

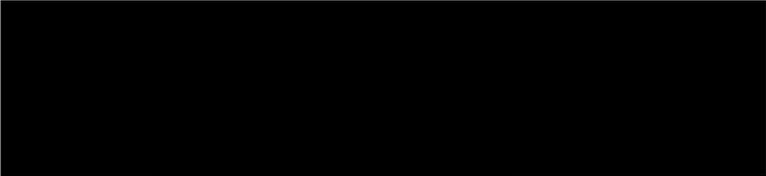


U.S. Citizenship  
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JAN 08 2008  
WAC 04 211 51581

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded.

The petitioner is a computer consultancy business. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. The petition is accompanied by a copy of Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's April 20, 2006 decision, the director determined that the petitioner had not provided an original or duplicate copy of the Form ETA 750 as required 8 C.F.R. § 204.5(1)(3)(i).<sup>1</sup> The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact.<sup>2</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.

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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 20 C.F.R. § 656.30(e) states:

Duplicate labor certifications. (1) The Certifying Officer shall issue a duplicate labor certification at the written request of a Consular or Immigration Officer. The Certifying Officer shall issue such duplicate labor certifications only to the Consular or Immigration Officer who initiated the request. (2) The Certifying Officer shall issue a duplicate labor certification to a Consular or Immigration Officer at the written request of an alien, employer, or an alien's or employer's attorney/agent. Such request for a duplicate labor certification must be addressed to the Certifying Officer who issued the labor certification; must include documentary evidence from a Consular or Immigration Officer that a visa application or visa petition, as appropriate, has been filed; and must include a Consular Office or DHS tracking number.

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<sup>1</sup> The regulation at 8 C.F.R. § 204.5(1)(3)(i) states, in part, that “[e]very petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation, or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program.”

<sup>2</sup> On appeal, counsel indicated that he would submit a brief and/or evidence to the AAO within 90 days. Counsel dated the appeal May 19, 2006. As of this date, approximately 19 months later, the AAO has received nothing further. The AAO sent a fax to counsel on July 30, 2007 informing counsel that no separate brief and/or evidence was received, to confirm whether or not he would send anything else in this matter, and as a courtesy, providing him with five days to respond. To date, more than five months later, no reply has been received.

The record contains the petitioner's request for a duplicate labor certification. The director asserted that a duplicate must be requested within five years of the date of the certified original ETA 750.<sup>3</sup> It does not appear that the director requested a duplicate from the DOL. Therefore, the petition shall be remanded to the director to request a duplicate labor certification in this matter.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the proffered job with a bachelor of science degree in computer engineering. 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). The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petitioner must 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on April 11, 2000.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>4</sup> Relevant evidence in the record includes an educational evaluation dated June 10, 2003 from American Evaluation Institute, the beneficiary's bachelor of mechanical engineering diploma and transcripts issued by Andhra University, the beneficiary's post graduate diploma in computer applications and transcripts issued by Silicon Infosys Software Training Centre, and the beneficiary's certificate of completion for the Sequential Program in Project Management issued by the University of California, Los Angeles (UCLA). The record does not contain any other evidence relevant to the beneficiary's educational qualifications.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (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).

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<sup>3</sup> The regulation at 20 C.F.R. § 656.30(a) states that "[e]xcept as provided in paragraph (d) of this section, a labor certification is valid indefinitely." The record is not clear whether the labor certification has been revoked or invalidated pursuant to 20 C.F.R. § 656.30(d). While the DOL maintains an official record retention schedule of five years for labor certification applications, the director does not appear to have made a request for a duplicate labor certification application in this case.

<sup>4</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).

In the instant case, 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 programmer analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |                      |
|-----|-------------------------|----------------------|
| 14. | Education               |                      |
|     | Grade School            | C                    |
|     | High School             | C                    |
|     | College                 | C                    |
|     | College Degree Required | B.S.                 |
|     | Major Field of Study    | Computer Engineering |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he represented that he received a bachelor's degree in mechanical engineering from Andhra University in India in December 1994, that he received a certificate in computer applications from Silicon Infosys in India in 1996, and that he received a certificate in project management from UCLA in California in 2003. He does not provide any additional information concerning his educational background on that form.

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 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 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations 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. In this case, the labor certification clearly indicates that the beneficiary must possess a bachelor of science degree in computer engineering, not a combination of degrees and certificates which, when taken together, equals the same amount of coursework required for a bachelor of science degree in computer engineering.<sup>5</sup> The beneficiary received a bachelor's degree

<sup>5</sup> The educational evaluation dated June 10, 2003 from American Evaluation Institute states that the beneficiary's *combined* studies at Andhra University from May 1989 to December 1994, at Silicon Infosys from February 1995 to 1996 and at UCLA in 2003 are equivalent to a bachelor of science degree in computer engineering. The evaluation does not state that the beneficiary has one degree that is equivalent to a bachelor of science degree in computer engineering.

in mechanical engineering; he does not have a bachelor's degree in computer engineering.<sup>6</sup> Therefore, the petitioner has not established that the beneficiary is qualified for the proffered job with a bachelor of science degree in computer engineering.

Further, beyond the decision of the director, the petitioner has 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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The proffered wage as stated on the Form ETA 750 is \$24.94 per hour (\$51,875.20 per year). Relevant evidence in the record includes a statement on the financial capacity of the petitioner dated June 4, 2004 signed by the petitioner's financial officer and the petitioner's unaudited financial statements for 2000, 2001, 2002, 2003, 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On the petition, the petitioner claimed to have been established in 1988 and to currently employ 120 workers.<sup>7</sup> On the Form ETA 750B, signed by the beneficiary on July 12, 2004, the beneficiary claimed to have worked for the petitioner as a software consultant from May 1998 to March 2001, and as a programmer analyst from June 2004 to the date he signed the Form ETA 750B.

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, 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

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<sup>6</sup> In fact, the beneficiary's transcripts from Andhra University show that the beneficiary took only one computer course during his studies at the University.

<sup>7</sup> The regulation at 8 C.F.R. § 204.5(g)(2) states that "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." The regulation allows the director to accept such a statement in his discretion. With the petition, the petitioner submitted a statement on the financial capacity of the petitioner dated June 4, 2004 signed by the petitioner's financial officer. The letter states that the petitioner employs over 100 employees and that the petitioner's annual gross income is \$15,000,000.00. The director issued a request for evidence (RFE) to the petitioner on January 3, 2006 and, in part, requested the petitioner to provide documentation of the petitioner's ability to pay the proffered wage from April 11, 2000 to the present. The director declined to rely on the letter from the petitioner's financial officer in the determination of the petitioner's ability to pay the proffered wage and, instead, asked the petitioner to provide copies of its annual reports, federal tax returns or audited financial statements for the relevant period. The petitioner declined to provide copies of the requested documents. Therefore, this office will not rely solely on the letter from the petitioner's financial officer in our determination of the petitioner's continuing ability to pay the proffered wage.

business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 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 beneficiary's IRS Forms W-2 for 2004 and 2005 show compensation received from the petitioner, as shown in the table below.

- In 2004, the Form W-2 stated compensation of \$41,592.12.
- In 2005, the Form W-2 stated compensation of \$85,003.98.

Therefore, for the year 2004, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages that year. Since the proffered wage is \$51,875.20 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$10,283.08 in 2004. For the year 2005, the petitioner has established its ability to pay the proffered wage. For the years 2000, 2001, 2002, and 2003, the petitioner must establish its ability to pay the entire proffered wage.

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 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 Chang* at 537.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>8</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 record before the director closed on March 27, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence (RFE). The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in his RFE, the petitioner declined to provide copies of its annual reports, federal tax returns or audited financial statements covering the period from April 11, 2000 to the present.<sup>9</sup> The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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 issues 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 is to be certified to the AAO for review.

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<sup>8</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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>9</sup> Instead, the petitioner submitted unaudited financial statements for 2000, 2001, 2002, 2003, 2004 and 2005. 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.