



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



B6

FILE:



Office: VERMONT SERVICE CENTER

Date:

OCT 26 2005

EAC-04-066-52080

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

The petitioner is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a database administrator. 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 the beneficiary had a bachelor's degree in a quantitative discipline as required on the Form ETA 750, 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, at the time of petitioning for classification under this paragraph, are professionals.

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, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date 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 October 30, 2002.

The Form ETA 750 states that the position of database administrator requires a bachelor's degree in a quantitative discipline and two years of experience in the offered position or in a related occupation. However, no related occupation is specified on the ETA 750. The Form ETA 750 also states, "A quantitative discipline can be in any one of the following: Electrical/Electronics/Computer Science Engineering, Mathematics, Science, Statistics, Physics, MIS, Management, Business Administration." The ETA 750 then states "See attached," but no attachment is found on the ETA 750 submitted for the record. (ETA 750, Part A, Items 14, 15).

On the Form ETA 750B, signed by the beneficiary on October 17, 2002, the beneficiary did not claim to have worked for the petitioner.

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) of 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 I-140 petition was submitted on December 27, 2003. On the petition, the petitioner claimed to have been established in 1999, to currently have nine employees, to have a gross annual income of \$3,000,000.00, and to have a net annual income of \$250,000.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated March 15, 2004 the director requested an advisory evaluation of the beneficiary's formal education. 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 April 16, 2004.

In a decision dated May 17, 2004, the director determined that the evidence failed to establish that the beneficiary had a United States bachelor's degree or the foreign equivalent of a bachelor's degree in the United States. The director found that the evidence failed to establish that the beneficiary was a professional. The director therefore denied the petition.

On appeal, counsel submits no brief and submits additional evidence. Counsel states on appeal that the beneficiary's bachelor's degree from a university in India was a four-year degree and that professional evaluations find that the beneficiary possesses the equivalency of a four-year bachelor's degree in electrical engineering from a regionally accredited institution of higher education in the United States. Counsel also states that the evidence establishes that the beneficiary is a professional.

The evidence submitted for the first time on appeal consists of a copy of the beneficiary's bachelor of engineering degree awarded in November 1993 by the University of Pune, in India, copies of supporting course transcripts and copies of two educational evaluations of the beneficiary which were not submitted prior to the decision of the director. 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 record contains a copy of a letter dated March 12, 1999 from a former employer of the beneficiary in Jamshedpur, India, stating the beneficiary's experience with that company in the field of database administration from March 6, 1995 to March 12, 1999. The record also contains a copy of a letter dated October 15, 2003 from a former employer of the beneficiary in Phoenix, Arizona, stating the beneficiary's experience with that company as a senior database administrator beginning in June 1999 and continuing through the date of the letter. The foregoing letters are sufficient to establish that the beneficiary has more than the two years of experience in the offered position required on the ETA 750.

The record contains copies of three evaluations of the beneficiary's education. The only evaluation which was in the record prior to the director's decision is an evaluation dated April 6, 2004 by IndoUS Technology & Educational Services, Inc. (ITES, Inc.), which finds that the beneficiary's education and experience are equivalent to a bachelor's degree in computer information systems from an accredited university in the United States. The evaluation finds that the beneficiary holds a bachelor of engineering degree granted in 1993 by the University of Pune in India and it states that the beneficiary's course of studies for that degree was a four-year program. The evaluation provides the opinion that the beneficiary's academic credentials are equivalent to three years of academic studies towards a bachelor's degree in computer information systems from an accredited college or university in the United States.

The evaluation further finds that the beneficiary has over eight years of progressively responsible work experience as a professional in the field of information technology and that the beneficiary's experience is equivalent to two years and eight months of academic studies towards a bachelor's degree in computer information systems from an accredited college or university in the United States. The evaluation concludes that based on the beneficiary's academic education and professional work experience, the beneficiary has the equivalent of a bachelor's degree in computer information systems from an accredited college or university in the United States.

Since the evaluation dated April 6, 2004 by ITES, Inc. relies on a combination of the beneficiary's education and experience to find that the beneficiary had the equivalent of a United States bachelor's degree, the director found that the evidence failed to establish that the beneficiary had a bachelor's degree or a foreign equivalent degree. See 8 C.F.R. § 204.5(1)(2). On that basis, the director denied the petition.

The other two educational evaluations in the record were submitted for the first time on appeal. An educational evaluation dated May 27, 2004 by ITES, Inc., relies only on the beneficiary's academic credentials. Like the earlier evaluation by that organization, the May 27, 2004 evaluation finds that the beneficiary holds a bachelor of engineering degree granted in 1993 by the University of Pune in India and that the course of studies for that degree was a four-year program. Unlike the previous evaluation, however, which had found that program to be equivalent to only three years of academic studies at an accredited college or university in the United States, the second evaluation by ITES, Inc., finds that the beneficiary's bachelor of engineering degree is equivalent to a bachelor's degree in electronics engineering from an accredited college or university in the United States.

The other educational evaluation in the record was also submitted for the first time on appeal, an evaluation dated May 26, 2004 by Foreign Credential Evaluations, Inc., (FCE, Inc.). Like the second evaluation by ITES, Inc., the evaluation by FCE, Inc., finds that the beneficiary's course of studies for his bachelor's degree was a four-year program, and it finds that the beneficiary's bachelor of engineering degree is equivalent to a bachelor of science in electronic engineering from a regionally accredited university in the United States.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

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.

Concerning the evidence needed to support classification in the above preference categories, the regulation at 8 C.F.R. § 204.5(1)(3)(ii) states in pertinent part:

(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.

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

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 at 8 C.F.R. § 204.5(1)(2) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must have 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 noted above, the only educational evaluation of the beneficiary in the record prior to the director's decision was the first evaluation by ITES, Inc. In calculating that the beneficiary's eight years of professional work experience are equivalent to two years and eight months of academic studies, the first evaluation by ITES, Inc., apparently employs a formula of substituting three years of specialized work experience for one year of university level studies. Such a formula is found in the regulations governing H-1B nonimmigrant visas petitions. *See* 8 C.F.R. 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition.

Nonetheless, on appeal the petitioner has submitted educational evaluations which conform to the requirements of the regulations governing immigrant petitions. *See* 8 C.F.R. § 204.5(1)(2), (3)(ii). Each of the two academic evaluations submitted on appeal relies only on the beneficiary's academic credentials, and each of those two evaluations finds that the beneficiary's education alone, without relying on any work experience, is equivalent to a bachelor's degree from a regionally accredited college or university in the United States.

The petitioner does not provide an explicit explanation for the differences between the two evaluations by ITES, Inc. However, the record provides some relevant information. In the RFE, the director had requested an education evaluation based on the beneficiary's formal education only, and not on practical experience. Nonetheless, the evaluation by ITES, Inc., submitted in response to the RFE considered both the beneficiary's education and his experience. The RFE did not provide reasons for its request for an evaluation based on formal education alone. In fact, the language of the RFE on that point was not mandatory, but rather was advisory. The RFE stated in pertinent part, "An acceptable evaluation should -- 1. Consider formal education only, not practical experience; . . ." (REF, March 15, 2004, at 1).

It appears that the first evaluation by ITES, Inc., did not limit its analysis to the beneficiary's academic education because the beneficiary's degree plus eight years of professional experience after obtaining that degree appeared to be more than sufficient to establish that the beneficiary had the equivalent of a United States bachelor's degree.

In his decision denying the petition, the director provided a detailed explanation of the reasons for limiting the analysis of the beneficiary's academic equivalence to his education alone. The director also provided citations to appropriate regulatory and case law authority. In response, the petitioner submitted on appeal the two evaluations discussed above, each of which relies only on the beneficiary's academic education in finding that he has the equivalent of a United States bachelor's degree. The petitioner also submitted on appeal a copy of the beneficiary's bachelor of engineering degree and copies of course transcripts pertaining to that degree.

Although the analysis in the evaluation by ITES, Inc., submitted on appeal differs from the analysis in the earlier evaluation by that organization, the evidence now in the record is sufficient to establish that the beneficiary holds a foreign degree which is equivalent to a bachelor of science degree in electronic engineering from a regionally accredited college or university in the United States.

In his decision, the director correctly summarized the first evaluation by ITES, Inc., and correctly found that the evidence then in the record failed to establish that the beneficiary had a bachelor's degree or a foreign equivalent degree as of the priority date. The director then found that the evidence failed to establish that the beneficiary is a professional.

The director's finding that the beneficiary is not a professional was not essential to the reasoning supporting the denial of the petition. With regard to the preference classification, the Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professionals, for a single check box, letter "e," applies both to skilled workers and to professionals. On the instant I-140 petition, the petitioner checked box "e," which indicates a request for classification either as a skilled worker or as a professional. Nonetheless, even if the instant petition is considered as a petition for a skilled worker, the requirements as stated on the ETA 750 for a bachelor's degree would be unaffected. As discussed above, the evidence in the record before the director failed to establish that the beneficiary has a United States bachelor's degree or a foreign equivalent degree. However, for the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal are sufficient to overcome the decision of the director on that issue.

Beyond the decision of the director, however, 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.

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).

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. *See* 8 C.F.R. § 204.5(d). As noted above, the priority date in the instant petition is October 30, 2002. The proffered wage as stated on the Form ETA 750 is \$95,000.00 per year.

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 October 17, 2002, the beneficiary did not claim to have worked for the petitioner. The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary for 2001 and 2002 issued by another employer. The Form W-2's in the record are consistent with a statement by the beneficiary on the ETA 750B that he worked for that other employer beginning in March 2001 and continuing through the date of the ETA 750B.

The record also contains copies of two pay statements of the beneficiary issued by the petitioner. The pay statements are dated September 6, 2003 and October 8, 2003. The first pay statement covers the period August 15, 2003 to August 31, 2003, and states the petitioner's wages for the pay period as \$1,920.00 and the year-to-date wages as the same amount, \$1,920.00. The first pay statement therefore indicates that the beneficiary began working for the petitioner on August 15, 2003 or soon thereafter. The second pay statement covers the period September 1, 2003 to September 15, 2003, and states the petitioner's wages for the pay period again as \$1,920.00 and the year-to-date wages as \$3,840.00. The two pay statements indicate that after being hired in 2003 the beneficiary was paid at a monthly rate of \$3,840.00, which is equivalent to a rate of \$46,080.00 per year. The two pay statements in the record are insufficient to establish the petitioner's ability to pay the proffered wage. Neither the \$3,840.00 total of the wages paid as of September 15, 2003 nor the rate of pay of \$46,080.00 per year is sufficient to establish the petitioner's ability to pay the proffered wage in 2003 or in any other year.

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.

In the instant petition, the petitioner has submitted no copies of any of its tax returns. The record therefore provides no basis to analyze whether the petitioner's net income as shown on its tax returns is sufficient to establish the petitioner's ability to pay the proffered wage during the relevant period. The petitioner also has failed to submit evidence in either of the other two alternative required forms, namely annual reports or audited financial reports. *See* 8 C.F.R. § 204.5(g)(2). Nor does the record contain any other evidence relevant to the petitioner's ability to pay the proffered wage.

For the foregoing reasons, the evidence in the record 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. Since the director failed to consider this issue in his decision, the petition must be remanded to the director to consider the petitioner's ability to pay the proffered wage during the relevant period.

In summary, the evidence now in the record is sufficient to establish that the beneficiary had a bachelor's degree in a quantitative discipline or a foreign equivalent degree as of the priority date. Beyond the decision of the director, however, 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. The petition will be remanded to the director for consideration of that issue.

ORDER: The petition is remanded to the director for actions consistent with this decision.