

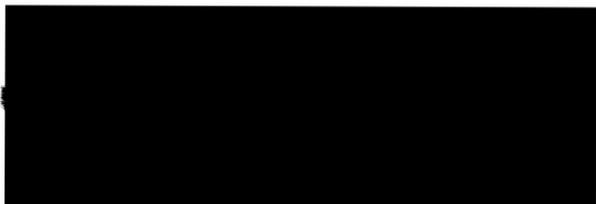
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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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**JUN 21 2006**

FILE: WAC-04-124-52261 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: 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:

SELF-REPRESENTED

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

CC:



**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 The director's decision will be affirmed in part and withdrawn in part.

The petitioner is a business systems consultant. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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. The director also determined that the petitioner failed to establish that the beneficiary was qualified for the proffered position. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact<sup>1</sup>. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 8, 2004 denial, the issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence and whether or not the beneficiary is qualified to perform the duties of the proffered position.

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.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>. The petitioner submits previously submitted evidence on appeal and some new items. Relevant evidence in the record includes the petitioner's corporate tax returns for 2001, 2002, and 2003; unaudited financial statements projecting future earnings in 2004; W-2 forms issued to the beneficiary from the petitioner in 2002 through 2004; the petitioner's quarterly wage reports and bank statements; invoices, and work orders and contracts

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<sup>1</sup> Apparently the petitioner substituted counsel on appeal. However, new counsel failed to submit a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, by the petitioner and counsel. There is a properly executed Form G-28 from prior counsel. Thus, the petitioner is considered self-represented although new counsel's appellate arguments will be considered. A copy of this decision will also be given to prior counsel of record since no notice was received that the attorney-client relationship was terminated between former counsel and the petitioner.

<sup>2</sup> 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).

between the petitioner and third party clients; a credential evaluation issued by the Foundation for International Services, Inc. (FIS); the beneficiary's bachelor of accounting science degree awarded by the University of South Africa in 1988; various certifications issued to the beneficiary for completion of computer skills training courses; letters from past employers; and W-2 forms issued by past employers to the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage or the beneficiary's qualifications.

The first issue to be discussed in this case is whether or not the petitioner has demonstrated that it has the continuing ability to pay the proffered wage beginning on the priority date. 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 March 13, 2002. The proffered wage as stated on the Form ETA 750 is \$90,000 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$145,451, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year runs from October 1 through September 30. Because the priority date is in March 2002, the petitioner's 2001 fiscal year corporate tax return covers that timeframe and is the priority date relevant tax return. On the Form ETA 750B, signed by the beneficiary on May 31, 2002, the beneficiary claimed to have worked for the petitioner since September 2000.

On appeal, the petitioner asserts that it misunderstood the evidentiary requirements requested by the director and on appeal establishes eligibility.

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 established that it employed and paid the beneficiary the following wages: \$104,600 in 2002, \$47,700 in 2003, and \$116,500 in 2004. The W-2 forms are issued on a calendar fiscal year instead of the petitioner's fiscal year. The petitioner has demonstrated that it paid wages greater than the proffered wage in 2002 and 2004 and thus established its ability to pay the proffered wage in those years accordingly. The petitioner is obligated to demonstrate that it can pay the difference between the wages it actually paid to the beneficiary and the proffered wage in 2003, which is \$42,300.

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 contrary to counsel's assertions. 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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. 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 tax returns demonstrate the following financial information concerning the petitioner's ability to pay the difference between the wages it actually paid to the beneficiary and the proffered wage in 2003, which is \$42,300:

- In 2003, the petitioner's net income<sup>4</sup> was -\$16,131.

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<sup>4</sup> Taxable income before net operating loss deduction and special deductions as reported on Line 28.

Therefore, the petitioner did not have sufficient net income to pay the difference between wages paid and the proffered wage in 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. 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.<sup>5</sup>** A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current 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.

- The petitioner's net current assets during 2003 were \$0.

Therefore, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid and the proffered wage in 2003.

Therefore, although showing an ability to pay the proffered wage in 2002 and 2004, the petitioner has not demonstrated its 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 because of 2003.

The petitioner stated on appeal that the beneficiary was employed by other entities both in the United States and South Africa in 2003. However, this is not relevant to determining the petitioner's continuing ability to pay the proffered wage out of wages paid to the beneficiary, its net income, or its net current assets. Likewise, the petitioner states that it was paying the beneficiary at the \$90,000 pay rate but it did not employ the beneficiary full-time in the 2003 year. Again, CIS undertakes an analysis that includes actual wages paid, and a review of net income and net current assets.

The petitioner also states that its bank statements reflect its ability to pay the proffered wage. However, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income

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<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

(income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

The petitioner also states that its projection of future earnings reflects its ability to pay the proffered wage and states that it has signed a contract with SysTECH Integrators, Inc. with a work order specifically for the beneficiary's services. The record of proceeding contains both the contract and work order and both are dated at the end of 2004. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if eligibility is not established at the priority date with the expectation of eligibility at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Additionally, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Finally, the AAO notes that the projections of future earnings were unaudited anyway and 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petitioner'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 the Department of Labor.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. This portion of the director's decision is affirmed.

The second issue to be discussed in this case is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 states that the position requires two years of experience in the proffered position or in the related occupation of business software analyst or systems support consultant and a bachelor's degree in computer science or three years of experience in lieu of a degree.

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).

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.”

FIS is a member of NACES, the National Association of Credential Evaluation Services (NACES). The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector. Thus, the credential evaluation provided by FIS will be given appropriate evidentiary weight in these proceedings.

FIS determined that the following concerning the beneficiary's credential equivalencies:

[The beneficiary] has the equivalent of three years of university-level credit from an accredited college or university in the United States and has, as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in information technology from an accredited college or university in the United States.

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 in Chemistry from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies to the instant petition since the Regional Commissioner made specific findings concerning a three-year degree from India in the context of third preference petitions.

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.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from South Africa 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. Finally, the proper evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The petitioner may establish the beneficiary's qualifications for the proffered position through alternative requirements as delineated on the Form ETA 750A. If the beneficiary does not have the equivalent of a four-year baccalaureate degree, applicants may qualify for the proffered position through demonstrating that they have three years of experience. The type of experience is not qualified but presumably, since the asterisk annotation is in Item 13 of the Form ETA 750A, the petitioner mean experience in the proffered position which includes the following job duties:

Implement SAP Software Financial and controlling modules (FI/CO) at client sites using the AcceleratedSAP "ASAP", an industry standard methodology to analyze client's business and provide client with a fully integrated business software solution. Prepare user-documentation and training of end-users at client sites. Develop and implement program specifications for ABAP (SAP 4GL programming language) for software modification programs and data conversions programs as well as testing. Identify client's requirements and current system functionality. Configure and customize SAP software to client's requirements. Test business processes.

In addition to three years of qualifying employment experience in the proffered position, the requirements delineated on the Form ETA 750A also require two years of experience in the proffered position or as a business software analyst or systems support consultant.

On the Form ETA 750B, the beneficiary represented the following concerning his prior employment:

- Senior SAP Functional Analyst for the petitioner from September 2000 through the present performing duties the same as those listed for the proffered position.
- "Returned to South Africa during the pendency of the new H-1B Petition filed on my behalf [sic] by [the petitioner]," from January 1999 through September 2000.
- Senior SAP Consultant for Softline, Inc. in San Jose, California, from February 1998 through September 1999 performing duties similar to the proffered position.
- SAP Consultant for Price Waterhouse MCS in South Africa from February 1996 through January 1998 performing duties similar to the proffered position.
- Financial Systems Manager for Teljoy Cellular Services Provider in South Africa from June 1995 through February 1996 performing management and project management of financial software implementation, modification and development.
- Systems Support Consultant for Unitrans Limited in South Africa from January 1994 through May 1995 performing consulting duties involving various software and hardware solutions.
- Business Software Analyst for Computer & Business Systems (CBS) in South Africa performing analysis of business strategy and requirements, advices on business software solutions, and configuration and customization of client systems from April 1989 to December 1993.

The regulation at 8 C.F.R. § 204.5(I)(3) provides:

(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.

**(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.

The record of proceeding contains letters from the beneficiary's prior employers. A letter from Unitrans Limited is dated November 7, 1997 and verifies the beneficiary's employment as a Systems Support Consultant responsible for providing support for the financial and accounting system from January 1, 1994 through May 31, 1995. The letter is on Unitrans Limited letterhead and signed by VHF Moore, Information Systems Manager and provides contact information. There is also a letter signed by Victor Moore, Owner/Manager of Setting the Trend who claims that he was employed by Unitrans Limited as IT Manager from August 1, 1992 through January 31, 2002 and worked as the beneficiary's direct manager and verifies that same information as the former letter.

There is also a letter from CBS signed by [REDACTED] as a Manager who states that Johannes Oosthuizen [the beneficiary] held the position of Manager of Computer and Business Systems from April 1989 to December 1993 performing duties the beneficiary represented on the Form ETA 750B for that employment experience, and another letter from himself verifying his ownership and management of Rico Financial Services from January 1988 to March 1989.

There is also a letter from [REDACTED], Business Manager of the St. Peter's Preparatory School in South Africa who states that he was employed by Price Waterhouse Management Consulting Services as a Partner from July 1987 to December 2002 and was the beneficiary's direct manager there. Thus, [REDACTED] verified the beneficiary's full-time employment there from February 1, 1996 through January 31, 1998 was a SAP consultant with duties similar to the proffered position.

There is also a letter signed by HVLeibbrandt not on letterhead but stating that he was employed by Cullinan Holdings as a Senior Executive from March 1981 to February 1987 and that during his employment the beneficiary worked for them as a Business Software Consultant.

There is also a letter with an electronic signature by [REDACTED] Chief Executive Officer of SysTECH Integrators who states that he was employed as Chairman and CEO at Sofline, Inc.<sup>6</sup> until it was acquired by KPMG LLP in 1999 and verifies the beneficiary's full-time employment as a Senior SAP Consultant at Sofline from February 1, 1998 through October 1, 1999 as a Senior SAP Consultant performing duties similar to the proffered position.

There is also a letter on PriceWaterhouseCoopers letterhead signed by [REDACTED], Senior Manager; Human Resources, dated September 17, 2004, verifying the beneficiary's full-time employment at PricewaterhouseCoopers in Johannesburg, South Africa from February 1, 1996 through January 31, 1998 performing duties as a SAP Consultant and describing duties similar to the proffered position.

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<sup>6</sup> Presumably this was a misspelling.

The director determined that the letters written by the beneficiary and those written by former employees verifying the beneficiary's employment at businesses they were formerly employed at was insufficient evidence of the beneficiary's qualifying employment experience.

On appeal, the petitioner asserts that [REDACTED] was the founder and CEO of Softline and was unable to use Softline's letterhead because it was acquired by KPMG in 1999. The petitioner submits an Internet article about KPMG's acquisition of Softline Systems & Integrators, Inc., not Softline, Inc., and without mentioning Mr. Gauba. The petitioner also submits W-2 forms from 1998 and 1999, as well as an H-1B approval notice, for Softline Consulting & Integrat. and the beneficiary.

The employment experience letters from Unitrans and PriceWaterhouseCoopers conform to the regulatory requirements and accounts for 41 months of qualifying employment experience as a SAP consultant, which are the duties of the proffered position, and of a systems support consultant, which is an alternative experience requirement. The regulation at 8 C.F.R. § 103.2(b)(2)(i) permits acceptance of secondary evidence where it is demonstrated that primary evidence is unavailable. The petitioner has explained that Softline was acquired by KPMG so a letter on Softline letterhead is impossible to procure. Instead, it has submitted a letter from a former manager at Softline and W-2 forms reflecting wages paid by Softline to the beneficiary. There is no adverse information in the record of proceeding from which the AAO concludes it should not accept this evidence as credible and probative evidence of the beneficiary's employment experience at Softline. These pieces of evidence corroborate the beneficiary's employment at Softline and accounts for 19 months of qualifying employment experience as a SAP consultant. Thus, adding together the total months of demonstrated qualifying employment experience, the petitioner has shown that the beneficiary has at least five years of experience that match the requirements as delineated on the Form ETA 750A. Therefore, the beneficiary is qualified for the proffered position and the director's decision on this point is withdrawn.

Beyond the decision of the director, there is an additional deficiency in the petition not identified by the director. 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 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).

The petitioner's tax returns reflect that the beneficiary is listed as an officer of the corporation. Although the beneficiary is not listed as owning stock, he is the only one of two officers receiving compensation from the petitioner's revenues in every year under analysis and appears to be inseparable from the management and operations of the business. It seems that the revenue stream relies upon his expertise solely as the unaudited projection of future earnings statements stated in its accompanying notes. Contracts undertaken by the petitioner with third party clients reference the beneficiary's name as the sole employee retained to perform the duties of the services sought. Therefore, the *bona fides* of the job offer do not appear to be meritorious. Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). Additionally, the Board of Alien Labor Certification Appeals (BALCA) has devised tests for determining the *bona fides* of a job offer including whether a "corporation has come to rely heavily upon the alien's skills and contacts so that, were it not for the alien, the corporation would probably cease to exist (inseparability test)" and also considers multiple factors in a totality of circumstances test that include, *inter alia*, the alien's position of control or influence over the company, being an incorporator or founder of the company, being involved in the management of the company, or is one of a small number of employees. *See Hall v. McLaughlin*, 864

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F.2d 868 (D.C. Cir. 1989) and *Matter of Modular Container Systems, Inc.*, 89-INA-228 (BALCA 1991)(en banc).

The director's decision will be withdrawn in part, affirmed in part, but the petition is denied for an additional reason. 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.