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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
EAC 05 252 52733

Office: VERMONT SERVICE CENTER

Date OCT 30 2008

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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 Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting and development firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The petitioner requests that the beneficiary in this matter be substituted for the original beneficiary listed on the alien employment certification.¹ The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief. For the reasons discussed below, we uphold the director's decision regarding the petitioner's ability to pay the proffered wage in 1999. In addition, we note that the record does not contain the initial required evidence set forth in the regulation at 8 C.F.R. § 204.5(g)(2) for any year after 1999 even though the petition was filed in 2005. Finally, beyond the decision of the director, the record does not establish that the beneficiary qualifies for the classification sought as he does not appear to have a baccalaureate degree in the required field from a college or university.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

¹ Substitution of the beneficiary was permitted pursuant to *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994) (invalidating the portion of the interim final rule, 56 Fed. Reg. 54925, 54930 (Oct. 23, 1991), which eliminated substitution of labor certification beneficiaries by amending the Department of Labor (DOL) regulation at 20 C.F.R. § 656.30(c)(1)). Effective July 16, 2007, substitution is no longer permitted pursuant to DOL regulation. 72 Fed. Reg. 27904, 27906 (May 17, 2007); 20 C.F.R. § 656.11. The instant petition was filed on September 19, 2005, supported by a Form ETA 750, which, as of March 28, 2005, was replaced by the ETA Form 9089.

priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 25, 1999. The proffered wage as stated on the Form ETA 750 is \$80,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner. In fact, the beneficiary did not claim any employment after July 2001. The beneficiary also filed a concurrent Form I-485 Application to Register Permanent Residence or Adjust Status. In support of that application, the beneficiary completed a Form G-325A Biographic Information. On this form, the beneficiary claimed to be currently working as a general manager for Prime Travel Pvt. Ltd. in Lahore, Pakistan as of July 2001 even though he listed a residential address in the United States and indicated on the Form I-485 that he had last entered the United States in 1999.

On the petition, the petitioner claimed to have an establishment date in 1994, a gross annual income of \$3,000,000, an undisclosed net income and 20 employees. In support of the petition, the petitioner submitted Statements of Deposits and Filings from the Internal Revenue Service (IRS) for various months in 2004 and 2005.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 23, 2006, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage in 1999. While the director did not specifically request tax returns, annual reports or audited financial statements for any year after 1999, the director did state that the petitioner must demonstrate its ability to pay the proffered wage "as of March 25, 1999, the date of filing and continuing to the present."

In response, the petitioner submitted its 1999 IRS Form 1120S U.S. Income Tax Return for an S Corporation containing the following information:

Net income	\$17,467
Current Assets	\$91,000
Current Liabilities	\$92,907
Net current assets	(\$1,907)

In addition, counsel submitted copies of the petitioner's IRS Form 941 Employer's Quarterly Federal Tax Return and the petitioner's State of New Jersey Employer's Quarterly Report for the first quarter of 1999 reflecting wages of \$23,088 paid to the original beneficiary during that quarter. The petitioner also submitted 2004 and 2005 Statements of Filing prepared by the IRS.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage in 1999 and, on November 6, 2006, denied the petition.

On appeal, counsel asserts that the Statements of Filing demonstrate that the petitioner has always met its payroll obligations.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant 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 establish that it employed and paid the beneficiary the full proffered wage in 1999. In addition, the record only establishes the wages paid to the original beneficiary in the first quarter of 1999. Most of this quarter predates the priority date. Without evidence that the petitioner continued to pay the original beneficiary at this rate for the remainder of 1999, we can only consider the \$23,088 documented as paid to the original beneficiary.

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.² Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. See *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). See also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). 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.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be

² The director's consideration of the petitioner's depreciation deduction in 1999 was in error, but did not impact the outcome of her decision.

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.³ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The petitioner has not demonstrated that it paid the current beneficiary or the original beneficiary the full proffered wage in 1999. In 1999, the petitioner shows a net income of only \$17,467, negative net current assets and has not, therefore, demonstrated the ability to pay the difference between the wage paid to the original beneficiary and the proffered wage (\$56,912) out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 1999.

Counsel's assertion that the Statements of Filings demonstrate the petitioner's ability to pay the proffered wage is not persuasive. These statements do not provide a breakdown of wages for each employee. Thus, these statements do not demonstrate that the petitioner has been paying the full proffered wage to the current beneficiary or original beneficiary since the priority date. Wages paid to other employees are not available to pay the proffered wage to the current beneficiary.

Finally, the petitioner has not provided the evidence required by the regulation at 8 C.F.R. § 204.5(g)(2). Specifically, the petitioner has not provided its tax returns, annual reports or audited financial statements for any year after 1999. Thus, the petitioner cannot establish its ability to pay the proffered wage in any year after 1999. As stated above, the regulation at 8 C.F.R. § 204.5(g)(2) requires evidence of the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during the salient portion of 1999 or subsequently during 2000, 2001, 2002, 2003, 2004 or 2005. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

While not raised by the director, the petition is also not approvable at this time because the record does not establish that the beneficiary has a baccalaureate from a college or university in the profession he seeks to pursue.

Relevant to the field in which the beneficiary seeks to work, the beneficiary possesses a foreign two-year bachelor's degree in Computer Science and a one-year Master of Science degree in Computer Science, both from the Association of System Designers in Lahore, Pakistan.

The petitioner submitted an evaluation of the beneficiary's education from [REDACTED] of the Trustforte Corporation. In this evaluation, [REDACTED] asserts that the universities where the beneficiary obtained his unrelated education are accredited institutions of higher learning in Pakistan. Significantly, [REDACTED] makes no such assertion about the Association of System Designers. Nevertheless, [REDACTED] still concludes that the beneficiary's diplomas from the Association of System Designers, in the aggregate, demonstrate that he "fulfilled the equivalent of at least a bachelor's level concentration in Computer Science."

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)

(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (an agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”)

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”⁴ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor’s degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an “official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree.” For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.” We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means a bachelor’s degree received *from a college or university*, or an equivalent degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R.

⁴ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

§ 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability”).

The record contains no evidence that the Association of System Designers is a college or university and [REDACTED] makes no such assertion.

We acknowledge that the beneficiary obtained a legal education at accredited universities in Pakistan. Possession of a professional degree in an unrelated field to the field in which the alien seeks employment cannot serve to classify an alien as a member of the professions. *Matter of Shah*, 17 I&N Dec. at 244-45 (Master of Business Administration was not considered where alien sought classification as a chemist).

Because the beneficiary only documents three years of postsecondary education in the requisite field and does not have a “United States baccalaureate degree or a foreign equivalent degree” from a college or university the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.