the beneficiary's education was contained in the record of proceeding. Additionally, the acting director noted that the credential evaluation includes employment experience in its equivalency determination but stated that "there are no provisions on the labor certification for the acceptance of less than a bachelor's degree."

On appeal, counsel asserts that the beneficiary's credentials are sufficient to meet the requirements of the labor certification. She states that she was not the petitioner's representative upon its initial filing and was not provided a copy of the filing so is unsure what evidence was provided. However, she asserts that the petitioner intended to file the petition under both the skilled worker and professional categories requiring Citizenship and Immigration Services (CIS) to consider eligibility in both of them. Counsel asserts that if the petition is evaluated under the "skilled worker" category, then the regulatory requirements only require the petitioner to establish that the beneficiary meets the requirements of the proffered position as indicated on the ETA 750A, which in this case, permitted an equivalency to a bachelor's degree.

At the outset, the translation of the beneficiary's degree and transcripts did not comply with the terms of 8 C.F.R. § 103.2(b)(3): "*Translations.* Any document containing foreign language submitted to [CIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Only one page of the transcripts appeared to be translated and it did not have a certification<sup>1</sup>. Thus, the AAO is unable to evaluate the beneficiary's diploma and underlying transcripts as the manner in which the evidence was present contains deficiencies rendering it incompetent.

Regardless of the category the petition was submitted under, 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

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<sup>1</sup> This evidence was submitted by the petitioner's current attorney representative in response to the director's request for evidence.

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 bachelor's degree or equivalent (four years in college) in computer science or a related field.

Guiding the actual credentials held by the beneficiary are credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: “[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted

or given less weight.” The AAO notes that the Foundation for International Services, Inc., the credential evaluation service in this case, is a member of the National Association of Credential Evaluation Services (NACES), which, according to NACES’ website at <http://www.naces.org/aboutnaces.htm>, is:

an association of private foreign educational credential evaluation services committed to formulating and maintaining ethical standards in the field of foreign educational evaluation. Within the United States, no government agency monitors the establishment of foreign credential evaluation services. NACES® was founded in 1987 by credential evaluation services dedicated to promoting excellence and committed to setting the standards for the profession.

The credential evaluation is thus considered competent and probative evidence of the beneficiary’s educational equivalency<sup>2</sup>. The credential evaluation advises that the beneficiary graduated in 1998 from Pontifical Catholic University of Rio de Janeiro in Brazil after completing courses during 1977 to 1982 that equated to three years of university-level credit in data processing and computer science from an accredited college or university in the United States. But for the beneficiary’s 22 years of employment experience combined with those three years of university-level credit, the credential evaluation service would not have determined that the beneficiary held a baccalaureate degree equivalent to a four-year bachelor’s degree from an accredited college or university in the United States.

In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor’s degree must be a foreign equivalent 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<sup>3</sup>. 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.

The regulations define a third preference category “professional” as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” See 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

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

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<sup>2</sup> The AAO notes that it references certified translated transcripts and certificates, which are presumably more than the one page contained in the record of proceeding without a certificate of competent translation.

<sup>3</sup> The ETA 750 reflects that the term “equivalent” is in the “college degree required” box, not the box for the required years of college. Thus, there is no equivalency for the 4 years of college requirement and the beneficiary only has 3 years of qualifying education.

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 Brazil 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 the beneficiary's coursework at a university in Brazil and his subsequent 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.

The AAO notes that the petitioner has established sufficiently that the beneficiary meets the employment experience requirements of the proffered position because of multiple employment experience letters that conform to the regulatory requirements set forth at 8 C.F.R. § 204.5(l)(3)<sup>4</sup>. Additionally, the content of those letters confirm that the beneficiary acquired the skills sets required under Item 15 prior to the priority date.

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<sup>4</sup> 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.

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.

Beyond the decision of the director, the record of proceeding does not contain regulatory-prescribed evidence demonstrating that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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 February 5, 2001. The proffered wage as stated on the Form ETA 750 is \$65,000-\$80,000 per year with an annotation that the beneficiary was actually being paid \$79,000. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of October 1999.

On the petition, the petitioner claimed to have been established in 1978, to have a gross annual income of \$61 million in fiscal year 1998, and to currently employ “+/- 240” workers. In support of the petition, the petitioner submitted printed screens from its website and a newsletter. The director never noted the deficiencies in this evidence, requested additional evidence, nor mentioned it in her decision. The AAO cannot overlook that the petitioner never established its continuing ability to pay the proffered wage as set forth by the regulatory requirements and relevant case law.

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<sup>5</sup>.

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<sup>5</sup> The AAO notes that the beneficiary submitted copies of his individual income tax returns and a letter from the petitioner confirming his employment with them in connection with an application to adjust status to lawful permanent resident. However, the tax returns do not contain the source of the beneficiary's reported income, such

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.<sup>6</sup> 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.

Since the record of proceeding does not contain regulatory-prescribed evidence of the petitioner's financial status, such as its annual report, tax return, or audited financial statements, the AAO cannot ascertain the petitioner's net income or net current assets. The record of proceeding also does not contain evidence that the petitioner paid the proffered wage to the beneficiary. Thus, the petitioner has not demonstrated its continuing ability to pay the proffered wage. For this additional reason, the petition cannot be approved.

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.

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as a W-2 form or paystubs. Additionally, the letter from the petitioner does not verify actual wages paid to the beneficiary or the date employment began, and the letter is dated in 2003, after the priority date.

<sup>6</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.



ORDER: The appeal is dismissed.