



U.S. Citizenship
and Immigration
Services

Bb

[REDACTED]

FILE: WAC 02 216 52643 Office: CALIFORNIA SERVICE CENTER Date: **MAY 18 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:
[REDACTED]

PUBLIC COPY
Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

The petitioner is a computer software solutions company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 beneficiary did not meet the education required by the labor certification. The director also 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.

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 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.

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.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted on November 8, 2000. The proffered salary as stated on the labor certification is \$73,000 per year.

With the petition, counsel submitted a copy of the petitioner's parent company's (Hall Kinion, Inc.) annual report and SEC Form 10-K. For the year 2000, the parent company reflected a net income of \$14,610,000 and net current assets of \$64,819,000. For the year 2001, the parent company reflected a net income of -\$45,612,000 and net current assets of \$36,721,000. The director determined that the evidence submitted was insufficient to establish the continuing ability to pay the proffered wage, and, on November 6, 2002, the director requested additional evidence of the petitioner's ability to pay the proffered wage from the priority date and continuing to

the present. The director specifically requested a copy of the beneficiary's 2001 Form W-2, Wage and Tax Statement.

In response, counsel provided a copy of the beneficiary's 2001 Form W-2 from a previous employer.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. On March 7, 2003, the director denied the petition quoting a section of the parent company's annual report that indicates the petitioner was "written off" and that "Economic and legislative conditions have caused these companies to experience a significant decrease in the demand for their services causing a decrease in revenues, cash flows, and expected future growth."

On appeal, counsel submits copies of excerpts from two SEC documents for 2001 and 2002 and a copy of the parent company's 2001 Form 1120, U.S. Corporation Income Tax Return, which shows that the petitioner was included in the consolidated return. Therefore, the AAO is satisfied that the petitioner and the parent company are related and are not, for the purpose of the ability to pay the proffered wage, two separate corporations. The 2001 SEC document shows that the petitioner had a net profit after taxes of \$538,375.90 and the 2002 SEC document shows that the petitioner had a net profit after taxes of \$1,432,213.63. The parent company's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$29,404,511 and net current assets of \$36,454,115. Counsel states:

The parent company, Hall Kinion, is a publicly traded company with almost a thousand employees and over \$70 million in gross sales in the first nine months of 2002. They have been in business for a decade and have been very successful. Group IPEX has been in business for almost 20 years and at the height of the 2000/2001 IT boom, had almost 250 employees. We fully expect the country's economy to make a dramatic turnaround soon and this business, as well as many others in the Information Technology industry will enjoy renewed successes.

I am submitting excerpts of two official Securities and Exchange Commission [SEC] documents for 2001 and 2002, which shows categorically that Group IPEX had ample income, and paid ample salaries during these years. The petitioner continues to have adequate funds to pay this alien's salary and to pay the salary of the other approximately 37 employees – most of whom are highly paid software engineers and computer systems analysts. Keep in mind that these documents are public documents and are filed with our Federal Government as part of the requirements of being a publicly traded corporation. If you wish to see the actual SEC documents, please feel free to check online – Hall Kinion's stock exchange acronym is HAKI.

Please forgive the very small print on the chart on the front of each SEC form. We sincerely hope this will not impact your ability to understand the fact that Group IPEX had gross sales of more than \$16 million in 2001 with almost \$10 million in direct payroll. For the first 9 months of 2002, the company had almost \$6 million in sales and almost \$3.5 million in salaries.

I also submit for your review the 2001 income tax return for the entire corporation (please see page two for a listing of the wholly owned subsidiaries who are included in this tax return). On

the very first page, you can see that gross receipts were \$171 million; salaries and wages were more than \$40 million. One finds it difficult to fathom how an examiner could make the determination that the “long term viability of the company” is in question.

In determining the petitioner’s ability to pay the proffered wage, Citizenship and Immigration Services (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 present matter, the petitioner did not establish that it had employed the beneficiary at a salary equal to or greater than the proffered wage in 2000 and 2001.

As an alternative 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, 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 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 CIS 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 also *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

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.¹ A corporation’s year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). 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

¹ 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.

current assets. The petitioner's parent company's net current assets during 2000 and 2001 were \$64,819,000 and \$36,721,000, respectively, according to the SEC documents. It is noted that the petitioner's parent company's 2001 Form 1120 reflected net current assets of \$36,454,115, a slight difference from the SEC document². The petitioner's parent company could have paid the proffered wage in 2000 and 2001 from its net current assets.

The parent company's annual report reflects a net income after taxes of \$14,610,000 and net current assets of \$64,819,000 in 2000. The parent company could have paid the proffered wage from either its net income or its net current assets in 2000.

The parent company's annual report reflects a net income after taxes of -\$45,612,000 and net current assets of \$36,721,000 in 2001. The parent company could have paid the proffered wage from its net current assets in 2001. The petitioner's parent company's 2001 tax return reflects a taxable income before net operating loss deduction and special deductions of -\$29,404,511 and net current assets of \$36,454,115. While there is a small difference between the annual report (for nine months only) and the tax return, the parent company could still have paid the proffered wage from its net current assets, according to the tax return. In addition, the 2001 SEC document reflects a net profit after taxes of \$538,375.90 for the petitioner. The petitioner could have paid the proffered wage from its net profit in 2001.

The 2002 SEC document reflects a net profit after taxes of \$1,432,213.63 for the petitioner. The petitioner could have paid the proffered wage from its net profit in 2002.

In summary, the petitioner has established its ability to pay the proffered wage in 2000 through 2002.

The second issue in this proceeding is whether the beneficiary met the education requirements of the labor certification as of the priority date.

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. *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is November 8, 2000.

The approved alien labor certification, "Offer of Employment," (Form ETA-750 Part A) describes the terms and conditions of the job offered. Block 14 and Block 15, which should be read as a whole, set forth the educational, training, and experience requirements for applicants. In the instant case, item 14 describes the "college degree required" as a "Bachelor's Degree or foreign equivalent." The major field of study must be EE/CS/CE, or related field. Block 15 has no data.

As proof of the beneficiary's foreign equivalent bachelor's degree, the petitioner submits a copy of the beneficiary's Bachelor of Commerce (Three-Year Degree Course), a copy of the beneficiary's transcripts, and various certificates and diplomas for completed computer courses.

² This difference appears because the 2001 SEC document was for the first nine months only.

An undated and unsigned evaluation from International Credentials Evaluation Services was also submitted in support of the petition. This evaluation states:

The nature of the courses and credit hours that are involved in the completion of the Bachelor of Commerce Program, the Post-Graduate Diploma in Computer Applications Program and the Diploma in RDBMS program indicate that [REDACTED] satisfied similar requirements to the completion of four years of academic studies in a Bachelor of Business Administration Program in Management Information Systems from an accredited institution of higher education in the United States.

The director denied the petition, concluding that the beneficiary's educational credentials are not an acceptable equivalency for a United States baccalaureate degree.

On appeal, counsel argues that the beneficiary does possess the equivalent to a U.S. Bachelor's Degree. Counsel submits another credentials evaluation from Global Education Group, Inc., dated April 2, 2003. The evaluation states:

Using the three for one rule instituted by INS, [REDACTED] meets the requirements for a U.S. Bachelor's degree equivalency in his field. He has the equivalent of completion of three years of undergraduate study at a regionally accredited university in the United States. In addition, [REDACTED] has completed five years of professional work experience in the computer information systems field. The U.S. degree of Bachelor of Science in Computer Information Systems awarded by a regionally accredited university in the United States requires four years of undergraduate study. [REDACTED] education and responsibilities during his five years of work experience in the field of computer information systems demonstrate both the broad and professional knowledge that would be acquired in four years of academic study towards the award of the U.S. degree of Bachelor of Science in Computer Information Systems by a regionally accredited university in the United States. In conclusion, [REDACTED] education and five years of professional work experience in the field of computer information systems are equivalent to the U.S. Bachelor's degree in Computer Information Systems (four year degree).

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 at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a professional that:

(C) *Professionals.* 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 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use 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.

The Form ETA 750 requires a bachelor degree and four (4) years of education. A bachelor degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the combination of education and experience, a combination of degrees, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree may not be accepted in lieu of a four-year degree.

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. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

As stated in 8 C.F.R. § 204.5(I)(3)(ii)(C), to qualify as a professional, the petitioner must submit evidence showing 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. In this case, the bachelor's degree must be in EE/CS/CE, or related field.

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. 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.

Based on the evidence submitted, we concur with the director that the petitioner has not established that the beneficiary possesses the equivalent of a United States bachelor's degree as required by the terms of the labor certification.

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 sustained that burden.

ORDER: The appeal is dismissed.