U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 19 2005
EAC 02 221 54350

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 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, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the petitioner failed to establish that it had the ability to pay the proffered wage as of the priority date.

On appeal, the petitioner's counsel contends that the petitioner did have the ability to pay the proffered wage. Counsel resubmits documentation with regard to the petitioner's ability to pay the proffered wage.

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 nature, for which qualified workers are not available in the United States.

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 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 for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 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 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, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 20, 2001. The proffered wage as stated on the Form ETA 750 is $81,000 annually. On the Form ETA 750, the beneficiary indicated she had worked for the petitioner since February 2000 to the time the ETA 750 was signed.

On the petition, the petitioner indicated it had 25 employees, was established in 1991, had an estimated gross annual income of two million dollars and an estimated net annual income of $500,000. With the petition, the petitioner submitted a cover letter that described the petitioner as a diverse internet-based service company that provides key information for transactions in real estate purchasing. Finally the petitioner submitted a brochure for MLX.com, which is described in the record elsewhere as a computer program run by the petitioner.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 25, 2004, the director requested additional evidence pertinent to that ability. The director specifically requested that the petitioner provide copies of its 2001 and 2002 income tax returns, with all schedules and attachments. In addition, the director stated that if the petitioner employed the beneficiary, it submit copies of the beneficiary's Forms W-2 Wage and Tax Statements. The director also noted that the petitioner could alternatively submit annual reports for 2001 and 2002 that were accompanied by audited or reviewed financial statements.

In response, counsel submitted Form 1120 corporate tax returns for the petitioner for the years 2001 and 2002, as well as the petitioner's Form 941, Employer's Quarterly Federal Tax Return, from the first quarter of 2001 to the fourth quarter report for 2002, and copies of Forms W-2 issued to the beneficiary for years 2001, 2002, and 2003. These latter documents indicate that the beneficiary was paid $39,624.50 in 2001, $52,878.25 in 2002, and $51,523.93 in 2003.

The petitioner also submitted a letter from its corporate accountant, Mr.Francis Joseph, C.P.A., B. Halpern, P.C. Counsel noted that although the tax return for 2001 indicated a net loss of -$82,485, the petitioner's accountant in his letter added back $123,505 in deductions to the petitioner's net income as part of an initial, one-time development experience. Counsel submitted copies of cancelled checks and invoices issued as evidence of the one-time development expense. Counsel also stated that the petitioner incurred depreciation expenses of $9,752 in tax year 2001 and that by adding back the one-time development expense deduction and the depreciation expense, according to the petitioner's accountant, the petitioner generated a true cash flow of $50,772. Counsel stated that the difference between the beneficiary's actual wages and the proffered wage in 2001 was $41,376, and that the petitioner's revised cash flow of $50,772 in 2001 was more than sufficient to pay the beneficiary the proffered wage of $81,000. Counsel also submitted copies of the petitioner's bank statements covering the months of January 2001 to April 2001 as evidence of the petitioner's readily available cash assets. These bank statements are from the Apple Bank for Savings, account number [redacted] for January to March 2001; an Apple Bank money market account, account numbe [redacted] for February 2001; and a Bank One basic business checking account for the petitioner doing business as MLX.com, account number [redacted] opened in March 2001, with checks itemized until March 30, 2001.

With regard to tax year 2002, counsel noted the petitioner's taxable income of $103,776 and stated that this amount alone more than covered the beneficiary's proffered wage of $81,000. Counsel also noted that the recent revival in the New York metropolitan real estate market was also adding fuel to the growth of the petitioner. Counsel submitted copies of website pages of MLX.Com, which counsel described as being operated by the petitioner.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on July 23, 2004, denied the petition. The director stated that while the petitioner's 2002 federal income tax return indicated sufficient net current assets to pay the proffered wage, the evidence submitted for 2001 did not demonstrate the petitioner's ability to pay the proffered wage as of the priority date. The director stated that the petitioner's 2001 tax return showed a net income of -$82,485 and the Schedule L for the tax return showed that current liabilities were greater than current assets. The director also noted that the petitioner's bank statements for January through May 2001 did not reflect the complete year, and as such they did not establish that the petitioner's bank balances increased incrementally and that the

ending bank balances for the year were equal to or greater than the amount of funds necessary to pay the difference between the beneficiary's actual wages and the proffered wage, which is $41,375.50.

On appeal, counsel states that the director's insistence on focusing just on the petitioner's net income figures is overly restrictive, and overlooks the petitioner's bigger financial picture. Counsel states that the petitioner has maintained steadfast business growth over a period of more than 13 years. Counsel reiterates his statements with regard to depreciation, development expenditures, and increased cash flow contained in the petitioner's response to director's request for further evidence. Counsel also resubmits the letter from the petitioner's accountant dated May 2004. Counsel also reiterates that the difference in 2001 between the beneficiary's actual wage and the proffered wage of $41,375.50 is more than compensated by the petitioner's increased cash flow of $50,772. Counsel, in reference to the figures contained on Schedule L, states that the petitioner's current liabilities of $18,221 were only slightly higher than its current sets of $17, 553, a difference of $668. Counsel then refers to the petitioner's bank statements in March and April 2001 and states that the petitioner's available cash on hand at that time was $36,551.94 and $55,395.49, respectively. Counsel states that the petitioner clearly had more than sufficient funds to cover the proffered wage and other employees' salaries and general expenses. Counsel also notes that in the year 2002, the petitioner's cash on hand increased dramatically from $17,553 in 2001 to $62,782. Counsel asserts that the petitioner has met the financial burden necessary to sponsor the beneficiary's employment as a programmer analyst,[1] and that the director acknowledged as much in his denial when the director confirmed that the petitioner did possess the ability to pay the proffered wage in 2002. Counsel resubmits the bank statements initially submitted in response to the director's request for further evidence.

Counsel in its response to the director's request for further evidence submitted the petitioner's bank statements for three bank accounts for parts of 2001. Counsel's reliance on the balances in the petitioner's bank 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. In the instant petition, counsel submitted statements from three bank accounts with no further explanation of whether the funds from all three accounts were actually available to the petitioner, or were funds being transferred between the three accounts. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements for April 2001 somehow reflect additional available funds that were not reflected on its 2001 tax return.

Both counsel and the petitioner's accountant make reference to depreciation expenses, and a one-time discretionary development expense in 2001, and to the impact of these two tax items, if added back, on the petitioner's net income for 2001. Counsel asserts that if these two items were added back, the petitioner actually has a cash flow in year 2001 of $50,772.

With regard to depreciation expenses, a depreciation deduction does not represent a specific cash expenditure during the year claimed. It is a systematic allocation of the cost of a long-term asset. It may be taken to represent the diminution in value of buildings and equipment or to represent the accumulation of funds necessary to replace perishable equipment and buildings. The value lost as equipment and buildings deteriorate, however, is an actual expense of doing business, whether it is spread over more years or concentrated into fewer.

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[1] Although counsel refers twice on appeal to the beneficiary's job duties as programmer analyst, these are the duties described in her present position with the petitioner as an H-1B visa beneficiary. The instant petition is for a software engineer position.

While the expense does not require or represent the current use of cash, neither is it available to pay wages. No precedent exists that would allow the petitioner to add its depreciation deduction to the amount available to pay the proffered wage. *Chi-Feng Chang Y. Thornburgh,* 719 F. Supp. 532 (N.D. Texas 1989). *See also Elatos Restaurant Corp. V. Sava*, 632 F. Supp. 1049 (S.D. N.Y. 1985). The petitioner's election of accounting and depreciation methods accords a specific amount of depreciation expense to each given year. The petitioner may not now shift that expense to some other year as convenient to its present purpose, nor treat it as a fund available to pay the proffered wage. The court in *Chi-Feng Chang* noted:

> Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos,* 632 F. Supp. at 1054. [CIS] 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. (Original emphasis.) *Chi-Feng* at 537.

With regard to the petitioner's adding back the one-time development expense to the net income in 2001 due to its discretionary nature, this expense appears to be a normal part of the petitioner's business growth. While the petitioner may have had the discretion not to spend money to further business goals, it nevertheless did. Generally, funds spent through the normal course of the petitioner's business, such as wages, for example, cannot be counted as funds that would have been available to pay the proffered wage. Furthermore, in *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service, now CIS, should have considered income before expenses were paid rather than net income.

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) 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. The petitioner provided Forms W-2 for the beneficiary for the years 2001, 2002,and 2003 which indicated she was paid $39,624.50 in 2001, $52,878.25 in 2002, and $51,523.93 in 2003. Thus, while the petitioner employed the beneficiary as of the April 20, 2001 priority date, she was not paid the proffered wage of $81,000 in 2001 and onward. Without more persuasive evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2001 and onward.

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, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, and as previously stated, 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 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).

Showing that the petitioner's gross receipts 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 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, now CIS, should have considered income before expenses were paid rather than net income.

The petitioner's taxable income[2] for 2001 is -$82,485 and $103,776 in 2002. As previously determined by the director, the petitioner, based on its taxable income for 2002, established that it had the ability to pay the proffered wage of $81,000 in 2002. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner's taxable income in 2001 is not sufficient to pay the difference between the beneficiary's actual wages of $39,624.50 and the proffered wage, namely, $41,375.

Nevertheless, counsel is correct that the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a 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, CIS will review the petitioner's assets. In addition, 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, CIS 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.[3] 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 a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The tax returns reflect the following information for the following years:

| | 2001 |
|---|---|
| Taxable income | $ -82,045 |
| Current Assets | $ 17,553 |
| Current Liabilities | $ 18,221 |
| Net current assets | $ -668 |

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[2] Taxable income is the sum shown on line 28, taxable income before NOL deduction and special deductions, IRS Form 1120, U.S. Corporation Income Tax Return.

[3] According 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.

The petitioner demonstrated that it paid wages to the beneficiary during 2001 of $39,624.50. In 2001, as previously illustrated, the petitioner shows a taxable income of -$82,045, and negative net current assets of $668 and has not, therefore, demonstrated the ability to pay the proffered wage.

Although counsel asserted that the petitioner had sufficient funds in its bank accounts to pay the difference between the beneficiary's wages in 2001 and the proffered wage, as previously stated, 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, and 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. Counsel's further assertions with regard to the petitioner's depreciation expenses and one-time development expenses are also not persuasive. The assertions 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). The petitioner has not, therefore, shown the ability to pay the proffered wage during the salient portion of 2001.

In 2002, the petitioner shows a taxable income of $103,776. Thus, the petitioner had the ability to pay the proffered wage during 2002. However, a petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Therefore, the petitioner has not established that it had the ability to pay the proffered wage from the priority date to the present.

On appeal, counsel refers several times to the fact that the petitioner has been in business since 1991, and states that CIS should examine the petitioner's bigger financial picture. *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), examined the totality of a petitioner's circumstances. The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

*Sonegawa,* therefore, relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. Although the petitioner in the instant petition and the petitioner in *Sonegawa* are similar in that both businesses had been in business for over ten years when they filed I-140 petitions, no unusual circumstances have been shown to exist in this case during the priority year to parallel those in *Sonegawa*. The petitioner also has not established that 2001 was an uncharacteristically unprofitable year. In viewing the totality of the petitioner's circumstances documented in the record, the petitioner has not established that it has the financial viability to support the proffered wage from 2001 to the present.

As stated previously, the petitioner has not established that it has the ability to pay the proffered wage from the priority date and onward. Therefore, the director's decision shall stand, and the petition shall be denied.

Beyond the decision of the director, the petitioner did not establish that the beneficiary has the requisite educational requirements to perform the duties of the position. Although the director requested further evidence with regard to the beneficiary's qualifications, he did not address this issue in his denial of the instant petition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO will briefly review this issue.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 20, 2001.

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 programmer/analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

| | | |
|---|---|---|
| 14. | Education | |
| | Grade School | 8 |
| | High School | 4 |
| | College | 4 |
| | College Degree Required | Bachelors |
| | Major Field of Study | C. S., Eng., Physics, Math |

The petitioner also specified that any applicants have two years of experience in the job offered and two years of experience in the related occupation of software consultant. Under Item 15, the petitioner set forth no additional special requirements. The job offered lists the following duties on Item 13:

> Design, develop and implement financial application software in client/server environment and web-based technologies including C, C++, JAVA, ASP, MS Windows, SyBase. Perform system setup by analyzing an organization's structure, resources, and requirements, Code assigned modules and sub-modules. Prepare flowcharts and diagrams to illustrate program algorithms. Monitor and maintain existing applications and perform testing to ensure optimum system performance. Provide detailed progress reports to management. Assist in end-user training and program documentation. Provide input at project meetings.

The beneficiary set forth her credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicated that she attended the University of Bombay from June 1981 until April 1987, and received a bachelor of science from this institution. She provides no further information concerning her educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that she worked in multiple positions for multiple past employers as follows in reverse chronology:

1. The petitioner, programmer analyst, February 2000 to date of signing the ETA 750;
2. Plastcon Engineering Pvt. Ltd, Mumbai, India, Systems Analyst, March 1996 to August 1999; The job description provided for this position is identical to that of the instant petition with additional programs of VC, and VC++.
3. Sharad D. Kharkar & Associates, Programmer/Trainee, December 1992 to January 1996.

With the initial petition, the petitioner submitted two letters of work verification from the beneficiary's former employers in India. One letter stated that the beneficiary worked as an invoicing system analyst from March 1996 to August 1999, while the other, Sharad D. Kharkar & Associates in Mumbai stated that the beneficiary worked for the company from December 1992 to January 1996 as assistant to the project manager. Neither letter provided any further details on the job duties performed by the beneficiary. Counsel also submitted the beneficiary's diploma from a three year integrated course at the University of Bombay, Siddharth College of Arts and Science, that stated the beneficiary received a bachelor's degree in science awarded in 1988, as well as a document that recorded her university course work in 1987 for the three year degree course and six certificates from the Vijay Mukhi Computer Institute (VMCI) for computer classes taken in 1991 and 1992.

Because the evidence was insufficient, on March 25, 2004, the director stated in a request for further evidence that the petitioner should submit evidence to establish that the beneficiary possessed the required two years of work experience as a software engineer and two years of work experience as a software consultant as of April 20, 2001 the priority date. The director stated that evidence with regard to qualifying experience should be in the form of letters from current or former employers or trainers and should include the name, address, title of the writer, and a specific description of the duties performed by the beneficiary. The director also stated that an advisory evaluation of the beneficiary's formal education must be obtained to determine the level and major field of educational attainment in terms of equivalent education in the United States. The director stated that an acceptable evaluation should consider formal education only, not practical experience; state if the collegiate training was post-secondary, provide a detailed explanation of the material evaluated; and briefly stated the qualifications and experience of the evaluator providing the opinion.

In response, counsel stated that the beneficiary's work experience at Plastcon Engineering Private Ltd, Mumbai India from March 1996 to December 1998 established the requisite two years of work experience as software engineer as of the priority date. Counsel also stated that the beneficiary's work at Sharad D. Kharkar & Associates, Chartered Accountants, from December 1992 to January 1996, was as a software consultant initially and then as a programmer and assistant to project manager. Counsel stated that the former employer's letter of work verification submitted to the record established the beneficiary's possession of the requisite two years of work experience as a software consultant as of the priority date.

Finally, counsel submitted a professional education evaluation written by Dr. Gerald L. Itzkowitz, for Morningside Evaluations and Consulting, Inc., New York, New York. Dr. Itzkowitz in his evaluation stated that the courses completed and the number of credit hours earned at the University of Bombay indicated that the beneficiary satisfied requirements substantially similar to those required toward the completion of academic

studies leading to a degree from an accredited institution of higher education in the United States. Dr. Itzkowitz then stated that the beneficiary enrolled in a postgraduate program at NIIT, and completed coursework and examination in 1989 and received a diploma. Dr. Itzkowitz stated that based on the beneficiary's studies at NIIT, and the University of Bombay, the beneficiary had attained the equivalent of a Bachelor of Science degree in computer information systems from an accredited institution of higher education in the United States.

Counsel resubmitted the documentation originally submitted with the initial petition, including the transcript certificate from Siddharth College, that stated the beneficiary had studied there during the year 1986-1987 and that her major subject was physics and electronic "instrument;" a marks certificate that indicates the beneficiary's examination grades, and a certificate from the registrar of the University of Bombay that also certifies that the beneficiary passed the three year integrated course in April 1987 and was placed in the second class.

Counsel also resubmitted the course certificates from VMCI, along with a transcript of the courses completed as of July 1992. The courses included Interfacing "C" with Clipper, local area networking, "C" under DOS, UNIX, OS/2, OOPS & C++, and RDBMS with Oracle, Ingress, Unify, Cancel, Super Base. An additional transcript from NIIT is found in the record dated March 1989. This transcript indicated that the beneficiary attended classes for two semesters for a diploma in systems management. Counsel also submitted a certificate from the National Institute of Information Technology, Mumbai, India, and stated that the beneficiary had successfully completed a course entitled Post Graduate Diploma in Systems Management taken from December 21 1987 to March 4, 1989. Counsel also submitted a letter from Rashmi Jaiswal, Centre Head, NIIT Churchgate, Mumbai, India, that stated the beneficiary was a student at NIIT during the years 1987 to 1989 and that she successfully completed her diploma in systems management. Finally counsel submitted letters from Plastcon Engineering Private, LTD in Mumbai, and from Sharad D. Kharkar & Associates, Mumbai, India, that described in more detail the beneficiary's computer and software development duties while employed by both companies. The owner of Sharad D. Kharkar & Associates stated in his letter that the beneficiary had worked from December 1992 to May 1995 as a software consultant, while the managing director of Plastcon Engineering stated that from March 1996 to December 1998, the beneficiary worked as a software engineer.

As stated previously, the director did not address the issue of the beneficiary's qualifications in his decision.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor

> certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, the petitioner must show that the beneficiary meets the requirements of the Form ETA 750A, which includes a baccalaureate degree.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree (four years in college) in computer science, engineering, physics, or mathematics, and two years of experience in the job offered and two years of experience as a software consultant.

The petitioner has established that the beneficiary has two years of experience in the job offered and in the related occupation of software consultant. The only issue to be discussed in the remainder of this decision is whether or not the beneficiary has a bachelor's degree or its equivalent in computer science, engineering, physics, or mathematics.

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

In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be an equivalent degree, not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah,* 17 I&N Dec. 244 (Reg. 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. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional.

The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(l)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language 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.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case,

includes a bachelor's degree, or an equivalent degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent degree to a U.S. bachelor's degree.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. It is noted that the decision in *Shah* states that a U.S. bachelor's degree is "usually" four years. It is possible to obtain a university education in less than four years, however, the AAO interprets this to mean the student took extra classes, summer schools, or extra credits in order to complete a four-year program in less than four years.

Here, the record reflects that the beneficiary on the Form ETA 750 claimed six years of university level education in physics. Nevertheless, the academic documentation initially submitted with the I-140 petition indicated that the beneficiary had received a diploma from a three-year college program at the University of Bombay in physics and electronic instruments. In addition, documentation provided by the petitioner also indicated that the beneficiary had attended classes in computer studies for over a year in 1991 and 1992 at a training center that is not identified as a college or university affiliated institution. Neither the beneficiary's three year program of studies, nor the beneficiary's three-year program with her independent computer studies would not be considered the equivalent of a United States bachelor's degree in computer science, physics, engineering or mathematics.

In response to the director's request for further evidence, the petitioner then submitted an educational evaluation report from Morningside Evaluations and Consulting Inc. that states the beneficiary's three years of studies are "substantially similar" to those required toward the completion of academic studies leading to a degree from an accredited institution of higher education in the United States." In addition, the Morningside evaluator also examined new documentation not previously submitted to the record with regard to the beneficiary's enrollment in a post gradate program at the National Institute of Information Technology in India. According to the documentation submitted by counsel and examined by the Morningside evaluator, the beneficiary completed her coursework and examination in 1989 and received a diploma in 1989. Neither counsel nor the Morningside evaluator provided any explanation of the actual academic level of the NIIT program.

Therefore the record is not clear whether the beneficiary's received a master's degree in systems management which in addition to her three year program of university studies might be considered as the equivalent of a bachelor's degree in computer sciences. But more importantly, neither counsel, the petitioner, or the beneficiary has provided any explanation for the submission of new academic information not reflected on the original Form ETA 750. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

Without further clarification, the educational equivalency document submitted by the petitioner is given no weight. Furthermore, without sufficient clarification of the actual academic level of the beneficiary's studies at the National Institute of Information Technology, the beneficiary's formal education consists of less than a four-year curriculum. It is noted that unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Item 14 of the Form ETA 750A does not expand the educational requirements to work experience that is equivalent to a bachelor's degree. A "B.S. or equivalent" listed under a question eliciting "College Degree Required," can lead to

no alternate conclusion, especially since additional employment experience was set forth under the box eliciting employment experience requirements.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER**: The appeal is dismissed.