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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: DEC 03 2007

LIN-07-111-53128

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, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal[1]. The appeal will be remanded to the director.

The petitioner is a networking services and solutions company. It seeks to employ the beneficiary permanently in the United States as a computer hardware engineer (hardware engineer). As required by statute, the petition is accompanied by a Form ETA 750, [redacted] approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary possessed the requisite U.S. Bachelor degree or its foreign degree equivalent, and therefore, he was ineligible for classification sought. 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.

As set forth in the director's March 8, 2007 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite bachelor's degree as required by the Form ETA 750 and was qualified for the proffered position prior to the priority date.

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 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.

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 U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on September 5, 2001.

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

[1] While this appeal was pending with the AAO, on April 30, 2007 the petitioner filed another I-140 immigrant petition (LIN-07-150-53947) for the instant beneficiary in the same position based on an approved labor certification initially submitted for another alien with a premium processing request and the petition LIN-07-150-53947 was approved by the Nebraska Service Center on May 3, 2007.

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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[2]. On appeal, counsel submits the beneficiary's transcripts from the Indian Institute of Technology and an educational evaluation from [redacted] Vice chair of the Computer Information Systems Department at Megar Evers College of the City University of New York (CUNY). Other relevant evidence in the record includes the beneficiary's bachelor of technology degree from the Indian Institute of Technology and an academic equivalency evaluation from the Trustforte Corporation. The record does not contain any other evidence relevant to the beneficiary's requisite bachelor's degree.

On appeal, counsel asserts that the submitted evidence demonstrates that the beneficiary earned a four-year baccalaureate degree from the Indian Institute of Technology which has been evaluated as equivalent to a four-year Bachelor of Science Degree in Computer Engineering from an accredited US college or university.

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).

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

14.	Education	
	Grade School	yes
	High School	yes
	College	yes
	College Degree Required	Bachelor's degree
	Major Field of Study	EE/CE

The applicant must also have three 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. 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 Indian Institute of Technology in Delhi, India in the field of "Computer Science" from June 1993 through June 1997, culminating in the receipt of a "Bachelor of Technology" degree. He

[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). 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).

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 the beneficiary's Bachelor of Technology degree in computer science and engineering issued by Indian Institute of Technology on August 9, 1997 and an academic equivalent evaluation dated March 10, 2004 from the Trustforte Corporation (Trustforte).

A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). If supported by a proper credentials evaluation, a four-year baccalaureate degree from India can reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. However, neither the degree nor the evaluation from Trustforte indicates that the beneficiary's bachelor of technology degree from Indian Institute of Technology was awarded upon completing a four-year curriculum of formal college level education. Therefore, the director determined that the beneficiary did not hold a foreign equivalent degree as required by the Form ETA 750.

On appeal counsel submits the beneficiary's transcripts from Indian Institute of Technology and another evaluation from [redacted]. The beneficiary's degree and transcripts from Indian Institute of Technology show that the beneficiary attended that school for eight semesters (4 academic years from 1993 to 1997) majoring in computer science and engineering and was awarded Bachelor of Technology degree in Computer Science & Engineering on August 9, 1997 upon completion of his four-year curriculum. Prof. Robotham clearly indicates in his evaluation that the bachelor of technology program completed by the beneficiary was a four-year bachelor's program, directly analogous to four-year bachelor's program at United States universities.

In determining whether the bachelor of technology degree from Indian Institute of Technology is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). ACCRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India. It provides that a Bachelor of Engineering/Technology degree is "awarded upon completion of four years of tertiary study beyond the Higher Secondary Certificate (or equivalent)" and further asserts that "[t]he Bachelor of Engineering/Technology represents attainment of a level of education comparable to a bachelor's degree in the United States."

The AAO concurs with counsel's assertions that the evidence in the record established that the beneficiary obtained the equivalent to a U.S. bachelor's degree in electronic engineering or computer engineering as set forth on the Form ETA 750. Counsel's assertions on appeal have overcome the director's findings that the beneficiary did not hold a foreign equivalent degree. Therefore, the director's ground of the denial must be withdrawn.

Beyond the director's decision and counsel's assertions on appeal, the AAO will discuss whether the petitioner has demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite

three years of experience in the job offered prior to the priority date. 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).

As previously noted, in addition to the bachelor's degree requirement, the Form ETA-750A, item 14 also requires three years of experience in the job offered, i.e. as a hardware engineer, as a part of the minimum requirements for the proffered position. On Part 15 of the Form ETA-750B, eliciting information of the beneficiary's work experience, he represented that he has been working as a full time hardware engineer for Andiamo Systems, Inc. – a storage networking company, located at [redacted] since May 2001. Prior to that, he represented that Netcontinuum, Inc. and R-Cube Technologies Pvt. Ltd. employed him as a full time design verification from January 2001 to May 2001 and from November 1999 to January 2001 respectively. He did not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record of proceeding contains three letters pertinent to the beneficiary's qualifying experience: one from Netcontinuum, Inc., another from [redacted] and the other from [redacted] Netcontinuum's undated letter was on the company's letterhead, signed by [redacted] as the vice president of engineering, and verified that the beneficiary worked for that company in design verification 40 hours a week for four months from January 2001 to May 2001. This letter is from the beneficiary's former employer, however, it is not clear whether the experience in design verification meets the requirement of experience in the job offered of hardware engineer in the instant case. In addition, it verifies only four months of experience.

The letter from [redacted] verifies the beneficiary's 14 months of full-time employment (from November 1999 to January 2001) in design verification with R-Cube Technologies. The letter from [redacted] verifies that the beneficiary worked for Duet Technologies Ltd. for 28 months from July 1997 to November 1999 as a full time member of technical staff. However, [redacted] and [redacted] did not provide the verification on behalf of the beneficiary's former employer. According to the letters, [redacted] was the beneficiary's manager at R-Cube Technologies but now is working as a manager in BBI Technologies Inc. in San Jose, California and Aditi Nigam was the beneficiary's manager at Duet Technologies but now is working as a senior CAD Engineer at Intel Corporation in Santa Clara, California. The regulation quoted above expressly requires that an experience letter be from a former employer. Although the regulation at 8 C.F.R. § 204.5(g)(1) states that the director may consider other documentation relating to the alien's experience if a letter from a current or former employer is unavailable, the petitioner has not established that letters from the beneficiary's former employer are not available. Further, the letters did not come with any documentary evidence to support their contents. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). In addition, the job duties performed by the beneficiary at R-Cube Technologies and Duet

Technologies Ltd. do not indicate requisite experience as hardware engineer, therefore, it is not clear whether the experience in design verification and as a member of technical staff meets the requirement of experience in the job offered of hardware engineer in the instant case.

Furthermore, the three letters provided in the instant case are similarly formatted. This similarity cast doubt on the origin and reliability of the letters. "Doubt cast on any aspect of the petitioner's proof may, of course, 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). Further, the beneficiary's experience referenced in Aditi Nigam's letter is not supported by the beneficiary's own statements on the Form ETA 750B. The beneficiary did not list employment with Duet Technologies Ltd. on the Form ETA 750B. *Matter of Ho*, *id.* at 591-592 states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record does not contain any independent objective evidence to resolve the inconsistency. Without solid evidence, such as the beneficiary's taxation documents showing his income sources from these companies, personnel records, payroll records or payment stubs from these companies, the petitioner failed to demonstrate that the beneficiary possessed the requisite three years of experience as a hardware engineering prior to the priority date of September 5, 2001 in the instant case.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior at least three years of experience as a computer hardware engineer, and further failed to establish that the beneficiary is qualified for the proffered position.

Further beyond the director's decision, the AAO will discuss whether the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence.

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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on September 5, 2001. The proffered wage as stated on the Form ETA 750 is $95,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) further provides: "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 establish the prospective employer's ability to pay the proffered wage." The petitioner claims to have 38,349 employees worldwide, but it did not submit a letter from its financial officer to

establish the petitioner's ability to pay the proffered wage. CIS records show that the petitioner filed 17,321 nonimmigrant and immigrant petitions. Therefore, given the record as a whole and the petitioner's history of filing petitions, CIS would not have exercised its discretion to accept the letter from a financial officer of the petitioner in the instant case even if the petitioner had submitted such a letter.

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 petitioner did not submit the beneficiary's W-2 forms or other documents showing the petitioner paid the beneficiary the full proffered wage during the relevant years 2001 through the present. Therefore, the petitioner failed to establish its ability to pay through the examination of wages actually paid to the beneficiary.

Counsel submitted the petitioner's annual report for 2006 as evidence to establish its continuing ability to pay the proffered wage. The petitioner's annual reports state that the petitioner had net income of $(1,014,000,000) for its fiscal year 2001, $1,893,000,000 for the fiscal year 2002, $3,578,000,000 for the fiscal year 2003, $4,401,000,000 for the fiscal year 2004, $5,741,000,000 for the fiscal year 2005, and $5,580,000,000 for the fiscal year 2006; and that the petitioner had net current assets of $5,640,000,000 for its fiscal year 2004, $3,520,000,000 for the fiscal year 2005, and $14,363,000,000 for the fiscal year 2006. We find that CIS records indicate that the petitioner has filed over 17,321 Form I-140 petitions and Form I-129 nonimmigrant petitions. 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 or approved 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 or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater 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 ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). With the documents submitted by the petitioner, the AAO cannot determine whether the petitioner established its continuing ability to pay all the proffered wages. Given that the number of immigrant and nonimmigrant petitions reflects 45 percent[3] of the petitioner's workforce worldwide, we cannot rely on a net income figure to determine the petitioner's ability to pay the proffered wage without further evidence showing that the petitioner had sufficient net income or net current assets to pay all proffered wages to the beneficiaries of the approved and pending petitions. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director consideration of the issues stated above. The director may request any additional evidence

[3] This is the percentage of the filed immigrant and nonimmigrant petitions out of the total number of the petitioner's employees worldwide. The petitioner claims that it currently employs 38,349 employees worldwide, but it did not provide its number of employees in the United States. The percentage of the petitioner's employees in the United States would be higher.

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.