



U.S. Citizenship
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Services

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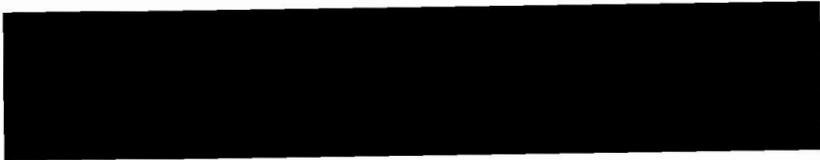
Petitioner:

Beneficiary:

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, Director
Administrative Appeals Office

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

The petitioner is a specialized software development and consultancy 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 it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and the petitioner had not established that the beneficiary met the education requirements specified on the Form ETA 750 and denied the petition accordingly.

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 who are members of the professions.

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

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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which 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 March 10, 1997. The proffered wage as stated on the Form ETA 750 is \$42,000.00 per year.

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).

On the Form ETA 750B, signed by the beneficiary on September 29, 2003, the beneficiary did not claim to have worked for the petitioner.¹ The ETA 750 was certified by the Department of Labor on December 4, 1997.

¹ On the certified Form ETA 750, the name of the beneficiary is [REDACTED]. The record contains a letter from counsel requesting the substitution of the original beneficiary with the current beneficiary, [REDACTED]. Thus, the current beneficiary signed the form after the priority date and the date of certification.

The I-140 petition was submitted on October 3, 2003. On the petition, the petitioner claimed to have been established on January 31, 1991, to currently have 60 employees, to have an anticipated gross annual income of \$5,800,000.00, and to have an anticipated net annual income of \$540,000.00. With the petition, the petitioner submitted supporting evidence.

In a decision dated November 8, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and the evidence did not establish that the beneficiary met the educational requirements specified on the Form ETA 750. Thus, she denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the petitioner has established its ability to pay the proffered wage based on its federal tax returns and the beneficiary's academic credential evaluation submitted with the I-140 petition contains an error. Counsel submits a revised evaluation and the petitioner's 1120S U.S. Income Tax Returns for an S Corporation from 1997 to 2003.

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 first issue is whether the petitioner has the ability to pay the proffered wage as stated in the Form ETA 750 as of the petitioner's priority date.

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 29, 2003, the beneficiary did not claim to have worked for the petitioner.

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 evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 1997, 1998, 1999, 2000, 2001, 2002, and 2003. The record before the director closed on October 3, 2003 with the receipt by the director of the petitioner's submissions of its I-140 petition and supporting evidence. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore the petitioner's tax return for 2002 is the most recent return available. The petitioner's tax return for 2003 was submitted on appeal on December 6, 2004. Since the petitioner's tax return for 2003 is part of the record, it will be considered along with the other tax returns in the record.

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 Form 1120S. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

The petitioner's tax return for 2001 shows the amounts for taxable income on line 23 of the Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1997	\$1,595,416.00	\$42,000.00*	\$1,553,416.00
1998	\$2,966,381.00	\$42,000.00*	\$2,924,381.00
1999	\$3,440,816.00	\$42,000.00*	\$3,398,816.00
2000	\$4,128,232.00	\$42,000.00*	\$4,086,232.00
2001	\$3,286,090.00	\$42,000.00*	\$3,244,090.00
2002	\$1,690,964.00	\$42,000.00*	\$1,648,964.00
2003	\$1,073,363.00	\$42,000.00*	\$1,031,363.00

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

The above information is sufficient to establish the petitioner's ability to pay the proffered wage from 1997 to 2003.

In her decision, the director stated that the petitioner failed to provide any evidence to prove ability to pay the beneficiary's proffered wage. The decision of the director to deny the petition was correct, based on the

evidence in the record before the director. However, evidence submitted on appeal has overcome this portion of the direction's decision.

The other issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

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.

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 a programmer/analyst. On the ETA 750A submitted with the instant petition, block 14 describes the education requirements of the offered position as follows:

Education (number of years)	
Grade School	8
High School	4
College	4
College Degree Required	Bachelor's Degree
Major Field of Study	Math or Engineering, Science, or Computer Science

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:

<u>Schools, Colleges and Universities, etc.</u>	<u>Field of Study</u>	<u>From</u>	<u>To</u>	<u>Degrees or Certificates Received</u>
Datapro Information Technology	Computer Applications	July 1997	June 1999	Diploma in Computer Applications
Osmania University	Business Management	May 1998	April 1990	Master of Business Administration
Kakatiya University	Biology	June 1983	May 1986	Bachelor of Science

The issue is whether the beneficiary met the education requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. According to the beneficiary's original academic credential evaluation, the beneficiary's Bachelor of Science degree "is equivalent to two years of [U.S.] undergraduate academic studies in General Science." Based on this evidence, the director determined that the petitioner failed to show that the beneficiary met the education requirements because "the two (2)-year degree in General Science and eighteen (18)-months further education in Computer Science [do] not constitute a four (4)-year bachelor's degree."

On appeal, counsel states that "[i]n the earlier evaluation report submitted with [the] I-140 [petition], the evaluator made the mistake in determining that [the] beneficiary's Bachelor of Science degree requires two (2) years of course study when, in fact that degree requires three (3) years of study." Counsel concludes that "[the] three (3) year Bachelor degree in Science and eighteen (18) months further education in Computer Science does constitute a four (4) year Bachelor's degree with a major field of study in Computer Science." Counsel submits a revised evaluation prepared by the same credential evaluation firm that issued the original evaluation.²

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(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies the classification of a professional:

(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 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 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.

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).

² Both the original evaluation and the revised evaluation include a letter from Datapro Information Technology stating that the beneficiary "completed his DCS (Diploma in Computer Science) course with us from June 1993 to December 1994." These dates are different from the dates listed on the ETA 750B. However, because other evidence in the record, including both evaluations, uses the same dates as the letter, AAO will assume that the beneficiary studied computer science from June 1993 to December 1994 and received his Diploma in Computer Science in 1994.

The record indicates that the beneficiary does not have the required number of years of college education as stated in the ETA 750 as of the petition's priority date. The beneficiary holds a bachelor's degree in science from Kakatiya University. The revised credentials evaluation states that this degree is equivalent to three years 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 degree from Kakatiya University cannot be considered a foreign equivalent degree. Moreover, the ETA 750 specifically requires four years of college education. The beneficiary's three years of undergraduate studies does not satisfy the four-year requirement.

The beneficiary also holds a diploma in computer science from Datapro Information Technology. However, the record does not demonstrate that the diploma from Datapro Information Technology is a single academic degree that is a foreign equivalent degree to a U.S. bachelor's degree. Furthermore, the credentials evaluation concludes that the applicant's course of instruction that led to the diploma is the equivalent of one-and-a-half years of graduate study. 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 does not meet that requirement. Therefore, the petitioner has not established that the beneficiary had the required number of years of college education. The petitioner also holds a master's degree, but the master's degree is not in any of the fields listed on the ETA 750.

Despite the fact that the petitioner has established its ability to pay the proffered wage as of the priority date, it has not established that the beneficiary had one degree that is the foreign equivalent of a U.S. baccalaureate degree on March 10, 1997. Therefore, the petitioner has not overcome the decision of the director regarding the beneficiary's qualifications.

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.