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FILE: WAC 02 271 54086 Office: CALIFORNIA SERVICE CENTER Date: APR 09 2007

IN RE: Petitioner: [Redacted]
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:



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.

A handwritten signature in black ink, appearing to read "RWiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition's approval was revoked by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a household. It seeks to employ the beneficiary permanently in the United States as a teacher, home based education. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. 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, the director determined that the petitioner had not established that the beneficiary is eligible for the classification sought. The director revoked the petition's approval accordingly.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is as follows: the I-140 petition was filed on September 4, 2002; the director approved the petitioner on December 6, 2002; the beneficiary attended a consular interview in India on October 20, 2003; the American Consulate in Mumbai, India, returned the I-140 petition to the National Visa Center for review and possible revocation on June 22, 2004; the director issued an intent to revoke the approval to the petitioner on June 15, 2005; the petitioner responded to the intent to revoke the approval on July 13, 2005; the director issued a decision revoking the petition's approval on August 10, 2005; and, the petitioner filed an appeal of the director's decision on August 25, 2005. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's revocation dated August 10, 2005, an issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation 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, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 CFR

§ 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 26, 1999.¹ The proffered wage as stated on the Form ETA 750 is \$2,590.74 per month (\$31,088.88). The Form ETA 750 states that the position requires two years of experience as a teacher, home based education, or, two years of experience as a school teacher.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Ability to Pay the Proffered Wage

Relevant evidence in the record, relative to the petitioner's ability to pay the proffered wage, includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a brief received September 22, 2005; and, U.S. Internal Revenue Service Form 1040 tax returns for 1999, 2000 and 2001, 2002, 2003 and 2004.

On appeal, relative to the petitioner's ability to pay the proffered wage, counsel asserts that the petitioner's household totals four individuals and the evidence submitted is proof of the petitioner's ability to pay the proffered wage. Counsel states that although no personal expenses of the petitioner or his/her assets were requested or submitted, that the petitioner's personal expenses are minimal.

The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

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, Citizenship and Immigration Services (CIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the

¹ It has been approximately eight years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

² 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).

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 during a given period, 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. In the instant case, the beneficiary is not in the United States, and, therefore, the beneficiary was never paid wages by the petitioner.

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 in the petitioner's instance (the adjusted gross income) figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a private household. Therefore the petitioner's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. The petitioner must show that he/she can cover their existing personal expenses as well as pay the proffered wage out of his/her adjusted gross income or other available funds. Similar to a sole proprietorship, the petitioner must show that she/he can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In the instant case, the petitioner supports a family of four. The proffered wage is \$31,088.88 per year. The tax returns reflect the following information for the following years:

	<u>1999</u>	<u>2000</u>	<u>2001</u>
Adjusted gross income (Form 1040)	\$ 69,127.00 ³	\$ 77,591.00	\$ 89,183.00
Itemized Deductions (Schedule A)	\$ 17,564.00 ⁴	\$ 17,434.00	\$ 16,612.00
	<u>2002</u>	<u>2003</u>	<u>2004</u>
Adjusted gross income (Form 1040)	\$100,041.00	\$106,855.00	\$133,701.00
Itemized Deductions (Schedule A)	\$ 18,310.00	\$ 18,289.00	\$ 23,543.00

³IRS Form 1040, Line 33, 34 or 35 depending upon the year of the tax return.

⁴IRS Form 1040, Schedule A, Line 28.

In each of the years for which tax returns were submitted, the petitioner's adjusted gross income as stated for each year would cover the proffered wage of \$31,088.88 per year considering those personal expenses disclosed by the petitioner on Schedule A of the tax returns.

However, beyond the decision of the director, no statement of personal expenses of the petitioner was found in the record of proceeding. Schedule A as submitted with the petitioner's Form 1040 tax return each year listed personal deductible expenses such as medical and dental services, home mortgage interest, charitable contributions as stated above. As already stated, the I-140 petitioner is a private household. Therefore, to determine the ability of the petitioner to pay the proffered wage and meet his/her living costs, all of the family's household living expenses should be considered. Besides the items found on the petitioner's Schedule A of his returns, such items generally includes the following: food, car payments (whether leased or owned), installment loans, insurance (auto, household, life, etc.), utilities (electric, gas, cable, phone, internet, etc.), credit cards, student loans, clothing, school, daycare, gardener, house cleaner, nanny, and any other recurring monthly household expenses. It is reasonable to expect that the petitioner's personal expenses for each of the years examined would be greater than that stated on the Schedule A statements to the returns. Therefore, we find as the record of proceeding exists, there is insufficient information found in the record to make a determination of the petitioner's ability to pay the proffered wage.

Qualifications of the Beneficiary

As set forth in the director's revocation dated August 10, 2005, another issue in this case is whether or not the beneficiary is eligible for the classification sought.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 26, 1999.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See 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 considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁵

On appeal, concerning the beneficiary's qualifications and the director's decision, counsel asserts that the director is "flatly wrong" when the director revoked the approval of the petition based on allegations raised by the U.S. consulate that the beneficiary does not speak or understand the English language.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the

⁵ 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).

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 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 teacher, home based education. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
- Grade School =
- High School =
- College =
- College Degree Required Bachelors
- Major Field of Study Education

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. In the related occupation of School Teacher, the applicant must have two years of experience in that occupation. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has job experience as an assistant teacher received at the Mohiniba Girls High School, Gujarat, India from July 1992 to present (the form was undated), and at the Por Educational Trust High School, Gujarat, India, from June 1981 to June 1992; and, as a teacher at that same school from July 1978 to May 1981. He does not provide any additional information concerning his employment background on that form.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

(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.

On appeal, counsel submits copies of the following documents: a brief received September 22, 2005; an undated letter from the petitioner's family members; two WebPages from the Internet, <<http://adaniel.tripod.com/Languages3html>> accessed September 20, 2005; three WebPages from the Internet <http://www.antimoon.com/forum/2003/2481.html> accessed September 20, 2005; an explanatory letter from counsel dated July 12, 2005; the beneficiary's college record transcript; the beneficiary's secondary school certificate; a letter with a certificate dated January 12, 2005 from the Institute of English, Ahmadabad, India, stating that the beneficiary was enrolled there from January 2004 to December 2004; two partially translated experience certificates dated May 30, 1981, and June 30, 1982; and, an experience certificate dated September 16, 1998, from the Mohinaba Kanya Vidhyalay Institute dated September 16, 1998.

Other relevant evidence in the record includes copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; and, a credentials evaluation report prepared by the Global Education Group Inc., Miami Beach Florida, dated February 22, 1999, that stated that the beneficiary's education is equivalent to the U.S. degree of Bachelor of Science in Education with a major in Mathematics awarded by a regionally accredited university in the United States. According to the report, the beneficiary received a Bachelor of Science (Special) degree in Geology from Gujarat University, India, in October of 1977. He was later awarded the degree of Bachelor of Science in Education, majoring in mathematics awarded on October 16, 1979.

Additionally, counsel submitted copies of the following documents: a diploma stating that the beneficiary received the degree of Bachelor of Science in Education, majoring in mathematics awarded on October 16, 1979; a diploma stating that the beneficiary received a Bachelor of Science (Special) degree in Geology from Gujarat University, India, in October of 1977; and, the beneficiary's college record transcripts as well as the beneficiary's secondary school certificate.

As already stated, the beneficiary attended a consular interview in India on October 20, 2003, after which, the America Consulate in Mumbai, India, returned the I-140 petition to the National Visa Center for review and possible revocation on June 22, 2004.

The consulate conducted an interview of beneficiary on October 20, 2003, and after conducting an interview and reviewing documents provided by the beneficiary, found that the beneficiary was not eligible to receive an immigrant visa according to 22 C.F.R. § 42.43(a)(1), and, therefore the consular post refused the visa application under § 212(a)(5)(A) of the Act.

The regulation at 22 C.F.R. § 42.43(a) of the Act states in pertinent part:

Suspension or termination of action in petition cases.

- (a) Suspension of action. The consular officer shall suspend action in a petition case and return the petition, with a report of the facts, for reconsideration by INS [now CIS] if the petitioner requests suspension of action, or if the officer knows or has reason to believe that approval of the petition was obtained by fraud, misrepresentation, or other unlawful means, or that the beneficiary is not entitled, for some other reason, to the status approved.

The Application for Alien Employment Certification, Form ETA-750A, item 13 sets forth the description of the job of teacher, home based education as follows in pertinent part:

Teach student academic, social and motor skills to 2 pupils in their home as part of home-based schooling, adapting curriculum to meet individual's need. Teach English, mathematics, science, social studies and foreign languages (Gujarati & Hindi)

According to the report of the interview prepared by the consular officer at the U.S. Consulate General, Mumbai, India, the beneficiary was unable to speak or understand English, and, the beneficiary required the services of a Gujarati language translator to conduct the interview. According to the consulate officer, the beneficiary stated through a Gujarati language translator, since the beneficiary was unable to respond to the interviewer in English, that he was to be employed by the petitioner to teach his/her children mathematics and science in the English language. However, the beneficiary was unable to answer science related questions. After which, the beneficiary changed what he said was his job responsibilities, and, then said he would teach the petitioner's only Indian history, and the Indian languages of Hindi and Gujarati. The consular officer noted that the beneficiary said that the Indian languages of Hindi and Gujarati were already spoken by the petitioner and his wife, and, it was not credible that they would hire a Hindi and Gujarati speaker to teach these same languages to the petitioner's children.

In rebuttal to the above report and its findings, counsel stated that the director is "flatly wrong" when the director revoked the approval of the petition based on allegations raised by the U.S. consulate that the beneficiary does not speak or understand the English language. Counsel cites the federal court cases of *Henry v. INS*, 74 F.3d 1, 4 (1st Cir. 1996), *Urbina Osejo v. INS*, 124 F.3d 1314, 1318-19 (9th Cir. 1997), and *Watkins v. INS*, 63 F.3d 844, 850 (9th Cir. 1995), and, *Tapis Inter'l v. INS*, 94 F. Supp. 2d 172 (Mass. 2000) for the premise that it is an abuse of discretion when CIS fails to consider all relevant factors, and, relies upon the consulate officer's evaluation of the beneficiary's English language skills instead of relying upon evidence of the beneficiary's training in English language skills.

At least two circuits, including the Ninth Circuit, have held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working

conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983). See also *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), “there is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.”

Counsel recounts the beneficiary's educational attainments and job experience as evidence of the beneficiary's qualification for the preference classification. There is no finding by the director adverse to the beneficiary in this regard. This assertion will not be discussed further.

Rather, the director stated in the decision to revoke the preference visa petition's approval that the U.S. consulate consular officer found that the beneficiary does not speak or understand the English language. Counsel speculates in a letter dated July 12, 2005, that the beneficiary was “nervous speaking a second language,” which was English, that the beneficiary used an interpreter “to avoid any inadvertent and costly mistakes,” and, implied that the consular interview was adversarial and stressful. A search of the record of proceeding does not disclose a statement by the beneficiary supporting counsel's assertions, nor why it would not be useful for any proposed recipient of an employment based visa that requires the teaching of the English language, not to speak English at the consular interview. Counsel's contentions, that are speculative, are not credible considering the terms of the job duties of the labor certification, or, the circumstances of the consular interview. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

We note that after the consular interview, the beneficiary found it necessary to attend a course of instruction in the English language. There was submitted a letter with a certificate dated January 12, 2005 from the Institute of English, Ahmadabad, India, stating that the beneficiary was enrolled there from January 2004 to December 2004. We find this is credible evidence that the beneficiary believed his English language skills were of a state that required additional instruction in 2004. Further, since the petitioner must demonstrate that, on the priority date the beneficiary had the qualifications to perform the job as stated in the labor certification, the beneficiary's educational attainment five years after the priority date of February 26, 1999, has no probative

value concerning the beneficiary's qualifications on the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the petitioner had established that the beneficiary is not eligible for the classification sought as he is not qualified to perform the duties of the proffered position.

We find as the record of proceeding exists, there is insufficient information found in the record to make a conclusive determination of the petitioner's ability to pay the proffered wage because a statement of the petitioner's personal expenses was never submitted. Nevertheless, we find that as of the priority date, the evidence submitted as found in the record of proceeding demonstrates that the beneficiary did not speak or understand the English language required to perform the job duties stated in the labor certification. Thus, the director had good and sufficient cause to revoke the approval of the petition according to Section 205 of the Act.

ORDER: The appeal is dismissed.