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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

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: NOV 18 2004

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:

[redacted]

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.

for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a computer consulting and engineering firm. It seeks to employ the beneficiary permanently in the United States as a financial 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 noted that the petitioner has seven recently approved petitions for alien workers and must demonstrate the ability to pay those workers in addition to the ability to pay the wage offered to the beneficiary. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also found that the petitioner had failed to prove that the beneficiary has the education required by the Form ETA 750. The director also noted inconsistencies in the petitioner's EID number stated on various documents. The director denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

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 petitioner must demonstrate the continuing ability to pay the proffered wage beginning on 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on September 10, 2001 and states that the position requires a "Masters Degree (or equiv)" in accounting. The proffered wage as stated on the Form ETA 750 is $100,000 per year.

On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner since March 2001. On the petition, the petitioner stated that it was established on April 1, 1995 and that it employs approximately 100 workers.

The petition states that the petitioner's IRS tax identification number is 95-4530989. With the petition, counsel submitted a letter from the petitioner's CEO and president stating that the petitioner employs 65 workers, has gross income in excess of $18 million, and has the ability to pay the proffered wage. No other

evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date was submitted with the petition.

The beneficiary named in the petition is In support of the contention that the beneficiary has the requisite education, the petitioner submitted (1) the report of the higher secondary examination of issued by the board of higher secondary examination in Tamil Nadu, India, (2) report cards of issued by University of Madras on June 1985, June 1986, and March 1987, and (3) a diploma from the University of Madras, India, dated September 30, 1987, awarding a bachelor of commerce degree t

The petitioner also submitted the report of an educational evaluator, dated April 27, 2000, stating that she found that the beneficiary has the equivalent of a master's degree in accounting. That report, however, stated that the degree from the University of Madras is a three-year bachelor's degree. The report stated that the beneficiary received additional education, upon which the evaluator's opinion was based, at the Institute of Chartered Accountants of India at New Delhi. No other evidence of that additional education was submitted with the petition.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and the beneficiary's eligibility for the proffered position, the California Service Center, on December 17, 2003, requested additional evidence.

Consistent with 8 C.F.R. § 204.5(g)(2) the Service Center requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to show that it had the continuing ability to pay the proffered wage beginning on the priority date. The Service Center noted that, as the petitioner had filed at least eight alien worker petitions it was obliged to demonstrate the ability to pay the proffered wage for all eight workers. The Service Center also specifically requested (1) 2001 and 2002 Form W-2 Wage and Tax Statements or Form 1099 Miscellaneous Income statements to show amounts it paid to the beneficiary during those years, (2) California Form DE-6 Quarterly Wage Reports for each quarter from the third quarter of 2001 through the third quarter of 2003, and (3) a copy of the petitioner's current business license. The Service Center also requested that the petitioner state the location at which the beneficiary would work, and provide evidence of contracts if the beneficiary would be contracted to work away from the petitioner's premises.

As to the beneficiary's education, the Service Center requested that the petitioner provide evidence sufficient to demonstrate that the beneficiary, holds a U.S. masters degree in accounting or an equivalent foreign degree. The Service Center stipulated that such evidence should include a copy of the beneficiary's official transcript and a copy of her diploma.

In response, counsel submitted (1) the petitioner's 2001 and 2002 Form 1120 U.S. Corporation Income Tax Returns, (2) 2001 and 2002 W-2 forms showing that the petitioner paid the beneficiary $81,326.85 and $114,717.70 during those years, respectively, (3) the requested California Form DE-6 reports, (4) the requested business license, and (5) copies of some documents previously submitted.

Both of the tax returns submitted indicate that the petitioner's IRS tax identification number is 95-4844560. The 2001 tax return shows that the petitioner declared a loss of $336,780 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The 2002 tax return shows that the petitioner declared a loss of $127,464 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that at the end of that year the petitioner's current liabilities exceeded its current assets.

The Form DE-6 quarterly reports submitted show that the number of workers the petitioner employed decreased from 111 to 67 during the period covered by those reports.

The documents submitted ostensibly relevant to the beneficiary's education included copies of the same documents previously submitted. Those documents show that graduated from the University of Madras, India, with a bachelor of commerce degree. Counsel also provided a copy of a certificate of membership showing that Ms. as admitted as an associate of the Institute of Chartered Accountants on August 29, 1991. Counsel provided no documents at that time, however, to demonstrate that is the same person as the beneficiary

Subsequently, in a collateral matter,[1] the beneficiary submitted additional documentation to CIS. That documentation includes a copy of the beneficiary's birth certificate showing that she was born on August 16, 1967, the daughter of a Mr That documentation also includes a copy of a statement notarized in India attesting that Mrs. daughter of C.L. Sarangpani was married to on May 23, 1993. The beneficiary attested to that affidavit.

On March 18, 2004, the director issued a decision in this matter. The director noted that the evidence does not demonstrate that the petitioner employs 100 or more workers. The director further noted that, as the petitioner then had seven approved alien worker petitions, it was obliged to demonstrate the ability to pay the proffered wage to those seven workers in addition to the ability to pay the proffered wage to the instant beneficiary. The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

As to the beneficiary's education, the director noted that the petitioner had failed to submit the requested copy of the transcript of classes the beneficiary took that are ostensibly the equivalent of a masters degree in accounting. Without that evidence, the director observed that CIS is unable to determine whether the beneficiary's education is truly the equivalent of a master's degree in accounting. The director stated that the petitioner had failed to demonstrate that the alleged graduate, is the same person as the beneficiary. The director also noted the discrepancy, described above, pertinent to the petitioner's IRS tax identification number. The director denied the petition.

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[1] The collateral matter was the submission of a Form I-485, Application to Register Permanent Residence of Adjust Status.

On appeal, counsel submits a brief. Counsel states that, as the beneficiary began to work for the petitioner during March of 2001, and was paid $81,326.85 for her work from then until the end of the calendar year, there is no discrepancy between the wages paid to the beneficiary during 2001 and the proffered wage. Counsel cited three non-precedent decisions of this office for the proposition that actual payment of the proffered wage during a given period obviates the need to otherwise prove the ability to pay the proffered wage during that same period.

Although 8 C.F.R. 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

With the appeal, counsel submitted the transcript of classes of Ms education at the Institute of Chartered Accountants of India. That document is sufficient to demonstrate that the education obtained by s the equivalent of a U.S. masters degree in accounting.

On appeal, counsel also stated, "The Notice of Denial alleges that there is evidence that and [the beneficiary] are not one and the same person." In support of the contention that is the beneficiary's maiden name, counsel submitted a copy of the beneficiary's marriage certificate, a copy of a page of the beneficiary's passport showing her maiden name, a copy of an invitation to the beneficiary's wedding, and a copy of the beneficiary's daughter's birth certificate. Although counsel's statement implicitly misstates the burden of proof in this matter, the documents submitted are, in the aggregate, sufficient to demonstrate tha s the beneficiary's maiden name.

As to the different taxpayer identification numbers, counsel stated that a company named OSI incorporated in Delaware on August 16, 2000. Counsel further stated that the petitioner merged with that company on December 31, 2000. Counsel stated that the taxpayer identification number of the petitioner prior to that merger was 95-4530989 and that after the merger it was given a new taxpayer identification number, 95-4844560. In support of that version of events, counsel submitted documents pertinent to the incorporation and merger of those two companies and the application for taxpayer identifications numbers resulting in the issuance of those two numbers. The documents submitted demonstrate the veracity of counsel's explanation of the perceived taxpayer identification number discrepancy.

The remaining issue is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established that it employed the beneficiary since March of 2001 and that it paid the beneficiary $81,326.85 during 2001 and $114,717.70 during 2002.

The priority date is September 10, 2001. The proffered wage is $100,000 per year. The exact date during March 2001 upon which the beneficiary began to work for the petitioner is not stated in the record. As counsel notes, $100,000 per year is equal to $8,333.33 per month. Thus, if the petitioner hired the beneficiary

very early during March 2001 and paid her at the rate of $100,000, she would have received approximately $83,333 during that year. If the petitioner hired the beneficiary very late in March of 2001 she would have received approximately $75,000. The evidence that the petitioner paid the beneficiary $81,326.85 during 2001 is consistent with the petitioner having hired the beneficiary during March of 2001 and having paid her at the rate of $100,000 per year. The petitioner has demonstrated the ability to pay the proffered wage during 2001.

During 2002, the petitioner paid the beneficiary $114,717.70. That amount is greater than the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2002. No evidence pertinent to other years was requested.

The petitioner has demonstrated that it paid the proffered wage to the beneficiary during both of the salient years. Having paid the proffered wage, the petitioner has manifestly demonstrated that it was able to pay the proffered wage. That the petitioner has multiple petitions is therefore irrelevant to the outcome of this petition.

The petitioner has overcome each of the bases of the decision of denial. 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.