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FILE: LIN-04-201-52804 Office: NEBRASKA SERVICE CENTER Date: APR 26 2006

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software development and computer consulting services firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the education requirements as required on the Form ETA 750, and 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 or seasonal 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, at the time of petitioning for classification under this paragraph, are professionals.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date 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). The priority date in the instant petition is October 6, 2003.

On the Form ETA 750B, signed by the beneficiary on September 26, 2003, the beneficiary claimed to have worked for the petitioner beginning in August 2001 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on April 2, 2004.

The I-140 petition was submitted on July 7, 2004. On the petition, the petitioner claimed to have been established on April 1, 1998, to currently have 53 employees, to have a gross annual income of \$2,265,745.45, and to have a net annual income of \$112,356.61. With the petition, the petitioner submitted supporting evidence.

In a decision dated September 7, 2004, the director determined that the beneficiary does not have a U.S. bachelor's degree or an equivalent foreign degree in computers, MIS or electronics. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the denial of the petition is unreasonable and contradicts the regulation, the credential evaluation process is time consuming, and the director failed to comply with the regulation by not giving the petitioner twelve weeks to respond to a request for evidence and obtain a credential evaluation. Counsel submits the evaluator's curriculum vitae and a letter stating that the evaluator has the authority to grant college-level credit for training and experience.

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

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

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 regulation at 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. Evidence of a baccalaureate degree shall be in the form 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.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, form ETA-750A, blocks 14 and 15, sets forth the minimum education, training and experience that an applicant must have for the position of programmer analyst. On the ETA 750A submitted with the instant petition, block 14 describes the education requirements of the offered position as follows:

14.	Education (number of years)	
	Grade School	X
	High School	X
	College	X
	College Degree Required	Bachelors
	Major Field of Study	Comp. or MIS or Electronics

The beneficiary states his qualifications on Form ETA 750B. On the ETA 750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Quaid-I-Azam University	Computer Science	02/1978	07/1979	Post Graduate Diploma in Comp. Science
Govt. College of Science, University of [t]he Punjab	Science	09/1973	05/1976	Bachelors of Science

Board of Intermediate & Secondary Education	Science	08/1971	08/1973	Intermediate
Board of Intermediate & Secondary Education	General Studies	03/1970	06/1971	Secondary School Certificate

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The record contains an academic evaluation dated December 23, 1999 stating that the beneficiary has the equivalent of a U.S. Bachelor of Science in computer science because he has a two-year Bachelor of Science degree and a one-year post-graduate diploma, and “[h]e has work experience in years and scope to make the equivalency of a [U.S.] four-year Bachelor of Science degree with a major in [c]omputer [s]cience.”¹ The evaluator also states that “the candidate must have worked three years for every year of course work lacking.” Based on this evidence, the director found that the beneficiary does not have a U.S. bachelor’s degree in computers, MIS or electronics, or an equivalent foreign degree.

The regulations define a third preference category professional as 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.” See 8 C.F.R. § 204.5(1)(2). The regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for the classification of a professional that:

(C) *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 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 above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary holds a bachelor’s degree in science from the University of the Punjab. The credential evaluation in the record states that this degree is equivalent to two years of undergraduate study in an accredited U.S. college or university. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary’s bachelor’s degree from the University of the Punjab cannot be considered a foreign equivalent degree.

¹ According to block 11 on the ETA 750B, the beneficiary attended the University of the Punjab from September 1973 to May 1976. Based on this information, the beneficiary has a three-year Bachelor of Science degree, not a two-year degree as stated by the evaluator. Regardless, whether the beneficiary has a two-year or three-year Bachelor of Science degree is immaterial in this case because both fail to qualify as an equivalent foreign degree.

The beneficiary also holds a diploma from Quaid-I-Azam University. However, the record does not demonstrate that the diploma from Quaid-I-Zam University is an academic degree and/or that it is the foreign equivalent of a U.S. bachelor's degree. As stated above, the regulation sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree. The combination of a degree deemed less than the equivalent to a U.S. baccalaureate degree and a diploma or certificate does not meet that requirement.

On appeal, counsel states that "the denial of the petition based on [CIS's] classification between ETA 750A with alternatives and ETA 750A without alternatives is unreasonable and contradicts 8 [C.F.R. §] 204.5(l)(3)(11)(C)." The correct citation for the regulation is 8 C.F.R. § 204.5(l)(3)(ii)(C).

In his decision, the director states that "[t]here are no alternatives to the degree requirement." The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states in pertinent part that "the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree . . . [e]vidence 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." Thus, the regulation itself is silent on alternatives to the degree requirement. CIS has the regulatory authority to include a provision allowing for such alternatives, and it has done so in certain nonimmigrant visa categories. However, no provision has been made in this case, and the provision that allows for alternatives in other visa categories does not apply in this case.

On the I-140 petition, the petitioner checked the box stating that the petition is being filed for a professional or a skilled worker. Thus, the AAO will also consider this petition under the "skilled worker" classification. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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.

The regulations for the skilled worker classification contain a minimum requirement of two years training or experience. While they do not contain a requirement of a bachelor's degree, the ETA 750 does contain such a requirement. 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). The ETA 750 requires a bachelor's degree and does not provide for an alternative. The petitioner was free to set forth alternatives prior to submission and certification of the ETA 750 by the Department of Labor, and the petitioner did not do so.

Counsel also asserts that the petitioner has submitted the beneficiary's credentials for professional evaluation by a university professor, and "it is a very time consuming process and requires adequate time to obtain the professional evaluation and require[s] additional two to three weeks of time." Counsel states that "[a] copy of the professor [sic] opinion along with resume" is included on appeal. According to the record, evidence submitted on

appeal includes the evaluator's curriculum vitae and a letter stating that the evaluator has the authority to grant college-level credit for training and experience.²

Based on evidence in the record and counsel's statement that an additional two to three weeks of time was necessary for the submission of a professional evaluation, the petitioner had more than enough time to submit such credential evaluation. The letter submitted on appeal was dated January 2004, and the brief and additional evidence was received by the AAO on November 10, 2004. The director's decision was dated September 7, 2004. Thus, the petitioner had more than two months from the time the petition was denied to submit the credential evaluation. No such additional credential evaluation appears in the record. Furthermore, it is questionable whether such evaluation is material to the case at hand because the record already contains a credential evaluation, and counsel has not shown why the original credential evaluation should not be considered. Unless the beneficiary's academic record is shown to be different, another credential evaluation could yield the same result.

Counsel likewise states that the director "failed to comply with the federal regulations, 8 CFR Part 103.2(b)(8), which clearly requires [a] grant of twelve weeks of time to respond to a request for evidence, and did not give an adequate opportunity of twelve weeks to obtain [a professional evaluation for submission.]"

The regulation at 8 C.F.R. § 103.2(b)(8) states that "[i]n such cases [where evidence is requested], the applicant or petitioner shall be given 12 weeks to respond to a request for evidence." However, no request for evidence appears in the record. According to the regulation at 8 C.F.R. § 204.5(g)(2), the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence, and it appears that the director declined to do so in this case. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal. As stated earlier, the petitioner did not submit a new credential evaluation on appeal.

The petitioner has not established that the beneficiary has a U.S. bachelor's degree in computer, MIS or electronics or an equivalent foreign degree on October 6, 2003. Therefore, the petitioner has not overcome this portion of the director's decision.

Beyond the decision of the director, the petitioner's ability to pay the beneficiary the proffered wage as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence warrant reexamination. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The director's decision is silent on the petitioner's ability to pay the proffered wage even though evidence in the record does not comport with the regulations' requirement.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

² The AAO is unsure what counsel is referring to when counsel mentions "[the] copy of the professor [sic] opinion." It can refer to a credential evaluation made by the professor. However, counsel indicated on appeal that the petitioner was not given adequate opportunity to obtain such credential evaluation. It can also refer to the letter submitted on appeal where the dean of Medgar Evers College of the City College of New York gave his opinion of professor Orandel Robotham. Based on the evidence available in the record, the AAO will assume that it refers to the latter.

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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is October 6, 2003. The proffered wage as stated on the Form ETA 750 is \$75,000.00 annually.

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. 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, 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).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on September 26, 2003, the beneficiary claimed to have worked for the petitioner beginning in August 2001 and continuing through the date of the ETA 750B.

The record contains a copy of the beneficiary's Form W-2 Wage and Tax Statement for 2003. The Form W-2 shows compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2003	\$46,173.38	\$75,000.00	\$28,826.62

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2003.

The record also contains copies of the beneficiary's earning statements for April and May of 2004. According to the earning statements, from January to May 2004, the beneficiary was paid \$12,666.00. This is not enough to show that the beneficiary was paid the proffered wage in 2004 because nothing in the record

indicates that the beneficiary was paid for the other 7 months in 2004. In addition, five-twelfth of the proffered wage is \$31,250.00, and \$12,666.00 is less than \$31,250.00.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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.*, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The record contains no federal income tax returns for the petitioner.³ Thus, CIS has no available information to calculate the petitioner's net income.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

The record contains no federal income tax returns for the petitioner. Thus, CIS has no available information to calculate the petitioner's net income.

The record contains a copy of the petitioner's compiled financial statements for 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's letter that accompanied the financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's letter also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

³ The record before the director closed on July 7, 2004 with the receipt by the director of the I-140 petition and supporting documents. As of that date the petitioner's federal tax return for 2004 was not yet due. Therefore the petitioner's tax return for 2003 is the most recent return available. However, the petitioner's tax return for 2003 does not appear in the record.

The record also contains copies of the petitioner's Form W-3 Transmittal of Wage and Tax Statements for 2002 and 2003, showing the total amount the petitioner paid in wages for 2002 and 2003. This information is irrelevant to whether the petitioner has the ability to pay the proffered wage to the beneficiary because even though the petitioner paid \$1,443,540.52 in wages in 2003, the beneficiary was paid \$28,826.62 less than the proffered wage in 2003. It does show that the petitioner issued 72 Form W-2's in 2003.

Based on the record, the petitioner has not established its ability to pay the proffered wage beginning on the priority date. This matter should be addressed in any subsequent proceedings.

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.