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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:

SRC 07 156 52596

Office: TEXAS SERVICE CENTER

Date: FEB 02 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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the case will be remanded for further consideration and action.

The petitioner claims to be an IT consulting business. It seeks to permanently employ the beneficiary in the United States as a programmer/analyst. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).²

The director denied the petition on November 2, 2007. The decision states that the beneficiary does not possess a single degree that was the foreign equivalent to a U.S. baccalaureate degree as required by the labor certification and the regulation for the requested preference classification. The AAO will also consider whether the labor certification is valid for the area of intended employment stated on the petition, and whether the petitioner has established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.³

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); *see also Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo*

¹Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

²This petition involves the substitution of a beneficiary on the labor certification. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (to be codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, the requested substitution will be permitted.

³An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003).

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.⁴

In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (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, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

Part A of Form ETA 750 sets forth the duties and requirements of the offered position. The relevant section is reproduced below:

- 14. Minimum education, training and experience required to perform the duties of the offered position.**
EDUCATION: four-year bachelor of science degree in "Computer Applications Business/Administration"
TRAINING: none required
EXPERIENCE: two years in the job offered or in an unnamed related occupation
- 15. Other Special Requirements:** none required

The record or proceeding contains a copy of the diplomas and transcripts for the beneficiary's two-year master of science degree in computer science from Bharathidasan University, India, and his three-year bachelor of science degree in computer science from Bharathiar University, India.

The record contains three evaluations of the beneficiary's academic credentials. The first evaluation, dated October 10, 2007, was prepared by [REDACTED] for Development and Quality Assurance of European-American University,⁵ located in the Commonwealth of Dominica.

⁴The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

⁵According to its website, European-American University provides distance learning degrees and awards degrees based on experience. www.thedegree.org/apel.html (accessed December 29, 2009). The website explains the institution's accreditation as follows:

The evaluation concludes that the beneficiary's three-year bachelor of science degree is equivalent to a U.S. bachelor of science degree from a regionally accredited U.S. college or university. The second evaluation, also dated October 10, 2007, was prepared by [REDACTED] of Marquess Educational Consultants. The evaluation also concludes that the beneficiary's three-year bachelor of science degree is equivalent to a U.S. bachelor of science degree from a regionally accredited U.S. college or university.

It is noted that the [REDACTED] evaluations are fundamentally identical, with each evaluation referencing many of the same supporting materials. The main argument of both evaluations is that a three-year bachelor's degree from India is equivalent to a 120 credit hour U.S. bachelor's degree, because an Indian three-year degree requires the same number of classroom hours (or "contact hours") as a U.S. bachelor's degree. The evaluations claim that a student must attend at least 15 50-minute classroom hours to earn one semester credit hour under the U.S. system. Since U.S. bachelor's degree programs require 120 credit hours for graduation, the evaluations conclude that a program of study with 1800 classroom hours is equivalent to a U.S. bachelor's degree. Since a three-year bachelor's degree from India allegedly requires over 1800 classroom hours, the evaluations conclude that it is equivalent to a U.S. bachelor's degree.

The third evaluation was prepared by [REDACTED] on behalf of International Credentials Evaluation Services on September 24, 1998. The author claims to be a Ph.D., and an Associate Dean and Professor at Bowling Green State University. The [REDACTED] evaluation states that the beneficiary's three-year bachelor's degree is equivalent to three years of study towards a U.S. bachelor's degree; and that beneficiary's two-year master's degree is equivalent to a U.S. bachelor of science degree.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive

The University holds official accreditation via a Parliamentary Charter dated 29 July 2008 from the International States Parliament for Safety and Peace, an intergovernmental association of nations founded in 1975 by Makarios III, then President of the Republic of Cyprus, and Archbishop Viktor Busà, with the constitutional support of the Republics of Mali and Senegal. The ISPSP is officially recognized by decree of the Republic of Ecuador and its International Vice-Presidents are Teodoro Obiang Nbasogo, President of Equatorial Guinea, and Hugo Chavez, President of Venezuela. The General Secretary until December 2008 was the late Lansana Conté, President of Guinea, and the Grand Chancellor International until June 2009 was the late Omar Bongo Ondimba, President of Gabon. The ISPSP is under Royal Protection of HRH Prince Saqer Bin Khalid Al-Qassimi of the Royal House of Sharjah, United Arab Emirates, is supported by the King of Cambodia and is recognized by nations around the world.

evidence of eligibility; USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

Given the inconsistencies between the statements in the evaluations and the evidence in the record, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials."⁶

EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not state that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. However, EDGE does state that a master of science from India, which is awarded upon completion of two years of study beyond a two- or three-year bachelors degree, "represents attainment of a level of education comparable to a bachelor's degree in the United States."⁷

Therefore, according to EDGE, the beneficiary's master of science degree is a single foreign degree that is equivalent to a U.S. bachelor's degree. Accordingly, since the director's denial was based on the determination that the beneficiary did not possess a single foreign degree equivalent to a U.S. bachelor's degree, the director's decision on this issue is withdrawn.

Beyond the decision of the director, it is concluded that the labor certification is not valid for the area of intended employment stated on the petition. The Part A, Item 7 of the labor certification states that the address of the intended employment is [REDACTED]. However, Part 6, Question 4 of the petition states that the address of the intended employment is [REDACTED]. A labor certification is only valid for the specific job offer in the area of intended employment described on the application form. *See* 20 C.F.R. §656.30(c)(2). USCIS must determine whether the job offered on the petition is the

⁶<http://aacraoedge.aacrao.org/register/index/php>.

⁷<http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=140> (accessed January 5, 2010).

same as the job described in the labor certification. If the worksite of the offered position is not in the same Metropolitan Statistical Area (MSA) as the worksite specified on the labor certification, then the petition will be denied. According to the latest available data issued by the Office of Management and Budget, the two worksite addresses are located in different MSAs. See www.whitehouse.gov/omb/assets/bulletins/b10-02.pdf (accessed December 30, 2009). Accordingly, it is concluded that there has been a material change in the location of the job opportunity, and the petition cannot be approved for this reason.

The petitioner has also not established its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In order to obtain classification the requested employment-based preference category, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 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.

Therefore, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the August 9, 2004 priority date, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).

The proffered wage stated on the labor certification is \$75,000.00 per year. The labor certification states that the position requires two years of experience in the job offered or in an unspecified related occupation. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of \$2,404,338.00, and to employ 24 workers. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

In this matter, the record of proceeding contains no evidence that the petitioner has employed the beneficiary. Accordingly, the petitioner has not established that it paid the beneficiary an amount

equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. 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. 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 wage expense is misplaced. Showing that the petitioner's gross sales 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*, 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 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).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.⁸

<u>Year</u>	<u>Net Income (\$)</u>
2004	66,582.00
2005	Not Provided ⁹
2006	103,205.00

For the years 2004 and 2005, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁰

⁸ For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 18 (2006 to present) or Line 17e (2004 and 2005). When the two numbers differ, the number reported on Schedule K is used for net income.

⁹The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). The petitioner's failure to provide this evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

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 net current assets for the required period, as shown in the table below.¹¹

<u>Year</u>	<u>Net Current Assets (\$)</u>
2004	143,302.00
2005	Not provided

For 2005, the petitioner did not establish that it had sufficient net current assets to pay the proffered wage.

Therefore, the petitioner has not 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.

In addition to the preceding analysis, 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 (Reg. Comm'r 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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

¹⁰According 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.

¹¹On Form 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

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, the petitioner claims to have been in business since 2001 and to employ 24 employees. The petitioner's tax returns show gross sales of \$1,963,329.00 in 2004 and \$2,802,734 in 2006. The magnitude of the petitioner's operations is a favorable factor, but, in this case, is not sufficient by itself to establish its ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

Further, it is noted that the petitioner has filed petitions on behalf of other beneficiaries.¹² Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144. The record in the instant case contains no information about the priority dates and proffered wages for the beneficiaries of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. There is also no information in the record about whether the petitioner has employed the beneficiaries or the wages paid to the beneficiaries, if any. Accordingly, the petitioner has not established its ability to pay the proffered wage for the beneficiary or the proffered wages to the beneficiaries of the other petitions.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above.

¹²LIN 07 119 52576, LIN 07 119 52896, LIN 07 123 51795, LIN 07 150 51975, LIN 07 150 53638, SRC 06 263 51319, SRC 07 006 53139, SRC 07 129 52456, SRC 07 162 51400, SRC 07 800 18862, SRC 07 800 19401, SRC 07 800 26241.

ORDER: The director's decision is withdrawn; however, the petition is currently not *approvable for the reasons discussed above*, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new decision.