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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

LIN 06 229 51591

Office: NEBRASKA SERVICE CENTER

Date:

APR 08 2010

IN RE:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 sustained.

The petitioner is an information technology solutions company.¹ It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). 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 possesses the required special other requirements stipulated in the ETA Form 750. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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

As set forth in the director's May 18, 2007 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and through tax year 2003, and whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position. The AAO will first examine the petitioner's ability to pay the proffered wage and then examine whether the beneficiary is qualified to perform the duties of the position.

The Petitioner's Ability to Pay the Proffered Wage

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

¹ On the I-140 petition, the petitioner describes itself as "contractor to the Federal government." The petitioner's cover letter provides a more precise description of the petitioner's business operation.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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.

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 DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on May 30, 2002. The proffered wage as stated on the Form ETA 750 is \$70,979 per year. The Form ETA 750 states that the position requires a bachelor of science degree in engineering or science and one year of work experience in the proffered position. The Form ETA 750 also lists, in Item 15, other special requirements, specific programs in which the beneficiary must have skills.⁴

With the initial petition, the petitioner submitted its Form 1120S, U.S. Tax Return for S Corporation, for tax year 2001. In response to the director's RFE dated February 23, 2007, the petitioner submitted reviewed financial statements for tax years 2002, 2003, 2004 and 2005 prepared by [REDACTED]. It also submitted the beneficiary's W-2 Wage and Tax Statements for tax years 2002 to 2006 that indicated the petitioner paid the beneficiary \$68,262.52 in 2002; \$66,478.40 in 2003; \$80,694.12 in 2004; \$85,008.52 in 2005; and \$86,357.47 in 2006. Finally, the petitioner submitted the beneficiary's biweekly pay stubs for the period July 2000 to December 2000. On appeal, counsel submits the petitioner's tax returns for 2002 and 2003 and the beneficiary's pay stubs for June 11, 2007 to July 25, 2007. The last pay stub indicates a yearly salary to date of \$54,153.44.

⁴ The AAO will discuss the contents of Section 15 further when it examines whether the petitioner established the beneficiary's qualifications for the proffered position.

⁶ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005) and line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc. The AAO notes that in both 2002 and 2003, the petitioner in the instant petition had additional income or loss or deductions that reduced the petitioner's actual net income in those years. Thus, for both years, contrary to counsel's assertion, the petitioner's net income is indicated on line 23 of Schedule K.

The AAO issued a request for evidence on November 27, 2009 and requested that the petitioner submit copies of its tax returns for the years 2004 to 2006. In response the petitioner submitted copies of its Forms 1120S for tax years 2004 to 2008, with the beneficiary's W-2 Forms for 2007 and 2008.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1989 and to currently employ 59 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 28, 2002, the beneficiary claimed to have worked for the petitioner since January 2001.

On appeal, counsel asserts that the difference between the beneficiary's actual wages and the proffered wage in tax years 2002 and 2003 was \$2,717 in 2002 and \$4,501 in tax year 2003. Counsel states that the petitioner's reviewed financial statements demonstrate consistent positive income since 2002 that is enough to cover the difference. Counsel also notes that the petitioner was established in 1989, has been successful in the information technology business, has hired 59 employees, and has a gross annual income in excess of nine million dollars. Counsel refers to the petitioner's tax return for 2002 and 2003 and states that the petitioner in 2002 had net income of \$60,996 and, in 2003, had positive net income of \$17,172.

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, United States Citizenship and Immigration Services (USCIS) 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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As the director noted, the petitioner's reliance on reviewed financial statements for tax years 2002 and 2003 is misplaced. 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 accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the account's report makes clear, the financial statements are the representations of

management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel refers to the petitioner's annual retained earnings as additional financial resources with which to pay the difference between the beneficiary's actual wages and the proffered wage. Retained earnings are the total of a company's net earnings since its inception, minus any payments to its stockholders. That is, this year's retained earnings are last year's retained earnings plus this year's net income. Adding retained earnings to net income and/or net current assets is therefore duplicative. Therefore, USCIS looks at each particular year's net income, rather than the cumulative total of the previous years' net incomes represented by the line item of retained earnings.

Further, even if considered separately from net income and net current assets, retained earnings might not be included appropriately in the calculation of the petitioner's continuing ability to pay the proffered wage because retained earnings do not necessarily represent funds available for use. Retained earnings can be either appropriated or unappropriated. Appropriated retained earnings are set aside for specific uses, such as reinvestment or asset acquisition, and as such, are not available for shareholder dividends or other uses. Unappropriated retained earnings may represent cash or non-cash and current or non-current assets. The record does not demonstrate that the petitioner's retained earnings are unappropriated and are cash or current assets that would be available to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has established that it employed and paid the beneficiary during the relevant period of time. As noted by the director, the petitioner paid the beneficiary wages greater than the proffered wage in 2004 to 2006. The petitioner has not established that it paid the beneficiary the full proffered wage in the 2002 priority date and in tax year 2003. Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2002 and 2003. The difference between the beneficiary's actual wages in these two years is \$2,716.48 and \$4,500.60, respectively.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage

expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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 USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. "[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on May 14, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was due. The record reflects that the petitioner's tax returns appear to be filed in September of the respective years, and that the petitioner has requested extensions for several returns. Therefore, the petitioner's income tax return for 2005 is the most recent return available. Since the petitioner established its ability to pay the proffered wage in tax years 2004 to 2006 based on the beneficiary's wages, the AAO will only examine tax years 2002 and 2003 with regard to the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage. The petitioner's tax returns demonstrate its net income for tax years 2002 and 2003, as shown in the table below.

- In 2002, the Form 1120S stated net income⁶ of \$50,701.
- In 2003, the Form 1120S stated net income of -\$77,720.

Therefore, for the year 2002, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage, while in 2003, the petitioner did not have sufficient net income to pay the difference.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003, as shown in the table below.

- In 2003, the Form 1120S stated net current assets of -\$617,940.

For the year 2003, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax year 2003.

Counsel asserts in his brief accompanying the appeal that the difference between the beneficiary's actual wages in 2003 and the proffered wage is \$4,501, and that other factors should be taken into consideration when examining the petitioner's ability to pay the proffered wage, such as business longevity, number of employees, and consistent positive income since 2002.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the

⁷According 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 accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, based on the 2002 and 2003 tax returns submitted to the record, the petitioner has paid significant amounts of salaries and wages, as well as varying amounts of officer compensation. In 2002, the petitioner paid salaries and wages of \$2,682,424, compensation for subcontractors of \$2,099,945,⁸ and officer compensation of \$179,311, while in 2003, the petitioner paid \$2,886,820 in salaries and wages, \$2,236,373 in subcontractor fees, and \$273,637 in officer compensation. The petitioner also has paid into employee benefit programs during these two years, as well as in tax year 2000, with consistently increasing gross profits. USCIS computer records reflect that seven of the 14 petitions filed under either [REDACTED] or [REDACTED] are related to the beneficiary. Thus, the question of multiple beneficiaries with similar wages to be paid does not play a major role in the overall totality of the petitioner's circumstances.

The AAO requested the petitioner's tax returns for tax years 2004 to 2006 to complete the record. The petitioner submitted these documents in response to the AAO RFE. These documents indicate that although the petitioner has growing gross receipts and salaries and wages in these three years, the petitioner's net income and net current assets for all three years were negative.⁹ Nevertheless the petitioner did establish that it paid the beneficiary wages greater than the proffered wage during all three years. The record also reflects that the petitioner paid the following significant and increasing salaries and wages in tax years 2004 to 2006: \$4,228,772; \$4,582,454; and \$6,108,657. The petitioner also submitted its tax returns for 2007 and 2008 which also add to the overall totality of the petitioner's circumstances. The tax return for 2007 reflect net income of \$140,308 and net current assets of \$188,575, while the petitioner's tax return for 2008 reflects net income of -\$335,301 and net current assets of \$115,827.

⁸ Subcontractor fees are identified at line 19, page one of the Form 1120S, as part of "other deductions"

⁹ The petitioner's net income for 2004 to 2006 was -\$161,439, -\$237,661; and -\$20,256; while the petitioner's net current assets in the same tax years were -\$1,029,803; -\$1,293,680; and -\$1,348,863, respectively. Nevertheless, the petitioner paid the beneficiary more than the proffered wage in 2004 to 2006.

Assessing the totality of the circumstances in this individual case, it is concluded that the petitioner, paid significant wages and salaries and subcontractor compensation. The pattern of the petitioner's business operations shows significant receipts for all tax years in question; minimal difference between the beneficiary's actual wages and the proffered wage in tax years 2001 and 2002; and the payment by the petitioner of the proffered wage for the remaining relevant period of time. In tax years 2007 and 2008, the petitioner had both positive net current assets and significant wages and salaries and subcontractor compensation. Based on the overall picture and volume and nature of the petitioner's business, it appears to be a viable business and has established that it has the continuing ability to pay the proffered wage. The AAO withdraws the director's decision with regard to the petitioner's ability to pay the proffered wage.

The Beneficiary's Qualifications for the Proffered Position

In his decision, the director also examined whether the petitioner had established that the beneficiary possessed the requisite work experience stipulated on the Form ETA 750. The director determined that the petitioner had not established that the beneficiary possesses the special skills listed at Item 15 of the Form ETA 750.

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

(ii) *Other documentation*—

(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.

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. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). As stated previously, Form ETA 750 was accepted for processing on May 30, 2002.¹⁰ The Immigrant Petition for Alien Worker (Form I-140) was filed on August 3, 2006.

As noted above, the Form ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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 the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).¹¹ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

¹⁰ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

¹¹ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). **The INS then makes its own determination of the alien's entitlement to sixth preference status.** *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The job qualifications for the certified position of systems analyst are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows: "Develop Web applic[a]t[io]ns./OO methods; conduct coding in Server side VB Scripting & Client Side Java Scripting."

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	8
High school	4
College	4
College Degree Required	B.S.
Major Field of Study	Engineering or Science

Experience:

Job Offered	1
(or)	
Related Occupation	X

Block 15:

Other Special Requirements: Skills in Windows NT 4.0, DHTML, Active Server Pages 2.0, SQL, VB 6.0, MS Front Page, Crystal Reports, ODBC, ADO

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as Bachelor of Science in Engineering from the University of Mysore, India, studying from November 1987 to May 1992.

In support of the beneficiary's educational qualifications, the record contains a copy of the beneficiary's diploma from the University of Mysore. It indicates that the beneficiary was awarded a Bachelor of Engineering in Mechanical Engineering from the University of Mysore in 1994. The copies of the beneficiary's transcripts for eight semesters from April 1988 to March 1994 are also submitted to the record. The record also contains a copy of a Certificate of Excellence (undated) that states the beneficiary completed the requirements to be recognized as a Microsoft Certified Professional.

The record also contains a copy of a credentials evaluation, dated January 23, 2001, from Intelli Source Company, Vienna, Virginia. The evaluation describes the beneficiary's diploma from the University of Mysore as a Bachelor of Science degree in Engineering and concludes that it is equivalent to a bachelor's degree in engineering in the United States.¹²

The Form ETA 750B also reflects the beneficiary's experience as follows:

Employer: The Petitioner January 1, 2001 to May 28, 2002
(the date the beneficiary signed the ETA Form 750)
Duties: Work in IOEAAA project, design the database requirements, document the technical details and develop the system; involve in system design, analysis and in production support.

Employer: [REDACTED] March 2000 to December 2000
Duties: Worked as an "ASP Technical Lead" in different modules of "Public and Indian Housing Information Center" project; gave requirements to the Database team, coordinated with the de[v]elopers to design and develop the system, migrated plans.

Employer: [REDACTED] January 1998 to February 2000

¹² We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). EDGE in its information on the Indian educational system, also identifies a Bachelor's degree in Engineering/Technology as equivalent to the U.S. Baccalaureate degree.

Technologies

Duties: Understood and performed the system requirements, designed the system, coordinated with the [D]atabase team and developed the system.

Employer: [REDACTED] January 1993 to December 1997

Duties: Developed a customized system, integrated all modules; involved in developing some active X Controls, Database design: developed some components using VB; conducted as a team member for production support.

In the petitioner's cover letter dated July 26 2006, submitted with the initial I-140 petition, the petitioner stated that the beneficiary had worked with the petitioner as a system analyst since January 2001. The petitioner described the beneficiary's duties as follows:

[The beneficiary] is developing and maintaining IOEAAA Application that is deployed on Sun One application services. He is responsible for maintaining developing, demo, production and training application servers. He developed reports using Oracle reports. [The beneficiary's] current project is OE/AAA System (FAA). He is developing a system, which integrates all the regions of FAA and workflow. He worked extensively in Security Administration, Work Flow, JavaScript validations and Reporting System. Created System using Visual Interdev, Front Page 98, Active Server Pages, Oracle 8.1 and Seagate Crystal Reports. Used HTML, VB Script extensively and ADO is used to access the data from Oracle Database.

On February 23, 2007, the director issued a Request for Evidence, stating that the petitioner had not established the beneficiary's required one year of work experience, based on the Microsoft certificate. The director requested correspondence from prior employers that included the name, address and title of the writer, and that reviewed the criteria for the position and a specific description of duties performed, dates of employment as well as the professional relationship (manager, supervisor, human resource director) that the writer had with the beneficiary.¹³ The director further requested that the petitioner submit photocopies of the beneficiary's tax documents, contracts, pay statements or any other document to verify the beneficiary's employment with any entity submitting letters of work experience.

In response, the petitioner submitted a letter dated July 23, 1999 from an individual whose name is illegible and who is identified as [REDACTED] The manager

¹³ The regulation at 8 C.F.R. § 204.5(g)(1), in pertinent part, states that 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.

states that beneficiary has worked for the organization as a SAP consultant since January 5, 1998 to the date of the letter.

The petitioner also submitted a copy of a document dated November 4, 1998 entitled "Summary of Oral Employment Conditions." The document is signed by [REDACTED] and by the beneficiary. The duties of the beneficiary's proffered position with [REDACTED] were "programming support for designing, developing and implementing database applications for various systems." The document further stated: "For details, please see the attached employer letter." There is no letter attached. The petitioner also submitted the beneficiary's pay stubs from [REDACTED] from July 16, 2000 to December 17, 2000 as well as a 2000 W-2 Wage and Tax Statement that indicates [REDACTED] paid the beneficiary \$26,448 in 2000. Counsel stated in the petitioner's response to the director's RFE that neither Unifor nor [REDACTED] were in business any longer, and that further documentation concerning their employment of the beneficiary was not available.

In his denial of the petition, the director determined that the documentation from [REDACTED] did not detail the duties performed by the beneficiary and that the record did not adequately explain how the duties of a SAP consultant related to the duties of a systems analyst. With regard to the document from [REDACTED] the director stated that the paycheck stubs and the contract did not establish in what capacity the beneficiary was employed, the length of employment, or that the beneficiary possessed the specific skills listed in section 15 of the ETA Form 750. With regard to the petitioner's cover letter submitted with the initial petition, the director stated that the petitioner's description of work done by the beneficiary at prior employers could not be viewed as primary evidence to establish the beneficiary's required one year of work experience. The director also appears to states that while the petitioner's correspondence established that the beneficiary meets the one-year job experience requirement, the same correspondence did not establish the beneficiary possesses the specific skills listed in section 15 of the ETA Form 750.

On appeal, with regard to the beneficiary's qualifying work experience, counsel submits two affidavits. In the first affidavit dated July 24, 2007, [REDACTED] affirms that he is currently and at all times has been employed with [REDACTED], and that during January 5, 1998 to May 31, 2000, he was employed by [REDACTED] as a Senior Software Engineer. [REDACTED] continues that from June 15, 1998 to February 15, 2000, he supervised the beneficiary who worked at [REDACTED] as a system analyst. [REDACTED] states that based on the beneficiary's hard work and ability to analyze multiple systems, he was promoted from SAP consultant to System Analyst in August 1999.

In the second affidavit, dated July 24, 2007, [REDACTED], states that he currently and at all times has been employed with [REDACTED]. Mr. [REDACTED] states that during January 5, 1998 to April 30, 2000, he was employed with [REDACTED] as a system analyst. He also states that to his knowledge, the beneficiary performed the following duties:

Used HTML, DHTML, Active server pages (ASP) 2.0 for creating dynamic web interface;
Installed applications on Windows NT 4.0 servers and developed web applications using Microsoft Visual Interdev and Front page;
Used Java script for client side form validations while Visual Basic scripting for server side back end data processing;
Used Crystal Reports as a management reporting tool;
Used ADO and ODBC extensively for data processing and SQL for checking data integrity;
Used Object Oriented Programming (OOPs) in integrating different modules; and
Understanding data integrity, legacy data base scheme and designing new system and working on conversion process.

On appeal, counsel states the director's decision is contradictory. Counsel cites 8 C.F.R. § 204.5(g)(1) and states the petitioner's 2006 cover letter established that the beneficiary possessed the work experience to meet the one-year requirements since he worked for the petitioner since January 2002.¹⁴ Counsel states that the petitioner's letter clearly demonstrates the beneficiary has possessed the requisite skills and performed them since January 2001. Counsel states that the director's RFE stating that no evidence was submitted to establish that the beneficiary had the required experience was invalid and contradictory to the director's decision that stated the petitioner had established a one-year length of work experience. Counsel states that if the RFE acknowledged that the one year length of work experience had been established, the petitioner would have no problem providing a separate letter to address the skills that the beneficiary possessed. Counsel then states that the two affidavits provided on appeal should satisfy the one-year experience and the skills requirement as well.

In response to the AAO's RFE, counsel stated that it appeared that the AAO had not seen the complete letter from [REDACTED] the beneficiary's supervisor at [REDACTED]. Counsel states the letter had a second page, as indicated by the notation "P.T.O.," meaning Please Turn Over. Counsel submits the second page of the Unifor letter. This letter is identical in format and text to the letter originally submitted on appeal, except for the missing second page. On the second page, [REDACTED] describes the beneficiary's work duties utilizing Microsoft Front Page, Microsoft Visual InterDev; OO Methods programming, Visual Basic (BV), Java Script, Crystal Reports, Windows NT 4.0 Servers, ODBC and ADO and SQL, as well as Active Server Pages 2.0 and DHTML for user interface. On the second page, [REDACTED] signs his name. This page indicates that the statement was executed on July 24, 2007, the same date as noted on the first page.

The petitioner also submitted the dated Microsoft Examination Score Report with the actual subject areas, and provided two more certificates with regard to a 1998 InterSolv Certificate for training in Oracle and VS, as well as a 1999 KarRox Participation Certificate that indicates training in ASP programming using Visual InterDev 6.0.

¹⁴ This statement appears to be a typographical error. The petitioner's letter and the ETA Form 750 both establish the petitioner employed the beneficiary in January 2001.

The AAO accepts the petitioner's submission of the complete letter from [REDACTED] in response to its RFE. It further finds that the petitioner has established that the beneficiary based on his employment with Unifor in India has the requisite experience and special skills outlined in Section 15 of the ETA Form 750 prior to the 2002 priority date.

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 met that burden with regard to its ability to pay the proffered wage, as well as with regard to the establishing the beneficiary's qualifications for the proffered position.

ORDER: The appeal is sustained.