



U.S. Citizenship  
and Immigration  
Services

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FILE:

LIN-04-011-51667

Office: NEBRASKA SERVICE CENTER

Date:

SEP 29 2006

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:



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

The petitioner is an IT consulting firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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 does not have the foreign equivalent of a United States bachelor's degree, and therefore, the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel contends that the beneficiary's credentials and experience verification letters are sufficient to meet the requirements of the labor certification and submits a brief and additional evidence.<sup>1</sup>

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 who are members of the professions.

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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is May 31, 2002.

Citizenship and Immigration Services (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).

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<sup>1</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). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, 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 systems analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |  |
|-----|-------------------------|--|
| 14. | Education               |  |
|     | Grade School            |  |
|     | High School             |  |
|     | College                 | 4  |
|     | College Degree Required | Bachelor's   |
|     | Major Field of Study    | <b>Computer Science, CIS, Systems Analysis, MIS, Electronic Engineering or its foreign educational equivalent.</b> |

The applicant must also have two (2) years of employment experience in the job offered or two (2) years as programmer analyst, programmer or software developer.

The beneficiary set forth his credentials on Form ETA-750B. The issue to be discussed is whether or not the beneficiary has the foreign equivalent of a U.S. bachelor's degree in computer science or related field. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary indicated that he attended Shivaji University in Kolhapur, India in the field of "Physics" from July 1992 through May 1995, culminating in the receipt of a "Bachelors"; and that he attended University of Pune in Pune, India in the field of "Computer Management" from June 1995 to May 1997, culminating in the receipt of a "Masters". 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 a copy of the beneficiary's Bachelor of Science Degree in Physics from Shivaji University, Master of Computer Management degree from University of Pune with transcripts, and an Educational Evaluation Report from Multinational Education & Information Services, Inc. The evaluation report stated the following:

[The beneficiary] was awarded the degree of Bachelor of Science from the Shivaji University, India in 1995.

This is equivalent to a three-year program of academic studies in Physics and transferable to an accredited University in the United States.

\* \* \* \* \*

[The beneficiary] was awarded the degree of Master of Computer Management from the University of Pune, India in 1997.

This is equivalent to a two-year program of academic studies in Computer Science and transferable to an accredited University in the United States.

[The beneficiary]'s three-year degree of Bachelor of Science and one year of his two years of the degree of Master of Science are equivalent to a Bachelor degree in Physics and Computer

Science from an accredited University in the United States. His remaining one year of the degree of Master of Science is equivalent to a one year of graduate studies in Mathematics and Computer Science from an accredited University in the United States.

The director denied the petition on January 18, 2005, finding that the petitioner had not demonstrated that the beneficiary met the minimum requirements at the time Form ETA 750 was accepted. The director stated “[a] foreign equivalent degree is a degree awarded by an institution outside the United States for a course of study that is similar in complexity and length to a course of study for which an institution in the United States would grant a baccalaureate degree. This does not include a series of diplomas or certificates evaluated to be equivalent to a bachelor’s degree.”

On appeal, counsel argues that the beneficiary’s degrees of Bachelor of Science in Physics from his three-years of academic studies at Shivaji University and Master of Computer Management from his two years of academic studies at University of Pune met the minimum educational requirements set forth on the Form ETA 750 in the instant case.

Counsel also submits a new Evaluation from Morningside Evaluations and Consulting. The new credential evaluation is drafted by [REDACTED]. The credential evaluation submitted on appeal will be rejected as incompetent evidence by the AAO. Correspondence from Queens College indicates that Dr. [REDACTED] does not have the authority to grant academic credit for either the beneficiary’s academic studies or for his work experiences. In December 2001, CIS received correspondence from [REDACTED] Assistant Vice President and Special Counsel to the President, Queens College.<sup>2</sup> Ms. [REDACTED]’s letter stated that Dr. [REDACTED] did not have the authority to grant college-level credit for foreign university studies and then added:

The only college credit that may be given at Queens College for prior work experience and training is that determined to be its equivalent by the Adult Collegiate Education (ACE) Program after a very specific process of portfolio review. It is the ACE program, not an individual faculty member, which has the authority to grant credit.

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. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

However, after reviewing the entire record the AAO concurs with counsel’s assertion that the petitioner has established that the beneficiary possessed the equivalent to a US Bachelor’s degree in Computer Science, CIS, Systems Analysis, MIS or Electronic Engineering as required on the Form ETA 750 prior to the priority date.

The Form ETA 750 requires a bachelor’s degree in computer science or related field. It also requires 4 years of college education. The regulations at 8 C.F.R. § 204.5(1)(3)(ii) 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.

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<sup>2</sup> Letter to [REDACTED] Immigration and Naturalization Service, Texas Service Center, from [REDACTED] Assistant Vice President and Special Counsel to the President, dated November 7, 2001, 2 pages.

In this case, the record demonstrates that the beneficiary holds a Master's degree in the field of Computer Management. The AAO finds this degree to meet the requirements of the regulations. It is a single degree in the specified field of study. Moreover, the degree represents a total of at least five years of study, meeting the specific requirement on the ETA 750 that the beneficiary have four years of college education, because entrance to the 2-year Master's program was contingent upon the completion of a relevant undergraduate course of study.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains two experience letters submitted with the initial filing. The letter from [REDACTED] verifies that the beneficiary worked for the company as a programmer analyst for eight (8) months from July 2000 to March 2001. The letter from [REDACTED] in Pune, India verifies that the beneficiary worked with them as a programmer for one (1) year and ten (10) months from August 28, 1998 to July 10, 2000. The petitioner has also established properly that the beneficiary possessed at least two (2) years of experience in the job offered or in a related occupation prior to May 31, 2002, the priority date in the instant case. Therefore, the petitioner has established that the beneficiary possessed the educational and experience qualifications for the proffered position prior to the priority date, thus is eligible for the classification sought.

Counsel's assertions on appeal have overcome the director's findings and demonstrate that the petitioner has established the beneficiary held the equivalent to a US Bachelor's Degree in Computer Science or related field and possessed two years of experience in the job offered or related occupation required on the Form ETA 750 prior to the priority date. In view of the foregoing, the previous decision of the director will be withdrawn.

Beyond the decision of the director, however, the AAO will discuss the issue whether the petitioner established that it had the continuing ability to pay the proffered wage beginning on the priority date. 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 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 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on May 31, 2002. The proffered wage as stated on the Form ETA 750 is \$71,807.84 per year. On the petition, the petitioner claimed to have been established in 1991, to have a gross annual income of \$452,200, and to currently employ six (6) workers.

With the petition, the petitioner submitted its Form 1120, U.S. Corporation Income Tax Return for 2002 pertinent to its ability to pay the proffered wage.

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 submit evidence that the petitioner paid any compensation to the beneficiary despite the beneficiary claimed to have worked for the petitioner since April 2001. Therefore, the petitioner has not established that it employed and paid the beneficiary the proffered wage during the period from the priority date to the present.

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). Reliance on the petitioner's gross receipts or wage expense is misplaced. 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. 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 2002 tax return shows that the petitioner is structured as a C corporation and the petitioner's fiscal year is based on a calendar year. The tax return demonstrates that the petitioner had net income of \$(318,773)<sup>3</sup> in 2002, which was not sufficient to pay the proffered wage of \$71,807.84 in the year of the priority date.

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>4</sup> 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 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 were \$(312,457) in 2002. The petitioner had insufficient net current assets to pay the proffered wage.

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

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issue stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

**ORDER:** The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.

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<sup>3</sup> Taxable income before net operating loss deduction and special deductions on Line 28 of Form 1120.

<sup>4</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.