

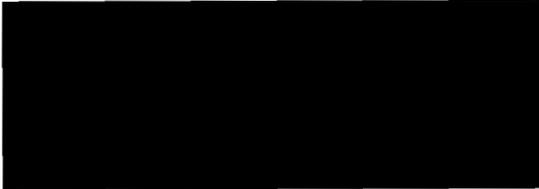
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FILE: WAC-03-219-52788 Office: CALIFORNIA SERVICE CENTER Date: AUG 19 2006

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, Chief
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 travel agent. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 that the petitioner has not established that the beneficiary possessed the requisite educational requirements for the proffered position. The director denied the petition accordingly.

On appeal, counsel submits a brief.

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 Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is \$32.54 per hour or \$67,683.20 per year. On the Form ETA 750B, signed by the beneficiary on July 22, 2003, the beneficiary did not claim to have worked for the petitioner. On the petition, the petitioner claimed to have been established in 1981, and currently to employ 5 workers. The petitioner did not provide information on its gross annual income and net annual income on the form.

The petitioner submitted with the initial filing of the petition no documentation to establish its ability to pay the proffered wage and the following items regarding the beneficiary's qualifications: a copy of the beneficiary's Bachelor's Degree, a copy of the beneficiary's transcript, and employment certificates for the beneficiary. Because the evidence was insufficient, the director requested additional evidence (RFE) on May 12, 2004, requesting annual reports, federal tax returns or audited financial statements from 2001 to 2003; Form DE-6,

Quarterly Wage Report for the last four (4) quarters, an advisory evaluation of the beneficiary's foreign educational credentials, and secondary proof of the beneficiary's foreign education credentials. In response to the director's RFE, counsel submitted the petitioner's tax returns for 2001 and 2002, an original diploma, a certified copy of the transcripts, and an academic and experiential evaluation for the beneficiary. On September 15, 2004, the director issued a notice of intent to deny (NOID) because the petitioner failed to demonstrate its ability to pay and failed to establish that the beneficiary holds the equivalent of a US Bachelor's degree in accounting as required on the Form ETA 750. **In response to the NOID, counsel submitted the petitioner's 2003 tax return and resubmitted the evaluation prepared by [REDACTED] again arguing that the petitioner demonstrated with the submitted evaluation that the beneficiary has achieved the equivalent of a Bachelor's degree in business administration with concentration in accounting.**

The director denied the petition on November 5, 2004, finding that the petitioner has not established its continuing ability to pay from the priority date and that the record does not show, nor has the petitioner established that the beneficiary possesses a baccalaureate degree in accounting as stipulated in part 14 of form ETA 750, and therefore, does not meet the minimum requirements of the labor certification.

On appeal, counsel asserts that the petitioner demonstrated its ability to pay the proffered wage with gross income around \$4,632,935, **retained earnings around \$55,953** and its capital stock around \$10,000. Counsel also asserts that the evaluation from [REDACTED] is acceptable and verifies that the beneficiary has met the educational requirements set forth on Form ETA 750, **i.e. a bachelor's degree in accounting or equivalent.**

The first issue to be discussed here in the instant case is whether the petitioner demonstrated its continuing ability to pay the proffered wage beginning on the priority date. In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (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. In the instant case, the petitioner did not submit any evidence of the beneficiary's compensation from the petitioner and did not claim to have employed and paid the beneficiary. Therefore, the petitioner did not establish its continuing ability to pay the proffered wage beginning on the priority date through the wages actually paid to the beneficiary.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the 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. 1099, 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). On appeal counsel asserts that the director failed to take into account the petitioner's gross income. Counsel's reliance on the petitioner's gross receipts with depreciation and on wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid compensation to officers 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. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 through 2003. The petitioner's tax returns indicate that the petitioner has been elected as an S corporation (with employer identification number: 94-3234138) since January 1, 2000; and that its fiscal year is based on calendar year. The petitioner's tax return for 2001 stated net income¹ of \$66,234, the 2002 tax return stated net income of \$33,110, and the 2003 tax return stated net income of \$13,469. Therefore, the petitioner did not have sufficient net income to pay the proffered wage of \$67,683.20 for the years 2001 through 2003.

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. On appeal counsel requested using the petitioner's capital stock of around \$10,000 to demonstrate the ability to pay the proffered wage. The capital stock will not be converted to cash during the ordinary course of business and will not become funds available to pay the proffered wage. Therefore, counsel's reliance on the petitioner's capital stock is misplaced. 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.² A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

¹ Ordinary income (loss) from trade or business activities as reported on Line 21.

²According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items

liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield that the petitioner had current assets of \$362,673 and current liabilities of \$324,446, and thus its net current assets were \$38,227 in 2001; that the petitioner had current assets of \$589,431 and current liabilities of \$526,963, and thus its net current assets were \$62,468 in 2002; and that the petitioner had current assets of \$254,442 and current liabilities of \$225,968, and thus its net current assets were \$28,474 in 2003. Therefore, the petitioner did not have sufficient net current assets to pay the proffered wage of \$67,683.20 for the years 2001 through 2003.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's ability to pay the proffered wage from the priority date. Counsel recommends the use of retained earnings to pay the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, CIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

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.

The second issue to be discussed is whether the petitioner demonstrated that the beneficiary possessed the requisite educational qualifications for the proffered position. 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. 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). 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 accountant. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	6
	High School	4
	College	4
	College Degree Required	Bachelor's Degree
	Major Field of Study	Accounting

The applicant must also have two years of employment experience in the job offered.

The beneficiary set forth her 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), she indicated that she attended St. Paul's College in Quezon City, Philippines in the field of "business" from June 1975 through March 1979, culminating in the receipt of "Bachelor of Arts" degree. She provides no further information concerning her 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 submitted the following items with the initial filing of the petition: a copy of the beneficiary's Bachelor's Degree and a copy of the beneficiary's transcript. In response to the director's RFE and NOID, the petitioner also submitted an evaluation report. On appeal counsel contends that the evaluation report submitted is acceptable and the petitioner established the beneficiary's educational qualifications for the proffered position with that evaluation.

The record of proceeding contains the beneficiary's Bachelor's Degree, transcripts and an evaluation report from Josef Silny & Associates, Inc. -- International Education Consultants. The Bachelor degree certifies that St. Paul College of Quezon City conferred the degree of Bachelor of Arts to the beneficiary, however, it does not indicate in what field the Bachelor's degree is granted. The beneficiary's transcripts show that the beneficiary completed four years of college studies for her Bachelor's degree with one year courses at the University of the East in Manila for the 1975-1976 academic year, another one year at Concordia College in Manila for the 1976-1977 academic year, and two more years at St. Paul College in Quezon City for the academic years of 1977-1978 and 1978-1979. The registrar certifies at the end of the transcripts that the student has been graduated with the degree of Bachelor of Arts (AB) with "Economics" as of March 26, 1979. The evaluation from Josef Silny & Associates, Inc. is drafted by [REDACTED] Associate Professor, School of Business Administration, University of Miami.

[REDACTED] states in pertinent part of the evaluation report:

I have examined the work history (presumed to be verifiable) of [the beneficiary]. In addition, for this evaluation I have also considered [the beneficiary]'s educational accomplishments as documented by Josef Silny and Associates, International Education Consultants.

* * * * *

Based upon my professional experience (see attached resume), I conclude that through the combination of formal education and work experience [the beneficiary] has achieved the equivalent of a U.S. Bachelor degree in business administration with concentration in Accounting. This conclusion is based upon the following:

1. [REDACTED] have concluded that [the beneficiary] has completed studies equivalent to the U.S. degree of Bachelor of Arts in Economics earned at a regionally accredited U.S. institution of higher education.

... ..

As previously discussed, 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. In the instant case, the Form ETA-750 requires four-years of college studies and a bachelor's degree in Accounting as the minimum educational requirements for the proffered position. The ETA 750 specifically requires accounting as the major field of study instead of any other related fields as alternatives.

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(1)(2). The regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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 beneficiary's degree and transcripts and the evaluation supports that the beneficiary obtained a Bachelor of Arts degree in

Economics from St. Paul College in Philippines which is equivalent to the U.S. degree of Bachelor of Arts in Economics earned at a regionally accredited U.S. institution of higher education.

However, as quoted above [REDACTED] evaluation concludes that the beneficiary has achieved the equivalent of a U.S. Bachelor degree in business administration with a concentration in Accounting using a combination of formal education and work experience despite the director specifically instructing in her RFE dated May 12, 2004 that “an acceptable evaluation should consider formal post-secondary education only and not practical experience.” 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The evaluation in the record used a combination of formal education and work experience, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). In order for the beneficiary to meet the requirements set forth on the labor certification, the petitioner should provide an educational evaluation from a professional evaluator who evaluates the beneficiary’s degree from a foreign country as an equivalency of a U.S. Bachelor’s degree in accounting based on her educational background only. The beneficiary was required to have a bachelor’s degree in accounting 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 if the employer wanted to accept a bachelor’s degree in economics or other related field. Since that was not done, the director’s decision to deny the petition must be affirmed.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director. Based on the evidence submitted, we concur with the director that the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date, and that the beneficiary possessed the equivalent to a US Bachelor's degree in Accounting 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 met that burden.

ORDER: The appeal is dismissed.