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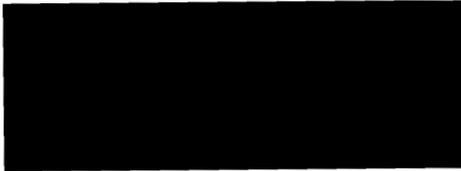
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U.S. Citizenship  
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Services

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: AUG 11 2008

LIN-06-223-52596

IN RE:

Petitioner:

Beneficiary:



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, Nebraska Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering company. It seeks to employ the beneficiary permanently in the United States as an accountant and auditor (project cost analyst II). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (the ETA Form 9089 or labor certification), approved by the Department of Labor (DOL), accompanied the petition.<sup>1</sup> Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as required on the ETA Form 9089. The director also determined that the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience. In addition, the director noted that the original certified ETA Form 9089 was not signed by the petitioner and the beneficiary. Accordingly, the director denied the petition.

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 also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal and in response to the AAO's RFE.<sup>2</sup> On appeal, counsel submits a brief, an undated experience letter from Robert Nosal, Manager Project

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<sup>1</sup> The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. Since the instant labor certification application was filed after March 28, 2005 and is governed by the PERM regulations.

<sup>2</sup> 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*

Control Group of Jacobs, a copy of the certified ETA Form 9089 with original signatures of the petitioner and the beneficiary, and copies of recruitment materials. Other relevant evidence in the record includes a diploma and certificate from El Instituto Central Femenino (now called Tecnológico de Antioquia), an evaluation report from Globe Language Services, Inc. and recruitment materials such as job order, internal posting notice, and job bank, website and newspaper advertisements.

The first issue in the instant case is whether the beneficiary met the minimum educational requirements set forth for the proffered position on ETA Form 9089. To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the 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 petitioner requires a bachelor's degree in accounting and two years (24 months) of experience in the job offered or in an alternate occupation of administrative assistant as the minimum requirements for the proffered position in Part H of the ETA Form 9089. The form does not reflect any specific skills or other requirements.

The original ETA Form 9089 was accepted on December 28, 2005 and certified on February 15, 2006 for the position of project cost analyst II. DOL assigned the occupational code of [REDACTED] accountants and auditors, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at [REDACTED]

(accessed July 26, 2008) and its extensive description of the position and requirements for the position same with project cost analyst position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to an accountant position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an 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* [REDACTED]

(accessed July 26, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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 id.*

Therefore, a project cost analyst position could be properly analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.<sup>3</sup> In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification of the skilled worker category pursuant to section 203(b)(3)(A)(i) of the Act. Therefore, Citizenship and Immigration Services (CIS) will examine the petition under the skilled worker category, which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application. 8 C.F.R. § 204.5(1)(3)(ii)(B).

### **Authority to Evaluate Whether the Alien is Eligible for the Classification Sought**

As noted above, the ETA Form 9089 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) of the Act provides:

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. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Act certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

---

<sup>3</sup> A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that project cost analyst positions are not included in this section.

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

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

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).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now CIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the

“equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.” In order to have experience and education equating to a bachelor’s degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as she does not have the minimum level of education required for the equivalent of a bachelor’s degree.

As stated above, however, the petitioner seeks to classify the beneficiary as a skilled worker.

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, and any other requirements of the individual labor certification.”

The certified ETA Form 9089 expressly requires a bachelor’s degree or equivalent in accounting as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary’s education includes a diploma of technologist in document administration and micrographics from El Instituto Central Femenino (now Tecnológico de Antioquia). An evaluation report dated July 12, 2005 from Globe Language Services, Inc. (GLS) evaluates the diploma as equivalent to three years of under graduate study from a regionally accredited educational institution in the United States. The GLS evaluation also evaluates the beneficiary’s three years of progressively advanced employment in business administration (accounting) as the equivalent to one academic years (30 semester credits) of undergraduate study in Business Administration (Accounting), and further concludes that the beneficiary holds the equivalent of U.S. four-year bachelor’s degree in Business Administration (Accounting) based on the diploma and three years of experience. Thus, the issues are whether that diploma is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary’s experience in addition to that diploma. We must also consider whether the beneficiary meets the job requirements of the proffered position as set forth on the labor certification.

#### **Authority to Evaluate Whether the Alien is Qualified for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, 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 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from 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, revisited this issue, stating:

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 (9<sup>th</sup> Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Ore. 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.

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (Ore. Nov. 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 district court 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.* 2006 WL 3491005 at \*8-9. 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. *Id.* 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. *Id.* at \*10. In the instant case,

unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated. *See also Maramjaga v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)

The key to determining the job qualifications specified in the labor certification is found on ETA Form 9089 Part H. This section of the labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification, as filled in by the petitioner, reflects the following requirements:

- 4. Education: minimum level required: -----Bachelor's
- 4-B. Major field of study ----- Accounting
- 5. Is training required in the job opportunity? ----- No
- 6. Is experience in the job offered required for the job? ----- Yes
- 6-A. If Yes, number of months experience required: ----- 24
- 7. Is there an alternate field of study that is acceptable? ----- No
- 8. Is there an alternate combination of education and experience that is acceptable? ----- No
- 9. Is a foreign educational equivalent acceptable? ----- Yes
- 10. Is experience in an alternate occupation acceptable? ----- Yes
- 10-A. If Yes, number of months experience in alternate occupation required: ----- 24
- 10-B. Identify the job title of the acceptable alternate occupation: ----- Administrative Assistant
- 14. Special skills or other requirements ----- **Blank**

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. 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, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification “must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.” As noted previously, the certified ETA Form 9089 requires a Bachelor’s degree in accounting. The certified ETA 9089 line 8, demonstrates that the petitioner would not accept a combination of degrees that are individually all less than a U.S. bachelor’s degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner’s labor market test. The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor’s degree might be met through a combination of lesser degrees, diplomas, and/or quantifiable amount of work experience.

Furthermore, counsel submitted with the initial filing and also resubmits on appeal the petitioner’s recruitment efforts conducted related to the relevant labor certification, including the internal posting notice, job order, internet and newspaper advertisements. While all these recruitment materials indicated that the position requires a minimum of Bachelor degree in accounting or equivalent and two years of experience, the record does not contain any documents indicating that the employer would accept a combination of lesser degree(s) and quantifiable amount of work experience as an “equivalent” to meet the minimum educational requirement of a bachelor’s degree in accounting. The AAO does not find that US workers were on notice that a combination of lesser degree(s) and work experience as an equivalent would meet the minimum educational requirement of a bachelor’s degree in accounting. Therefore, the petitioner failed to demonstrate its intent to accept a combination of lesser degree(s) and work experience as an equivalent of a bachelor’s degree in accounting on the ETA Form 9089 and the relevant recruitment materials.

Additionally, 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. *See Snapnames.com, Inc.* 2006 WL 3491005 at \*8-9. In the instant case, the petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor’s degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing.

The petitioner asserts that the beneficiary possessed the equivalent to a U.S. bachelor’s degree according to a private credential evaluation from GLS. This evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The evaluation evaluates the beneficiary’s diploma of technologist in document administration and micrographics as the equivalent of three years of academic studies toward a bachelor’s degree at an accredited college or university in the United States. However, the record does not contain the official transcripts from the institution issued the diploma or any other evidence showing the length of study or courses taken in the program. The evaluator did not indicate on what based he evaluated the diploma as a three-year college program. A bachelor’s degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, even if the beneficiary’s diploma had been demonstrated to be the equivalent of three-year bachelor’s degree, it alone cannot be deemed as an equivalent of a U.S. bachelor’s degree. Furthermore, CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In the instant case, the beneficiary holds a diploma in document administration and micrographics, and the

beneficiary never completed her four-year college studies in the field of accounting. The evaluation does not explain how three years of study in document administration and micrographics is evaluated as equivalent degree in accounting. CIS may, in its discretion, use as advisory 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). The beneficiary was required to have a bachelor's degree in accounting on the ETA Form 9089. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 90899 was certified by DOL. Since that was not done, the petition cannot be approved. Therefore, the AAO finds that the petitioner failed to demonstrate that the beneficiary possesses a bachelor's degree or educational equivalent in accounting, and thus the beneficiary did not meet the minimum educational requirements for the proffered position prior to the priority date under the skilled worker category. The director's April 16, 2007 decision is affirmed.

The second issue to be discussed is whether the petitioner has demonstrated that the beneficiary possessed the requisite two years of experience prior to the priority date with the regulatory-prescribed evidence. A beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The petitioner must demonstrate that, on the priority date, that is December 28, 2005 in the instant case, the beneficiary had the qualifications stated on its ETA Form 9089 as certified by DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The certified ETA 9089 requires two years of experience in the job offered, i.e. project cost analyst, or two years of experience in related occupation of administrative assistant in addition to the bachelor's degree in accounting. The beneficiary set forth his work experience on the ETA Form 9089. In Part K. Alien Work Experience, the beneficiary listed his experience as a full-time "Administrative Assistant" since March 2, 1998 and as a full-time "Project Coordinator Scheduler" from July 7, 1997 to March 1, 1998 for the petitioner. Prior to that, she represented that she worked for Postobon in Colombia as a full-time "Treasury Assistant" from June 22, 1989 to June 30, 1993.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

However, the petitioner did not submit any evidence described in the regulation quoted above with its initial filing of the petition. On appeal, counsel submits an undated experience letter from [REDACTED], Manager Project Controls Group of Jacobs Engineering Group Inc. (JE experience letter). This letter is on JE letterhead and from the manager project controls group of JE. The letter states in pertinent part that:

I [REDACTED] notified that [the beneficiary] was employed in the Boston Office of Jacobs Civil Inc. from March 2, 1998 through December 28, 2005 as an Administrative Assistant.

The writer “notified” rather than certified or verified the beneficiary’s employment in the letter. The writer did not indicate whether he was in a position to verify or notify the beneficiary’s employment with the petitioner. The letter did not explain how a manager of JE could verify the beneficiary’s employment with the petitioner, Jacobs Civil, Inc. Further, the JE experience letter did not verify the beneficiary’s full-time employment and does not contain a specific description of the duties performed by the beneficiary during the employment with the petitioner. Without such a description, the AAO cannot determine whether the experience as an administrative assistant qualifies the beneficiary to perform the duties of the proffered job. The AAO cannot accept the JE experience letter as primary regulatory-prescribed evidence to establish the beneficiary’s qualifying two years of experience prior to the priority date. The record does not contain any objective evidence to support the beneficiary’s employment history with the petitioner. Thus, the petitioner failed to establish the beneficiary’s requisite two years of experience from the employment with the petitioner with regulatory-prescribed evidence. Counsel’s assertions and new evidence submitted on appeal cannot overcome the ground of the director’s denial that the petitioner did not demonstrate that the beneficiary possessed the requisite two years of experience prior to the priority date. The director’s ground is affirmed.

Beyond the director’s decision and counsel’s assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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*, 299 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 appeals on a de novo basis).

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 either 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 ETA Form 9089 was accepted for processing by DOL. *See* 8 CFR § 204.5(d). The priority date in this case is December 28, 2005. The proffered wage as stated on the ETA Form 9089 is \$23.70 per hour (\$49,296 per year).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit the beneficiary's W-2 forms, 1099 forms or any other type of evidence showing that the petitioner paid the beneficiary compensation in the relevant years. Therefore, the petitioner did not establish its ability to pay the proffered wage in these relevant years through the examination of wages actually paid to the beneficiary.

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. See *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 income and gross profit is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* 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 Chang* 719 F. Supp at 537.

The petitioner submitted a 2005 Summary Annual Report of Jacobs Engineering Group, Inc. as evidence of the petitioner's ability to pay the proffered wage. While counsel asserted that Jacobs Engineering Group, Inc. is the petitioner's parent company, the submitted summary annual report does not indicate or establish the parent-subsidiary relationship between Jacobs Engineering Group, Inc. and the petitioner, Jacobs Civil, Inc. The record does not contain any other evidence to support counsel's assertions. 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). 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)). In addition, the State official business databases show that Jacobs Engineering Group, Inc. is an active Delaware corporation and Jacobs Civil, Inc. is in good standing as a Missouri domestic corporation respectively.<sup>4</sup> Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Without demonstrating the parent and subsidiary relationship between the two corporations with documentary evidence and a legal obligation for the parent company to cover the proffered wage, the petitioner cannot establish its continuing ability to pay the proffered wage with an annual report of Jacobs Engineering Group, Inc. The record does not contain such evidence in the instant case. Therefore, the petitioner failed to establish that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence.

Furthermore, 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 or approved 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 or approved 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 ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2). CIS records show that during the years 2002 through 2008 at least 67 immigrant and nonimmigrant petitions were filed under the name of Jacobs Civil, Inc., 7 petitions filed under Jacobs Civil, 422 petitions under Jacobs Engineering Group, Inc., 72 under Jacobs Engineering Group and 7 more under Jacobs Engineering. CIS records do not support the parent and subsidiary relationship between Jacobs Engineering Group, Inc. and the petitioner.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.

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<sup>4</sup> <http://sos-res.state.de.us/tin/GINameSearch.jsp> and <https://www.sos.mo.gov/BusinessEntity/soskb/csearch.asp> (accessed on July 29, 2008).