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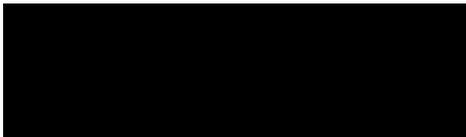
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FILE: EAC-03-172-54267 Office: VERMONT SERVICE CENTER Date: OCT 20 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

The petitioner is an engineering, telecommunications and voice response systems 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 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 April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$65,000.00 per year. On the Form ETA 750B, signed by the beneficiary on April 23, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on May 19, 2003. On the petition, the petitioner claimed to have been established in 1986. The items for the petitioner's current number of employees, its gross annual income and its net annual income were left blank on the petition. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated April 26, 2004, the director requested additional evidence relevant to the petitioner's 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 the director on May 13, 2004.

In a decision dated June 24, 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 in the form of a letter dated July 28, 2004, and submits additional evidence. Counsel states on appeal that the beneficiary began his employment with the petitioner on April 13, 2001 and that the beneficiary was paid the prevailing wage from that date forward.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 April 23, 2001, the beneficiary did not claim to have worked for the petitioner. However, other evidence in the record indicates that the beneficiary began working for the petitioner at about the time that the ETA 750 was submitted.

The record contains copies of Form 1099-MISC, Miscellaneous Income, of the beneficiary for the years 2001, 2002 and 2003 showing nonemployee compensation received from the petitioner. The record before the director closed on May 13, 2004. As of that date the beneficiary's Form 1099-MISC for 2003 was the most recent one available. The amounts of nonemployee compensation stated on the beneficiary's Form 1099-MISC statements are shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
2001	\$46,242.00	\$65,000.00	\$18,758.00
2002	\$61,003.00	\$65,000.00	\$3,997.00
2003	\$67,536.00	\$65,000.00	-\$2,536.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001 and 2002. In the year 2003 the beneficiary's actual compensation exceeded the proffered wage.

The record also contains a copy of an earnings statement for the beneficiary showing the beneficiary's earnings from the petitioner during each pay period in 2001. That statement was submitted for the first time on appeal. On the statement, the total amount of compensation for the year through December 31, 2001 is shown as \$46,242.00, which is the same figure as appears on the beneficiary's Form 1099-MISC statement for 2001. The earnings statement provides further corroboration of the amount of salary paid to the petitioner in 2001.

The earnings statement shows that the beneficiary began employment with the petitioner on April 13, 2001, and that he was paid at a rate of \$65,000.00 per year, which is the rate of the proffered wage. Since the priority date is April 26, 2001, the information on the beneficiary's earnings statement for 2001 is sufficient to establish the petitioner's ability to pay the proffered wage during the year 2001. Nonetheless, the earnings statement contains no information about payments to the beneficiary in the year 2002, and the beneficiary's Form W-2 for that year shows that the beneficiary's compensation of \$61,003.00 was \$3,997.00 less than the proffered wage.

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 record contains no copies of any federal tax returns of the petitioner. Therefore no analysis can be made of the petitioner's net income as shown on the petitioner's federal tax returns. Nor has the petitioner submitted copies of any annual reports or of any audited financial statements, which are the two other alternative forms of required evidence under the regulation at 8 C.F.R. § 204.5(g)(2). That regulation states that evidence of the petitioner's ability to pay the proffered wage "shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2).

The only other acceptable alternative form of required evidence is a statement from a financial officer of the petitioner, but such a statement is allowed only where a petitioner employs 100 or more workers. On the I-140 petition, the petitioner left blank the item for its current number of employees. No evidence in the record indicates that the petitioner has 100 or more workers.

For the foregoing reasons, the petitioner has failed to submit evidence in one of the alternative forms required by the regulation at 8 C.F.R. § 204.5(g)(2). In the RFE the director made specific requests for evidence in one of the required forms. The RFE stated, "Submit the 2001 United States federal income tax return(s), with all schedules and attachments, for your business. . . . As an alternative you may submit annual reports for 2001 which are accompanied by audited or reviewed financial statements." (RFE, April 26, 2004, at 1). The

petitioner's response to the RFE ignored these specific requests. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The record contains no other evidence pertaining to the financial condition of the petitioner. The evidence therefore 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.

In his decision, the director correctly stated that CIS had requested a copy of the petitioner's federal income tax return for 2001 and that the petitioner had not submitted that tax return. The director stated that in response to the CIS request the petitioner had submitted a copy of the beneficiary's Form W-2 for 2001. The director's reference to a Form W-2 was an incorrect reference to the petitioner's Form 1099-MISC for 2001. The director found that the amount shown on the form of \$46,242.00 was not as much as the proffered wage. The director therefore found that the evidence failed to establish the petitioner's ability to pay the proffered wage in 2001. The director made no reference to the beneficiary's Form 1099-MISC for 2002, one copy of which had been submitted with the petition and another copy of which had been submitted in response to the RFE. Nor did the director mention the beneficiary's Form 1099-MISC for 2003, a copy of which was submitted in response to the RFE.

For the above reasons, the director's analysis was incomplete. Nonetheless, the decision of the director to deny the petition was correct, based on the evidence in the record before the director. 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 fails to establish that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

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 Wing's Tea House*, 16 I&N Dec. 158 (Comm. 1977). As noted above, the priority date in the instant petition is April 26, 2001.

The Form ETA 750 states that the position of software engineer requires a bachelor of science degree or equivalent in the major field of study of computer science, engineering. The ETA 750 does not define the term "or equivalent" which appears in block 14, Part A of that application. The ETA 750 also requires six years of college education and either two years of experience in the job offered or two years of experience in the related occupation of visual environment development and database design. (ETA 750, Part A, Item 14).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains copies of letters from three former employers of the beneficiary in Montevideo, Uruguay, attesting to the beneficiary's experience in several positions pertaining to software development during the years

1984 through 2001. 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 diploma of Software Engineer awarded the beneficiary on July 14, 1984 by the Educational Department of Sistemac, Montevideo, Uruguay. The record also contains a copy of a summary of the course of study for the software engineer diploma from that institution. Certified English translations are provided of each of the foregoing documents.

The record lacks any copy of the beneficiary's transcript supporting his diploma as a software engineer. Therefore the evidence does not establish that the studies leading to that diploma consisted in at least six years of college education.

The record also lacks any evaluation of the beneficiary's education providing an opinion on whether the beneficiary's diploma is equivalent to a United States bachelor of science degree in computer science, engineering.

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 of science degree, but the petitioner chose not to do so.

In the definition of "professional," 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.

The record does not indicate whether the petitioner is claiming that the beneficiary's diploma in software engineering is equivalent to a United States bachelor of science degree, or whether the petitioner is attempting to rely on a combination of the beneficiary's education and experience to satisfy the "or equivalent" requirement in block 14 of the ETA 750, Part A. In any event, in the context of an immigrant petition, the equivalence to a United States bachelor's degree requires a single foreign degree, and no reliance may be placed on a beneficiary's work experience to establish that equivalence.

Since the record lacks any evaluation of the beneficiary's education, the evidence fails to establish that the beneficiary had bachelor of science degree or the equivalent in the field of computer science, engineering, as of

the priority date. Moreover, since the record lacks of copy of the beneficiary's course transcript pertaining to his diploma in software engineering, the evidence fails to establish that the beneficiary had six years of college education as of the priority date.

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. Beyond the decision of the director, the evidence fails to establish that the beneficiary had the education required by the ETA 750, Part A, block 14 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.