



U.S. Citizenship
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FILE:

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LIN-03-123-52877

Office: NEBRASKA SERVICE CENTER

Date: JUN 23 2005

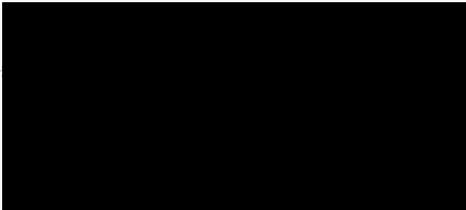
IN RE:

Petitioner:
Beneficiary:



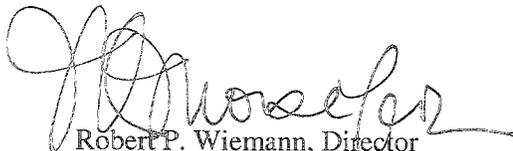
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior software programmer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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). The priority date in the instant petition is July 18, 2001. The proffered wage as stated on the Form ETA 750 is \$83,388.00 per year. The instant petition is for a substituted beneficiary. On the Form ETA 750B, signed by the beneficiary on January 31, 2003, the beneficiary claimed to have worked for the petitioner beginning in July 2002 and continuing through the date of the ETA 750B.

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).

The I-140 petition was submitted on March 5, 2003. On the petition, the petitioner claimed to have been established in 1997, to currently have 16 employees, to have a gross annual income of \$2 million, and to have a net annual income of \$400,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated July 16, 2003, the director requested additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. In accordance with 8 C.F.R. § 204.5(g)(2), the director requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by CIS on October 1, 2003.

In a decision dated January 8, 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, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the petitioner's tax returns show a history of paying substantial amounts in employee compensation. Counsel also states that the beneficiary is a substituted beneficiary who is a replacement for the initial beneficiary on the ETA 750. Counsel states that the initial beneficiary has since left the employ of the petitioner. Counsel states that salary payments made by the petitioner to the initial beneficiary should be credited as evidence of the petitioner's ability to pay the proffered wage.

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. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole 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 (Reg. Comm. 1967).

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 January 31, 2003, the beneficiary claimed to have worked for the petitioner beginning in July 2002 and continuing through the date of the ETA 750B. The record contains copies of Form W-2 Wage and Tax statements of the beneficiary in the record. Only the

beneficiary's Form W-2 for 2002 shows 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	\$0	\$83,338.00	\$83,338.00
2002	\$9,000.00	\$83,338.00	\$74,388.00

The foregoing figures fail to establish the petitioner's ability to pay the proffered wage in either 2001 or 2002.

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 show 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
2000	-\$365,863.00	NA (priority date is July 18, 2001).	
2001	-\$613,352.00	\$83,338.00*	-\$696,740.00
2002	\$257,854.00	\$74,388.00**	\$183,466.00

* The full proffered wage, since no wage payments were made to the beneficiary in 2001.

** Crediting the petitioner with the \$9,000.00 actually paid to the beneficiary in 2002.

The foregoing figures fail to establish the ability of the petitioner to pay the proffered wage in the year 2001.

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	
2000	\$23,783.00	-\$274,145.00	NA (priority date is 7/18/01)
2001	-\$274,145.00	-\$962,481.00	\$83,388.00*
2002	-\$962,481.00	-\$477,919.00	\$74,388.00**

* The full proffered wage, since no wage payments were made to the beneficiary in 2001.

** Crediting the petitioner with the \$9,000.00 actually paid to the beneficiary in 2002.

The foregoing figures also fail to establish the ability of the petitioner to pay the proffered wage in the years 2001 or 2002.

The record contains copies of several federal and state tax quarterly tax returns and of a federal annual unemployment tax return of the petitioner. The figures shown on those returns are presumably reflected as expenses on the petitioner's Form 1120 tax returns which are analyzed above. The quarterly tax returns and the federal annual unemployment tax return contain no significant relevant information beyond that on the petitioner's Form 1120 tax returns.

The record contains copies of unaudited financial statements for the petitioner dated December 31, 2001 and December 2002. 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 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.

Counsel asserts that since the beneficiary of the instant petition is a substituted beneficiary for a former employee of the petitioner who has since left the company, salary payments made to that former employee should be credited toward the petitioner's ability to pay the proffered wage. Payroll records in evidence show that the beneficiary was not yet on the petitioner's payroll in 2001. Those records show that the former employee was paid \$69,863.00 by the petitioner in 2001. Since the proffered wage is \$83,338.00, the wage increase needed to raise the compensation for the former employee's position to the proffered wage is \$13,524.36. However, the petitioner's figures for net income in 2001 and for its net current assets at the beginning and at the end of 2001 are all negative. Therefore, those figures fail to establish the petitioner's ability to pay any additional wages in that year, which is the year of the priority date.

Counsel asserts that the evidence establishes that the petitioner has a history of paying substantial employee compensation expenses. Counsel's assertion on this point is supported by the tax return evidence and the payroll records in the record. Nonetheless, the issue is whether the evidence establishes the petitioner's ability to pay the

additional amounts in salary obligations which were required by the petitioner's offer of a job to the beneficiary at the proffered wage. For the reasons discussed above, the evidence fails to establish the petitioner's ability to pay the proffered wage in the year of the priority date.

In his decision, the director correctly analyzed the financial evidence submitted for the record prior to the director's decision. That evidence did not include the petitioner's Form 1120 tax return for 2002, which was submitted for the first time on appeal. The director's decision to deny the petition was correct, based on the evidence then in the record.

For the reasons discussed above, the assertions of counsel on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence raises the issue of whether the beneficiary had the minimum qualifications for the job as required on the ETA 750.

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 July 18, 2001.

The Form ETA 750 states that the position of senior software programmer requires a bachelors degree in "computer science/engineering," and two years of experience in the offered position or in the related occupation of "programmer/analyst". (ETA 750, block 14).

The record contains copies of letters from four former employers of the beneficiary. Those letters are sufficient to establish that the beneficiary had the experience required by the ETA 750 as of the priority date.

The record also contains a copy of a Bachelor of Engineering degree granted to the beneficiary on August 27, 1997 by Andhra University, Visakhapatnam, India, with accompanying examination transcripts. However, the record lacks any educational evaluation of whether the beneficiary's degree is equivalent to a United States bachelor's degree.

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).

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals. The regulation at 8 C.F.R. § 204.5(1)(2) states in pertinent part

Professional means 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.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision.

No provision pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore even if it were assumed that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree, but the petitioner chose not to do so.

The regulation quoted above 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. Moreover, regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in computer science or engineering on July 18, 2001 or a foreign equivalent degree.

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. Moreover, the evidence fails to establish that the beneficiary had the education required by the ETA 750 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.