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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

FILE: [REDACTED]
SRC 06 229 53720

Office: TEXAS SERVICE CENTER Date: FEB 20 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:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Texas Service Center denied the preference visa petition and certified her decision to the Administrative Appeals Office (AAO) on appeal. The director's decision will be affirmed. The petition will remain denied.

The petitioner is a software consultant and developer. It seeks to employ the beneficiary permanently in the United States as a management analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). As set forth in the director's November 1, 2006 decision, the director determined that the petitioner had not established that the beneficiary meets the minimum requirements of the Form ETA 750. The director 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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The 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 DOL 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 June 21, 2004.

The AAO reviewed the record of proceeding under its *de novo* review authority. The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296.

The first issue to be discussed in this case is whether the petitioner has established that the beneficiary meets the minimum requirements of the Form ETA 750. Relevant evidence in the record includes an educational evaluation report dated April 13, 2004 from Foundation for International Services, Inc., an educational evaluation report dated September 6, 2006 from Career Consulting International, an educational evaluation report dated September 7, 2006 from Marquess Educational Consultants together with additional correspondence and research regarding educational equivalency, a letter dated August 31, 2006 from E [REDACTED] former Vice President of Sales for [REDACTED] regarding the beneficiary's previous employment experience, a letter dated February 13, 2004 from Ampersand Corporation regarding the beneficiary's previous employment experience, a copy of a letter dated July 3, 2002 from Ampersand Corporation submitted in support of the beneficiary's previous L-1B nonimmigrant visa extension application, the beneficiary's Bachelor of Science degree in chemistry, environmental science and zoology from Bangalore University, the beneficiary's transcripts from Bangalore University, the beneficiary's high school transcripts, two certificates of participation issued to the beneficiary for attendance at computer courses, and a letter dated February 13, 2004 from Ampersand Corporation regarding the beneficiary's previous employment experience.

On November 20, 2006, counsel submitted a brief and previously submitted evidence in connection with the certification. Counsel asserts that the petitioner has defined foreign equivalence on the ETA 750A and that in allowing for an alternative to the requirement of a bachelor's degree on the Form ETA 750A, the petitioner did not require three years of course work in business administration. Instead, the petitioner required three

years of university level course work plus three years of progressively more responsible experience. Counsel states that if the petitioner required business coursework, the petitioner would have placed an asterisk at item 14, Major Field of Study, on the ETA 750A. Further, counsel asserts that the educational evaluations submitted by the petitioner are not conflicting. Counsel states that one evaluation was based on the beneficiary's education and experience, while the other two evaluations were based solely on his education.

In the instant case, the Form ETA 750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of management analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	C
	High School	C
	College	C
	College Degree Required	Bachelors or foreign degree equiv.***
	Major Field of Study	Business Administration

***In lieu of a Bachelors degree Employer will accept an educational evaluation equivalence of 3 years of University level course work plus 3 years of progressively more responsible experience.

The applicant must also have three years of experience in the job offered, however, three years of experience in business development work but designated under another title is also acceptable. The duties of the job offered are delineated at item 13 of the Form ETA 750A. Since this is a public record, the duties will not be recited in this decision. 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. At item 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he represented that he obtained a bachelor of science degree from Bangalore University in India in April 1994, where he attended from June 1991 to April 1994. He does not provide any additional information concerning his education on that form.

DOL assigned the occupational code of 13-1111, management analyst, to the proffered position. According to DOL's extensive description of the position of management analyst, the position falls within Job Zone Four requiring "considerable preparation." See <http://online.onetcenter.org/link/summary/13-1111.00> (accessed January 16, 2007). According to DOL, a minimum of two to four years of work-related skill, knowledge, or experience is needed for this occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/13-1111.00> (accessed January 16, 2007). Additionally, DOL states the following concerning the training and overall experience required for this occupation:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See <http://online.onetcenter.org/link/summary/13-1111.00> (accessed January 16, 2007).

If the AAO were to consider the petition under the “professional” classification, the regulations define a third preference category professional as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” See 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form 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.

However, if the AAO were to consider the petition under the “skilled worker” classification, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

While the regulations for the skilled worker classification do not contain a requirement of a bachelor’s degree, they do require that the beneficiary qualify according to the terms of the labor certification application, in addition to proving a minimum of two years of training or experience.¹ To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services [CIS] must examine whether the beneficiary’s credentials meet the requirements set forth in the labor certification application. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The record contains educational evaluation reports from Foundation for International Services, Inc., Career Consulting International and Marquess Educational Consultants. CIS may, in its discretion, use as advisory

¹ In the instant case, the labor certification application increases the minimum experience requirement by requiring that the applicant have three years of experience in the job offered, or three years of experience in business development work but designated under another title.

opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Additionally, Career Consulting International and Marques Educational Consultants are not members of the National Association of Credential Evaluation Services (NACES). The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector. In light of the AAO's findings concerning the beneficiary's educational program, which will be discussed below, the credential evaluations provided by Career Consulting International and Marquess Educational Consultants carry little evidentiary weight in these proceedings. Foundation for International Services, Inc. is a member of NACES and thus, its credentials evaluation will be given appropriate weight in these proceedings.

The evaluation from Foundation for International Services, Inc. states that as a result of his educational background and employment experiences, the beneficiary has the equivalent of a United States bachelor's degree in business administration with a concentration in marketing. The evaluation states that the beneficiary's diploma from Bangalore University in India is equivalent to three years of university level credit from a regionally accredited college or university in the United States. The evaluation cites the beneficiary's 7 ¼ years of experience as a sales executive and an account manager. The formula employed by Foundation for International Services, Inc. in substituting three years of specialized work experience for one year of university level studies is one which is found in the regulations governing H-1B nonimmigrant visas petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition.

The educational evaluation report from Marquess Educational Consultants dated September 7, 2006 states that the beneficiary's three-year Bachelor of Science degree is equivalent to a U.S. Bachelor of Science degree with a concentration in business. The evaluation states that "there is a substantial functional and academic equivalency between Mr. D [REDACTED] degree and a U.S. four-year baccalaureate, and thus it is our opinion that they should be regarded as equivalent." Using the three-for-one rule utilized by Foundation for International Services, Inc. in its evaluation, the evaluation from Marquess Educational Consultants indicates that the beneficiary's experience is equivalent to two years and four months of education in business and that the experience is sufficient to justify a concentration in business at the bachelor's level.² While the evaluation

² As noted herein, the three-for one formula is one which is found in the regulations governing H-1B nonimmigrant visas petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition. Further, the evaluation from Marquess Educational Consultants references as exhibits additional correspondence and research regarding educational equivalency, including excerpts from the United Nations Educational Scientific and Cultural Organization (UNESCO) regarding recognition of foreign educational qualifications. As noted by the director, these items do not establish that the beneficiary's degree is equivalent to a U.S. bachelor's degree. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and

from Marquess Educational Consultants uses the beneficiary's work experience in its conclusion that the beneficiary's degree is equivalent to a bachelor's degree in business, the regulation for the professional classification requires that a beneficiary must produce one degree that is determined to be the foreign equivalent of a United States baccalaureate degree. Therefore, this office concurs with the director that the evaluation must be rejected.

The educational evaluation report from Career Consulting International also states that the beneficiary's three-year Bachelor of Science degree in chemistry, environmental science and zoology is equivalent to a U.S. Bachelor of Science degree with a concentration in business. As noted by the director, it is unclear how the evaluator determined that the beneficiary's degree is equivalent to a degree with a concentration in business, as the beneficiary did not take any business courses at Bangalore University.³ 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). Therefore, this office concurs with the director that the evaluation must be rejected.

As noted by the director and despite counsel's claim to the contrary, the petitioner has submitted conflicting evidence regarding the beneficiary's education. One evaluation submitted by the petitioner indicates that the beneficiary's diploma from Bangalore University in India is equivalent to three years of university level credit from a regionally accredited college or university in the United States, and the other two evaluations submitted by the petitioner indicate that the beneficiary's diploma from Bangalore University in India is equivalent to a U.S. Bachelor of Science degree with a concentration in business. 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).

The record indicates that the beneficiary does not hold a United States baccalaureate degree or a foreign equivalent degree. The beneficiary holds a three-year bachelor of science degree from Bangalore University in India. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (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. The beneficiary clearly states on Form ETA 750B that his education at Bangalore University lasted three years. As stated above, the regulation for the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a United States baccalaureate degree.⁴ The petitioner has failed to meet this requirement.⁵

Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed January 16, 2007).

³ The evaluation from Career Consulting International lists all of the courses taken by the beneficiary at Bangalore University, none of which were in the field of business.

⁴ This office notes that the beneficiary's two certificates of participation for attendance at computer courses at Aptech Computer Education and Digital Equipment (India) Limited do not establish that he has one degree that is determined to be the foreign equivalent of a United States baccalaureate degree.

⁵ We are aware of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. November 3, 2005), which finds that CIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." We note that the AAO is not bound to follow the published decision of a United States district court in matters which arise in another district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the

analysis does not have to be followed as a matter of law. *Id.* at 719. The court in _____ makes no attempt to distinguish its holding from other Circuit Court decisions discussed below. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act, 8 U.S.C. § 1103(a). At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, 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 similar decisions on this issue in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984) and *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO at *9 (D. Ore. November 30, 2006).

The 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."

While we do not lightly reject the reasoning of a District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other

However, although the petition does not qualify under the professional classification, the petition may be considered under the skilled worker classification based on the requirements of the ETA 750.

As set forth herein, the regulations for the skilled worker classification require that the beneficiary qualify according to the terms of the labor certification application, in addition to proving a minimum number of years of training or experience. In this case, the ETA 750 requires a bachelor's or foreign degree equivalent in business administration or, in lieu of a bachelor's degree, the petitioner will accept an educational evaluation equivalence of three years of university level course work plus three years of progressively more responsible experience. The labor certification application also requires that the applicant have three years of experience in the job offered, or three years of experience in business development work but designated under another title.⁶

Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(1)(2). We also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The court in *Snapnames.com, Inc.* determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated. The labor certification allows the applicant to have an educational evaluation equivalence of three years of university level course work in the field of business administration plus three years of progressively more responsible experience. As set forth herein, the petitioner in this case has not established that the beneficiary had three years of university level course work in the field of business administration and three years of progressively more responsible employment experience.

⁶ This office notes that the evidence submitted in support of the beneficiary's prior work experience is conflicting and does not establish that the beneficiary's work experience became progressively more responsible over time. The letter dated February 13, 2004 from Ampersand Corporation and the letter dated August 31, 2006 from Bhavesh Ashani, former Vice President of Sales for Ampersand Corporation, state that the beneficiary was employed by Ampersand Software Applications Limited in India as a sales executive from November 1996 to November 1999. The letters further state that the beneficiary was employed as an account manager with Ampersand Corporation in California from September 1999 to February 2004. The letters make a distinction between the positions of sales executive and account manager. However, the letter dated July 3, 2002 from Ampersand Corporation submitted in support of the beneficiary's previous L-1B nonimmigrant visa extension application indicates that the beneficiary was employed as a sales account executive from September 1999 to the date of the letter, and the letter indicates that Ampersand was seeking to extend the beneficiary's employment as a sales account executive for an additional two years. The Forms I-797A in the record indicate that Ampersand Corporation's L-1B nonimmigrant visa petition and corresponding L-1B extension petition submitted on behalf of the beneficiary were granted, valid from September 29, 1999 to September 15, 2004. On the Form ETA 750B, the beneficiary indicated that he was employed as an account manager with Ampersand Corporation in California from November 1996 to February 2004. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent

The beneficiary holds a three-year bachelor of science degree in chemistry, environmental science and zoology from Bangalore University in India. The labor certification clearly indicates that the equivalent of a United States baccalaureate must be a foreign equivalent degree, not a combination of degrees, training, work experience or certificates which, when taken together, equals the same amount of coursework required for a United States baccalaureate degree. While the labor certification allows the applicant to have an educational evaluation equivalence of three years of university level course work plus three years of progressively more responsible experience, the university course work must have been in the field of business administration.⁷ The beneficiary took no business administration courses at Bangalore University. The beneficiary does not qualify for the proffered job according to the terms of the labor certification application and therefore, the petition does not qualify under the skilled worker classification.

The AAO thus affirms the director's decision that the petitioner has not established that the beneficiary meets the minimum requirements of the Form ETA 750.

Beyond the decision of the director, the second issue to be discussed in this case is whether the petitioner has shown its continuing ability to pay the proffered wage beginning on the priority date.⁸ 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.

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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Thus, the petitioner has not established that the beneficiary had three years of progressively more responsible employment experience in addition to three years of experience in the job offered or three years of experience in business development work but designated under another title.

⁷ Counsel states that that if the petitioner required business coursework, the petitioner would have placed an asterisk at item 14, Major Field of Study, on the ETA 750A. We find this argument without merit. The petitioner qualified the field requesting information on the college degree required by placing three asterisks in the field and indicating that it would accept an educational evaluation equivalence of three years of university level course work plus three years of progressively more responsible experience. If the petitioner had wanted to qualify the major field of study for an applicant's education, it could have done so next to its asterisks by stating that it would accept an educational evaluation equivalence of three years of university level course work *in any subject* plus three years of progressively more responsible experience. Or, the petitioner could have placed an asterisk in the field requesting information on the major field of study and indicated that it would accept coursework in any subject if the applicant planned to qualify for the position based on three years of university level course work plus three years of progressively more responsible experience. The petitioner did not do so.

⁸ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews cases on a de novo basis).

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 DOL. See 8 C.F.R. § 204.5(d). Here, the proffered wage as stated on the Form ETA 750 is \$86,600.00 per year. Relevant evidence in the record includes the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2004, the beneficiary's IRS Forms W-2, Wage and Tax Statements for 2004 and 2005, a letter from the petitioner's Chief Financial Officer dated June 7, 2006 and the petitioner's unaudited financial statement for 2005.⁹ 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 projected gross annual income of \$20,000,000.00, and to currently employ 175 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 25, 2005, the beneficiary claimed to have worked for the petitioner from February 2004 to the date he signed the Form ETA 750B.

In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That section further provides: "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 establish the prospective employer's ability to pay the proffered wage." The record contains a letter from the petitioner's Chief Financial Officer dated June 7, 2006 stating that the petitioner has a workforce of approximately 175 employees and that it has the ability to pay the salaries for the employees filed under its I-140 petitions.¹⁰ However, CIS electronic records show that the petitioner has filed over 50 other I-140 petitions since 2001.¹¹ In addition, the petitioner has also filed over 425 Form I-129 nonimmigrant petitions since 1999.¹² If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750). See also 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa

⁹ The record also contains the petitioner's IRS Form 1120, U.S. Corporation Income Tax Return, for 2003. Evidence preceding the priority date in 2004 is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

¹⁰ This office notes that the letter does not name the beneficiary.

¹¹ Assuming each of the approximately 50 other petitions reflects a similar wage obligation of \$86,600.00 per year, the petitioner must establish that it can pay wages of over \$4,330,000.00 per year, in addition to the proffered wage for the instant petition.

¹² This office notes that for I-129 petitions, which pertain to temporary workers, the regulations do not require evidence to establish a petitioner's ability to pay the proffered wages. Nonetheless, the added costs to a petitioner of hiring temporary workers authorized by I-129 petitions are relevant to any I-140 petitions for permanent workers filed by that same petitioner, since the regulations do require the petitioner to establish its ability to pay the proffered wages to the beneficiaries of any I-140 petitions.

petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Lacking such evidence, the record fails to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of the other petitions filed by the petitioner.

Given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from the petitioner's Chief Financial Officer. CIS must take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. As we decline to rely on the Chief Financial Officer's letter, we will examine the other financial documentation submitted.

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 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's IRS Forms W-2 for 2004 and 2005 show compensation received from the petitioner, as shown in the table below:

- In 2004, the Form W-2 stated compensation of \$61,888.43.
- In 2005, the Form W-2 stated compensation of \$106,061.43.

Therefore, for the year 2004, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages that year. Since the proffered wage is \$86,600.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$24,711.57 in 2004. For the year 2005, the petitioner has established that it employed and paid the beneficiary the full proffered wage.

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).

For a C corporation, CIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on September 29, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. On July 25, 2006, the date the petitioner submitted the instant petition, the petitioner's 2005 federal income tax return was due but was not provided by the petitioner. Instead, the petitioner submitted its unaudited financial statement for 2005.¹³ The petitioner's IRS Form 1120 for 2004 stated net income of \$228,737.00. While the petitioner's net income is sufficient to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2004, the petitioner has not established that its net income is sufficient to pay the proffered wage to each beneficiary for whom it has filed a petition.

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. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. 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. The petitioner's IRS Form 1120 for 2004 stated net current assets of \$1,326,287.00. As set forth herein, assuming each of the approximately 50 other petitions filed by the petitioner reflects a wage obligation of \$86,600.00 per year, the petitioner must establish that it can pay wages of over \$4,330,000.00 per year. Thus, while the petitioner's net current assets are sufficient to pay the difference between the wages actually paid to the beneficiary and the proffered wage in 2004, the petitioner has not established that its net current assets are sufficient to pay the proffered wage to each beneficiary for whom it has filed a petition.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the proffered wage to the beneficiary of the instant petition while also paying the proffered wages to the beneficiaries of the other petitions filed by the petitioner.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision on November 1, 2006 is affirmed. The petition remains denied.

¹³ Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. However, as noted herein, the petitioner has established that it employed and paid the beneficiary the full proffered wage in 2005.

¹⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.