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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

MAR 17 2004

FILE: SRC 01 172 54431 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary

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)

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 must be made to that office.

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 (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act, (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a computer sales and services firm. It seeks to employ the beneficiary permanently in the United States as a microcomputer support specialist. 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 it had the continuing financial ability to pay the beneficiary's proffered salary. The director further concluded that the beneficiary's educational credentials did not conform to the job offer requirements of the approved labor certification.

On appeal, counsel argues that the petitioner has established its continuing financial ability to pay the beneficiary's wage offer and that the evidence demonstrates that the beneficiary possesses the necessary qualifications to meet the terms of the labor certification.

The appeal, Form 1290 B, shows that the appeal was filed October 1, 2002. It also indicates that counsel is submitting a separate brief and/or evidence to the AAO within 30 days. A review of the record reveals that no further documents have been received.

Section 203(b)(3)(A)(i) of 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.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii) also provides employment-based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

> (2) *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. . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

Eligibility in this matter is based, in part, upon 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. 8 C.F.R. § 204.5 (d). The petition's priority date in this instance is July 18, 1999. The beneficiary's salary as stated on the labor certification is $42,524 per year. The visa petition reflects that the petitioner was established in 1988 and employs 16 people.

As evidence of the petitioner's ability to pay the beneficiary's wage offer of $45,524 per year, counsel initially submitted no evidence.

In a request dated January 10, 2002, the director instructed the petitioner to submit evidence establishing that it had the continuing financially ability to pay the offered wage as of the priority date of the labor certification. The director specified that the evidence must include the petitioner's most recent annual report, federal tax return, or

audited financial statement. The director also advised the petitioner that it may submit additional evidence such as profit/loss statements, personnel records, or bank account records.

In a letter dated April 2, 2002, counsel advised the director that he was submitting copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return for 1997, 1998, and 1999. Counsel also stated that copies of the petitioner's Florida corporate tax returns for 1998, 1999 and 2000 were also submitted, as well as a Florida "Intangible Tax Return" for the year 2000. These returns reflect that it represents the petitioner's financial data during a fiscal year running from June 1st to May 31st of the following year. Counsel offered no explanation why federal income tax returns were not available and no explanation why none of the income tax returns submitted appear to offer any financial data beyond May 31, 2000. It is noted that the petitioner's 1999 federal corporate tax return designated by counsel as "3" and the 2000 Florida corporate tax return labeled as "4" both cover the same period ending May 31, 2000.

The petitioner's 1999 corporate federal tax return is the first return that covers the priority date of July 18, 1999. It shows that the petitioner declared -$64,658 in taxable income before net operating loss (NOL) deduction and special deductions. Schedule L of this tax return discloses that the petitioner had $134,902 in current assets and had $27,217 in current liabilities, producing $107,685 in net current assets. Net current assets are assets that can reasonably be expected to be converted to cash or a cash equivalent within the year, less any financial encumbrances. These are additional resources that CIS will review in order to determine if they are available to cover the beneficiary's proposed salary.

In addition to the tax returns, counsel also responded with financial statements compiled by an accounting firm. These statements purport to represent the petitioner's financial status for a ten-month period ending March 31, 2002. They are neither audited nor reviewed. These reports offer limited value because they are based solely on the management's representations. The regulation at 8 C.F.R. § 204.5(g)(2) requires either federal tax returns, annual reports, or audited financial statements. While additional material may be submitted, the regulation neither states nor implies that unaudited financial statements may be substituted in lieu of the regulatory requirements.

The director denied the petition partially because he concluded that the petitioner had failed to establish its continuing ability to pay the beneficiary's proposed wage offer of $42,524 based on a review of the petitioner's taxable income as shown on its 1999 federal tax return. The director noted that the record contained a substantial gap in financial information, as the acceptable evidence submitted did not reach beyond that contained in the petitioner's 1999 corporate tax return.

On appeal, aside from a basic argument that the petitioner's evidence has established its continued financial ability to pay the proffered wage, and that the beneficiary possesses the requisite educational and employment credentials to satisfy the terms of the labor certification, counsel does not specifically challenge the director's conclusions.

Although we concur as to the absence of additional credible evidence relevant to the petitioner's continuing financial ability to pay the beneficiary's proffered salary, we find that the petitioner's 1999 net current assets of $107,685 far exceeded the beneficiary's proposed salary of $42,524. The petitioner's ability to pay the beneficiary's proposed salary, at least during this period from the priority date of July 18, 1999 to May 31, 2000, has been demonstrated by these figures.

The director's denial was also based, in part, upon his determination that the beneficiary's credentials did not satisfy the terms set forth on the approved labor certification.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. As discussed above, the filing or priority date of the petition is the

initial receipt in the Department of Labor's employment service system. *See Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, the beneficiary's experience and education necessary to fulfill the terms of the labor certification must be established as of July 18, 1999.

To determine whether a beneficiary is eligible for an employment-based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of microcomputer support specialist. Here, the applicant must have four years of college culminating in a bachelor's degree in computer science. Item 15 additionally specifies that the applicant must have a "Bachelor's degree or equivalent experience with HP PC's net servers, printers, and notebooks; Compaq servers, printers, notebooks; Fujitsu printers and notebooks; and, Novell and Microsoft networking operations."

As proof of the beneficiary's four years of college and bachelor's degree in computer science, counsel submitted a copy of a diploma from the "All-Union Extra-Mural Institute of Railway Transport Engineering," Moscow, USSR. This diploma indicates that the beneficiary was admitted in 1984 and completed his studies in the electrification of railway transport in 1990. A translated list of subjects accompanying the diploma indicates that the beneficiary took thirty-two classes at this institution.

Counsel also submitted copies of various certificates from Compaq, and Hewlett Packard indicating that the beneficiary has completed a variety of electronic and computer equipment maintenance courses. The record also contains a copy of the beneficiary's "resume worksheet" and a copy of an unsigned letter from a managing director at "Professional Computing Limited," located in Malta. The letter states that the beneficiary worked as a system and projects coordinator for that company from October 1994 until June 1997.

A credentials evaluation report from the Foundation for International Services, Inc. is also in the record. This report, dated January 16, 1998, states that the beneficiary's diploma from the All-Union Extra-Mural Institute of Railway Transport Engineering is equivalent to a United States bachelor's degree in electrical engineering with emphasis in electromechanical technology. After reviewing the beneficiary's resume worksheet and the letter from the Maltese computer company, the evaluation concludes that the beneficiary's course of study at the All-Union Extra-Mural Institute of Railway Transport Engineering and his employment experience suggested by the Professional Computing Limited letter and resume worksheet are the combined equivalent of a United States bachelor's degree in computer science. The credentials report indicates that it used a method ascribing one year of university-level credit for every three years of employment experience.

*Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides:

> This Service uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.

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. It is also noted that 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). The evidence relating to skilled workers also must show that a beneficiary meets the educational, training and experience requirements set forth on the approved labor certification. 8 C.F.R. § 204.5(l)(3)(ii)(B). In this case, the labor certification minimally requires that the job candidate have four years of college and a bachelor's degree with a major in computer science. The beneficiary does not have a bachelor's degree in computer science.

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. In order to conclude that the beneficiary holds the requisite bachelor's degree, the evaluation erroneously combined the beneficiary's study at the Moscow All-Union Extra-Mural Institute of Railway Transport Engineering and subsequent work experience. The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant petitions, not to immigrant petitions.

Based on the evidence submitted, it cannot be concluded that the director erred in denying the petition based upon the lack of evidence demonstrating the petitioner's continued financial ability to pay the beneficiary's salary or that the petitioner has not established that the beneficiary possesses the equivalent of a United States bachelor's degree in computer science as required by the terms of the labor certification.

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 sustained that burden.

**ORDER:** The appeal is dismissed.