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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

JAN 29 2003

File: EAC 01 275 52668 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

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

PUBLIC COPY

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a software design and development firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor.

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

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.

Eligibility in this matter turns, in part, on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is September 6, 2000. The beneficiary's proffered salary as stated on the labor certification is $30.05 per hour, or $1,202 a week, for a sum of $62,504 per annum.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage. On November 7, 2001, the director issued a request for evidence (I-797) to establish that the petitioner either had the ability to pay the proffered wage as of the priority date and continuing to the

present, or that the petitioner had paid it to the beneficiary. Counsel submitted no evidence on this portion of the I-797, and the director determined that ability to pay had not been proven.

On appeal, the petitioner offers Wage and Tax Statements (Forms W-2) for 2000 and 2001, showing, respectively, the payment of $62,209.56 and $64,884.64 in wages to the beneficiary. The wage paid in 2000 falls $294.44 short of the proffered wage.

Counsel avers on appeal that the petitioner has submitted income tax returns confirming that it had gross revenues of approximately three (3) million dollars and net income of approximately $400,000 for the year of the filing of the Application for Alien Employment Certification (Form ETA 750). The Service record, in fact, contains no tax returns.

The statements of counsel do not constitute evidence. Matter of Obaigbena, 19 I & N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I & N Dec. 503, 506 (BIA 1980).

Counsel states that he has provided all supporting documents with his brief as of November 13, 2002. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I & N Dec. 190 (Reg. Comm. 1972).

In Form I-797 at the outset, the director required the federal tax return, annual report or audited financial statement for 2000. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before the Service. Matter of Soriano, 19 I & N Dec. 764, 766 (BIA 1988).

A careful review of the sparse evidence leads to the conclusion that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

Beyond the limitations placed on the director by the scant evidence of the ability to pay, the petitioner has not established that the beneficiary met the petitioner's qualifications for the position.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's priority date. Matter of Wing's Tea House, 16 I & N Dec. 158 (Act. Reg. Comm. 1977). In

this case, the priority date is September 6, 2000.

The Form ETA 750, in block 14, exacted three (3) years of college education with a Bachelor of Science in the major field of computer science or physics and six (6) months experience in either the job offered, software engineer or the related occupation of programmer/analyst.

The director requested an evaluation of the education of the beneficiary as one who possessed a Bachelor of Science in computer science or physics as of the priority date of the petition. The petitioner responded with the educational evaluation from the Foundation for International Services, Inc. (FIS).

FIS specified data and reported as education:

1. Copy of the Special Certificate from the University of Mumbai in Mumbai, India certifying that [the beneficiary] passed the Bachelor of Science (B.Sc.) degree examination held in May of 1996 in the First Class and qualified for the award of the degree. This document which was dated July 10, 1998 … is equivalent to three years of university-level credit from an accredited college or university in the United States. A copy of the certificate listing the subjects examined, including the grade for each, was also submitted.
2. Copy of the Diploma from APTECH Computer Education in Mumbai, India certifying that [the beneficiary] successfully completed the course in computer programming and was awarded the Masters Diploma in Software Engineering. This document … is equivalent to completion of a computer training program offered by a private organization in the United States….
3. Resume listing [the beneficiary's] employment experiences in management information systems from December of 1995 to February of 1996 (part-time) and from June of 1996 to [April 7, 1999]….
4. In summary, it is the judgment of [FIS] that [the beneficiary] has the equivalent of three years of university-level credit in the sciences from an accredited college or university in the United States and has, <u>as a result of his educational background, professional training and experience (3 years of experience = 1 year of university level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science</u> from an accredited college or university in the United States. (Emphasis added)

Counsel claims in response to the I-797 that:

> [FIS' evaluation] of the Beneficiary's diploma … indicates that he has three years of college level education in the field of Computer Science…. The evaluation states that experience is being used ONLY to make up for the FOURTH year of education which the beneficiary lacks.

The director determined that the FIS evaluation substituted work experience to construct a "functional equivalent" of a major in the field of computer science. The director concluded that the beneficiary's degree did not, therefore, meet the qualifications for the position as stated in the labor certification and denied the petition.

The FIS evaluation, *supra*, derives the evidence for the beneficiary's major in computer science through a combination of training, experience, and education of the beneficiary. On appeal, counsel calls attention to an untitled copy of a document of the University of Mumbai authorized on December 12, 1997 (the parchment). It makes a claim to a Bachelor of Science degree based on education alone, but it shifts to physics as the major area.

On appeal, counsel offers an evaluation of the parchment from Washington Evaluation Service (WES). WES simply provides a "Conclusion" that the parchment represents a degree "academically equivalent" to a Bachelor of Science in Physics awarded by an accredited United States university.

The WES evaluator conspicuously omits any reference to transcripts, major courses, catalogues, or course descriptions related to physics. WES volunteers that the beneficiary was in an integrated three (3) year program of study in an accelerated program that allows students to complete a four (4) year course in three (3) years, as stated in the parchment. The bare conclusion of WES lacks any particular of the claimed degree as "academically equivalent" to one with a major field of physics.

WES relied on the parchment alone. The petitioner has not shown that the primary evidence, including transcripts, of this degree in physics, first advanced on appeal, to be unavailable for evaluation. Neither WES nor counsel explained the shift from a major in computer science to physics. 8 CFR 103.2(b)(1)-(2).

Finally, counsel specifies error on appeal in that the director failed to notice that the Form ETA 750 only required three (3) years of experience. In fact, it required only six (6) months,

and the director never questioned that experience. The director objected to a "functional equivalent" of a major field.

As of the priority date, the petitioner has established neither that it had the ability to pay the proffered wage, nor that the beneficiary had a Bachelor of Science with the requisite major. Therefore, the petitioner has not overcome the director's decision.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.