



U.S. Citizenship
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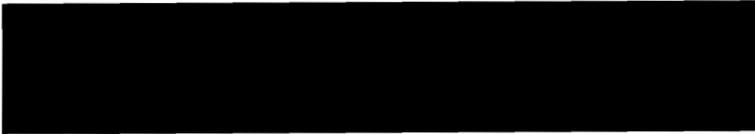
Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a medical firm. It seeks to employ the beneficiary permanently in the United States as a magnetic resonance imaging ["MRI"] technologist. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition, and, that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied. The director denied the petition accordingly.

According to the petition, the petitioner's business was established in 1992, and, at the time the petition was prepared, employed six individuals.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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 regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

“Professional means 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.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

Professionals. 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.

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). The proffered wage as stated on the Form ETA 750 is \$53,477.00 per year.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to 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. Here, the Form ETA 750¹ was accepted for processing on May 22, 2000. The Form ETA 750 states that the position requires a Bachelor of Science degree in Life Sciences, or a related field as well as one year of experience.

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).

On appeal, counsel submits a legal brief and additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated July 28, 2004; three partial copies (first page only), unsigned and undated, of U.S. Internal Revenue Service Form 1120S tax returns for 2000, 2001, and 2002; a "Certification" dated January 30, 2000, from [REDACTED], M.D. of CEBU Doctor's Hospital, Cebu City, Philippines; the beneficiary's collegiate record from Cebu Doctors' College; the beneficiary's diploma memorializing the attainment of a Bachelors of Science degree in the major field of study Physical Therapy in 1995 from Ago Medical and Educational Center, Legazpi City, Philippines; the beneficiary's Philippine government issued professional license as a physical therapist valid until March 28, 1998; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The director denied the petition on November 29, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date; and, that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied.

In the appeal filed December 28, 2004, counsel asserts that the petitioner has the ability to pay the proffered wage, and, states that the petitioner employs the beneficiary as a MRI Technologist that is not a new job position within the company.

Further, counsel asserts educational evaluations of the beneficiary's credentials are submitted.

Counsel also states that the beneficiary is registered as a MRI Technologist with the American Registry of Magnetic Resonance Imaging Technologists.

¹ It has been approximately six years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., it states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

Counsel has submitted copies of the following documents to accompany the appeal statement: the director's decision dated November 29, 2004; a letter from the petitioner dated December 20, 2004; a letter from the petitioner's accountant dated December 15, 2004; three partial copies (first page only), unsigned and undated, of U.S. Internal Revenue Service Form 1120S tax returns for 2000, 2001, and 2002; the petitioner's payroll journal for 2004; approximately 25 pages of the beneficiary's pay records showing year to date earnings (the year is not given) of \$35,124.75; a statement dated December 20, 2004, given by [REDACTED], M.D., a radiologist, that he is aware of the beneficiary's work as a MRI technologist; a credentials evaluation given by The Knowledge Company dated December 9, 2004; a credentials evaluation given by International Education Consultants dated July 29, 1996; the I-140 petition; the Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a certificate of attainment (undated) given by the American Registry of Magnetic Resonance Imaging Technologists to the beneficiary stating that she had completed the 2003 examination successfully for magnetic resonance imaging, and, that she is a qualified Magnetic Resonance Imaging Technologist; a certificate of attainment (undated) given by the American Registry of Magnetic Resonance Imaging Technologists to the beneficiary stating that she had completed the 2004 examination successfully for magnetic resonance imaging, and, that she is a qualified Magnetic Resonance Imaging Technologist; the beneficiary's membership card from the American Registry of Magnetic Resonance Imaging Technologists valid to December 15, 2005.

The petitioner's ability to pay the proffered wage

Counsel submits a statement from the petitioner's accountant dated December 15, 2004, that opines, in pertinent part, that the petitioner operated at a profit that the accountant calculated by subtracting from gross receipts normal business expenses that included the salary of the MRI technologist. Since the salary of the MRI technologist was not disclosed for the three years for which the accountant states gross receipts were received, 2000, 2001 and 2002, the accountant's opinion is unsubstantiated by objective, independent evidence. 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)).

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Service (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. Evidence was submitted to show that the petitioner employed the beneficiary as a MRI Technologist from October 10, 1999 to the present.² As set forth below, the

² The lack of proof of wages paid to the beneficiary by the petitioner in years 2000, 2001, 2002 and 2003, is a serious detriment to the petitioner's burden of proof in this matter. Acceptable evidence would be Wage and Tax Statements (W-2) or 1099-MISC statements, the beneficiary's Social Security Administration Earnings Record Information, cancelled pay checks, pay stubs, a history of bank deposits of the beneficiary's pay checks, the beneficiary's personal tax returns with W-2/1099-MISC statements, or Employers Quarterly Federal Tax Forms (Form-941)). Not only is payment of the proffered wage a *prima facie* indicator of the petitioner's ability to pay the proffered wage, but also the amount of *any* wages paid may be added to the petitioner's net income or net current assets for the year to possibly equal the amount of the proffered wage. Further, the petitioner failed to provide complete, signed and dated income tax returns. Clearly, unsigned, undated and incomplete tax returns were not submitted to the IRS. The probative value of this evidence is diminished substantially. If CIS or the AAO had for example, Schedule L from the returns, the petitioner's net current assets could be

petitioner must demonstrate that it is able to pay the difference between wages actually paid to the beneficiary and the proffered wage of \$53,477.00 per year from the priority date, May 22, 2000. According to copies of internally generated pay records, and, the petitioner's payroll journal for 2004, the petitioner paid the beneficiary \$35,124.75 in 2004.

Alternatively, in determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the 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. *Id.* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng* at 537.

The one page, incomplete tax returns, demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$53,477.00 per year from the priority date of May 22, 2000:

- In 2000, the Form 1120S stated taxable income of \$62,356.00
- In 2001, the Form 1120S stated taxable income of \$6,279.00.
- In 2002, the Form 1120S stated taxable income of \$46,915.00.

From an examination of the petitioner's tax returns, there was insufficient net income to pay the proffered wage in years 2001 and 2002. The petitioner's accountant opined that since the petitioner stated a profit for 2000, 2001 and 2002, that the petitioner could pay the proffered wage. However, the evidence submitted for years 2001 and 2002, does not support this opinion.

Counsel asserts in his brief accompanying the appeal that there are other ways to determine the petitioner's ability to pay the proffered wage from the priority date. According to regulation,³ copies of annual reports, federal tax returns, or audited financial statements are the means by which petitioner's ability to pay is determined.

Counsel submits a statement from the petitioner dated December 20, 2004, and the petitioner's accountant dated December 15, 2004, that opine, in pertinent part, that the petitioner operated at a profit he calculated by subtracting from gross receipts normal business expenses that included the salary of the MRI technologist.

calculated. CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.² In this case, that calculation could not be made since only incomplete returns were submitted. The petitioner had an additional time on appeal to submit more complete and persuasive evidence but neglected to do so. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

³ 8 C.F.R. § 204.5(g)(2).

Since the salary of the MRI technologist was not disclosed for the three years for which the accountant states gross receipts were received, 2000, 2001 and 2002, the accountant's opinion is unsubstantiated by objective, independent evidence. 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)).

The petitioner, and the petitioner's accountant also in his statement, both stated that the services of the beneficiary contribute as one of the primary sources of the company's gross earnings. Again, there is no supporting independent evidence in the record to support this statement other than the statement that the beneficiary scans approximately 75 patients each week. The assertions of the petitioner or the petitioner's accountant do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a magnetic resonance imaging technologist will significantly increase petitioner's profits since the beneficiary has been in the petitioner's employ since 1999. Proof of ability to pay begins on the priority date, that is May 22, 2000, when petitioner's Application for Alien Employment Certification was accepted for processing by the U. S. Department of Labor. Petitioner's taxable income is examined from the priority date. It is not examined contingent upon some event in the future. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns

No evidence was submitted that the petitioner was a personal service company, at least from the one page of the tax returns submitted. It is certainly not an uncommon practice for a petitioner's sole owner/stockholder of a Subchapter S corporation to take the corporation's income and compensate himself with it, thus sheltering it from corporate additional taxation. However, there is no evidence submitted that the sole shareholder could have used, or have been willing to use, some portion of that income/profit to instead pay the beneficiary had he needed to do so, as in this case as evidence of the corporation's, not the shareholder's, ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage. As already stated above, the petitioner has failed substantially to come forward with independent, objective evidence that would be readily available to the petitioner to make its case. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The qualifications of the beneficiary under the visa preference category

As already stated, the director denied the petition on November 29, 2004, finding, *inter alia*, that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied, that is a Bachelor of Science degree in Life Sciences, or related field as well as one year of experience.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 determining the respective jurisdictions of the Department of Labor and the CIS, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See *Stewart Infra-Red Commissary, Etc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981); *Denver Tofu Company v. District Director, Etc.*, 525 F. Supp. 254 (D. Colo. 1981); and, *Joseph v. Landon*, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. CIS, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true and correct. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Although the advisory opinions of other Government agencies are given considerable weight, the CIS has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the CIS's authority regarding eligibility for occupational preference classification.⁴ Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

⁴ Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth Circuit Court of Appeals in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983) stated in pertinent part:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

Id. at 1008. The court in that case relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:



In the instant case, the Application for Alien Employment Certification, Form ETA-750A, 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of magnetic resonance imaging [“MRI”] technologist as follows:

* * *

14. State in detail the MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in item 13:

Education (enter number of years)	
Grade School	<u>N/A</u>
High School	<u>N/A</u>
College	<u>N/A</u>
College Degree Required	<u>Bachelor of Science</u>
Major Field of Study	<u>Life Sciences, or related field⁵</u>
Training	Blank
Experience	
Job Offered	
Number –Years / Mos.	1/0
Related Occupation	
Number –Years / Mos.	Blank
Related Occupation	
Specify	Blank

15. Other Special Requirements
Must be a Registered Magnetic Resonance Imaging Technologist with the Magnetic Resonance Imaging Technologists.

The employer who is the petitioner has prepared the above ETA 750 Part A as an essential part of the labor certification process used to support a preference visa petition that is employment based. The employer who

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS [now CIS], therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

⁵ Nowhere in the record of proceeding has counsel explained if, in fact, a Bachelor of Science in the major field of study, Life Sciences, is obtainable, what the curriculum of studies may be to receive it, or what its related field may be. The term “Life Sciences” may actually be a generalization describing many major fields of studies. The petitioner’s credentials evaluations do not mention this term, Life Sciences, at all.

desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria. In the present case, the above requirements also state that the occupation of magnetic resonance imaging technologist requires a Bachelor of Science degree in the major field of study or Life Sciences, or related field.

Along with Form ETA 750, Part A, set forth above, the employer also is required to submit Form ETA 750, Part B that is a "Statement of Qualifications of Alien." Part B identifies the alien, specifies his current and prospective address in the United States, his education including trade and vocation training, and lists his work experience.

The Form ETA 750 Part B prepared by the beneficiary states the following education history:

Block 11

Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

Ago Medical and Educational Center
Legazpi City, Philippines

Field of Study	<u>Physical Therapy</u>
From ...[mo./yr]	<u>June 1992</u>
To ...[mo./yr.]	<u>March 1995</u>
Degrees or Certificates Received	<u>Bachelor of Science</u> <u>In Physical Therapy</u>

Cebu Doctors' College, Cebu City, Philippines

Field of Study	<u>Biology</u>
From ...[mo./yr]	<u>June 1987</u>
To ...[mo./yr.]	<u>March 1992</u>
Degrees or Certificates Received	<u>Bachelor of Science</u> <u>In Biology⁶</u>

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, set forth work experience that an applicant listed for the position of magnetic resonance imaging ["MRI"] technologist:

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB
Magnetic resonance imaging technologist
DATE STARTED

⁶ The beneficiary's diploma in biology from Cebu Doctors' College, Cebu City, Philippines is not in the record of proceeding.

Month – October Year - 1999

DATE LEFT

Month – Present

KIND OF BUSINESS

Medical firm

DESCRIBE IN DETAIL DUTIES...

Operates magnetic resonance imaging equipment to produce cross-sectional images

NO. OF HOURS PER WEEK

40

b. NAME AND ADDRESS OF EMPLOYER

NAME OF JOB

Magnetic resonance imaging technologist

DATE STARTED

Month – January Year - 1996

DATE LEFT

Month – July Year - 1998

KIND OF BUSINESS

Hospital

DESCRIBE IN DETAIL DUTIES...

Operates magnetic resonance imaging equipment to produce cross-sectional images

NO. OF HOURS PER WEEK

40

Consistent with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) counsel submitted proof of the beneficiary's education and job experience. As evidence, counsel submitted the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a letter from the petitioner dated July 28, 2004; a "Certification" dated January 30, 2000, from A [REDACTED] M.D. of CEBU Doctor's Hospital, Cebu City, Philippines; the beneficiary's collegiate record from Cebu Doctors' College; the beneficiary's diploma of the attainment of a Bachelors of Science degree in the major field of study Physical Therapy in 1995 from Ago Medical and Educational Center, Legazpi City, Philippines; the beneficiary's Philippine government issued professional license as a physical therapist valid until March 28, 1998; a statement dated December 20, 2004, given by F [REDACTED] M.D., a radiologist, that he is aware of the beneficiary's work as a MRI technologist; a credentials evaluation given by The Knowledge Company dated December 9, 2004; a credentials evaluation given by International Education Consultants dated July 29, 1996; the I-140 petition; the Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a certificate of attainment (undated) given by the American Registry of Magnetic Resonance Imaging Technologists to the beneficiary stating that she had completed the 2003 examination successfully for magnetic resonance imaging, and, that she is a qualified Magnetic Resonance Imaging Technologist; a certificate of attainment (undated) given by the American Registry of Magnetic Resonance Imaging Technologists to the beneficiary stating that she had completed the 2004 examination successfully for magnetic resonance imaging, and, that she is a qualified Magnetic Resonance Imaging Technologist; the beneficiary's membership card from the American Registry of Magnetic Resonance Imaging Technologists valid to December 15, 2005.

As mentioned, the director determined, among other things, that the petitioner had not established that the beneficiary had the college degree required by the preference classification for which the Alien Employment

Certification accompanying the petition specified, and, therefore denied the position accordingly on November 29, 2004.

The subject Form ETA 750 Part A requires a Bachelor of Science degree in the major field of study of Life Sciences, or related field. CIS regulations do not provide that a combination of education and experience may be accepted in lieu of a four-year degree. A bachelor degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

Petitioner's clear intent is expressed in the certified Alien Employment Application. A Bachelor of Science degree in the major field of study of Life Sciences, or related field is required.⁷

The petitioner submitted two education credential evaluations.

The first evaluation dated July 29, 1996, was prepared by [REDACTED] doing business as International Education Consultants concerning the beneficiary's foreign schooling as it equates to a higher education offered in the United States. The evaluation was specifically prepared for consideration by the Florida Board of Physical Therapy, and it stated in pertinent part that the beneficiary's diploma in biology (Bachelors in Science) from Cebu Doctors' College, Cebu City, Philippines received in 1992 is equivalent to that same degree awarded by a regionally accredited institution of higher learning in the United States. According to the same evaluator, the beneficiary attended a five-year underground course in physical therapy offered by Ago Medical and Educational Center, Legazpi City, Philippines. The Bachelor of Science degree attained by the beneficiary in physical therapy according to the evaluator is the equivalent of a degree of Bachelor of Science in Physical Therapy awarded by a "CAPTE" accredited institution of higher education in the United States.

The regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(1)(2) and 8 C.F.R. § 204.5(1)(3)(ii)(C). Although certain regulations for temporary worker status allow a combination of education and experience, the employment based third preference regulations do not. In addition, the Form ETA 750 separates education from experience.

The above regulations at 8 C.F.R. § 204.5(1)(3)(ii)(C) use a singular description of foreign equivalent degree. Thus, for professionals, 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.⁸

There is no discussion found in this evaluation concerning equivalence of the beneficiary's degrees to a

⁷ Note that even if this petition were considered under the skilled worker regulations, the result would be the same. While it is clear that regulations governing the skilled worker classification do not contain a baccalaureate degree requirement, CIS is still bound by the regulations and above-cited case law to require the petitioner and beneficiary to meet the requirements specified on the ETA-750. See 8 C.F.R. § 204.5 (1)(3)(ii)(B). Regardless of classification, the ETA-750 contains the requirements that the beneficiary must have a Bachelor of Science degree in the major field of study of Life Sciences, or related field.

⁸Certain nonimmigrant visas do allow a combination of education and experience. See 8 C.F.R. § 214.2 (h)(4)(iii)(C)(5).

Bachelor of Science degree in the major field of study of Life Sciences, or related field, or magnetic resonance imaging technology. As stated the evaluation was made for consideration by the Florida Board of Physical Therapy. Counsel has not asserted the relevance of this evaluation to the issue at hand relating to the minimum requirements of the labor certification which is Bachelor of Science degree in the major field of study of Life Sciences, or related field, with a special requirement, that being a Registered Magnetic Resonance Imaging Technologist with the Magnetic Resonance Imaging Technologists.

The second evaluation dated December 9, 2004, was prepared by "The Knowledge Company" concerning the beneficiary's foreign schooling as it equates to a higher education offered in the United States. The evaluation reached the same conclusions relative to the beneficiary's degrees in biology and physical therapy as that evaluation prepared by International Education Consultants.

Again, counsel has not asserted the relevance of this evaluation to the issue at hand relating to the minimum requirements of the labor certification which is a Bachelor of Science degree in the major field of study of Life Sciences, or related field, with a special requirement, that being a Registered Magnetic Resonance Imaging Technologist with the Magnetic Resonance Imaging Technologists. There is no evidence that the beneficiary was educated to become a magnetic resonance imaging technologist although evidence was submitted she was employed in that capacity.

CIS may in its discretion, use as advisory opinions, statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this instance, by the petitioner's credential evaluators' opinion, the beneficiary has degrees in biology and physical therapy that are equivalent to the same degrees offered in the United States by an institution of higher education in the United States. However, they both failed to explain what a Life Sciences degree connotes, its education requirements, or if the beneficiary's two degrees in biology and physical therapy are, singularly or together, in fact a Bachelor of Science degree in the major field of study of Life Sciences, or related field, or equivalence.⁹ Again, there is a failure by the petitioner to present independent, objective evidence of the issue at hand.

Even if biology were a related field to a Life Sciences degree, the petitioner failed to submit evidence that the beneficiary has a bachelor's degree in biology. All that record has to substantiate that claim is a description of the beneficiary's background in a credential evaluation instead of the actual documentation to prove the fact asserted. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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)).

⁹ We are aware that the first evaluation dated July 29, 1996, prepared by [REDACTED] doing business as International Education Consultants, was prepared years before the director's decision. However, under the circumstances, the petitioner had ample time to have that evaluation up-dated to the present.

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. The instant petition, submitted pursuant to 8 C.F.R. §204.5(l), may not be approved.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The evidence submitted does not demonstrate credibly that the beneficiary had the requisite education. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.