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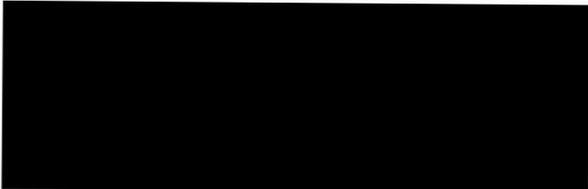


File: [Redacted] Office: TEXAS SERVICE CENTER Date: **AUG 25 2008**
SRC-07-033-53356

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 Director, Texas Service Center (“director”), denied the immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a software development and consulting company, and seeks to employ the beneficiary permanently in the United States as a software engineer (“Senior Programmer/Analyst”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s April 2, 2007 decision, the petition was denied based on the petitioner’s failure to demonstrate its ability to pay the proffered wage from the priority date until the beneficiary obtains permanent residence.

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).¹

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 petitioner has filed to obtain permanent residence and classify the beneficiary pursuant to Section 203(b)(A) of the of the Immigration and Nationality Act (the Act) as a professional worker or skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is 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.” Section 203(b)(3)(A)(i) of 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, 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).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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).

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.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on July 8, 2003. The proffered wage as stated on Form ETA 750 is \$75,000.00 per year, based on a 40 hour work week. The labor certification was approved on August 24, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on November 15, 2006. On the I-140, the petitioner listed the following information: date established: 2000; gross annual income: \$2.13 million; net annual income: \$200,000; current number of employees: 30.

On December 22, 2006, the director issued a Request for Additional Evidence ("RFE") for the petitioner to submit: evidence that the beneficiary met the educational qualifications of the certified labor certification, as well as evidence related to the petitioner's ability to pay the proffered wage, including the petitioner's 2003 and 2004 annual reports, or audited financial statements, as well as additional evidence in the form of bank account records, payroll records, and/or profit and loss records. The petitioner responded. Following consideration of the petitioner's response, on April 2, 2007, the director denied the petition as the petitioner failed to demonstrate that it could pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. The petitioner appealed, and the matter is now before the AAO.

On November 8, 2007, the AAO director issued an RFE. The RFE stated that the petitioner had filed 199 petitions since it was established in 2000, 26 of which were Form I-140 petitions. The RFE requested that the petitioner provide documentation that it could pay the proffered wage for all of the sponsored I-140 beneficiaries from each respective priority date onward. Further, the RFE requested that the petitioner provide documentation to show that the beneficiary met the educational requirements of the certified labor certification of a bachelor's degree in Computer Science or Engineering. The documentation that the petitioner provided did not establish that the beneficiary had a four-year degree as listed, but rather that the beneficiary had education evaluated as the equivalent of a bachelor's degree. The RFE further requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner did not respond.

We will examine the petitioner's ability to pay first based on information in the record and then consider the petitioner's additional arguments on appeal. Subsequently, we will consider the issue of the beneficiary's qualifications.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will 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 case at hand, the beneficiary listed on Form ETA 750B that the petitioner has employed him since June 2002. The petitioner provided the following evidence of wage payment to the beneficiary:

<u>Year</u>	<u>Wages Paid</u>	<u>Difference between wages paid and the proffered wage</u>
2006	\$64,235.10 ²	\$10,765
2005	\$81,799.54	paid full wage
2004	\$46,000	\$29,000
2003	\$0 ³	\$75,000

The petitioner can partially demonstrate its ability to pay the proffered wage based on prior wages paid to the beneficiary. However, wages alone are insufficient to demonstrate the petitioner's ability to pay. The petitioner did not provide a W-2 statement or evidence of any wage payment in 2003, so it must show that it can pay the beneficiary the full wage in 2003. In 2004, the wages that the petitioner paid to the beneficiary were less than the proffered wage, so the petitioner must show that it can pay the difference between the wages paid in that year and the proffered wage. Based on the wages paid, the petitioner can demonstrate its ability to pay the beneficiary the proffered wage in 2005.

The petitioner additionally provided paystubs for the months of April through September 2006, which exhibited monthly pay to the beneficiary in the amount of \$6,692.23, which if paid that amount for the full year would equate to an annual salary of \$80,306.76. The September 2006 paystub indicates that the beneficiary was paid \$64,235.10 for the year to date as of September 30, 2006. The decision indicates that based on payment of the beneficiary's monthly salary in 2006, the petitioner would have paid the beneficiary \$84,310 for the year, and, therefore the petitioner could establish its ability to pay the wage in that year. Based on the date of filing the I-140, the beneficiary's 2006 W-2 would not have been available, but should have been at the time of response to the RFE, and would have been available at the time that the petitioner filed its appeal. The petitioner, however, did not provide this document on appeal. Therefore, we would not conclude based on wages alone that the petitioner can pay the proffered wage in 2006. The petitioner must establish that it can pay the beneficiary the proffered wage in 2003, 2004, and 2006.

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. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well supported by federal case law. *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). 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.

² \$64,235.10 represents the amount of wages that the petitioner paid the beneficiary as of September 30, 2006.

³ Counsel indicates on appeal that the beneficiary was not in the U.S. during 2003. We note that Form ETA 750B lists that the beneficiary has been employed with the petitioner since June 2002. The reason for this discrepancy is unclear. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner does not list any additional income so we will take the petitioner's net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	-\$2,979
2003	-\$11,244

The petitioner's net income would not allow for payment of the beneficiary's proffered wage in any of the above years, even if the wages paid to the beneficiary were added to the petitioner's net income.

We additionally note that the petitioner has filed approximately 28 other I-140 petitions and would need to show that it could pay the proffered wage for all sponsored workers from their respective priority dates onward.⁴

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

<u>Tax year</u>	<u>Net current assets</u>
2004	-\$67,768
2003	-\$34,110

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage to the instant beneficiary, or to all sponsored beneficiaries, in any of the above years based on net current assets.

Counsel additionally submitted the petitioner's financial statements, including profit and loss statements, and balance sheets, for the years ending December 31, 2003, and December 31, 2004. For the year ending

⁴ CIS records reflect that the petitioner has filed for 232 workers, either nonimmigrant H-1B petitions, or I-140 petitions (approximately 28), since the year 2000. The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.

December 31, 2005, the petitioner provided a balance sheet; and for the year ending December 31, 2006, the petitioner provided a statement of revenues and expenses paid, a statement of assets and liabilities, and a profit and loss statement.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, counsel provides that CIS "incorrectly determined" that the petitioner did not have the ability to pay the proffered wage in 2003 and 2004.

In support, he provides that the petitioner has established its ability in 2005, and 2006, and can establish its ability to pay in 2003 and 2004 based on the profit and loss statements submitted. He provides that the statements were prepared on an accrual basis, as opposed to the tax returns, which were prepared on a cash basis. He further provides that the statements prepared on an accrual basis provide "the more accurate financial picture of the company . . . as significant assets such as accounts receivables are not listed on the cash basis statements."

If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the profit and loss statements prepared based on another method. If the accountant wished to persuade this office that accrual accounting supports the petitioner's continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Counsel further provides that as a small business it would be "prohibitively expensive to have an accountant review all transactions, prepare detailed notes, disclosure statements, cash flow projections, etc."

Based on 8 C.F.R. § 204.5(g)(2), the petitioner is required to submit audited financial statements. If the cost of having a statement audited is too prohibitive for a small employer, 8 C.F.R. § 204.5(g)(2) also allows the petitioner to submit and rely on its tax returns. A petitioner might also demonstrate its ability to pay through wages paid to the beneficiary, including W-2 statements and other pay records. While the petitioner submitted its tax returns, and W-2 statements for the beneficiary, those documents individually, or combined, fail to document the petitioner's ability to pay the proffered wage from the time of the priority date until the beneficiary obtains permanent residence.

Counsel then asserts that the petitioner's profit and loss statement shows a net income of \$30,092 in 2003, and net current assets for that year in the amount of \$88,250. The petitioner's profit and loss statement for 2004 showed a net income of \$99,386, and net current assets in the amount of \$162,383.

The petitioner's net current assets were calculated above based on the petitioner's tax returns submitted. The petitioner cannot now shift to rely on unaudited profit and loss statements compiled on an accrual basis as that method of calculation is more convenient for the petitioner's cause.

On appeal, the petitioner submitted bank statements for the time period of February 2003⁵ through December 31, 2004. The statements submitted show significant variation in the amount that the petitioner had in its account from a low balance of \$25,383 (as of August 31, 2004) and a high balance of \$117,930 (as of December 31, 2003).⁶ First, we note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities.

Counsel asserts that while the petitioner's "cash basis tax returns do not by themselves demonstrate their financial ability to pay the proffered wage, when looking at the broader evidence attached, the petitioner's Profit/Loss Statements, Balance Sheets, Bank Statements, and W-2 Statements," the petitioner would have the ability to pay.

We disagree. The petitioner has sponsored multiple I-140 beneficiaries. The petitioner was afforded an opportunity to address its ability to pay all its sponsored beneficiaries. The petitioner did not respond to the AAO's RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner has not demonstrated that it has the ability to pay the instant beneficiary the proffered wage. Further, the petitioner has not demonstrated that it can pay all the sponsored beneficiaries their respective proffered wages. Accordingly, the director properly denied the petition on this basis.

Further, although not raised in the director's decision, a second ground of ineligibility is that the petitioner failed to demonstrate that the beneficiary had the education required to meet the terms of the certified labor

⁵ The petitioner did not submit its bank statement for the month of January 2003, but submitted each subsequent month for the year 2003, and each monthly statement for the year 2004. The February 2003 statement does indicate, however, a February 1 opening balance of \$43,155.29.

⁶ We note that the petitioner's 2003 tax return only lists year-end cash in the amount of \$12,320. The petitioner's tax return does not list that the petitioner files based on a different fiscal tax year rather than a calendar year. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). This issue was raised in the AAO's RFE, however, the petitioner did not respond to the RFE.

certification. 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).

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

The proffered position requires a four-year bachelor's degree and two years of experience. Because of those requirements, the proffered position is for a professional,⁷ but might also be considered under the skilled worker category. DOL assigned the occupational code of 030.062-010, "Software Engineer," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database, O*Net, its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered 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 <http://online.onetcenter.org/link/summary/15-1031.00#JobZone>* (accessed August 20, 2008).⁸ 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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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

⁷ Section 101(a)(32) of the Act defines profession: "The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Further, 8 C.F.R. 204.5(l)(2) provides, "Professional means 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."

⁸ DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O*Net. Under the DOT code, the position of software engineer has a SVP of 8 allowing for four or more years of experience.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary provided a certificate to show that he had passed Sections A and B of the Institution of Engineers Exams in the field of Electronics and Communications Engineering in summer 1990 and winter 1994 respectively. He additionally completed a post-graduate diploma, and has relevant work experience. Thus, the issues are whether the beneficiary's passage of Sections A and B of the Institution of Engineering Exams is equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's work experience and/or additional diploma. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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) 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 Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) 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

(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).⁹ *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 (the Service), 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).

For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.)

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289m 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential.

⁹ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

The petitioner has not demonstrated that the beneficiary's "post diploma" was awarded by a college or a university.

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) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

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 (9th 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 (9th Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 1174 (D. Or. 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 (D. 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 court rejected the argument that CIS cannot evaluate whether the alien meets the job qualifications. *Id.* at *5. 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. *Id.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services ("CIS") properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor's degree.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the Form ETA 750A, the "job offer" position description for a Senior Programmer/Analyst provides:

Analyze, design, develop, test and implement n-tier web-based application software in a client/server environment using ASP, Visual Basic, COM, COM+, DCOM, Active X, RDO, JavaScript, MTS, SQL Server, Oracle, MS Access, IIS, Visual Interdev and SML under Windows NT/2000 operating systems; Provide technical support with Peoplesoft Human

Resources Management Systems (HRMS) and Financial modules using PeopleTools, SQR and PeopleCode.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Education: Grade School: not listed;
High School: not listed;
College: 4 years;
College degree: Bachelor's degree;
Major Field Study: Computer Science, Engineering discipline or a closely related field;
Experience: 2 years in the job offered, Senior Programmer/Analyst, or 2 years in the related occupation of Software Engineer.

Other special requirements: Extensive travel on assignments to various client sites within the U.S. is required.

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. 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 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).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) the Institute of Management Technology, Ghaziabad, India; Field of Study: Computer Science; from June 1995 to July 1998, for which he received a Post Graduate Diploma; and (2) the Institution of Engineers, Calcutta, India; Field of Study: Electronics Engineering; from June 1990 to December 1994, for which he received a "Bachelor's."

The director's RFE requested that the petitioner submit evidence that the beneficiary met the educational qualifications of the certified labor certification.

In response to the director's RFE, counsel stated that the beneficiary completed his twelfth year of high school in 1987. He then completed a four year program in Electrical Engineering and completed the course in 1992. The beneficiary subsequently completed a three year Post Graduate Diploma in Computer Applications so that counsel states, the beneficiary completed seven years of "college level" educational course work.

The petitioner submitted an evaluation of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

Evaluation One:

- Evaluation: Multinational Education & Information Services, Inc., Atlanta, GA.

- The evaluation considered the beneficiary's completion of the Sections A & B Examinations of the Institution of Engineers (India) in 1990 and 1994. He completed courses for a Diploma in Electronics and Television Engineering from the YMCA Institute of Engineering, India in 1990.
- The evaluator stated that completion of these studies were "equivalent to over a six-year program of academic studies in Electronics Engineering and transferable to an accredited university in the United States." Further, the evaluator stated that admission to studies required the completion of "secondary education equivalent to a U.S. high school diploma."
- The evaluator additionally considered the beneficiary's Post Graduate Diploma in Computer Applications from the Institute of Management Technology, India, in 1998. The evaluator provides that this program was equivalent to "a three year program of academic study in Computer Science and transferable to an accredited university in the United States."
- The evaluator adds that the beneficiary has "extensive training and experience in software engineering, system analysis, and computer program design and development over a period of two years."
- The evaluator concludes that "completion of Sections A & B Examinations of the Institution of Engineers and completion of courses for a Diploma in Electronics and Television Engineering are equivalent to a Bachelor degree in Electronics Engineering from an accredited university in the United States."

The petitioner has not established that the Institution of Engineers is a college or university.¹⁰ For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Further, we note that the evaluator does not provide that the beneficiary's Post Graduate Diploma is separately equivalent to a bachelor's degree. As the beneficiary's diploma was obtained through coursework and outside examination, it would be the "equivalent" of a bachelor's degree, but not considered a "foreign equivalent degree." The petitioner did not indicate that it would accept a degree based on any equivalency, but rather required four years of college leading to a bachelor's 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) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

We note that the labor certification did not list that any qualified U.S. worker could meet this standard through an alternate combination of education, training and experience. The question is whether a U.S. worker would have understood by looking at the relevant advertisements that he or she might have qualified for the position through technical training, and examinations, experience or a combination of degrees. Related to these issues, is the question of how was the position advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree Computer Science, or Engineering have known that his or her combination of education and/or experience would qualify them for the position. To ascertain the petitioner's expressed intent in advertising the position requirements, the AAO sent the petitioner an RFE.

¹⁰ The Institution of Engineers acts as a "qualifying body and conduct[s] . . . examinations under its non-formal education programme." See <http://www.ieindia.org/about.htm>, accessed August 4, 2008. The beneficiary did not receive degree from a college or university, but completed coursework and passed Examinations given by the Institution of Engineers.

The petitioner did not respond to the AAO's RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

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 he does not have the minimum level of education required for the equivalent of a bachelor's degree.

Further, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750. The petitioner specifies that a bachelor's degree is required, and the certified Form ETA 750 does not allow for meeting the degree requirement through any equivalency, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

Based on the foregoing, the petitioner has failed to document that it can pay the beneficiary the proffered wage from the priority date until the beneficiary obtains permanent residence, and the petition was properly denied. Further, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Accordingly, 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.