



U.S. Citizenship
and Immigration
Services

identity information is stated to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B6

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 16 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 Director of the California Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) rejected a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The AAO's prior decision will be withdrawn. The petition will be remanded to the director.

The petitioner provides automotive services. It seeks to employ the beneficiary permanently in the United States as an administrative assistant. 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 petitioner did not present evidence that the beneficiary had the foreign equivalent of a United States bachelor's degree. Thus, the director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On motion, 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), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Although the petitioner requires a baccalaureate degree for the proffered position, it also sought classification "as a skilled worker" in its letter dated June 30, 2001.

The regulation at 8 C.F.R. § 204.5(l)(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 December 12, 1996.

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

14. Education	
Grade School	9
High School	12
College	16
College Degree Required	BA in Commerce
Major Field of Study	Business

The applicant must also have four years of employment experience in the job offered, which is described in detail on the Form ETA 750A, Item #13, and there are no special requirements.

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 "Tribhawan" [sic] University in Nepal from 1982 to 1987, obtaining a "Bachelors of Commerce" in Business. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

In corroboration of the Form ETA-750B, the petitioner provided a copy of a transcript issued by Tribhuvan University to the beneficiary reflecting that the beneficiary attended Tribhuvan University for "2 Academic Years" from 1987 to 1990 towards a Bachelor's degree. The petitioner also provided a copy of an examination proficiency certificate issued by Tribhuvan University to the beneficiary for "2 Academic Years" from 1985 to 1986. The petitioner also provided a copy of a "school leaving certificate examination" that is undated and does not indicate the level of studies involved. The petitioner also provided copies of various certificates issued to the beneficiary showing completion of computer and language programs and membership in trade organizations.

Because the evidence was insufficient, the director requested additional evidence on November 19, 2001, specifically requesting evidence of the beneficiary's education and training, specifically requesting a copy of an official college or university transcript. The petitioner resubmitted previously submitted evidence.

The director denied the petition on February 25, 2002 stating that the transcripts contained in the record of proceeding show attendance at Tribhuvan University for two years that "are not equivalent to a baccalaureate degree in Business."

The beneficiary's counsel filed an appeal stating that additional documentary evidence would be forthcoming within 30 days, but the record of proceeding does not contain any further communication or submissions related to that appeal. The AAO rejected the appeal because it was filed by a party without standing. The AAO noted that there was no executed Form G-28 (Form G-28), Notice of Entry of Appearance as Attorney or Representative, in the record of proceeding from the petitioner evidencing its permission to be represented by the attorney who filed the appeal.

On motion to reopen and reconsider, counsel submits a Form G-28 executed by the petitioner and states that the director erroneously denied the petition since "the evidence submitted clearly indicated that the beneficiary had attended Tribhuvan University in Nepal for four years total. Two years ending in 1986 and two years ending in 1991 and culminating with the issuance by that institution of a Bachelor's Degree in (Business) Management." Counsel

complained that the director failed to seek evidence such as a credential evaluation or diploma or other documentation to corroborate the beneficiary's credentials. The petitioner submits a credential evaluation from Academic and Professional International Evaluations, Inc., more detailed transcripts issued by Tribhuvan University to the beneficiary including transcripts reflecting that the beneficiary successfully completed a two year master's degree program in economics, a certification from Tribhuvan University to the beneficiary that the beneficiary completed the "Bachelor's Degree in Business Administration" in 1990, and previously submitted evidence. The petitioner also submitted tax returns and quarterly wage reports.

The credential evaluation states the following, in pertinent part:

[The beneficiary] has completed studies (1984-1986) at Tribhuvan University, located in Kathmandu, Nepal, passing the **Proficiency Certificate Examination**.

The academic entry requirement to the above program was completion of School Leaving Certificate studies in Nepal, which is equivalent to completion of tenth grade in the United States.

These studies are equivalent to **graduation from a regionally accredited senior high school** in the United States.

[The beneficiary] completed additional studies (1987-1990) at Tribhuvan University, passing the **Bachelor's Degree Examination from the Faculty of Management**.

The academic entry requirement to the above program was completion of Proficiency Certificate studies in Nepal, which is equivalent to graduation from senior high school in the United States.

These studies are equivalent to **sixty (60.0) semester units of undergraduate work** at regionally accredited colleges and universities in the United States.

[The beneficiary] completed additional studies (1991-1993) at Tribhuvan University, passing the **Master's Degree Examination in Economics**.

The above studies *combined* are equivalent to the **Bachelor of Arts in Economics**, granted by regionally accredited colleges and universities in the United States.

(Emphasis in original in part and added in part).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel's motion to reopen and reconsider qualifies as both since she submits new

evidence, stating new facts to be proved, namely the equivalency of the beneficiary's credentials to a U.S. bachelor degree, and that the director's decision was an incorrect application of law.

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 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 in commerce with a major

field of study in business. The petitioner inserted the number "16" under the number of years required of education for college, but presumably the petitioner meant the total number of years. For example, the petitioner required "9" years of grade school, "12" years of high school, and "16" years for college. Thus, the AAO infers that the petitioner was indicating a cumulative minimum educational requirement and thus, it must be concluded that it meant "4" years of college if 16 is reduced by 12.

Guiding the actual credentials held by the beneficiary is the credential evaluation submitted into the record of proceeding for this case. The credential evaluation clearly states that it is a combination of degrees that renders the beneficiary's credentials equivalent to a U.S. baccalaureate degree. The credential evaluation references secondary educational credentials as well.

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.

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. The petitioner simply cannot qualify the beneficiary as 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 Nepal 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 towards a bachelor's degree consists of less than a four-year curriculum¹. Thus, his three-year baccalaureate degree is insufficient evidence that he is qualified to perform the duties of the proffered position. However, the beneficiary also completed a two-year master's degree program, into which he could not

¹ Tribhuvan University's website indicates that four-year baccalaureate degree programs are available.

enroll without completion of a bachelor's degree program². The evaluation submitted with the evidence in this proceeding states that the beneficiary's three-year baccalaureate degree in combination with a two-year master's degree and secondary education certificates should be considered as the equivalent of a baccalaureate degree is not necessarily dispositive that the beneficiary holds a foreign equivalent degree to a United State's bachelor's degree because it includes multiple degrees in the evaluation. However, the AAO finds that the beneficiary's master's degree represents a single degree premised upon completion of the equivalent of a baccalaureate degree program. The beneficiary's master's degree thus reflects that he has greater than the minimum educational requirements for the proffered position.

The director did not have the copy of the beneficiary's master's degree program transcripts and thus properly adjudicated the petition with the evidence contained in the record of proceeding at the time of adjudication. The AAO properly dismissed the first appeal for a procedural matter. Thus, neither the director nor the prior AAO adjudicating officer committed error; however, both decisions will be withdrawn. The director's determination that the beneficiary was not qualified for the proffered position is withdrawn.

Beyond the decision of the director, however, there is insufficient evidence that the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date³. 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 record of proceeding contains the petitioner's tax returns, either through partnership returns or via its sole proprietor's individual income tax returns, but there are problems with 1996 and 2000. The 1996 partnership return shows nothing as the petitioner's net income and significantly negative net current assets⁴. The 2000 return, filed

² Tribhuvan University's website indicates that completion of a bachelor's degree program is a pre-requisite to acceptance into a master's degree program.

³ 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.

⁴ 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.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the

through its sole proprietor, does not contain a Schedule C, Profit or Loss from Business statement, from the petitioner⁵. Thus, the petition will be remanded to the director to utilize any procedural mechanism available to him to address the deficiency in the evidence pertaining to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, and to issue a decision on that issue, which if adverse to the petitioner, is to be certified to the AAO.

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). Reliance on the petitioner's gross receipts and wage expense is misplaced. 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.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.

⁵ The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. See *Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

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 motion to reopen or reconsider is granted. The AAO's prior decision, dated May 12, 2003, is withdrawn and replaced by the foregoing. The petition will be remanded to the director to determine whether or not the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.