U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 16 2006

EAC 04 063 50283

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.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's November 26, 2004 denial, the director determined that the petitioner had not established that the beneficiary holds a United States baccalaureate degree or its foreign equivalent. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. 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.

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 September 19, 2001.[1]

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] On appeal, counsel submits a brief, an affidavit dated December 21, 2004 from the petitioner, previously submitted newspaper advertisements for the proffered job, an educational evaluation report from IndoUS Technology & Educational Services Inc. and the beneficiary's previously submitted diplomas and transcripts.[3] Other

[1] The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[2] 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).

[3] On August 11, 2004, pursuant to a request for evidence (RFE), the director informed the petitioner that the educational evaluation conducted by Zicklin School of Business at Baruch College-the City University of New York and originally submitted with the petition was insufficient because it considers work experience in determining that the beneficiary has the equivalent of a bachelor of science degree in computer science. The director requested that the petitioner provide an evaluation of the beneficiary's education that considers formal education only, not practical experience, that states whether the collegiate training was post-secondary education, that provides a detailed explanation of the material evaluated and that briefly states the qualifications and experience of the evaluator providing the opinion. The petitioner did not provide a sufficient evaluation in response to the RFE. Instead, the petitioner resubmitted the evaluation from the Zicklin School of Business at Baruch College-the City University of New York and stated that it should be accepted as evidence that the beneficiary possesses the equivalent of a baccalaureate degree. The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept

relevant evidence in the record includes a letter dated October 29, 2003 from the petitioner, an educational evaluation report from Zicklin School of Business at Baruch College-the City University of New York, and the beneficiary's resume. The record does not contain any other evidence relevant to the beneficiary's education.

On appeal, counsel asserts that the director erred in his determination that the beneficiary does not hold the equivalent of a United States baccalaureate degree. Counsel states that the beneficiary holds the equivalent of a United States baccalaureate degree based on his education in India. In addition, counsel argues that since the employer considered the equivalent of a bachelor degree based on a combination of education and work experience to be acceptable, the beneficiary meets the requirements for the proffered job based on his education and work experience.

The record contains a copy of an evaluation of the beneficiary's education and experience dated April 2, 2001 by [redacted] of the Zicklin School of Business at Baruch College-the City University of New York which finds that the beneficiary's education and experience are equivalent to a bachelor's degree in computer science from an accredited university in the United States. The evaluation relies on a formula that for every year of university studies, three years of specialized work experience may be substituted.

Citizenship and Immigration Services (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 that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The formula employed by Pai-chun Ma in substituting three years of specialized work experience for one year of university level studies is one which is found in the regulations governing H-1B nonimmigrant visas petitions. *See* 8 C.F.R. 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition.

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.

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evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the educational evaluation from IndoUS Technology & Educational Services Inc. to be considered, it should have submitted the evaluation in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and will not, consider the sufficiency of the educational evaluation from IndoUS Technology & Educational Services Inc. submitted on appeal.

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 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	blank
	High School	blank
	College	4
	College Degree Required	Bachelor
	Major Field of Study	**Comp.** Sci. (Computer Science)/ Management Info. System or related field

The duties of the job offered are delineated at Item 13 of the Form ETA 750A. Since this is a public record, the duties 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 degree from Osmania University in India. He specifically states that the degree is equivalent to three years of undergraduate study in the United States. He does not provide any additional information concerning his education on that form.

The record indicates that the beneficiary has not completed four years of college studies and does not hold a United States baccalaureate degree or a foreign equivalent degree. The record contains copies of the beneficiary's diploma from Osmania University in India, his diploma in computer applications from Intel Computer Training Centre in India, his diploma in hardware technology from Computers & Communications Technology in India, and his certificate in computer coursework from Aptech Computer Education in India. The record does not demonstrate that the diploma from Osmania University in India is a single academic degree that is a foreign equivalent degree to a United States baccalaureate degree. Further, the beneficiary's diploma in computer applications from Intel Computer Training Centre, his diploma in hardware technology from Computers & Communications Technology, and his certificate in computer coursework from Aptech Computer Education have not been shown individually to be a single academic degree that is the foreign equivalent of a United States baccalaureate degree. The beneficiary clearly states on Form ETA 750B that his education at Osmania University lasted three years. In addition, the educational evaluation report from Zicklin School of Business at Baruch College-the City University of New York states that the beneficiary's education at Osmania University is the equivalent of three years of academic studies leading to a bachelor of science degree in computer science from an accredited institution of higher education in the United States. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). As stated above, the regulations set forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a United States baccalaureate degree. The petitioner has failed to meet this requirement.

Further, Zicklin School of Business at Baruch College-the City University of New York is not a member of the National Association of Credential Evaluation Services (NACES).[4] The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector. In light of the AAO's findings concerning the beneficiary's educational program, the credential evaluation provided by Zicklin School of Business at Baruch College-the City University of New York carries little evidentiary weight in these proceedings.

In this case, the labor certification clearly indicates that the beneficiary must have completed four years of college and posses a baccalaureate degree, not a combination of degrees, training, work experience or certificates which, when taken together, equals the same amount of coursework required for a United States baccalaureate degree. Despite the petitioner's affidavit indicating that the petitioner will accept a combination of education and work experience and newspaper advertisements indicating that the petitioner will accept a bachelor of science degree or its equivalent, 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). At any rate, the ETA 750 specifically requires four years of college education. The beneficiary has not satisfied these requirements.

The AAO thus affirms the director's decision that the petitioner has not established that the beneficiary possesses the foreign equivalent of a United States baccalaureate degree as required by the terms of the labor certification.

Beyond the decision of the director, the petitioner has not shown its continuing ability to pay the proffered wage beginning on the priority date.[5] 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 DOL. *See* 8 CFR § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA

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[4] This office notes that IndoUS Technology & Educational Services Inc. is not a member of NACES.

[5] 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*, 229 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 cases on a de novo basis).

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 proffered wage as stated on the Form ETA 750 is $74,890.40 per year. Relevant evidence in the record includes two paystubs issued by the petitioner to the beneficiary. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.[6]

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 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 record contains copies of two paystubs issued by the petitioner to the beneficiary. One paystub dated February 27, 2004 indicates that the beneficiary's year-to-date earnings were $2,520.00. The other paystub dated October 24, 2003 indicates that the beneficiary's year-to-date earnings were $4,294.00.[7]

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[6] CIS electronic records show that the petitioner filed two other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). *See also* 8 C.F.R. § 204.5(g)(2). The other petitions submitted by the petitioner in July 2004 and May 2005 were approved in December 2004 and June 2005, respectively. The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

[7] The record contains two Forms I-797A, Notices of Action, indicating that the petitioner filed two I-129 petitions to classify the beneficiary in H-1B nonimmigrant status. The beneficiary was granted H-1B status valid from April 16, 2001 through October 16, 2006. Although the petitioner stated on the Form ETA 750 that it intends to pay the beneficiary the proffered wage when the alien begins work under the I-140 petition, the evidence in the record indicates that the petitioner has not been paying the beneficiary the prevailing wage for

Therefore, for the years 2001, 2002, 2003 and 2004, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date, but it has established that it paid partial wages in 2003 and 2004. Since the proffered wage is $74,890.40 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 $72,370.40 and $70,596.40 in 2003 and 2004, respectively.

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).

The regulation at 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. The record before the director closed on September 28, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal income tax return is the most recent return available. However, the record contains no federal income tax returns for the petitioner. Further the record contains no annual reports, audited financial statements or other evidence that would establish the petitioner's ability to pay the proffered wage. While the petitioner indicated in a letter dated October 29, 2003 in support of the petition that it is currently paying the petitioner $74,890.40 per year, the petitioner provided no evidence to support this assertion. 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 evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date in 2001.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa proceedings, the burden of proof 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.

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his work on an H-1B visa under the I-129 petitions, despite its attestations on those petitions that it would do so. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).