

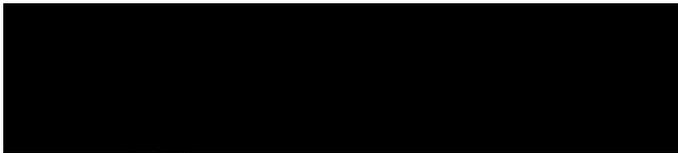


U.S. Citizenship
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Services

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Office: VERMONT SERVICE CENTER

Date: **JUN 08 2006**

EAC-04-055-51889

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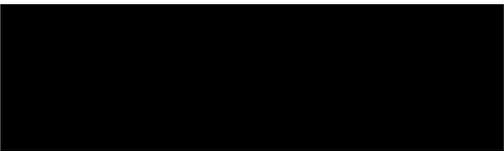
Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center. Upon completion of reviewing the record of proceeding after granting a motion to reconsider and/or reopen, the director affirmed the previous decision. Now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software developing and consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because she determined that the petitioner did not present evidence that the beneficiary possessed the requisite U.S. Bachelor degree or its foreign degree equivalent, therefore, he was ineligible for classification as an E32 professional under Section 203(b)(3)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).

On appeal, the petitioner's counsel contends that the beneficiary's credentials are sufficient to meet the requirements of the labor certification and submits additional evidence.¹

Section 203(b)(3)(A)(i) of the Act 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) also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Citizenship and Immigration Services (CIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

receipt in the Department of Labor's employment service system. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); 8 C.F.R. § 204.5(d). In this case, that date is October 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, item 14, 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 | 8 |
| | High School | 4 |
| | College | |
| | College Degree Required | Bachelor |
| | Major Field of Study | Computer Sc., Engineering or Business |

The applicant must also have two years of employment experience in the job offered or the related occupation of programmer analyst, programmer, or systems manager.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended the University of Bombay in India in the field of "Business/Commerce" from June 1984 through March 1990, culminating in the receipt of a "Bachelor of Commerce", and also attended the Datamatics Institute of Management in Bombay, India in the field of "Computer Science" from November 1988 to March 1990, culminating in the receipt of a "Postgraduate Diploma in Computer Science." He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. In corroboration of the Form ETA-750B, the petitioner provided copies of The Post Graduate Diploma in Computer Science issued by Datamatics Institute of Management with its transcripts, Bachelor of Commerce certificate issued by the University of Bombay with transcripts, and two experience letters from Rafiq Iivani of Global Consulting Services, Inc. and N.S. Shridhar of Raymond Ltd.

A credential evaluation of education, training, and experience drafted [redacted] School of Business, Medgar Evers College of the City University of New York was also initially submitted with the petition and stated the following in pertinent part:

[The beneficiary] was awarded a Diploma for a Bachelor of Commerce Degree from the University [of Bombay]. The nature of the courses and the credit hours involved indicate that he completed the equivalent of three years of academic studies leading to a Bachelor's Degree in the area of management from an accredited institution of higher education in the United States.

* * * * *

As set forth above, [the beneficiary] completed approximately twelve years of employment experience and training in positions of progressively increasing responsibility and sophistication, characterized by the theoretical and practical application of specialized knowledge and training by superiors, together with peers, with baccalaureate-level training in management information systems, and related areas. At the equivalency ratio of three years of work experience for one year of college training, promulgated by [CIS], [the beneficiary] completed, in time equivalence,

four years of the academic studies required in connection with the attainment of a bachelor's-level degree, in addition to his completion of a Bachelor of Commerce Degree. Due to the concentrated nature of his work experience and training in MIS and related areas, it is my opinion that [the beneficiary]'s background would be comparable to university-level training in management information systems.

Accordingly, based on the reputations of the University of Bombay, the number of years of coursework, the nature of the coursework, the grades attained in the courses, and the hours of academic coursework, as well as approximately twelve years of work experience and training in management information systems, and related areas, it is my judgment that [the beneficiary] completed the equivalent of a Bachelor of Science Degree in Management Information Systems from an accredited institution of higher education in the United States.

The director denied the petition on August 17, 2004, finding that the evaluation provided indicates that the beneficiary possesses the equivalent of a U.S. bachelor degree in Management Information Systems by virtue of the combination of his formal education and work experience while 8 C.F.R. § 204.5(1)(3)(ii) requires that a beneficiary must hold a United States baccalaureate degree or a foreign equivalent degree, not just a "functional equivalent." The director determined that the petitioner has not established that the beneficiary possessed the requisite education requirements for the permanent position as certified by the Department of Labor. On October 19, 2004, the director also affirmed her previous decision and denied the petition after granting a motion to reconsider and/or reopen and a complete review of the record of proceeding.

On appeal, counsel asserts that the beneficiary has the educational equivalent to a baccalaureate degree on the basis of combining his Bachelor's degree in Commerce and Diploma in Computer Science. Counsel submits an additional credential evaluation by [redacted] Professor of Computer Information systems, City University of New York to support his assertion. Counsel claims that letters of [redacted] Director of USCIS Business and Trade Services supports his argument that a three year bachelor's degree and completion of a postgraduate diploma program may be deemed to be equivalent to a four year U.S. bachelor degree.

The record indicates that the beneficiary does not hold a U.S. bachelor's degree or a foreign equivalent degree. The beneficiary holds a bachelor's degree of commerce from the University of Bombay in January 1991. The credential evaluations state that this degree is the equivalent to three years undergraduate study at an accredited U.S. college or university. The new credential evaluation submitted on appeal is drafted by [redacted] of Computer Information Systems at the City University of New York on November 10, 2004. [redacted] summarizes his findings as follows: "[f]ollowing his completion of the required academic classes and examinations on January 18, 1991, [the beneficiary] was awarded a Diploma for a Bachelor of Commerce Degree by the University of Bombay. The nature of the courses and the credit hours involved indicate that he completed the equivalent of three years of academic studies toward a Bachelor's Degree in Business Administration from an accredited college or university in the United States." However, a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's degree from the University of Bombay cannot be considered a foreign equivalent degree.

The beneficiary also holds a Diploma in Computer Science from the Datamatics Institute of Management in India. [redacted] submitted on appeal states that: "[the beneficiary] enrolled in a Diploma in Computer Science program at the Datamatics Institute of Management, a recognized educational institution in India. Admission to the graduate-level programs of the Datamatics Institute of Management is based on the

completion of secondary-level academic studies.” The petitioner also submitted a Certificate of Merit showing the beneficiary was awarded a Diploma in Computer Operation from Door-Step Computers. However, the evaluation and the record of proceeding do not demonstrate either the diploma in computer science from the Datamatics Institute of Management or the diploma in computer operation from Door-Step Computers is a single academic degree that is a foreign equivalent degree to a U.S. bachelor’s degree. As stated above, the regulation 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. The combination of a degree deemed less than the equivalent to a U.S. baccalaureate degree and a diploma or certificate does not meet that requirement.

Further, the previous submitted evaluation [REDACTED] used the rule to equate three years of experience for one year of education, however, as the director correctly pointed out in her decision that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The beneficiary in the instant case was required to have a four years bachelor’s degree in computer science, engineering or business on the Form ETA 750. The petitioner’s actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director’s decision to deny the petition must be affirmed.

Counsel also submits copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from [REDACTED] the CIS Business and trade Services to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2). Within the July 2003 letter, [REDACTED] states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor’s degree.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); see also, Memorandum [REDACTED] Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in [REDACTED] correspondence, permits a certain combination of progressive work experience and a bachelor’s degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree under the third preference category.

The AAO concurs with the director’s findings that the petitioner did not establish that the beneficiary possessed the requisite educational requirement for the proffered position prior to the priority date. Counsel’s assertions on appeal cannot overcome the ground of denying the petition.

Beyond the director's decision, the AAO will review the petitioner's ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR § 204.5(d).

Here, the Form ETA 750 was accepted on October 30, 2001. The proffered wage as stated on the Form ETA 750 is \$80,000 per year. On the Form ETA 750B, signed by the beneficiary on October 19, 2001, the beneficiary claimed to have worked for the petitioner since February 2001. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$4 million, and to currently employ 35 workers. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year.

With the petition, the petitioner submitted a letter from its Chief Executive Officer, and its Form 1120 U.S. Corporation Income Tax Return for 2002 pertinent to its ability to pay.

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 of proceeding contains the beneficiary's W-2 forms for 2001 and 2002, and the beneficiary's pay stubs for February and March of 2004 submitted with the beneficiary's application for adjustment of status to lawful permanent resident. The W-2 forms indicate that the petitioner employed and paid the beneficiary \$62,827.70 in 2001 and \$23,214.00 in 2002. There is no evidence of the beneficiary's compensation from the petitioner in the record for 2003. The beneficiary's pay stubs show that the beneficiary earned \$24,339.00 as of March 31, 2004 for that year. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during the period from the

priority date through 2004. The petitioner is obligated to demonstrate that it could pay the difference between the wages actually paid to the beneficiary and the proffered wage of \$17,172.30 in 2001 and \$56,786 in 2002, and the full proffered wage of \$80,000 in 2003.

With the petition, the petitioner submitted a letter from its Chief Executive Officer regarding its ability to pay the beneficiary the proffered wage. As quoted above the regulation 8 C.F.R. § 204.5(g)(2) only permits the director to accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage in a case where the prospective United States employer employs 100 or more workers. However, the instant petitioner employs 35 workers, which is less than 100. Therefore, the statement from the petitioner's CEO cannot be accepted as evidence of the petitioner's ability to pay the proffered wage.

CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains the petitioner's Form 1120 tax return for 2002 which stated net income² of \$11,122. Therefore, for the year 2002, the petitioner did not have sufficient net income to pay \$56,786 of the difference between wages actually paid to the beneficiary and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of

² Taxable income before net operating loss deduction and special deductions as reported on Line 28.

business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's net current assets during the year 2002, were \$11,066. The petitioner had insufficient net current assets to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2002.

The petitioner did not submit its tax returns or other regulatory-required evidence for 2001, the year of the priority date, and 2003 to establish its ability to pay the proffered wage or the difference between wages paid and the proffered wage.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

³ According to *Barron's Dictionary of Accounting Terms* 117 (3rd 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.