



U.S. Citizenship
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Services

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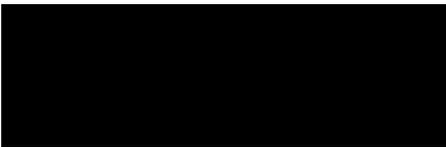
Petitioner:

Beneficiary:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be sustained.

The petitioner is a rotary die manufacturer. It seeks to employ the beneficiary permanently in the United States as a computer engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U. S. 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 priority date of the visa petition; and, the director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition. The director denied the petition accordingly.

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.

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 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 regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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 granting 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)(2) states, in pertinent part:

“*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

Professionals. 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.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to 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. Here, the Form ETA 750 was accepted for processing on October 3, 2002. The petitioner selected in Part 2, box "e" of the I-140 petition. That selection states, "A skilled worker (requiring at least two years of specialized training or experience) or professional."

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. 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 April 7, 1998. The proffered wage as stated on the Form ETA 750 is \$35,400.00 per year. The Form ETA 750 states that the position requires one-year experience.

On appeal, counsel submits additional evidence.

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; partial copies of U.S. Internal Revenue Service Form tax returns for 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004; as well as the beneficiary's W-2 Wage and Tax Statements for 1997, 1998, 1999, 2000, 2001, 2002, 2003 and 2004. Counsel also submitted three W-2 Wage and Tax Statements showing wages paid for years 2002, 2003 and 2004; and, nine bank account statements.

Copies of documentation concerning the beneficiary's finances were submitted as follows: the beneficiary diploma and credentials evaluation; a letter from a prior employer; the beneficiary's H-1B1 petition approval; pay stubs; a social statement; and, three income tax returns.

Because the director determined the evidence submitted with the petition was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, consistent with 8 C.F.R. § 204.5(g)(2), the director requested on June 25, 2004, pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The director also requested annual reports, U.S. tax returns, with audited or reviewed financial statements from 1998 to present. Supplementary evidence was also requested to the above. The director indicated accredited profit/loss statements; bank account records or personnel records would be additional evidence of the ability to pay the proffered wage.

The director requested the Form W-2 Wage and Tax Statements and/or Form 1099-MISC for the beneficiary while he was employed by the petitioner; and, a “most recent pay voucher” as well as other documents.

The director also requested evidence that the beneficiary “... obtained the required 4 years of college leading to the [attainment] ... of a Bachelor’s degree before April 7, 1998.” Also, the director requested evidence that the beneficiary attained 1 year of experience in the job offered.

In response to the above requests counsel submitted the following documents: a letter from petitioner dated August 20, 2004; a credentials evaluation dated January 14, 1997 from Evaluation Service Inc.; and, two corporate U.S. federal tax returns;

The director denied the petition on May 8, 2005, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date; and, the director determined that the petitioner had not established that the beneficiary has the requisite experience as stated on the labor certification petition.

On appeal, the petitioner asserts that the evidence submitted which were eight income tax returns and eight years of payroll statement is evidence of its ability to pay the proffered wage. The petitioner states that the beneficiary is employed at the wage of \$35,400.00 per year. Also, the petitioner states that CIS has approved other similar petitions based upon the same evidence submitted in the present case.

Counsel has submitted the following documents to accompany the appeal statement: W-2 Wage and Tax Statements and bank statements.

In determining the petitioner’s ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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. Evidence¹ was submitted to show that the petitioner employed the beneficiary since June 9, 1997.

- In 1998 the beneficiary’s W-2 Wage and Tax Statement from the petitioner stated wages paid of \$37,171.24.
- In 1999 the beneficiary’s W-2 Wage and Tax Statement from the petitioner stated wages paid of \$39,250.34.
- In 2000 the beneficiary’s W-2 Wage and Tax Statement from the petitioner stated wages paid of \$42,426.38.
- In 2001 the beneficiary’s W-2 Wage and Tax Statement from the petitioner stated wages paid of \$44,943.50.
- In 2002 the beneficiary’s W-2 Wage and Tax Statement from the petitioner stated wages paid of \$47,596.93.
- In 2003 the beneficiary’s W-2 Wage and Tax Statement from the petitioner stated wages paid of \$47,382.70.

¹ In 1997 the beneficiary’s W-2 Wage and Tax Statement from the petitioner stated wages paid of \$20,842.08.

- In 2004 the beneficiary's W-2 Wage and Tax Statement from the petitioner stated wages paid of \$47,860.31.

The Form ETA 750 was accepted on April 7, 1998. The proffered wage as stated on the Form ETA 750 is \$35,400.00 per year. Therefore for seven consecutive years, the petitioner has paid the beneficiary more than the proffered wage. The Social Security Administration earnings history submitted for the beneficiary substantiates the W-2 wage evidence.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will 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). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service 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. *Supra* at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, *Supra* at 537. See also *Elatos Restaurant Corp. v. Sava*, *Supra* at 1054.

The tax returns² demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$35,400.00 per year from the priority date of April 7, 1998:

- In 1998, the Form 1120 stated taxable income of \$44,652.00.
- In 1999, the Form 1120 stated taxable income of \$83,742.00.
- In 2000, the Form 1120 stated taxable income loss of <\$76,869.00>.³
- In 2001, the Form 1120 stated taxable income of \$19,121.00.
- In 2002, the Form 1120 stated taxable income of \$41,032.00.
- In 2003, the Form 1120 stated taxable income of \$31,587.00.
- In 2004, the Form 1120 stated taxable income of \$12,104.00.

The net income the petitioner demonstrates it had available during 1998, 1999, 2001, 2002, 2003 and 2004 added to the wages paid to the beneficiary during the periods examined are greater than the amount of the proffered wage except for tax year 2000.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is a failure of the petitioner to demonstrate that it has taxable income to pay the proffered wage. In the subject case, as set forth above, the petitioner did not have taxable income sufficient to pay the proffered wage at any time between the years 2000, 2001, 2003, and 2004 for which the petitioner's

² Tax returns submitted for years prior to the priority date, have little probative value to show the ability to pay the proffered wage. In 1997, the petitioner stated taxable income of \$24,784.00, and net current assets are \$190,610.00.

³ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

tax returns are offered for evidence. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Those schedules were not included with the petitioner's submittals of its Form 1120 federal tax returns from 1998 through 2004. Notwithstanding the above, the petitioner has demonstrated the ability to pay the proffered wage by the compensation it has paid the beneficiary.

The second issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite experience as stated on the labor certification petition. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & 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, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of a computer engineer.

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

14.	Education	
	Grade School	<u>8</u>
	High School	<u>4</u>
	College	<u>4</u>
	College Degree Required	<u>Bachelors degree</u>
	Major Field of Study	<u>Computers</u>
	Training	<u>0</u>
	Experience	
	Years/Months	<u>1/0</u>
	Related Occupation	
	Years/Months	<u>0/0</u>

In the instant case, the Application for Alien Employment Certification, Form ETA-750B, item 15, sets forth work experience that an applicant listed for the position of computer engineer.

15. WORK EXPERIENCE

a. NAME AND ADDRESS OF EMPLOYER

[REDACTED]

NAME OF JOB

computer engineer

DATE STARTED

Month - 04 [April] Year - 1997

DATE LEFT
Month – Year -Current
KIND OF BUSINESS
Rotary Die Manufacturing
DESCRIBE IN DETAIL DUTIES...
Provide computer-engineering services ...
NO. OF HOURS PER WEEK
40

15. WORK EXPERIENCE

b. NAME AND ADDRESS OF EMPLOYER

NAME OF JOB
Computer engineer
DATE STARTED
Month – 01 [Jan] Year - 1996
DATE LEFT
Month – 03 [March] - 1997
KIND OF BUSINESS
Software firm
DESCRIBE IN DETAIL DUTIES...
Provided computer engineering services ...
NO. OF HOURS PER WEEK
40

In this case the beneficiary has the academic equivalent of a master's degree in electrical engineering after completion of a five-year program with a concentration in computer technology according to a credentials evaluation dated January 14, 1997 from Evaluation Service Inc. Further, the beneficiary was employed by INFOGO Computers as a computer engineer from January 1996 through May 1997. There are also job verification statements accompanying the appeal detailing the beneficiary's employment as a computer engineer. In this case the job verification letters that the petitioner submitted with the petition prove the beneficiary's work experience as a computer engineer.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The petitioner has demonstrated its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The evidence submitted does demonstrate credibly that the beneficiary had the requisite one-year of experience. Therefore, the petitioner has established that the beneficiary is eligible for the proffered position.

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 established that it has the ability to pay the proffered wage and the beneficiary has the requisite experience as stated on the labor certification petition. The petitioner has met that burden.

ORDER: The petition is sustained.

