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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Nebraska Service Center Date: JAN 21 2004

IN RE: Petitioner:
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 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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner specializes in custom embroidery for garments. It seeks to employ the beneficiary permanently in the United States as a marketing manager. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's filing date. The director also found that the petitioner had not established that it had the financial ability to pay the proffered wage as of the priority date of the petition.

On appeal, counsel submits a brief and additional evidence.

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.

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 filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is July 10, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of marketing manager required a Bachelor's degree or equivalent in Business, Marketing, or a related field and two years of experience in the job offered, or two years of experience in the related occupation of marketing. At block #15, Other Special Requirements. The required experience in item #14 must include designing and developed market strategies for embroidery or garments industry and usage of embroidery design software. Proficiency in corel draw and photoshop graphic designs software.

As proof of the beneficiary's foreign equivalent bachelor's

degree, counsel submits a copy of the beneficiary's Bachelor of Arts degree from Panjab University, India, conferred upon him on September 15, 1989. The transcripts submitted with the diploma indicate that the beneficiary's degree resulted from a three-year undergraduate curriculum.

An academic evaluation from C.E.I. Education Specialists was also submitted in support of the petition. This evaluation states that the beneficiary's academic studies at Panjab University satisfied similar requirements to the completion of three years of academic study toward a Bachelor of Science degree from an accredited institution in the United States. It concludes that the beneficiary "has the academic and industrial experience equivalent to that of a U.S. professional with the following qualifications: B.A. Business achieved in the year 1995 with 03 years of professional service."

The director denied the petition, concluding that the beneficiary's three-year bachelor's degree is not an acceptable equivalency for a United States baccalaureate degree. We concur. It is noted that India's educational degree structure provides for both three-year and four-year bachelor's degree programs. Bachelor degrees in the arts, commerce, or the sciences may be earned after three years of higher education. A bachelor's degree in fields such as agriculture, dentistry, engineering, pharmacy, technology, and veterinary science, generally require four years of higher education. *See generally* Government of India, Department of Education, *Higher Education in India, Academic Qualification Framework - Degree Structure,* (last updated October, 2001) (http://www.education.nic.in/htmlweb/higedu.htm).

On appeal, counsel argues that "the employer intended to have the equivalency requirement based on education and/or experience. According to the credentials evaluation by Dr. H. S. Hayre, [the beneficiary's] credentials are equivalent to a Bachelor of Arts Degree in Business."

The regulation at 8 C.F.R. § 204.5(l)(2) specifically defines a professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent *degree* and is a member of the professions." (Emphasis added). In evaluating a beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific college degree. In this case, the labor certification plainly requires that the job candidate have a bachelor's degree, or an equivalent degree in Business, Marketing, or a related field.

A combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a United States baccalaureate degree, is not a foreign equivalent bachelor's degree. We note that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. Based on similar reasoning, it cannot be concluded that the beneficiary's three-year diploma from Panjab University is a foreign equivalent degree to a United States baccalaureate degree.

Therefore, the petitioner has not overcome this portion of the director's decision.

The other issue is whether the petitioner has established his ability to pay the proffered wage as of the filing date of the petition.

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 hinges 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). As previously noted, the petition's priority date is July 10, 2000. The beneficiary's salary as stated on the labor certification is $63,549.00 per annum.

Counsel submitted copies of the petitioner's Internal Revenue Service (IRS) Forms 1120 for fiscal years 2000 and 2001. The IRS Forms show taxable incomes of $8,741.00 and $28,549.11 respectively. Counsel also submitted copies of the beneficiary's

W-2 Wage and Tax Statements which showed he was paid $28,549.11 in 2000, and $40,806.20 in 2001.

In determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and 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).

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel resubmits a copy of the beneficiary's 2001 W-2 which shows he was paid $40,806.20 and argues that the director failed to take depreciation into account.

In *K.C.P. Food Co., Inc. v. Sava*, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that CIS should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

Noting that the forms 1120 submitted are for fiscal years and the beneficiary's W-2 Forms are for calendar years, even though the petitioner paid the beneficiary a salary in 2000, the combination of the salary paid and the taxable income shown on the tax return would not come near the proffered wage of $63,549.00. The petitioner, therefore, did not have the ability to pay the proffered wage as of the priority date. The record does show, however, that the petitioner had that ability in 2001, again adding together the wage paid the beneficiary and the petitioner's net income.

Nevertheless, it is concluded 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.

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.