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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: [REDACTED]
LIN-07-200-52453

Office: NEBRASKA SERVICE CENTER

Date: **APR 27 2010**

IN RE: Petitioner: [REDACTED]
 Beneficiary: [REDACTED]

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:

[REDACTED]

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 concerning your case 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 or reopen, 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 dismissed.

The petitioner is a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification), approved by the Department of Labor (DOL). The director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification and the petitioner's continuing ability to pay the proffered wage. The director denied the petition accordingly.

The record shows that the appeal is properly and timely filed, 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.

As set forth in the director's January 22, 2008 denial, the first issue in this case is whether or not the petitioner has demonstrated that the beneficiary satisfied the minimum level of education stated on the labor certification.

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).¹

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.

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). Here, the Form ETA 750 was accepted for processing on February

¹ The submission of additional evidence on appeal is allowed by the instructions to 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).

19, 2004² and certified on January 8, 2007 initially on behalf of the original beneficiary.³ The Immigrant Petition for Alien Worker (Form I-140) was filed on July 5, 2007. The instant petition is for a substituted beneficiary.⁴

The job qualifications for the certified position of programmer-analyst are found on Form ETA-750 Part A. 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		Bachelor's

² 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.

³ The original copy of the labor certification filed and certified on behalf of the original beneficiary is in the record. U.S. Citizenship and Immigration Services (USCIS) records do not contain any I-140 immigrant petition filed and approved on behalf of the original beneficiary based on the instant labor certification.

⁴ We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to USCIS based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

Major Field of Study Computer Science, Computer
Applications, Computer Information Systems, Computer Engineering,
Electrical/Electronic Engineering, Electronics & Telecommunications,
Math, Physics or its foreign education equivalent.

Experience:

Job Offered 1 year
(or)
Related Occupation 1 year in IT industry

Block 15:

Other Special Requirements Travel and/or relocation required.

As set forth above, the proffered position requires four years of college culminating in a Bachelor's degree in computer science or a related field and one year of experience in the job offered or a related occupation.

In support of the beneficiary's educational qualifications, the petitioner submits copies of the beneficiary's diploma and transcripts from Andhra University in India. These documents indicate that the beneficiary was awarded a Bachelor of Engineering on August 12, 1997. The petitioner additionally submitted a credentials evaluation, dated November 14, 2003, from Foundation for International Services, Inc. (FIS). The evaluation describes the beneficiary's diploma from Andhra University "as a bachelor's degree in mechanical engineering from an accredited college or university in the United States and has, as result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background equivalent to a bachelor's degree in computer information systems from an accredited college or university in the United States."

The director denied the petition because the educational evaluation used the 3-to-1 rule in evaluating the foreign bachelor's degree as equivalent to a U.S. bachelor's degree in computer information systems.

On appeal, counsel asserts that the beneficiary's education alone is sufficient to meet the qualification of the approved labor certification and submits a new education evaluation based solely on the beneficiary's education. Counsel further argues that engineering is one of the categories listed in the labor certification.

The position requires four years of college culminating in a Bachelor's degree in computer science or a related field and one year of experience, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C). Thus, combined with DOL's classification and assignment of educational and experience requirements for the occupation, the certified position must be considered as a professional occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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 that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses 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. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.)

In this case, the diploma and transcripts from Andhra University demonstrate that the beneficiary was awarded a bachelor of engineering degree upon completion of four years of college study. The AAO finds this degree to meet the requirements of the regulations. Form ETA 750 requires a bachelor’s degree in a broad range of fields, including several areas of engineering and math, physics or equivalent. The plain meaning of the language should interpret the field requirements include mechanical engineering. Therefore, the AAO finds that the beneficiary possesses a foreign equivalent bachelor’s degree in the specified field of study. The portion of the director’s decision will be withdrawn.

The second issue in this case is whether or not the petitioner has established the continuing ability to pay the proffered wage as of the priority date.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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, in this case which is February 19, 2004. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is \$72,000 per year. On the petition, the petitioner claimed to have been established in 1995, to have a gross annual income of \$12.5 million, to have a net annual income of \$128,000, and to currently employ 80 workers. With the petition, the petitioner submitted a Form ETA 750B with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B signed by the beneficiary on June 26, 2007, the beneficiary claimed to have worked for the petitioner since September 2006.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (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 beneficiary claimed to have worked for the petitioner since September 2006. Counsel submitted the beneficiary's W-2 forms for 2006 and 2007, and paystubs for 2008. The W-2 forms show that the petitioner paid the beneficiary \$23,581.04 in 2006 and \$81,826.94 in 2007. The beneficiary's paystub for period from January 1 to 15, 2008 indicates that the petitioner was paying the beneficiary at the level of \$4,000 semi-monthly. If the petitioner had continued to pay the beneficiary the same rate to the end of the year, it would demonstrate that the petitioner had paid the beneficiary the full proffered wage of \$72,000 in 2008. Thus, the petitioner demonstrated that it paid the instant beneficiary the full proffered wage in 2007 and 2008 and a partial proffered wage in 2006. The petitioner must demonstrate that it had sufficient net income or net current assets to pay the difference of \$48,418.96 between wages actually paid the beneficiary and the proffered wage in 2006, and the full proffered wage of \$72,000 in the years 2004 and 2005.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court

specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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).

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.⁵ 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 evidence in the record of proceeding shows that the petitioner is structured as an S corporation. The petitioner’s tax returns in the record demonstrate its net income and net current assets for 2004 through 2006, as shown in the table below.

⁵According 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.

- In 2004, the Form 1120S stated net income⁶ of \$49,494 and net current assets of (\$696,252).
- In 2005, the Form 1120S stated net income of \$84,344 and net current assets of (\$766,595).
- In 2006, the Form 1120S stated net income of \$145,996 and net current assets of (\$372,974).

Therefore, for the year 2004, the petitioner had insufficient net income to pay the instant beneficiary the proffered wage while for the years 2005 and 2005, the net income was sufficient to pay the full proffered wage in 2005 and the difference of \$48,418.96 between wages actually paid the beneficiary and the proffered wage in 2006.

On appeal, counsel submits the petitioner's financial statements for 2003 and 2004. 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 submits a list of monthly balances for the petitioner's bank account for 2004 through 2006 claiming the balances in the petitioner's bank account can be used to pay the proffered wage and further establish the ability to pay the proffered wage. Counsel's reliance on the balances in the petitioner's business checking accounts is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that

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 (2003), line 17e (2004-2005) or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed on February 3, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered in determining the petitioner's net current assets.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In the instant case, the petitioner has filed additional Immigrant Petitions for Alien Worker (Form I-140) for numerous workers.⁷ The approved immigrant petitions require the petitioner must demonstrate that it had paid all proffered wages or it had sufficient net income or net current assets to pay all proffered wages to at least 37 additional beneficiaries in 2004, 47 in 2005, and 47 in 2006. The record does not contain any evidence showing that the petitioner had paid the proffered wages to all these beneficiaries in the relevant years. To establish the ability to pay all these proffered wages, the petitioner would need to have net income or net current assets of \$2,664,000⁸ in 2004, and \$3,384,000 in each of the years 2005 and 2006. As previously discussed, the petitioner had insufficient net income to pay the instant beneficiary a single proffered wage in 2004; the petitioner's net income of \$84,344 in 2005 was sufficient to pay only one proffered wage; and the net income of \$145,996 in 2006 was sufficient to pay only two proffered wages. Therefore, the petitioner failed to establish its ability to pay all proffered wages in 2004 through 2006 through an examination of wages paid to the beneficiaries, or its net income or net current assets.

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 petitioner's prospects for a resumption of successful business operations were well established. The

⁷ USCIS records show that the petitioner has filed total 100 Form I-140 immigrant petitions and 469 Form I-129 nonimmigrant petitions in recent years including 32 immigrant petitions in 2003 or before, five in 2004, three in 2005, 17 in 2006, 37 in 2007, two in 2008, one in 2009 and three in 2010.

⁸ The AAO assumes that proffered wages in those petitions are identical to the one in the instant case.

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, given the record as a whole, the petitioner's history of filing petitions that the petitioner with 80 workers has filed 100 immigrant petitions and 469 nonimmigrant petitions, the AAO must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiaries the proffered wages as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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 portion of the director's decision based on the ground of educational requirement is withdrawn. However, the appeal is dismissed and the petition remains denied on the ground of eligibility on the petitioner's ability to pay the proffered wage.