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U.S. Citizenship
and Immigration
Services

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BC

FILE: WAC 05 062 51381 Office: CALIFORNIA SERVICE CENTER Date: JAN 23 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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a watch and apparel retail and wholesale business. It seeks to employ the beneficiary permanently in the United States as a marketing manager. 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 the beneficiary is qualified to perform the duties of the proffered position because the beneficiary did not have a four-year bachelor's degree, and the petitioner had not established its ability to pay the proffered wage based on its net income, net current assets, or wages paid to the beneficiary. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The AAO notes that the director in his denial did not answer the various issues presented by counsel in the petitioner's response to the director's request for further evidence, dated May 23, 2005. While the procedural history in this case is documented by the record and incorporated into the decision, the AAO will address more fully some of the issues raised by counsel further in these proceedings. Further elaboration of the procedural history will be made as necessary.

As set forth in the director's July 21, 2005 denial, there are two issues in the current petition, namely, whether the beneficiary is qualified to perform the duties of the proffered position, and whether the petitioner has the ability to pay the proffered wage as of the 2001 priority date and onward. The AAO will examine the first issue examined by the director, namely, the beneficiary's qualifications, and then will address the petitioner's ability to pay the proffered wage.

In the instant petition, the petitioner submitted the I-140 petition identifying the beneficiary's classification as skilled worker. 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.

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.

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

The 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 13, 2001.

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.¹ On appeal, counsel resubmits a copy of an approved I-140 petition for an earlier petition in which the Vermont Service Center had asked the petitioner in a request for further evidence whether it wished to reclassify the beneficiary as a skilled worker. Counsel also resubmits the subsequent I-797 approval notice for the same petition.

The record also contains a credential evaluation report written by Dr. [REDACTED] & [REDACTED] Florida. In his report, Dr. [REDACTED] examined the beneficiary's work experience and concluded that the beneficiary, based on his work experience, had the equivalent of a bachelor's degree in business administration with a major in marketing. With the submission of the instant petition, counsel stated that the petitioner had previously filed an I-140 petition for the beneficiary, however on November 16, 2004, this petition for professional worker was denied. Counsel stated that the instant petition was being filed under the skilled worker classification of section 203(b)(3)(A)(i). The record does not contain any other evidence relevant to the beneficiary's qualifications. The director issued a Notice of Intent to Deny, and the petitioner responded to this notice. Counsel's comments in his response to the notice are part of the record, and will not be repeated here. The director subsequently denied the petition, in part, based on the beneficiary's qualifications.

On appeal, counsel asserts that the director's denial was based entirely on the proposition that the petition was for the section 203(b)(3)(A)(ii) classification, namely, professional. Counsel states that CIS has recognized that work experience and education may be equal to a degree. Counsel cites *Matter of Shin*, 11 Int. Dec. 686; *Matter of Portuguese do Informatin Bureau* Int. Dec. 2982; *Matter of Devnani*, 11 Int. Dec. 800 (D.C. 1966); and *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988). Counsel then asserts that if the position is not classifiable as a professional as interpreted by CIS, nothing prevents CIS from classifying the position as a skilled worker based upon the approved labor certification application. Counsel further asserts that the Department of Labor certifying officer thoroughly examined compliance with DOL regulations and that the Certifying Officer determined that the beneficiary possessed the minimum requirements of education, training and experience as stated on the Form ETA 750, and that the petitioner properly relied upon the DOL's determination that the beneficiary met the requirements as to the qualifications and experience stated on the Form 750. Counsel also cites Board of Alien Labor Certification Appeals (BALCA) decisions with regard to beneficiaries having to possess the stated minimum requirements for the proffered position.

Counsel also states that CIS has routinely approved cases for different or lower classifications, if the petition is not approvable for the classification designation on the I-140 petition. Counsel states that the instant petition is a case in which the petition is not approvable for the EB-3 professional classification but rather for the skilled worker classification. Counsel submits a copy of documentation of another I-140 petition for another beneficiary in which the Vermont Service Center requested information from the petitioner as to

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).

whether it wished to change the requested preference classification.² Counsel submits the subsequent approval of this petition as well as the earlier beneficiary's documentation of a three-year baccalaureate degree. Counsel states that the facts in the earlier petition are identical to the facts of the instant petition.

Counsel also states that while CIS may not be amenable to approve the visa petition for the classification of professional, the petition is clearly approvable for the skilled worker classification notwithstanding the fact that the DOL approved the Form ETA 750 on the basis of the beneficiary's combined education and experience qualifications.

Counsel's assertion that the facts of the instant petition are identical to the documentation submitted to the record with regard to an earlier I-140 petition that counsel submitted to CIS that was subsequently approved is without merit. The record contains a copy of the earlier petition's ETA 750 that indicates the minimum education to be three years of college with a B.S. degree. The record also contains an education evaluation report that concludes the beneficiary's qualifications to be equivalent to a three-year program of academic studies culminating in a Bachelor of Commerce from the University of Bombay. Thus, the beneficiary's qualifications, while not applicable to the professional EB-3 preference, do meet the minimum requirements stipulated in the Form ETA 750, a three-year college degree. In the instant case, the beneficiary's educational evaluation report is entirely based on his extensive work experience, and there is not evidence as to any college level academic studies.

On appeal, counsel also asserts that the director erred in failing to consider the beneficiary's employment experience in determining his qualifications for the proffered position and cites four precedent cases. However, *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966); and *Matter of Devnani*, 11 I & N Dec. 800 (Act. Dist. Dir. 1966) are inapplicable to the instant petition because for each case the court defines "professional" as it was defined in the Act from its historical context, when section 1153(a)(3) failed to define "professional" with a baccalaureate degree. The Act currently defines "profession" for third preference visa petitions as "immigrants who hold baccalaureate degrees." See Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Thus, *Shin*, and *Devnani* are irrelevant as they define third preference petition "professionals" prior to Congress amending that same statutory provision and providing the current definition given to "professionals" that includes a degree requirement. *Shin* and *Devnani* are thus distinguishable and irrelevant. *Matter of Portuguese do Information Bureau* is also irrelevant as it involves the petitions of a nonimmigrant, not an immigrant. CIS does cite and apply the findings in *Matter of Sea, Inc.* when it reviews evaluations by a credentials evaluation organization of a person's foreign education. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Thus, counsel's reference to *Matter of Sea* and *Matter of Portuguese do Information Bureau* and their applicability to the instant petition is not clear.

Furthermore, counsel appears to suggest that the DOL approval of the Form ETA 705 was tantamount to the approval of the beneficiary's qualifications for the proffered position. Counsel's comments are not persuasive. The issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(l)(3)(B). As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) provides:

² The Service Center requested this clarification as a part of a request for further evidence. The request stated that the beneficiary did not appear qualified for the classification identified on the I-140 petition, and provided a space on its request for the petitioner to accept or decline the proposed reclassification.

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.20(c), as in effect at the time of filing,³ an employer applying for a labor certification must “clearly show” that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay 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;
- (3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis;
- (4) The employer will be able to place the alien on the payroll on or before the date of the alien’s proposed entrance into the United States;
- (5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
- (6) The employer’s job opportunity is not:
 - (i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
 - (ii) At issue in a labor dispute involving a work stoppage;
- (7) The employer’s job opportunity’s terms, conditions and occupational environment are not contrary to Federal, State or local law; and
- (8) The job opportunity has been and is clearly open to any qualified U.S. worker.

³ Recently the Department of Labor has promulgated new regulations regarding the labor certification process. These new regulations only apply to applications filed on or after the effective date of the regulations, March 28, 2005. Applications filed before March 28, 2005, such as the one before us, are to be processed and governed by the current regulations quoted in this decision. 69 Fed. Reg. 77326-01 (Dec. 27, 2004).

(9) The conditions of employment listed in paragraphs (c) (1) through (8) of this section shall be sworn (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746, on the Application for Alien Employment Certification form.

The regulation at 20 C.F.R. § 656.21(a) requires the ETA 750 to include:

- (1) A statement of the qualifications of the alien, signed by the alien; [and]
- (2) A description of the job offer for the alien employment, including the items required by paragraph (b) of this section.

Finally, the regulation at 20 C.F.R. § 656.24(b) provides that the DOL Certifying Officer shall make a determination to grant the labor certification based on whether or not:

(1) The employer has met the requirements of this part. However, where the Certifying Officer determines that the employer has committed harmless error, the Certifying Officer nevertheless may grant the labor certification, Provided, That the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. Where the Certifying Officer makes such a determination, the Certifying Officer shall document it in the application file.

(2) There is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity according to the following standards:

(i) The Certifying Officer, in judging whether a U.S. worker is willing to take the job opportunity, shall look at the documented results of the employer's and the Local (and State) Employment Service office's recruitment efforts, and shall determine if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers.

(ii) The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed, except that, if the application involves a job opportunity as a college or university teacher, or for an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U.S. worker must be at least as qualified as the alien.

(iii) In determining whether U.S. workers are available, the Certifying Officer shall consider as many sources as are appropriate and shall look to the nationwide system of public employment offices (the "Employment Service") as one source.

(iv) In determining whether a U.S. worker is available at the place of the job opportunity, the Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expenses, or, if the prevailing practice among employers employing workers in the occupation in the

area of intended employment is to pay such relocation expenses, at the employer's expense.

(3) The employment of the alien will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination the Certifying Officer shall consider such things as labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and the prevailing working conditions, such as hours, in the occupation.

It is significant that none of the above inquiries assigned to DOL involve a determination as to whether or not the alien is qualified for the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9th Circuit that covers the jurisdiction for this matter.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on this decision, 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).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (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.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same 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 *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. 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 *8 (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).

In this matter, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, has 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.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 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 marketing manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	(blank)
High School	(blank)
College	4
College Degree Required	B.S. Degree
Major Field of Study	Marketing

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. Item 15 of Form ETA 750A states the following: "Must have B.S. Degree in Marketing or equivalent with 2 years of prior experience in similar capacity."

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 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he had attended [unintelligible] English High School, Mumbai, India from June 1963 to April 1967, and graduated. He then stated he had a work experience equivalent to a B.S. degree, and that an equivalent certification was attached. On Item 14, of Part B, the beneficiary also states, "Please refer to the attachments marked as Beneficiary's Resume, Degrees & Transcripts and Letters of Experience." The record reflects no evidence of degrees, or transcripts for college level studies.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes four years of college, with a bachelor's of science degree in marketing.

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

(Emphasis added).

With regard to the credentials evaluation report submitted to the record, it is given no evidentiary weight, as the evaluator solely examined the beneficiary's work experience. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions. As stated previously, the credential

evaluation from Silny and Associates stated, in pertinent part, that the beneficiary's extensive work experience was the equivalent of a bachelor's degree in business administration with a major in marketing. Based on the evaluator's exclusive review of the beneficiary's work experience in arriving at his evaluation, this report is given no evidentiary weight in these proceedings.

The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(l)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

Finally, counsel suggests that if the beneficiary is not qualified under the professional section of the third preference category, then CIS should consider the beneficiary's qualifications under the skilled worker section of the third preference category. It is noted that while the various Service Centers may enquire of petitioners as to the perceived deficiencies and request clarification and/or suggest a more appropriate petition classification, during an initial review of the petitioner, such requests are neither statutorily or regulatorily mandated. See Yates memo.⁴ The burden of proof, including any clarification of petition classification, remains with the petitioner.

Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a "professional" because the regulation requires it and for a "skilled worker" because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

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

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

⁴ 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).

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

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

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the beneficiary must have a bachelor’s degree or its foreign equivalent.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a “skilled worker,” the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor’s degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent foreign degree to a U.S. bachelor’s degree.

Here, the record does not reflect any formal education undertaken by the beneficiary. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The beneficiary was required to have a bachelor’s degree on the Form ETA 750. The petitioner’s actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director’s decision to deny the petition based on the beneficiary’s qualifications must be affirmed.

With regard to the second issue addressed by the director, the petitioner has not established its ability to pay the proffered wage. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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 April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$37,000 per year.

As stated previously, 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 appeal⁵. Counsel submits previously submitted evidence on appeal. Relevant evidence in the record includes the petitioner's Forms 1120 for tax years 2001, 2002, and 2003. The petitioner also submitted payroll documentation for the beneficiary, including Form 941 for the first quarter of tax year 2003 that indicated the beneficiary earned \$7,500 during this quarter. The petitioner also submitted more recent pay stubs dated as of September 30, 2004 that the beneficiary had earned \$25,416.70. The record does not reflect any wage documentation for the tax year 2001 or 2002.⁶ The petitioner also submitted extensive documentation as to the petitioner's owner's real estate assets as well as evidence of the petitioner's line of credit. 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 1997, to have a gross annual income of \$1.1 million and a net annual income of \$70,000. The petitioner claimed to currently employ more than eight workers. On the Form ETA 750B, signed by the beneficiary on March 30, 2001, the beneficiary claimed to have worked for the petitioner since September 2000.

On May 23, 2005, the director issued a Notice of Intent to Deny (NOID) the petition. In his notice, the director stated that based on the salary evidence submitted to the record for tax year 2004, it appeared that the petitioner had the ability to pay the proffered wage in that year. The director further noted that in tax year 2003, the petitioner's ability to pay the proffered wage was "close". The director then multiplied \$8,000 by four quarters and determined that this sum was \$24,000. The director then added this sum with the petitioner's net income of \$5,526 and net current assets of \$5,775 and stated that the petitioner had available financial resources of \$35,301. The director then stated that the other two years⁷ were not well documented with regard to the beneficiary's wages, and added that although the beneficiary started working for 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).

⁶ The AAO did not find any such wage documentation in the record.

⁷ The AAO presumes that within the context of the director's comments, he refers to tax years 2000 and 2001.

petitioner in tax year 2000, the petitioner submitted no W-2 forms or pay stubs to “help raise the numbers.” The director concluded that the petitioner’s net income or taxable income in 2001 was -\$17,538, while the petitioner’s net income was \$2,165 in tax year 2002. With regard to the petitioner’s net current assets, the director noted that the petitioner had net current assets of \$31,272 in 2001 and net current assets of \$17,113 in tax year 2002.

In response to the director’s NOID, counsel submitted documentation on the petitioner’s owner’s real estate holdings, including statements with regard to mortgage interest and mortgage balances. Counsel also submitted an affidavit from the petitioner’s owner that described the owner’s access to home equity lines as a source of additional finances with which to pay the proffered wage. Counsel also submitted documentation with regard to these loans.

On July 21, 2005, the director then denied the petition, stating that the petitioner contends that the documentation on petitioner’s owner’s various loans and real estate properties can establish the petitioner’s ability to pay the proffered wage. The director stated that one of the properties described in the documentation is the petitioner’s owner’s residence. The director further stated that the \$100,000 equity claimed by the petitioner would only cover three years of the beneficiary’s proffered wage and then after these funds were exhausted, no permanent employment could be offered.

On appeal, counsel asserts that the director did not adequately address the petitioner’s assets in his decision and did not address the continuing viability of the petitioner’s business and its increase in sales during the relevant years in question. Counsel states that based on the Yates memo, the petitioner has established its ability to pay the proffered wage based on its assets. Counsel states that the documentation submitted clearly established that the personal assets of Mr. [REDACTED], the petitioner’s owner, exceeded \$100,000 in tax years 2001 and 2002. Counsel then states that the petitioner clearly met and exceeded the guidelines in the Yates memo regarding the petitioner’s personal assets.

Counsel also states that with the exception of a publicly traded Wall Street company, most enterprises and businesses are capitalized from personal savings, assets, home equities and lines of credits, and that to conclude that a sole stockholder’s assets cannot be considered in the context of capitalization of small business is not tenable with either established business practices, but also in terms of the Yates memo.

Counsel also notes that beyond the petitioner’s ability to pay the proffered wage, other factors can determine the overall viability of a business. Counsel states it is relevant and crucial to examine a progressive increase of volume of business. With regard to the instant petitioner, counsel states that the petitioner had a gross revenue of \$1,039,648 in tax year 2001 with a payroll of \$251,000. Further counsel states that in tax year 2002, the petitioner had a gross revenue of \$1,195,941 with a payroll of \$357,000.

Counsel also refers to an unpublished AAO decision from April 2004 that stated the petitioner is not obliged to demonstrate the ability to pay the entire proffered wage during the complete fiscal year, but only that portion which would have been due if it had hired the [beneficiary] on the priority date. Counsel states that the petitioner was only required to show it had the ability to pay the pro-rated share of the annual wage that would have been owed the beneficiary on the priority date. Counsel states that with regard to the instant petitioner, it only needs to show it has the ability to pay \$24,000 during fiscal year 2001 since the priority date is April 27, 2001.

Counsel also refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), and states that other factors beyond the petitioner’s income tax return would be taken into consideration, such as the nature and profile of the

petitioner, potential for growth, size of the petitioner, and number of current and past employees. Counsel states that the volume of revenue and working capital of the petitioner are also equally significant. Counsel states that the petitioner has demonstrated steady and consistent increase in its business volume as corroborated by the petitioner's tax returns

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 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 response to the director's NOID and on appeal, counsel appears to confuse the legal corporation that is the petitioner, with the owner of the corporation, namely the petitioner's owner, Mr. Gnai. Although the director did not directly refer to this fact in his decision, the AAO will address this issue in these proceedings. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In addition, in his decision, the director appears to countenance the use of a line of credit, or a home equity loan to finance the proffered wage. Contrary to both the director's comment in his decision, and contrary to counsel's assertions, in calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the corporation's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although, as counsel correctly notes

on appeal, lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In his decision, the director also appears to add both the petitioner's net income and net current assets in arriving at the petitioner's ability to pay the proffered wage in tax year 2003. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

On appeal, counsel refers to a decision issued by the AAO that approved the use of pro-rating the beneficiary's income based on the priority date, but does not provide its published citation. 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 AAO 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.

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. Although the director refers to tax year 2000 and the lack of documentation for this year, the AAO notes that the priority date for the instant petition is April 2001. Thus, the beneficiary's wages in 2000 are not dispositive of the petitioner's ability to pay the proffered wage in 2001. As stated correctly by the director, the record does not appear to contain any wage documentation for tax years 2001 and 2002. With regard to tax year 2003, as previously stated, the record contains a Form 941 that establishes the petitioner paid the beneficiary \$7,500 in the first quarter of 2003. This documentation does not establish that the petitioner paid the beneficiary the entire proffered wage in tax year 2003.⁸ With regard to tax year 2004, although the

⁸ Even if this quarterly wage were duplicated throughout the tax year, the AAO notes that it would not equal the \$37,000 proffered wage. Four times \$7,500 is \$30,000.

director stated that evidence in the record was sufficient to establish the petitioner's ability to pay the proffered wage in 2004, this part of the director's decision is incorrect. The evidence submitted to the record simply establishes that the beneficiary earned \$25,416.70 as of September 30, 2004. It did not establish that by the end of 2004, the petitioner had paid the beneficiary the entire proffered wage of \$37,000 per year. Therefore, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the 2001 priority date and onward. Thus, the petitioner has the obligation to establish its ability to pay the entire wage in tax years 2001 and 2002, based on lack of documentation of any wages, and then the difference between the wages paid and the proffered wage, in tax year 2003 and 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.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$37,000 per year from the priority date:

- In 2001, the Form 1120 stated a net income⁹ of \$2,165.
- In 2002, the Form 1120 stated a net income of -\$17,538.
- In 2003, the Form 1120 stated a net income of \$5,526.

⁹The AAO considers a C Corporation's net income to be the taxable income before net operating loss deduction and special deductions, as identified on Line 28 of the Form 1120.

Therefore, for the years 2001, 2002, and 2003, the petitioner did not have sufficient net income to pay the entire proffered wage, or the difference between any wages paid to the beneficiary and the proffered wage.¹⁰

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.¹¹ 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.

- The petitioner's net current assets during 2001 were \$28,272.¹²
- The petitioner's net current assets during 2002 were \$9,042.
- The petitioner's net current assets during 2003 were \$5,775.

Therefore, for the years 2001, and 2002, the petitioner did not have sufficient net current assets to pay the entire proffered wage.¹³ With regard to tax year 2003, the petitioner's net current assets of \$5,775 would not be sufficient to pay the difference between the beneficiary's documented wages (\$7,500) and the proffered wage of \$37,000. As previously noted, the record is rather confused with regard to the beneficiary's wage documentation.

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 asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date, and refers to *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), which relates to petitions filed during uncharacteristically unprofitable or difficult years

¹⁰ Since the petitioner's 2004 tax return is not in the record, the AAO cannot determine if the petitioner had sufficient net income in tax year 2004 to pay the proffered wage.

¹¹ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹² The record is not clear how the director calculated the figures for the petitioner's net current assets for 2001 and 2002 contained in the director's NOID. They are not correct.

¹³ As noted previously, the record does not reflect any of the beneficiary's wage documentation for tax year 2001 or 2002.

but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 2001 was an uncharacteristically unprofitable year for the petitioner. In fact, the petitioner has had positive net current assets all of the relevant years in question, and has had negative net income only during tax year 2002. Furthermore the petitioner has provided no pertinent documentation as to the petitioner's business reputation or reputation as a jewelry and apparel wholesaler and retailer. Counsel on appeal states that other factors such as the nature and profile of the company, potential for growth, size of the organization and the number of current and past employees should also be taken into consideration when evaluating the petitioner's viability. Counsel also refers to business structure as another factor of viability. However, counsel provides no further documentation to address any of these factors. 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). Counsel does state that the petitioner has demonstrated steady and consistent increase in its business volume, as corroborated by its tax returns. This statement alone is not sufficient to find the petitioner's overall circumstances analogous to the petitioner in *Matter of Sonegawa*.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax 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.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. As discussed previously, the petitioner also did not establish that the beneficiary is qualified to perform the duties of the proffered position.

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.