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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE:

SRC 04 129 52254

Office: TEXAS SERVICE CENTER

Date: OCT 02 2006

IN RE:

Petitioner:
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: 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.

A handwritten signature in black ink, appearing to read "Michael Valdez".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant 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 restores British racing bikes and Volkswagens. It seeks to employ the beneficiary permanently in the United States as a craftsperson. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The director also concluded that the petitioner had not established that the beneficiary's educational credentials fulfilled the requirements of the approved labor certification.

On appeal, counsel submits additional evidence and asserts the petitioner's need to employ the alien.

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.

The regulation at 8 C.F.R. § 204.5(g)(2) also provides in pertinent part:

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)].

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 employment service system. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is June 17, 2001. The beneficiary's salary as stated on the labor certification is \$15.76 per hour, which amounts to \$32,780.80 per year. On the ETA 750B, signed by the beneficiary on July 29, 2003, the beneficiary does not claim to have worked for the petitioner.

The labor certification (item 14) also specifies that an applicant for the certified position of craftsperson must have four years of college culminating in a bachelor's degree in mechanical engineering. The ETA 750B indicates that the beneficiary attended Barnsley College of Technology in Barnsley, England and received an ordinary and a higher national certificate.

On Part 5 of the visa petition, filed on April 5, 2004, the petitioner claims to have been originally established in 1970, have a gross annual income of \$216,000, a net annual income of \$168,000, and to employ one

worker.

The petitioner did not initially submit any supporting evidence of its ability to pay the proffered wage or evidence of the beneficiary's experience or formal education. On December 11, 2004, the director requested additional documentation of the petitioner's ability to pay the proposed wage for 2001, 2002, and 2003, as well as evidence showing that the beneficiary's past work experience and formal education meets the requirements of the approved labor certification. She additionally advised the petitioner that the evidence supporting its continuing ability to pay the certified wage must be in the form of copies of annual reports, federal tax returns, or audited financial statements.

In response, the petitioner provided a copy of an unaudited profit and loss statement purporting to represent its financial data for 2001-2003. Relevant to the beneficiary's formal education, the petitioner provided a copy of a "Higher National Certificate" from Barnsley College of Technology showing that the beneficiary was awarded the certificate in July 1985 following the completion of a Business & Technician Education Council (BTEC)-approved course in mechanical and production engineering. A grade transcript for twelve courses accompanies the certificate.

The director denied the petition, determining that the financial statement that the petitioner supplied had failed to establish its continuing ability to pay the proffered salary beginning on the visa priority date. She noted that the \$24,134, \$11,970, and \$9,127 shown as "net profit" for 2001, 2002, and 2003, respectively, were all insufficient to pay the certified wage of \$32,780.80. The director also found that the certificate from Barnsley College of Technology did not demonstrate that the beneficiary possessed a bachelor's degree in mechanical engineering.

On appeal, filed in March 2005, the petitioner's owner, [REDACTED] states that he has been unsuccessful in recruiting a U.S. citizen. In an accompanying undated letter, Mr. [REDACTED] states that he had previous business dealings with the beneficiary and desired his services in expanding his business. The petitioner employed the beneficiary beginning in September 2004 and Mr. [REDACTED] states that he had been paid over \$6,600, plus \$4,420 in "living expense benefits." He further asserts that the beneficiary's skills have proven to be an asset to the company.

These contentions are not persuasive. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner may have employed and paid the beneficiary during a given period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage during that period. If any shortfall between the proffered wage and any actual wages paid can be covered by either a petitioner's net taxable income or its net current assets, then the petitioner will be deemed to have demonstrated its ability to pay the proposed wage offer during a given period. In this case, the evidence does not indicate that the petitioner employed the beneficiary during the 2001 - 2003 period. Although Mr. [REDACTED] states that the beneficiary has been employed since September 2004 and has been paid over \$6,600,¹ no documentation has been submitted

¹ We do not consider the \$4,420 stated as "living expense benefits." The proposed wage on an approved labor certification is expressed in U.S. currency and not a formula including the value of "living expense benefits" provided, but rather on a determination of the prevailing wage determined pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40. Further, the regulation at 20 C.F.R. 656.20 (c)(3) clearly

to support this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, CIS will next examine the net taxable income as reflected on the petitioner's federal income tax return, audited financial statements or annual reports, without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. 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. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, supra*, and *Ubeda v. Palmer, supra*; see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). 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.

It is noted here that the unaudited profit and loss statement, submitted by the petitioner, is not determinative of the petitioner's ability to pay the proffered wage in any of the relevant years. According to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. Moreover, as determined by the director, even if the figures represented as net profit were derived from an audited statement, they do not demonstrate the petitioner's ability to pay the proffered wage of \$32,780.80 beginning as of the priority date of June 17, 2001, as they indicate shortfalls \$8,646.80 in 2001; \$20,810.80 in 2002; and \$23,653.80 in 2003. The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner demonstrate its continuing ability to pay the proffered wage beginning at the priority date and continuing until the beneficiary obtains permanent resident status. The evidence submitted here does not establish that the petitioner has had the continuing ability to pay the certified wage.

The AAO also concurs with the director's determination that that the beneficiary's credentials do not represent a foreign equivalent degree to a U.S. bachelor's degree. At the outset, it is noted that CIS has authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a

provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis."

candidate with a specific degree, even where a classification may not require a bachelor's degree. In this case, the ETA 750 states that the proffered position requires a bachelor's degree, not a combination of experience, certificates or degrees, which could be considered the equivalent of a bachelor's degree. Relevant to a petition for a skilled worker, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the evidence must show that the alien has the education, training or experience, and any other requirements of the individual labor certification. This labor certification does not specifically define an equivalency less than a bachelor's degree whether it is a U.S. awarded or foreign equivalent 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 Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is also instructive:

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 member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for an entry into the occupation.

We find that "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration or study" is applicable to what constitutes evidence of a degree even in this case involving a skilled worker petition. Because neither the Act nor the regulations indicate that a bachelor's degree must be a United States bachelor's degree, CIS will recognize a foreign equivalent bachelor's degree for the purpose of meeting the requirement for a baccalaureate. The above regulation also uses the singular description of a 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 for third preference visa category purposes.

The labor certification and regulation cited above clearly require an applicant for the position of craftsperson to have four years of college culminating in a U.S. bachelor's or a foreign equivalent degree in mechanical engineering. A bachelor's degree is generally found to require 4 years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). We find that similar reasoning would also prohibit the acceptance of an equivalence in the form of multiple lesser degrees, certificates, or professional training, or any other level of education deemed to be less than a "foreign equivalent degree" to a United States baccalaureate degree. Therefore, the beneficiary's higher national certificate from Barnsley College of Technology cannot be construed to establish that this institution awarded the beneficiary a baccalaureate degree that is a foreign degree equivalent to a U.S. 4-year bachelor's degree in mechanical engineering.

Based on the evidence submitted, the AAO concurs with the director that the petitioner has not established that the beneficiary possesses a United States Bachelor's degree in mechanical engineering, or a foreign equivalent bachelor's degree as required by the terms of the labor certification. Therefore, the beneficiary is not eligible for the visa classification sought. As the petitioner has not established that it has had the continuing ability to pay the proffered wage or that the beneficiary possesses the educational credentials required by the approved labor certification, the petition may not be approved.

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 sustained that burden.

ORDER: The appeal is dismissed.