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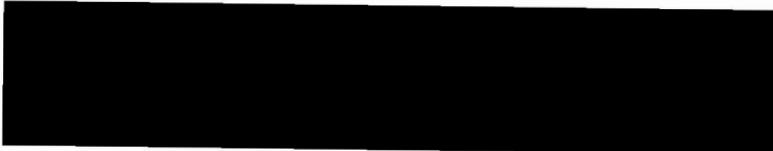


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 02 2006**
WAC-02-175-52499

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be dismissed.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

The petitioner is a telecommunications installation and operations firm. It seeks to employ the beneficiary permanently in the United States as an accounting chief. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The regulation at 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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date 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). The priority date in the instant petition is January 13, 1998. The proffered wage as stated on the Form ETA 750 is \$45,500.00 annually. On the Form ETA 750B, signed by the beneficiary on January 7, 1998, the beneficiary claimed to have worked for "L.A. Tel Corp." beginning in January 1991 and continuing through the date of the ETA 750B. The ETA 750 was certified by the Department of Labor on October 3, 2001.

The I-140 petition was submitted on May 2, 2002. On the petition, the petitioner claimed to have been established on January 1, 1994, to currently have 48 employees, to have a gross annual income of \$5,793,000.00, and to have a net annual income of \$156,847.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated September 16, 2002, the director requested additional evidence, including evidence that the beneficiary meets the education, training, and experience requirements listed on the Form ETA 750 and evidence of the petitioner's ability to pay the proffered wage. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on November 29, 2002.

In a decision dated January 2, 2003, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

Counsel appealed the director's decision by submitting a brief and additional evidence.

In a decision dated September 9, 2004, the AAO dismissed the appeal because the evidence does not convincingly establish that the petitioner had the ability to pay the proffered wage as of the priority date.

In response to the AAO's decision, counsel submits a motion to reopen and additional evidence. Counsel's submissions were received by CIS on November 8, 2004. According to the regulation at 8 C.F.R. § 103.5(a)(1)(i), the motion 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 was beyond the control of the applicant or petitioner." The record contains counsel's declaration stating that counsel experienced problems receiving mail from the U.S. Postal Service and thus did not receive the AAO's decision until October 20, 2004, and that the petitioner also received the decision late due to a change of address. Therefore, the AAO, in its discretion, finds the delay to be reasonable.

Counsel states in the motion to reopen that *Matter of Sonegawa* applies to this case, the petitioner has shown continuing ability to pay the proffered wage since the priority date, the discrepancy between the petitioner's date of incorporation and the date the petitioner began doing business can be explained, the petitioner has large balances in its business accounts, and the petitioner is willing to set aside 5 years' worth of the proffered wage in an escrow account. Evidence submitted with the motion to reopen includes a declaration by counsel regarding the reason the motion to reopen is submitted late, copies of the beneficiary's Form 1099 Miscellaneous Income for 2001, 2002, and 2003, copies of the petitioner's Articles of Incorporation and Certificate of Amendment, a bank statement dated October 8, 2002, copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 2002 and 2003, a letter regarding a buy-out agreement, a letter regarding the proposed escrow account, and a copy of a buy-out agreement. Counsel also submits additional copies of evidence already in the record.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. 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). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on January 7, 1998, the beneficiary claimed to have worked for "L.A. Tel Corp." beginning in January 1991 and continuing through the date of the ETA 750B. As the AAO points out in its prior decision, the petitioner's name on the ETA 750 is "L.A. Tel Corp." and the petitioner's name on the I-140 petition is "L.A. Tel Cellular." On the Form ETA 750B, the beneficiary claimed to have worked for "L.A. Tel Corp." from January 1991 and continuing through the date of the ETA 750B. In the motion to reopen, counsel states that "the beneficiary became a full time employee in August 2001." The record also contains a copy of the beneficiary's Form G-325A Biographic Information where the beneficiary claimed to have worked for "L.A. Tel Enterprise" from October 1992 to 1998, and to have worked for "L.A. Tel Cellular Inc." beginning in October 2000.

Counsel, in responding to the discrepancy in the petitioner's date of incorporation and business license issuance, states that the petitioner's name was amended from "L.A.-TEL ORANGE COUNTY CORP." to "L.A. TEL CELLULAR, INC." in 1994. Evidence in support of this statement includes the petitioner's Articles of Incorporation and Certificate of Amendment. However, even though the discrepancy regarding the petitioner's name is resolved, counsel failed to provide an explanation as to the discrepancy regarding when the beneficiary started working for the petitioner.¹ *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.

Regardless of when the beneficiary began working for the petitioner, the record contains copies of the beneficiary's Form 1099 Miscellaneous Income for 2001, 2002, and 2003. The beneficiary's Form 1099's show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage
2001	\$23,615.00	\$45,500.00	\$21,885.00
2002	\$46,770.00	\$45,500.00	\$0
2003	\$46,541.00	\$45,500.00	\$0

¹ Counsel, in listing the issues raised by the AAO's previous decision, states that "[t]he beneficiary claims to have worked full time for [the petitioner] since October, 1991 (page 2)." However, counsel's arguments in the motion to reopen do not address this issue.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 2001.²

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, 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. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now 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 the Service 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." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is an S corporation. The record contains copies of the petitioner's Form 1120S U.S. Income Tax Returns for an S Corporation for 1998, 1999, 2000, 2001, 2002, and 2003. The record before the director closed on November 29, 2002 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2002 was not yet due. Therefore the petitioner's tax return for 2001 is the most recent return available. The record, however, does contain the petitioner's tax returns for 2002 and 2003 as they were submitted with the motion to reopen.

Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. Where an S corporation has income from sources other than from a trade or business, that income is reported on Schedule K. Where the Schedule K has relevant entries for either additional income or additional deductions, net income is found on line 23 of the Schedule K.

The petitioner's tax returns show the amounts for taxable income on line 23 of the Schedule K as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	\$7,153.00	\$45,500.00*	-\$38,347.00
1999	\$27,532.00	\$45,500.00*	-\$17,968.00
2000	\$37,449.00	\$45,500.00*	-\$8,051.00
2001	\$32,956.00	\$21,885.00**	\$11,071.00
2002	\$73,932.00	\$0.00**	\$73,932.00
2003	\$137,218.00	\$0.00**	\$137,218.00

² The record contains copies of 3 checks written to the beneficiary in 2002 and a list of the petitioner's independent contractors where the beneficiary is listed as having been paid \$5,300.00 in 2000 and \$23,615.00 in 2001. As the AAO's decision points out, it is unclear what these payments represent. In addition, \$5,300.00 is less than the proffered wage, and the amount paid to the beneficiary in 2001, if the payment is for wages, would already be included in the Form 1099.

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

** Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 1998, 1999, and 2000.

As an alternative means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's 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 net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
1998	\$12,799.00	\$45,500.00*
1999	\$38,901.00	\$45,500.00*
2000	\$16,122.00	\$45,500.00*
2001	\$58,907.00	\$21,885.00**
2002	\$93,532.00	\$0.00**
2003	-\$338,949.00	\$0.00**

* The full proffered wage, since the record contains no evidence of any wage payments made by the petitioner to the beneficiary in those years.

** Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 1998, 1999, and 2000.

Counsel states that "Matter of Sonogawa applies fully to this case and the distinctions asserted by the AAO are at best without merit." Specifically, counsel states that the petitioner's income has increased steadily,

“[t]he reasonable expectation of a rise in profits is quite sound[,] [t]he progression in rise of income can be traced,” and the petitioner had large cash reserves on hand.

As the AAO states in its prior decision, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000.00. 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.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonogawa*, nor has it been established that 1998, 1999, and 2000 were uncharacteristically unprofitable years for the petitioner.

Counsel states that the petitioner has shown a continuing ability to pay the proffered wage since the priority date because [REDACTED] an outside contractor, received payments in 1998, 1999, and 2000, and “[t]he only reason for paying outside contractors was because the position was not filled and the work needed to be done.” Counsel raised the same issue on appeal, and the AAO’s prior decision states that evidence in the record does not establish that the beneficiary would have replaced [REDACTED]. Both the beneficiary and [REDACTED] provided accounting service to the petitioner in 2000. No new evidence submitted with the motion to reopen addresses this issue.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not documented the position, duty, and termination of the worker who performed the duties of the proffered position. If [REDACTED] performed other kinds of work, then the beneficiary could not have replaced her. According to [REDACTED]’s declaration, which is part of the record, she “was employed to perform accounting work.” According to the Form ETA 750, the offered job of accounting chief requires more than the performance of accounting work. Thus, wages paid to [REDACTED] cannot be used in calculating the petitioner’s ability to pay the proffered wage.

Counsel states that “the beneficiary worked full time for [the petitioner] since August 2001 and . . . [was] paid the full proffered wage during the relevant years.” According to the beneficiary’s Form 1099 Miscellaneous Income for 2001, 2002, and 2003, the beneficiary was paid more than the proffered wage in 2002 and 2003, and \$23,615.00 in 2001. Counsel states that “the beneficiary became a full time employee in August 2001 . . . [and] grossed \$23,615.00 in five (5) months.” Counsel is essentially requesting that CIS prorates the proffered wage for the portion of 2001 that occurred after the beneficiary became a full time employee.

While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary’s wages specifically covering the portion of the year that occurred after the priority date (and only that period), such is not the case here. Even though the beneficiary was not a full time employee for the entire year in 2001, the petitioner still has to show its ability to pay the full proffered wage in 2001.

In response to the AAO's statement that "[t]he letter references two checking accounts but does not distinguish whether they are individual or business accounts," counsel states that "the letters from Cal Fed Bank and Bank of America attesting that [the] petitioner had large balances referred to business related accounts only." Even if those two accounts are business accounts, 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. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets. The AAO's prior decision states that bank accounts are not persuasive evidence, and counsel failed to state in the motion to reopen why the petitioner's bank accounts should be considered as persuasive evidence.

Counsel states that [REDACTED] certified that [the petitioner] established its accounts with them in 1993 and since then, [the petitioner] has maintained an average balance of \$1,076,000.00 throughout those years." As stated above, bank accounts are not persuasive. In addition, the tax returns and the other evidence in the record do not support [REDACTED] assertion. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel states that the petitioner "proposes to set aside the beneficiary's proffered wage for five (5) years in an escrow bank account of [CIS's] choosing and will abide by any monitory process required by [CIS]." The AAO notes that the creation of such account today would not demonstrate the petitioner's ability to pay the proffered wage in the past years. Additionally, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988)

Despite the foregoing, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration, and the magnitude of the petitioner's enterprise cannot be overlooked. In fact, this case presents several unique factors that the AAO will look to in determining whether the petitioner has the ability to pay the proffered wage. According to material within the record, the petitioner was incorporated in 1990, the petitioner had the ability to pay the proffered wage since 2001, there has been a progression in the rise of income, and the petitioner recently spent \$600,000.00 in a buy-out.

Based on the unique factors in this case, the AAO finds that 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.

The AAO's prior decision, however, raises another issue, and counsel fails to address that issue in the motion to reopen.

The AAO's prior decision states that "evidence submitted in support of the beneficiary's educational credentials does not appear to conform to the requirements of the approved labor certification." On the ETA 750A submitted with the instant petition, block 14 describes the education requirements of the offered position as follows:

Education (number of years)	
Grade School	
High School	
College	5
College Degree Required	Masters
Major Field of Study	Banking or Accounting

The beneficiary states on the ETA 750B that he attended Dhaka University from July 1978 to May 1981 and received a bachelor's degree in sociology, he attended Dhaka University from July 1981 to June 1982 and received a master's degree in sociology, and he attended the Banking Diploma Institute from 1985 to 1987 and received parts 1 and 2 of a banking diploma in money and banking.

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(1)(2). The regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for the classification of a professional that:

(C) *Professionals.* 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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.

Moreover, if the AAO were to consider the petition under the "skilled worker" classification, the regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for the classification of a skilled worker that:

(B) *Skilled workers.* 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.

The regulations for the skilled worker classification contain a minimum requirement that the position of two years training or experience. While they do not contain a requirement of a degree, the ETA 750 does contain such a requirement. 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).

The beneficiary holds a three-year bachelor's degree in sociology from Dhaka University. The beneficiary also holds a one-year master's degree in sociology from Dhaka University. This master's degree represents a total of four years of study because entrance to the one-year master's program appears to be contingent upon the completion of a relevant undergraduate course of study, and in this case the beneficiary completed a three-year undergraduate course of study. The ETA 750 specifically requires five years of education. The beneficiary's four years of undergraduate and graduate studies fall short of the five-year requirement. In addition, the ETA 750 states that the major field of study is banking or accounting; the beneficiary's bachelor's degree and master's degree are in sociology.

The beneficiary also holds a diploma from the Banking Diploma Institute. However, the record does not demonstrate that the diploma from the Banking Diploma Institute is a single academic degree that is a foreign equivalent degree to a five-year U.S. master's degree. As stated above, the regulation sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. degree. The combination of a degree deemed less than the equivalent to a five-year U.S. degree and a diploma does not meet that requirement.

For the reasons discussed above, the assertions of counsel in the motion to reopen and the evidence submitted with the motion to reopen fail to overcome the prior decision of the AAO.

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 motion to reopen is granted and the decision of the AAO dated September 9, 2004 is affirmed. The petition is dismissed.