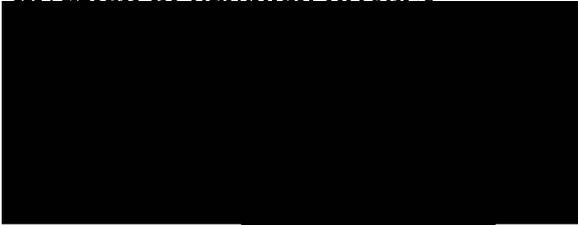




U.S. Citizenship
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FILE: [Redacted]
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Office: NEBRASKA SERVICE CENTER

Date: APR 30 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

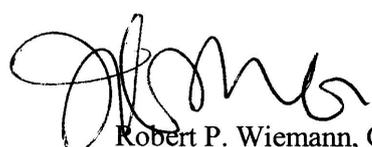
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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.


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a database administrator. 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 based on the beneficiary's wages, the petitioner's net income or the petitioner's net current assets for tax years 2001 to 2003. The director also noted that the petitioner amended its tax returns as the new accounting system was not in effect at the time the petition was initially filed, and were only amended after the request for evidence was sent to the petitioner. The director also determined that the petitioner had to establish its ability to pay the proffered wages of an additional eight beneficiaries for whom the petitioner had submitted petitions. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, the single 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)(i) of the Immigration and Nationality 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 (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of 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 C.F.R. § 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 August 5, 2003. The proffered wage as stated on the Form ETA 750 is \$63,000 per year. The Form ETA 750 states that the position requires four years of college with a bachelor's degree or equivalent in computer science, or electronics & communication engineering, electrical engineering or related field. The ETA 750 also specifies one year of work experience in the proffered position or one year of experience in a related occupation of programmer, database analyst or related experience.

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 appeal¹. On appeal, counsel submits a second letter from ██████████ Columbus, Ohio.² In his letter, ██████████ examines when permission is required from the IRS for changes in methods of accounting practices for tax returns, and other related issues. ██████████ further notes that the director's denial decision established that Citizenship and Immigration Services (CIS) accepted that only the prorated portion of the annual proffered wage needs to be demonstrated in the first year of the priority date. ██████████ also provides cumulative figures for what he claims are the differences between proffered wages and actual wages for all pending adjustment of status applications submitted by the petitioner for 2003 to 2005.

Counsel resubmits a one page document entitled "ability to pay calculations" that examines the wages of seven individuals with regard to priority dates, proffered wages, prorated wages for priority years, wages paid in 2003 (based on prorated wages), in 2004, and wages as of 2005 to date. Finally on appeal, counsel submits the beneficiary's wage slip for pay period September 12, 2005 to September 25, 2005 that indicates a biweekly wage of \$2,500, with year to date wages of \$42,564.

The record also contains the petitioner's Form 1120 for tax year 2003 that indicates taxable income before net operating gross deduction and special deductions of \$8,117, as well as Forms 941, Employer's Quarterly Federal Tax Return for all four quarters of tax year 2003. The petitioner also submitted the beneficiary's W-2 form for 2003 with a handwritten annotation "began employment in the last week of April 2003." The beneficiary's W-2 form indicated that the petitioner paid the beneficiary \$36,391 during tax year 2003.

In response to the director's request for further evidence, counsel also submitted the petitioner's amended U.S. corporation income tax returns for tax years 2003 and 2004. These amended tax documents indicate the petitioner's net current assets for tax year 2003 were \$338,627, and for tax year 2004 were \$227,931. ██████████ an independent accountant previously mentioned in these proceedings, explained in an initial letter that the petitioner had changed its accounting basis from a cash basis to an accrual basis. ██████████ explained that the petitioner's 2003 and 2004 federal tax returns were amended and now utilized the hybrid method of accounting to have consistent information between the accrual basis accounting and cash basis accounting. ██████████ also stated that the difference in proffered wages and actual wages for tax year 2003,

¹ 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).

² The state of Ohio licensing center indicates that ██████████ CPA license expired on December 31, 2005. *See* <http://license.ohio.gov/lookup/default.asp>. (Available as of April 12, 2007.)

2004 and 2005 year to date was \$240,489, \$142,675, and \$20,070. [REDACTED] then noted that the petitioner's net income, as indicated by Schedule M-1 and by the petitioner's net current assets documented on the petitioner's Schedules L, were \$123,774 and \$338,627 respectively in tax year 2003, and \$102,568 and \$247,864 respectively in 2004. [REDACTED] further stated that the petitioner only had to establish its ability to pay the amounts due to beneficiaries from the priority date to the end of the fiscal year. [REDACTED] refers to a CIS interoffice memo written by William Yates (the Yates memo) in support of his assertion.³

Counsel also submitted W-2 Forms for its employees in tax year 2003 and 2004, which included the beneficiary's W-2 forms for these two relevant years. Counsel also submitted the petitioner's Form 941 for the first quarter of 2005, which indicated the petitioner had eleven employees, with combined wages, tips and other compensation of \$164,246.15. The record also contains a one-page breakout of employee information apparently generated by the petitioner for the first quarter of 2005 that lists thirteen employees and their quarterly salaries. [REDACTED] also apparently prepared a document entitled "Ability to Pay Calculations" that examines the priority dates; proffered wages; prorated proffered wages; wages paid in 2003 and 2004; and the difference between the prorated salaries and the actual wages for 2003 and 2004 for six employees.⁴ The record also contains the beneficiary's individual income tax return, Form 1040 for tax years 2003 and 2004. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of approximately \$500,000, and to currently employ eleven workers. On the Form ETA 750B, signed by the beneficiary on July 11, 2003, the beneficiary claimed to have worked for the petitioner since April 2003.

On appeal, counsel asserts that the director erred in stating that the amended tax returns were rejected as credible evidence. Counsel states that the second letter from [REDACTED] explains that according to tax law, the petitioner did not need permission to amend its tax returns for the purpose of calculating taxable income, and that CIS cannot question the amended returns for the petitioner as any amended tax returns submitted to the IRS supersede previous tax returns. Counsel states that the returns were amended to clarify the issue of the petitioner's ability to pay the proffered wages, not to confuse this issue. Counsel also notes that [REDACTED] provides a table to calculate the petitioner's ability to pay the petitioner's I-140 petitions that have been denied.

Counsel also asserts that the director did not review any of the financial information provided in response to the director's request for further evidence. Counsel states that the petitioner submitted W-2 forms for all its employees which indicate the petitioner is a financially viable company with the ability to pay the beneficiary. Counsel also states that the petitioner's 13 I-140 petitions and 39 H-1Bs in the last two years are hardly excessive considering that the petitioner provided the CIS with its employees' W-2 forms. With regard to the H-1B petitions, counsel states that many of these petitions were for extensions for the same employees, and that the petitioner, like other companies in its competitive business, files more H-1B petitions than the number of individuals that actually join and stay at the company.

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

³ Memorandum from William R. Yates, Associate Director For Operations, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, HQOPRD 90/16.45, (May 4, 2004).

⁴ The beneficiary is one of the six employees identified in this document.

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 his letters submitted to the record refers to the Yates memo which refers to the beneficiary's wages, and the petitioner's net income and net current assets as the three criteria by which CIS adjudicators can evaluate the petitioner's ability to pay the proffered wage. The AAO consistently adjudicates appeals in accordance with the Yates memorandum, and will do so in these proceedings in its examination of the petitioner's ability to pay the proffered wage.

also referred to the use of prorated wages when calculating the petitioner's ability to pay the proffered wage. In his letter submitted in response of the director's request for further evidence, refers to excerpts taken from the Internet of several AAO decisions that analyzed whether a petitioner could pay the proffered wage if prorated wages during the priority date year were considered. assertions are not persuasive. First, although does describe the decisions to which he refers as "published," he does not provide any published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore the excerpts to which refers do not appear to use the concept of prorated wages in their denial of the referenced petitions, but rather mentioned the issue as a hypothetical issue. Third, with regard to the issue of prorated wages, we will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. 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 as monthly income statements or pay stubs, the petitioner has not submitted such evidence for the beneficiary.

calculations contained in the initial document "Ability to Pay Calculations" submitted to the record in response to the director's request for further evidence also identify four claimed beneficiaries who did not work in tax year 2003, and does not document any specific periods of employment worked by the remaining two beneficiaries. The assertions of counsel and of with regard to the claimed proffered wages and prorated wages earned by other beneficiaries do not constitute evidence. 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).

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 petitioner has established that it employed and paid the beneficiary \$36,391 in tax year 2003 and \$49,484 in tax year 2004. The petitioner therefore did not establish that it paid the beneficiary the proffered wage of \$62,000 as of the 2003 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2003 and 2004, namely \$25,609 in tax year 2003 and \$12,516 in tax year 2004.

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, 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the 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.

(Emphasis in original.) *Chi-Feng* at 537.

Counsel, the director, and [REDACTED] refer to the petitioner's amended tax returns for 2003 and 2004 submitted in response to the director's request for further evidence, however, the record in the instant petition only contains the petitioner's original tax return for 2003. The AAO has examined the petitioner's original tax return for tax year 2003 and examined the amended 2003 tax return, and the petitioner's amended tax return for 2004, originally submitted in response to the director's request for further evidence. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "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." The AAO views the petitioner's change of accounting practices and the subsequent amended tax returns as questionable, specifically with regard to the significant increases in the petitioner's net current assets based on the changed accounting procedures and reallocation of assets. 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). It is also noted that the IRS requires Form 3115 to be filed when switching accounting methods. The record does not reflect that the petitioner filed any such document. These factors raise questions as to the veracity of the petitioner's amended tax returns. Thus, the AAO gives no weight to the amended tax returns.

For illustrative purposes only, the AAO will examine the amended tax returns submitted to the record. First, it is noted that the AAO does not consider line 1, Schedule M in its deliberations with regard to petitioners' net

income, as suggested by [REDACTED]. The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120. Therefore, the amended tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$63,000 per year from the priority date:

- In 2003, the Form 1120 stated a net income⁵ of \$8,117.
- In 2004, the Form 1120 stated a net income of \$8,678.

Therefore, for the years 2003 and 2004, the petitioner did not have sufficient net income to pay the difference between the actual wages and the 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. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, 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.⁶ 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 the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. With regard to the petitioner's original tax return for tax year 2003, the petitioner did not list any assets on Schedule L, Line 2, item a, trade notes and accounts receivable, or item b, less allowance for bad debts; however in its amended tax return for 2003, the petitioner listed \$218,500 as trade notes and accounts receivables, and \$218,500 as less allowance for bad debts. In its 2004 tax return, the petitioner listed \$209,890 on its Schedule L, line 2a, as trade notes and accounts receivables, and the same amount on line 2b, allowance for bad debts. Both of these figures significantly changed the petitioner's current assets for both years. For example, prior to the amendment of the petitioner's 2003 tax return, the petitioner's net current assets for tax year 2003 were \$13,127. Such significant increases in the petitioner's net current assets do raise questions as to which tax return is more accurate. Furthermore, 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).

As stated previously, the AAO gives no weight to the amended tax returns submitted in response to the director's request for further evidence. However, for illustrative purposes, the AAO will examine the 2003 and 2004 amended tax returns to examine the petitioner's ability to pay the difference between the

⁵The petitioner's net income is its taxable income before NOL deduction and special deductions, as reported on Line 28 of the Form 1120.

⁶According 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.

beneficiary's actual wages and the proffered wage, namely \$25,609 in 2003, and \$12,516 in tax year 2004. 004.

The petitioner's net current assets during 2003 were \$338,627.

- The petitioner's net current assets during 2004 were \$227, 931.

Therefore, for the year 2003, based on its amended tax returns, the petitioner did have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$25,609. In tax year 2004, based on the amended tax return, the petitioner did have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, namely, \$12,516. However, as noted previously, the petitioner's amended tax returns are given no weight in these proceedings. 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).

Furthermore, as the director correctly pointed out in his decision, the petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for an undetermined number of beneficiaries.⁷ Therefore, the petitioner must show that it had sufficient income to pay all the wages of all beneficiaries whose petitions had the same 2003 priority year. The petitioner, with statements uncorroborated by evidentiary documentation, has not established that it had the ability to pay the entire proffered wage for all beneficiaries whose priority date was during tax year 2003. While the petitioner submitted W-2 forms for two employees for tax year 2003 listed on [REDACTED] unsubstantiated list of beneficiaries and wages, these wages for 2003 totaled \$76,021, with an additional \$305,979 needed to pay the proffered wages of other beneficiaries listed who did not work for the petitioner in tax year 2003.

As previously stated, the petitioner's net income in tax year 2003, based on the tax return submitted with the petition, is \$8,117. Thus, for tax year 2003, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage, and also pay the proffered wages of any other beneficiaries with the same priority year. Without more clarification as to any other beneficiaries and proffered wages during tax year 2004, the record is not clear that the petitioner had sufficient net current assets in tax year 2004 to pay the difference between the beneficiaries' actual wages and the proffered wages.⁸ On appeal, counsel states that the numerous petitions submitted to CIS for I-140 and I-129 beneficiaries are hardly excessive and that many of the I-129 petitions are for H-1B extension petitions. Nevertheless, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax

⁷ It is noted that the director in his decision stated that the petitioner had filed 13 I-140 petitions and 39 I-129 petitions, while at the most the petitioner has provided documentation on wages paid to 15 employees in tax years 2003 and 2004. Thus far, the petitioner has provided tax documentation on 11 employees in the first quarter of 2005.

⁸ It is noted that the list of seven beneficiaries presented by counsel and the petitioner in its response to the director's request for further evidence as pending applications with priority year designation of 2003 is significantly smaller than the 13 I-140 petitions and 39 I-129 petitions noted by the director in his decision.

returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. Thus, the petitioner has not established its ability to pay the proffered wage from the 2003 priority date until the beneficiary receives permanent legal residency. Therefore, the director's decision shall stand. The petition will be denied.

It is noted that the director in his request for further evidence addressed the beneficiary's qualifications to perform the duties of the proffered position. While the director did not further address this issue in his decision, the AAO notes that the record reflects that the degree obtained by the beneficiary from the Government Polytechnic for Women in 1990 is a three year program in electronic and communication Engineering. While [REDACTED] of Multinational Education & Information Services, Inc., Jonesboro, Georgia, stated that the beneficiary's further studies at the Institute of Engineers in India is considered a bachelor's degree in engineering, the record only reflects the beneficiary's attendance at a one year program at the Institute of Public Enterprise at Osmani University, Hyderabad, India from 1990 to 1991 as well as a marks statement for two examinations in the summer of 1993 and the winter of 1997 taken through an academic engineering program with the Institute of Engineers, Calcutta, India.

The petitioner clearly delineated four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A. 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).

Furthermore, it is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. It is further noted that regulations require the beneficiary to produce one degree that is the foreign equivalent to a United States baccalaureate degree in order to be qualified as professional for third preference visa category. *See* 8 C.F.R. § 204.5(l)(3)(ii)(c).

Guidance on the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[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." If the petitioner chooses to pursue this matter, further clarification as to how the beneficiary's educational credentials equate the requisite four year U.S. baccalaureate degree stipulated in the Form ETA 750 may be warranted.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.