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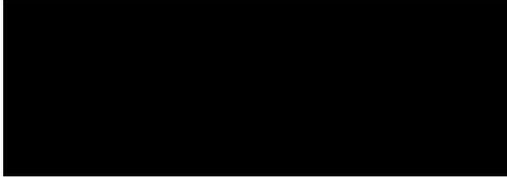
U.S. Department of Homeland Security
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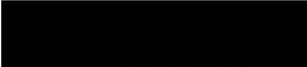
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Office: TEXAS SERVICE CENTER Date:

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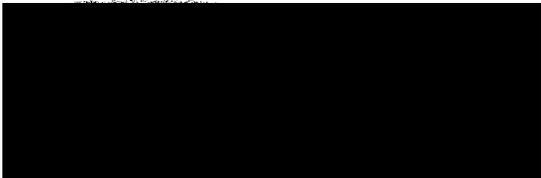
Petitioner:

Beneficiary:



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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides marine survey and analytical services. It seeks to employ the beneficiary permanently in the United States as a marine technical surveyor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the beneficiary did not present evidence that he had the foreign equivalent of a United States bachelor's degree. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel asserts that the director erred by failing to consider the petition under the skilled worker category.

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, 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.¹

The regulation at 8 C.F.R. § 204.5(1)(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. The filing date of the petition is the initial receipt in the Department of Labor's (DOL) employment service system. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, that date is November 3, 1999.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 marine technical surveyor. In the instant case, item 14 describes the requirements of the proffered position as follows:

¹ No correspondence or petition marks clearly indicates which category the petitioner sought to file the petition under. Correspondence accompanying the beneficiary's application to adjust status to lawful permanent resident status reflects that the petitioner was seeking categorization under either category.

14. Education	
Grade School	Blank
High School	Blank
College	x
College Degree Required	Bachelor of Science degree
Major Field of Study	Marine Systems

The applicant must also have two years of employment experience in the job offered, marine technical surveyor, which lists the duties as "survey, [sic] marine vessels and watercraft to ascertain condition of the shore/vessel pipeline, inspection and evaluation of vessel tank, machinery, equipment, and equipage for vessels to meet requirements and the overall condition of the vessel and equipment used. Will make summary calculations [sic] on the results of the survey." Item 15 reflects that there are no special requirements.

The beneficiary set forth his 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), he indicated that he attended Lowestoft College in England studying Merchant Marine from September 1993 through July 1994 for which he was awarded a Certificate of Achievement. He also represented that he attended "Government National²" College in Karachi, Pakistan studying general studies from September 1974 through July 1976 receiving a certificate. He also represented that he attended Green Wood Secondary School in Karachi, Pakistan studying general studies from June 1969 through July 1974 receiving a certificate. He provides no further information concerning his 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 provided copies of a Certificate of Achievement, dated July 1994, from BTEC itemizing the courses or "modules" taken by the beneficiary at Lowestoft College; a transcript from Lowestoft College reflecting that the beneficiary attended a nautical science course from September 1993 to July 1994; a course certificate issued by Lowestoft College reflecting the beneficiary's completion of a course in operational use of navigational systems; secondary school certificates; a certificate from Lowestoft College's Suffolk County Council certifying the beneficiary to be a Deck Officer, Merchant Navy or Fishing; course certificates showing the beneficiary's completion of courses at Merchant Navy College in Kent, England in various electronic navigation systems and basic sea survival issued by the British government; certificates reflecting the beneficiary's completion of various safety courses, first aid and medical training, fire fighting, and competency as a deck officer, deck hand, and watchkeeper deck officer 1st marine mariner from the British government; report of service paperwork reflecting the beneficiary's service as a second officer on vessels during various timeframes and indicating that the beneficiary has competency to carry out safely cargo handling duties involving petroleum tankers, liquefied gas carriers, or liquid chemical carriers; certificate from the United Kingdom and Northern Ireland for the beneficiary's competency in radiotelephony; license issued to the beneficiary from Liberia to be a merchant marine officer; certificate of efficiency as a lifeboatman issued to the beneficiary by Australia's government; and various certificates of watch-keeping service issued to the beneficiary reflecting his service as an officer on various vessels; and France-issued certificate in crude oil washing issued to the beneficiary.

² Presumably this is a typographical error and was intended to be "Government National."

Contained in the record of proceeding is a credential evaluation from Spantran Educational Services, which utilized an attached opinion from Dr. [REDACTED] Professor of Management, Our Lady of the Lake University, Houston Weekend College, formerly Associate Professor Management, School of Business and Economics, Houston Baptist University, who stated that the beneficiary, "by a combination of formal education, specialized training in areas directly related to his expertise and sustained demonstrated competency in progressively more responsible employment experiences achieved the equivalency of the Bachelor of Science Degree in technology with an emphasis in Operations Management earned in the American system of tertiary education."

The director denied the petition on August 31, 2004, finding that the Form ETA-750 and professional third preference category requires the beneficiary to have, as a minimum, the equivalent of a U.S. Baccalaureate degree in marine systems and not the "functional equivalent."

On appeal, counsel asserts that the director erred by failing to consider the petition's eligibility under the skilled worker category instead of the professional third preference visa category. Counsel also asserts that the director failed to consider the "proper effect" to be given to DOL's certification of the Form ETA-750, approving it despite the beneficiary lacking "an academic degree at the bachelor's level." Counsel claimed that he would send additional evidence and a brief within thirty days on October 1, 2004. The AAO sent notice to counsel that it had not received any additional pleadings or documentary submissions as of December 13, 2005. Counsel did not respond within thirty days to that notice. Thus, the appeal will be adjudicated as the record is currently constituted.

The AAO concurs with the director's findings. Regardless of the category the petition was submitted under or properly categorized as, the petitioner must not only prove statutory and regulatory eligibility under that category, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. Each regulatory provision governing the two third preference visa categories clearly requires that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent degree – for a "professional" because the regulation requires it and for a "skilled worker" because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," 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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, the beneficiary must have a bachelor's degree or its foreign equivalent.

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. 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). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree of science in marine systems.

Guiding the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[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."

The credential evaluation in the record of proceeding states that the beneficiary's combination of specialty courses and career progression resulted in the beneficiary having the equivalent of a "Bachelor of Science Degree in technology with an emphasis in Operations Management earned in the American system of tertiary education." At the outset, a bachelor of science degree in technology with an emphasis in operations management is not the same as a bachelor of science degree in marine systems. Thus, the credential evaluation by Dr. [REDACTED] does not support that the beneficiary has the credentials required by the proffered position as delineated on the Form ETA 750A.

Dr. [REDACTED] credential evaluation also fails to support that the beneficiary is qualified for the proffered position through credentials deemed equivalent to an American baccalaureate degree because he specifies that the beneficiary's combination of education and employment experience is the basis upon which Dr. [REDACTED] makes his findings. In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be a foreign equivalent degree, not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that

case, the Regional Commissioner declined to consider a three-year bachelor of science degree from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional.

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 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.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a “skilled worker,” the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor’s degree, or an equivalent foreign degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent foreign degree to a U.S. bachelor’s degree.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from Pakistan or the United Kingdom could reasonably be considered to be a “foreign equivalent degree” to a United States bachelor’s degree. Here, the record reflects that the beneficiary’s formal education consists of less than a four-year curriculum. The evaluations submitted with the evidence in this proceeding suggesting that the beneficiary’s certificates from various schools and his subsequent employment experience should be considered as the equivalent of a baccalaureate degree is not accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United State’s bachelor’s degree because it includes employment experience in the evaluation. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Additionally, the petitioner has not indicated that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification. Thus, the combination of education and experience may not be accepted in lieu of education. 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. Since that was not done, the director’s decision to deny the petition must be affirmed.

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

Beyond the decision of the director, the petitioner failed to submit regulatory-prescribed evidence of the beneficiary’s qualifying employment experience³. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer*

(ii) *Other documentation*—

(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.

The beneficiary set forth his employment experience on Form ETA 750-B, Item 15. He represented that he worked for the petitioner as a marine technical surveyor from November 1998 to the date he signed the form, November 1, 1998. Prior to that, he represented that he worked for Denholm Ship Management Ltd. in Glasgow, United Kingdom, as a marine technical surveyor from November 1988 through October 1998 performing duties described to be exactly the same as the duties of the proffered position. The record of proceeding does not contain evidence verifying the beneficiary's qualifying employment experience through a letter from Denholm Ship Management Ltd. giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the beneficiary according to the explicit terms of 8 C.F.R. § 204.5(l)(3)(ii)(A).

Also beyond the decision of the director, the evidence contained in the record of proceeding does not demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date⁴. 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor, which was, as noted above, November 3, 1999. *See* 8 CFR § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$68,036.80 per year. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of November 1998.

As evidence of its continuing ability to pay the proffered wage beginning on the priority date, the petitioner submitted copies of W-2 forms issued by it to the beneficiary for 1998⁵, 1999, 2000, and 2001 reflecting wages

Enterprises, Inc. v. United States, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

⁴ *See* note 3, *supra*.

⁵ Evidence preceding the priority date in 1999 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

paid in the amounts of \$17,755, \$44,504.94, \$45,832.98, and \$43,119.33, respectively. The petitioner also submitted reviewed financial statements for the periods ending October 2000 and 2001.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 establish that it employed and paid the beneficiary the full proffered wage in any relevant year, but rather partial wages. The petitioner must demonstrate that it can pay the difference between the wages actually paid and the proffered wage in each year, which would be \$50,281.80, \$23,531.86, \$22,203.82, and \$24,917.47 in 1998, 1999, 2000, and 2001, respectively.

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. 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. 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). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages 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.

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

⁶ 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.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance whether the financial statements of the business are free of material misstatements. The accountant's report that accompanied the petitioner's financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements submitted with the petition are thus not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner did not demonstrate that it paid the full proffered wage in 1999, 2000, or 2001. The petitioner did not submit regulatory-prescribed evidence for those years which would provide information about its net income and net current assets from which it would be possible to analyze and determine whether or not it could pay the difference between the wages actually paid to the beneficiary and the proffered wage in 1999, 2000, and 2001. Because such regulatory-prescribed evidence is not in the record of proceeding, no such determination can be made. Any additional proceedings in this matter must address that issue.

The petitioner failed to demonstrate that it had the ability to pay the proffered wage during 1999, 2000, or 2001. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.