

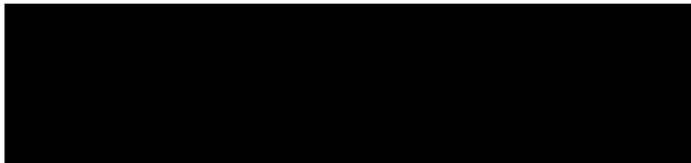
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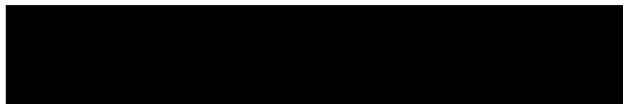


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **AUG 18 2008**
LIN 07 02652959

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

A handwritten signature in cursive script, appearing to read "Robt P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director, Nebraska Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision of December 21, 2006; however, because the petition is not approvable, it is remanded for further action and consideration of the beneficiary's qualifications to perform the duties of the proffered position.¹

The petitioner is a custom computer development company. It seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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 2003 priority date of the visa petition and during tax year 2004. The director noted that the petitioner had established its ability to pay the proffered wage in tax year 2005 based on the beneficiary's wages. The director also noted that the petitioner had not established that it employed over 100 employees and that the petitioner's federal income tax returns served as a basis for determining the petitioner ability to pay the proffered wage. 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 December 21, 2006 denial, the single issue raised by the director is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

¹ The AAO will examine this issue following its discussion of the petitioner's ability to pay the proffered wage as of the 2003 priority date and onwards.

§ 204.5(d). The petitioner must also 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 July 2, 2003. The proffered wage as stated on the Form ETA 750 is \$64,500 per year. The Form ETA 750 states that the position requires four years of college; a bachelor of science degree in engineering with major studies in industrial and production engineering; two and a half years of training on eSchool Data program; and two and a half years of work experience in the proffered position, or four years of work experience in the related occupation of software engineer.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all relevant evidence in the record, including new evidence properly submitted on appeal.²

Relevant evidence submitted on appeal includes counsel's brief, and copies of the petitioner's Forms 1120S, U.S. Income Tax Return for an S Corporation, for tax years 2003 to 2005. The petitioner also submits a copy of the last page of a five-page report from Paychex Inc. as to the beneficiary's earnings from January 1, 2006 to December 2006. This report dated January 11, 2007 listed the beneficiary's earnings in December 2006 and indicated a final gross earning of \$90,429 in regular and overtime pay. The petitioner also submitted a voided pay stub for the first two weeks of tax year 2007 that indicated the beneficiary earned a gross pay of \$4,166.67 during this period of time.

The record also contains the beneficiary's W-2 Forms for tax years 2003, 2004, and 2005 that indicate the petitioner paid him \$58,084.90 in tax year 2003, \$62,079.85 in tax year 2004, and \$72,058.88 in tax year 2005. In its response to the director's RFE dated November 8, 2006, the petitioner also submitted a copy of the beneficiary's voided pay stub that indicated he earned \$77,928 in regular or overtime wages as of November 16, 2006, and copies of the beneficiary's voided pay stubs dated December 14, 2004 and December 31, 2003 that indicated that the petitioner paid the beneficiary \$64,716.68 in regular pay as of December 15, 2004 and \$60,468.75 as of December 31, 2003.

The director in his RFE requested further corroboration of the petitioner having over 100 employees. In response, the petitioner submitted a Paychex listing of 89 employees and a supplementary list of 15 individuals identified as the petitioner's consultants. The petitioner also submitted a letter dated November 30, 2006 and signed by [REDACTED] the petitioner's bookkeeper, stating that the petitioner had employed the beneficiary since August 29, 1999, and that the beneficiary's current gross salary was \$100,000. The petitioner also submitted an Internet report produced by Dun and Bradstreet for the petitioner as of November 30, 2006. The report stated that there was a moderate likelihood the petitioner would not pay on time over the next twelve months; a low likelihood the petitioner would experience financial distress in the next 12 months; and that the timeliness of historical payments

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).

for the petitioner was slow. The record contains no further evidence of the petitioner's ability to pay the proffered wage.

On appeal, counsel states that the petitioner did not attempt to mislead Citizenship and Immigration Services (CIS) when it submitted its list of employees and consultants, and that the distinction between full-time, part-time employees and consultants was an oversight on the petitioner's part. Counsel states that the petitioner, in business since 1974, has had at varying times over the last several years over 100 employees.

With regard to wages paid to the beneficiary, counsel states that although the beneficiary's W-2 statement for tax year 2003 indicated taxable income of \$58,084.90, the beneficiary elected to participate in a Cafeteria Section 125 Plan,³ a pre-tax plan that reduced the beneficiary's taxable income on his W-2 Form. Counsel states the beneficiary placed \$2,880 in the 125 Plan in 2003. Counsel also states that the beneficiary in 2002 borrowed vacation time from tax year 2003 for a 15-day vacation in 2002 and as a result the beneficiary's wages were reduced by \$3,535.10 in actual wages in 2003. Counsel states that the beneficiary's annual gross salary in 2003 was \$64,500, less 14.5 days of unpaid vacation. Counsel calculates a deduction of \$3,535.10 in actual wages paid to the beneficiary in 2003. Counsel then combined the beneficiary's W-2 wage of \$58,084.90 with his contributions to the Cafeteria 125 Plan of \$2,880, and the paid vacation time of \$3,535.10 taken from the beneficiary's wages for the 2002 vacation leave, and states the petitioner actually paid the beneficiary \$64,500, or the proffered wage in tax year 2003.

With regard to tax year 2004, counsel stated that the beneficiary's wages, per the top part of his W-2 Form were stated as \$65,774.85, and the beneficiary's taxable wages were \$62,079.85 because he placed \$3,695 into the petitioner's Cafeteria Section 125 Plan that year, as indicated on the top part of the W-2 Form. Counsel then adds the health insurance premiums of \$7,912.80 paid by the petitioner for the beneficiary and states the total compensation for the beneficiary in tax year 2004 was \$73,678.65.

With regard to tax year 2005, counsel notes the beneficiary's taxable wages were \$72,058.88, and that he placed \$4,095 of wages into the petitioner's Cafeteria 125 Plan and \$2,846.20 into a 401KEE plan, both of which are not taxable. Counsel states that these tax-free sums further reduced the beneficiary's taxable wages. Counsel combined these sums with the beneficiary's medical insurance paid by the petitioner in the amount of \$7,912.80 and states the beneficiary's total compensation for 2005 was \$86,912.88.

³ A cafeteria plan is a separate written plan maintained by an employer for employees that meet the specific requirements of and regulations of section 125 of the Internal Revenue Code. *See* www.irs.gov/govt/fsla/article/0,,id=112720,00.html#1 (FAQs for government entities regarding cafeteria plans. Available as of July 14, 2008.) It provides participants an opportunity to receive certain benefits on a pretax basis. Participants in a cafeteria plan must be permitted to choose among at least one taxable benefit (such as cash) and one qualified benefit. A qualified benefit is a benefit that does not defer compensation and is excludable from an employee's gross income under a specific provision of the Code, without being subject to the principles of constructive receipt. Qualified benefits include: Accident and health benefits (but not Archer medical savings accounts or long-term care insurance); adoption assistance, dependent care assistance, group-term life insurance coverage, and health savings accounts, including distributions to pay long-term care services. A section 125 plan is the only means by which an employer can offer employees a choice between taxable and nontaxable benefits without the choice causing the benefits to become taxable.

Counsel then refers to a document entitled "Memorandum for Regional Directors, et al., Chapter 22, Employment based Petitions," and states that this document states in pertinent part that a petition may still be approved if the employer can demonstrate the financial ability to pay the required wage and the intent to do so once the I-485 is approved, even if the petitioner is not paying that wage when it filed the Form I-140 petition. Counsel notes that at the time of filing the instant I-140 petition in 2006, the petitioner was paying the beneficiary \$100,000 annually. Counsel states that in 2006, the beneficiary was paid \$90,429, while the evidence submitted with regard to the beneficiary's 2007 earnings showing a biweekly gross earnings of \$4,166.67 indicates the beneficiary could earn over \$108,000 in 2007, a sum well above the \$64,500 proffered wage.

The evidence in the record of proceeding indicates that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established on January 1, 1974, to have a gross annual income of \$16,463,557, a net annual income of \$797,150, and to currently have 102 employees. On the Form ETA 750, signed by the beneficiary on June 11, 2003, the beneficiary claimed to have worked directly with the petitioner as of June 2000, and to have performed subcontracted work for the petitioner through Systemlogic, a California company, since August 1999.

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. Thus counsel's assertion that the petitioner was paying the proffered wage to the beneficiary at the time the instant I-140 was filed, is not persuasive, as the 2007 wages do not establish that the petitioner paid the proffered wage as of the 2003 priority date. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 Forms for tax years 2003 to 2005, as well as Paychex documentation for the beneficiary's wages in tax year 2006, and 2007. The W-2 Forms, as previously stated, established that the beneficiary received wages of \$58,084.90 in tax year 2003, \$62,079.85 in tax year 2004, and \$72,058.88 in tax year 2005. Thus, the petitioner established its ability to pay the proffered wage based on the beneficiary's wages in tax year 2005. The documentation submitted by the petitioner with regard to the beneficiary's wages in tax year 2006 and 2007 support the petitioner's ability to pay the proffered wage in these years also. The AAO will not comment further on tax years 2005, 2006, or 2007 in these proceedings.

With regard to tax years 2003 and 2004, counsel suggests that items such as payments made by the beneficiary to tax free programs such as the petitioner's Cafeteria 125 plan and to the beneficiary's 401 K plan be added back to the beneficiary's gross wages during these years. The AAO notes that the beneficiary's W-2 Forms in 2004 does indicate he earned regular wages of \$65,774.85, and that the sum of \$3,695 was deducted from his wages for a

voluntary adjustment described as MED 125, resulting in the beneficiary earning wages, tips and other compensation of \$62,079.85. Since these payments were from pre-tax compensation made to the beneficiary by the petitioner, the AAO will accept the addition of such payments to the beneficiary's W-2 wages in tax year 2004. Thus, the petitioner established its ability to pay the proffered wage in tax year 2004 based on the beneficiary's wages.

The beneficiary's W-2 form for tax year 2003 does not contain a breakout of voluntary adjustments made by the beneficiary. The Paychex documentation submitted to the record dated December 31, 2006 does indicate a payment of Med125 (DE, NY, P) deducted from the beneficiary's wages in tax year 2003 and also indicates that the beneficiary's gross pay in 2003 was \$60,964.90. The AAO notes that even if the beneficiary's payments into the Med 125 category were included in the beneficiary's wages, the beneficiary's resulting gross pay of \$60,964.90 would not be sufficient to establish the petitioner's ability to pay the proffered wage based on the beneficiary's wages in tax year 2003. The petitioner would have to establish its ability to pay the difference between the beneficiary's gross wages, including the payments made to Med125 category, of \$60,964.90, and the actual proffered wage of \$64,500, namely, \$3,535.10.

Counsel's assertions that the monies paid by the petitioner toward the beneficiary's health benefits should be included in any consideration of the beneficiary's yearly wages are not persuasive, as these sums paid by the petitioner directly to a health plan were never received by the beneficiary as wages or payments or compensation. Likewise, counsel's assertions that the deductions made to the beneficiary's salary, based on his taking 2003 paid vacation time earlier in tax year 2002, should be added back to the beneficiary's 2003 salary do not appear persuasive. If the beneficiary's 2003 leave time was used earlier and not paid to him in tax year 2003, then it would not have been reflected in his 2003 wage statement as compensation.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross 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 Chang* at 537.

On appeal, the petitioner submitted its tax return for tax year 2003, 2004, and 2005. As previously stated, the petitioner established its ability to pay the proffered wage in 2005, and based on the additional tax-free compensation earned by the beneficiary in 2004, also established its ability to pay the proffered wage in 2004. Thus, the AAO will only examine the petitioner's 2003 net income. The petitioner's 2003 tax return demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$64,500 per year during the priority date:

- In 2003, the Form 1120S stated a net income⁴ of -\$1,834,671.

Therefore, for the priority year 2003, the petitioner did not have sufficient net income to pay the proffered wage of \$64,500.⁵

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, including real property that counsel asserts should be considered. Those depreciable assets will not be converted to cash during the ordinary course of 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.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current

⁴ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and interest income or adjustments shown on its Schedule K for tax years 2003 and 2004, the petitioner's net income is found on Schedule K of its tax return.

⁵ CIS computer records indicate that the petitioner has submitted seven petitions in either the non-immigrant or immigrant employment based visa categories, with three of these applications being for the beneficiary either in H-1B status or the instant I-140 immigrant classification. The AAO notes that the petitioner's net income in tax year 2004 is \$975,937. Based on the petitioner's net income for 2004, the petitioner appears able to pay the remaining four non-immigrant I-129 petitions.

⁶According 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

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. With regard to tax year 2003, the petitioner's net current assets are -\$1,924,626.

Thus the petitioner cannot establish its ability to pay the proffered wage based on its net current assets for tax year 2003, its net income, or the wages paid to the beneficiary. Therefore, from the date the Form ETA 750, was filed with the Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the 2003 priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel's assertions on appeal, with regard to recalculating the beneficiary's wages in tax year 2003 cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor.

In evaluating whether a job offer is realistic, as previously stated, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonogawa, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

In the instant petition, the petitioner has been in business for thirty years, since 1974, and has submitted evidence of a present combined employee and contractor base of over 100 employees, with considerably more employees than contractors. The petitioner's tax returns indicate significant amounts of salaries or compensation paid to officers, employees, and contractors during the relevant period of time in question. Based on these factors, the petitioner appears to be a viable business entity capable of paying the proffered wage. Thus, the totality of the petitioner's circumstances would support the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the AAO notes that the record contains conflicting evidence or insufficient evidence with regard to the beneficiary's qualifications to perform the duties of the proffered

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.

position. 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).

In the instant petition, the petitioner submitted the I-140 petition identifying the beneficiary's classification as a professional. 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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

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. Evident 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 showing 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). As previously stated, the Form ETA 750 was accepted on July 2, 2003.

The Form ETA 750 required a four year bachelor's of science degree in engineering, with the major field of study listed as industrial and production engineering, two years and six months of training on the eSchool Data program, and two years and six months of work experience in the proffered position, or four years in the related occupation of software engineer.

With the initial petition, the petitioner submitted an incomplete copy of a diploma from Kuvempu University that indicated the beneficiary earned a bachelor of engineering. The petitioner also submitted an academic equivalency evaluation report written by [REDACTED] Evaluator, Foundation For International Services, Inc. (FIS), Bothell, Washington. In his evaluation dated August 19, 1997, [REDACTED] stated that the beneficiary had been granted the degree of bachelor of Engineering on March 31, 1996, having passed the subject of Industrial Production Engineering at the examination held in 1995. [REDACTED] stated that copies of the beneficiary's seventh and eighth semester statements of marks listing the subjects studied had been submitted for the evaluation, and that the beneficiary's degree was equivalent to a bachelor's degree in industrial and manufacturing engineering from an accredited U.S. college or university. [REDACTED] further stated that the beneficiary had the equivalent of a bachelor's degree in industrial and manufacturing engineering; and that as a result of his educational background and employment experience, he had the educational background of an individual with an undergraduate minor in computer science. The petitioner also submitted a copy of a certificate from SoftPro, Bangalore, India that stated the beneficiary had undergone a professional training course in DB2, PL1, COBOL; VSAM; JCL; CLIST; and ISPF/PDF.

In an RFE dated November 9, 2006, the director requested evidence that the beneficiary obtained the required two years and six months of training in eSchoolData program prior to the July 2, 2003 priority date, and that

he obtained the requisite two years and six months of work experience in the proffered position, or the requisite four years of prior work experience in the related occupation of software engineer prior to the July 2, 2003 priority date.

In response, the petitioner submitted the following documentation:

A letter dated November 20, 2006 from [REDACTED], eSchoolData Project manager, and the petitioner's Executive Vice President. In her letter, [REDACTED] stated that the beneficiary had received on the job training and experience working on the eSchool Data program from June 2000 to June 2003;

A letter from [REDACTED], the petitioner's bookkeeper dated November 30, 2006 that stated the beneficiary has been employed by the petitioner since August 29, 1999 as a computer programmer;

A letter dated October 8, 1997 and signed by [REDACTED], Executive Vice President, Systemlogic, Santa Monica, California. In a letter addressed to the beneficiary, [REDACTED] stipulated the salary the beneficiary would receive upon approval of the beneficiary's H-IB visa and commencement of his employment;

A letter dated July 5, 1997, signed by [REDACTED], Director, Padmashree Computers, Bangalore. In the letter, the writer stated that the beneficiary worked for the company as a software engineer from December 1, 1995 to March 10, 1996.

A letter dated April 11, 1998, written by [REDACTED], Manager (CAD group), Hindustan Aeronautics, LTD., Bangalore, India that stated the beneficiary worked for Hindustan Aeronautics from November 3, 1996 to October 4, 1998 as a project engineer.

A letter dated April 26, 2000 written by [REDACTED], Technical Resource Manager, Mastech Corporation, Amsterdam, The Netherlands. The letter writer stated that the beneficiary was employed as a software engineer from April 1998 to July 1999; and

A letter dated February 21, 1996 and written by [REDACTED], proprietor, of Softpro, Bangalore, India. The letter writer stated that the beneficiary had been selected to work for Softpro in the post of Project Engineer/software Engineer and assigned to work at LCA Complex, Bangalore for a period of one year, or until the project ends.

In response to these additional documents, the director made no further comments or enquiry into the beneficiary's qualifications to perform the duties of the proffered position, and did not refer to the issue in his decision.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 software engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|---------------------------------------|
| 14. | Education | |
| | Grade School | |
| | High School | |
| | College | 4 |
| | College Degree Required | Bachelor of Science in Engineering |
| | Major Field of Study | Industrial and Production Engineering |

The applicant must also have either two years and six months of training in eSchooldata software, and either two and a half years of work experience in the proffered position, or four years of work experience in the related occupation of software engineer. The duties of the proffered position 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 did not state any further 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 about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he attended Kuvempu University, studying industrial and production engineering, from August 1991 to October 1995, and received a bachelor degree in engineering. The beneficiary also indicated that he attended Mastech Virtual University, studying visual basic application developer, from June 1998 to September 1998, and received a designation of Mastech Certified, and that he also studied at an unidentified entity or possibly at Mastech Virtual University, studying Mainframe PL/I, COBOL, CICS, and DB2, from June 1995 to September 1998, and received a designation of Softpro Certified Mainframe App. Dev.

With regard to his work experience, the beneficiary, in Section 15, indicated the following work experience:

- | | | |
|--|-------------------|-----------------------------|
| CCSI Professional Services | Software Engineer | June 2000 to June 11, 2003 |
| (the date the beneficiary signed the ETA 750). | | |
| Systemlogic | Software Engineer | August 1999 to May 2000 |
| (subcontracted to CCSI) | | |
| Mastech Corporation | Software Engineer | April 1997 to July 1999 |
| Hindustan Aeronautics | Software Engineer | February 1997 to April 1998 |
| Padmashree Computers | Software Engineer | December 1995 to March 1996 |

With regard to the evidence submitted to the record, the AAO notes that the record does not contain a complete copy of the beneficiary's diploma from Kuvempu University. Although the FIS evaluator referred to copies of statements of marks in his evaluation report, the beneficiary's statements of marks are not contained

in the record. Without such evidence, the AAO cannot determine if the beneficiary attended Kuvempu University for four years, what coursework he studied, and whether he received a four-year bachelor's degree in engineering.

With regard to the additional evidence submitted to the record in response to the director's RFE, the AAO notes that the two letters in the record from Systemlogic and SoftPro are simply employment offer letters and do not establish the actual employment dates for the beneficiary's claimed employment with Systemlogic or SoftPro as a software engineer.⁷ Thus, they cannot be used to verify the beneficiary's employment as a software engineer.

Further the letters submitted to the record from Mastech and from Hindustan Aeronautics identify periods of employment that do not corroborate the beneficiary's claimed periods of employment with these two businesses, as he identified them on Part B of the Form ETA 750. The letter from Mastech states that the beneficiary worked for them from April 1998 to July 1999, a period of one year and three months, while the Form ETA 750 states the beneficiary worked at Mastech from April 1997 to July 1999, a period of two years and 3 months.⁸ With regard to Hindustan Aeronautics, the letter submitted to the record states the beneficiary worked there from November 3, 1996 to October 4, 1998, a period of 1 year and 11 months, or 23 months, while the Form ETA 750 indicates the beneficiary worked there from February 1997 to April 1998, a period of 14 months.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) 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." Without further clarification, the petitioner has not established the beneficiary's actual dates of employment with either Mastech Corporation or Hindustan Aeronautics. The only periods of employment that have been established by the petitioner based on letters of work verification and the contents of the Form ETA 750 are the beneficiary's four months of work experience with Padmashree Computer from December 1995 to March 1996, and his work with the petitioner as of June 2000.

In determining whether the beneficiary has the requisite two and a half years of training in eSchooldata, the AAO accepts the petitioner's letter that claims the beneficiary worked on this particular software program from June 2000 to June 2003, a period of three years.⁹ Although [REDACTED], the petitioner's bookkeeper, in her letter claimed that the beneficiary worked for the petitioner since August 29, 1999, the Form ETA 750 indicates that the beneficiary was actually an employee of Systemlogic and was subcontracted to the petitioner. Thus, the AAO will only consider the beneficiary's employment with the petitioner as of June 2000.

While the beneficiary has the requisite two and a half years of training in eSchooldata based on his training while with the petitioner, the same two and a half years of training cannot be utilized to establish the requisite

⁷ The AAO notes that the Form ETA 750 does not refer to any employment with Softpro although the record contains a certificate for training with Softpro. The AAO also notes that the date of the Softpro letter coincides with the beneficiary's claimed employment with Padmashree Computers.

⁸ The ETA 750, Part B also indicates that the beneficiary studied with the Mastech Virtual University from June to September 1998.

⁹ The AAO also accepts that the beneficiary worked for the petitioner three years and one month as of the July 2, 2003 priority date.

two and a half years of work experience in the proffered position. Only seven months (three years and one month of work experience prior to July 2003 minus the two and a half years of requisite training in eSchooldata) can be applied toward the requisite two and a half years of work experience in the proffered position. Based on the evidence in the record, the petitioner cannot establish that the beneficiary both has two and a half years of training and two and a half years of work experience in the proffered position. Thus the petitioner has to establish that the beneficiary has four years of relevant work experience as a software engineer to establish the work experience qualifications for the proffered position.

As previously stated, the record contains contradictory evidence with regard to the beneficiary's claimed employment with Mastech and with Hindustan Aeronautics, and contains no corroborating evidence as to the actual periods of employment with Systemlogic in California. As such, the record does not establish the beneficiary's actual employment with these businesses and the petitioner can not utilize these claimed periods of employment to establish the beneficiary's requisite four years of work experience as a software engineer. Further, the seven months of work experience with the petitioner beyond the two and half years of training, and the four months of work experience as a software engineer with Padmashree Computers from December 1, 1995 to March 10, 1996 are not sufficient to establish four years of relevant work experience as a software engineer prior to the July 2003 priority date. Thus, the petitioner has not established that the beneficiary has a four-year Bachelor of Science degree in engineering, or a foreign degree equivalent to a United States Bachelor of Science degree in engineering, or both the two and a half years of requisite training, and either the two and half years of work experience in the proffered field, or four years of relevant work experience as a software engineer prior to the July 2, 2003 priority date.

In view of the foregoing issues, the previous decision of the director dated December 21, 2006 will be withdrawn. The petition is remanded to the director for further consideration of the beneficiary's qualifications for the proffered position. The director must issue a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision