



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



B6

FILE: [Redacted]
LIN-05-088-50945

Office: NEBRASKA SERVICE CENTER

Date: FEB 05 2008

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

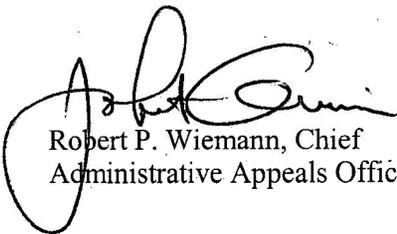
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition¹ was denied by the Acting Director (Director), Nebraska Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a circuit board manufacturer. It seeks to employ the beneficiary permanently in the United States as an accountant (system accountant). As required by statute, a Form ETA 750,² Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification, that the petitioner did not demonstrate that the beneficiary possessed the requisite experience with regulatory-prescribed evidence, and that the petitioner failed to establish its continuing ability to pay the proffered wage beginning on the priority date. Accordingly, the director denied the petition on December 4, 2005.

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.

On appeal counsel asserts that the beneficiary's two-year studies at Sydenham College of Commerce and Economics is equivalent to an Associate's Degree in Accounting from an accredited university in the United States, that without additional supporting documentation the experience from the beneficiary's former employer has demonstrated that the beneficiary possessed the requisite two years of experience, and that the letter from the petitioner established its ability to pay the proffered wage since the petitioner employs more than 100 workers.

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.³ On appeal, counsel submits two briefs, a new credential evaluation dated January 24, 2006 from [REDACTED] of Career Consulting International (CCI), and a letter dated January 30, 2006 from [REDACTED] of the petitioner. Other relevant evidence in the record includes Higher Secondary Certificate (HSC) issued by

¹ The instant petition was re-filed by the petitioner on behalf of the same beneficiary based on the same certified labor certification. A previous petition (LIN-03-164-51434) was filed on April 17, 2003 and denied by the director of the Nebraska Service Center on May 26, 2004 because the petitioner did not establish that the beneficiary met the minimum education requirement set forth on the Form ETA 750. No further action was taken on the previous petition.

On February 16, 2007, the petitioner filed another immigrant petition (SRC-07-105-51263) through premium processing on behalf of the instant beneficiary with the Texas Service Center based on another certified labor certification while the instant appeal was pending with the AAO, and the new petition was approved on February 27, 2007.

² After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

³ 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).

Maharashtra State Board to the beneficiary in March 1992, the statements of marks from the University of Bombay Sydenham College of Commerce and Economics for the beneficiary, a credential evaluation dated June 16, 2004 from International Credential Evaluators, Inc. (ICE), printouts of curriculum for associate's degree in accounting program from the website of Roger State University in Oklahoma, printouts of syllabus information about the Bachelor of Commerce degree program at the University of Bombay, an experience letter dated July 25, 1996 from Wintech in India, the beneficiary's paystubs in 1997 and 1998, W-2 forms for 1997 and 1999 through 2004, and the petitioner's financial statements for 2003 and 2004.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The Form ETA 750 was accepted on April 30, 2001 and certified on January 24, 2003. The approved labor certification in the instant case requires an associate's degree in accountancy and two years of experience in the job offered. In response to the director's request for evidence dated July 14, 2005, the petitioner states that it specifically filed the instant petition under the skilled worker category. Therefore, the AAO finds that the director properly evaluated the petition under the skilled worker category and will examine the petition under the skilled worker category.

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.

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 beneficiary studied for two years in a bachelor of commerce degree program at Sydenham College of Commerce and Economics. Thus, the issue is whether those two years of studies are a foreign degree equivalent to a U.S. associate degree. 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 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 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

(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).

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).

The key to determining the job qualifications specified in the labor certification 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.

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

14. EDUCATION⁴

⁴ Number of years required by the petitioner as the minimum education, training, and/or experience to satisfactorily perform the duties of the proffered position.

Grade School	8 years
High School	4 years
College	2 years
College Degree Required	Associate
Major Field of Study	Accountancy

The applicant must also have two (2) years of employment experience in the job offered. Item 15 does not reflect any special requirements.

Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, Citizenship and Immigration Services (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).

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (*citing Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court.

Finally, 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." *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 Form ETA 750 requires an associate's degree in accountancy and two years of experience in the job offered. The petitioner clearly required an associate's degree in accountancy, however, the labor certification does not further define the degree requirement or set forth an equivalency at all. Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. associate'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 requirement of an associate's degree might be met through a combination of lesser studies, certificates, diplomas, and/or quantifiable amount of work experience.

Furthermore, the AAO notes that the petitioner filed another labor certification application on behalf of the beneficiary in the proffered position. On the new labor certification, the petitioner modified its degree requirement from "Associate" degree to "Associate or equivalent" and also defined "equivalent" as "4 years of relevant work experience is considered the equivalent to an Associate's degree and 2 years of experience by our company." With this modification and definition, the employer, now the petitioner, specified on its new Form ETA 750 that the minimum academic requirements of an associate's degree might be met through a combination of lesser studies, certificates, diplomas, and/or quantifiable amount of work experience. On the instant Form ETA 750, the petitioner did not indicate its intent to accept any combination of studies, certificates, diplomas, and/or qualified work experience to meet its associate's degree requirement, even a foreign equivalent degree. 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. Similarly, the AAO cannot interpret the requirements set forth on the Form ETA 750 as any combination of lesser degrees, certificates or experience without the petitioner's express statements. The plain meaning of the language of associate's degree without the phrase "or equivalent" cannot be defined or interpreted as a combination of lesser degrees, studies, certificates, diplomas or experience but an actual associate's degree itself. If the petitioner had wanted to accept any combination of less education and/or work experience for candidates to meet the associate's degree requirement, it should have specified that definition or interpretation on the Form ETA 750 before it was certified as the petitioner did on its new Form ETA 750 filed in 2005.

Although the singular degree requirement is not applicable to skilled workers, the regulation governing skilled workers still requires that the beneficiary meet all the educational and training requirements of the labor certification. The Form ETA 750 clearly requires an associate's degree in accountancy, however, the record does not contain any evidence showing that the beneficiary holds any associate's degree in accountancy, therefore, the petitioner failed to demonstrate that the beneficiary meets the minimum educational requirement for the proffered position.

As previously noted, the record contains a statement of marks from the University of Bombay Sydenham College of Commerce and Economics for the beneficiary showing that the beneficiary completed two years of studies towards a bachelor of commerce degree at that college during the academic years of 1992-1993 and

1993-1994. The credential evaluations submitted conclude that the beneficiary's two years of studies are equivalent to a U.S. associate's degree in accounting.⁵

Both credential evaluations from ICE and CCI state that the beneficiary's two years of studies are equivalent to a U.S. associate's 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).

Therefore, the AAO finds that the petitioner has failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date.

The second issue is whether or not the petitioner demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date of April 30, 2001 in the instant case.

The beneficiary set forth his credentials on Form ETA-750B and signed his name on April 26, 2001 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he has been unemployed since January 2001. The beneficiary represented that he worked as a full-time system accountant for International Business Machines Corporation in Endicott, New York from January 1999 to December 2000. Prior to that, he represented that he was unemployed again from April 1998 to January 1999. The beneficiary does not provide any additional information concerning his employment background on that form.

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

⁵ In determining whether the beneficiary possessed a U.S. associate's degree in accountancy, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE provides a great deal of information about the educational system in India. It confirms that a bachelor of commerce degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States. However, in the instant case, the beneficiary has never been awarded a bachelor of commerce degree. While EDGE also confirms that a post secondary diploma is awarded upon completion of one to two years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to one year of university study in the United States, it does not suggest that two years of studies without conference of a degree may be deemed a foreign equivalent to a U.S. associate's degree.

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.

The only evidence in the record to establish the beneficiary's requisite two years of experience in the job offered is the experience letter dated July 25, 1996 from Wintech in India (Wintech July 25, 1996 letter). The director issued a request for additional evidence (RFE) on July 14, 2005 requesting additional documentary evidence, such as personal tax returns, payroll receipts, etc. of the beneficiary's employment at Wintech. In response to the director's RFE, the petitioner submitted nothing and stated that payroll receipts/tax returns from Wintech were not available.

The Wintech July 25, 1996 letter is on Wintech letterhead and signed by the owner of the company. This letter stated the following concerning the beneficiary's work experience, in pertinent part:

This is to certify that [the beneficiary] worked as a System Accountant from April 1994 till July 1996. He reviewed accounting systems and prepared computerized reports of assets and liabilities, net worth, income statements, balance sheets, profit and loss statements. He reviewed software, designed, developed, evaluated, installed, debugged, customized and used various accounting software to examine, analyze and interpret accounting records. He prepared and maintained general ledger, accounts payable, accounts receivable ledgers, reports for audits, compilation of financial reports, etc. Additionally, he reviewed cost accounting, cash flow analysis and budgeting systems, set up computerized management systems and internal audit control procedures.

The letter is from the owner of the business, and thus it is a letter from a former employer. The letter verifies that the beneficiary was employed as a system accountant, the job offered in the instant case, for more than 2 years from April 1994 to July 1996. However, the director determined that the language used in this letter mirrored the language of the job description provided on the Form ETA 750 beyond any probability of coincidence. It is noted that the language used to describe the job to be performed at Item 13 of the Form 750A is almost identical. In the instant case, the experience letter was written on July 25, 1996, and the Form 750A was prepared and submitted in 2001, almost five years later. This casts doubt on whether the job offer was realistic when the labor certification application was filed. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

Additionally, the Wintech July 25, 1996 letter was signed by someone as the owner of the company, but it did not include the name of the author as required by the regulation at 8 C.F.R. § 204.5(g)(1). The letter did not verify the beneficiary's full-time employment. If the beneficiary had worked on a part-time basis, the alleged 27 months of experience could be considered as 13 months of full-time experience only. Without the full-time employment verification, the AAO cannot determine whether the beneficiary possessed the requisite two years of experience in the job offered. The experience referenced in the Wintech July 25, 1996 letter is not supported by the beneficiary's statements on the Form ETA 750B. Item 15 of the Form ETA 750B clearly instructs applicants to "list all jobs held during the last three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification as indicated in Item 9." However, the beneficiary did not list this experience on the form and signed his name under a declaration that the contents of the form were true and correct under the penalty of perjury. Although specifically and clearly requested by the director, counsel declined to provide any supporting documentary evidence to this experience letter based on

unavailability. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Therefore, this experience letter cannot be accepted as primary regulatory-prescribed evidence to establish the beneficiary's qualifications in the instant case. The record of proceeding does not contain any other evidence to support the beneficiary's qualifications.⁶ Therefore, the petitioner failed to demonstrate that the beneficiary possessed the requisite two years of experience in the job offered for the proffered position as required by the ETA 750.

Therefore, the petitioner did not establish with regulatory-prescribed evidence the beneficiary's two years of experience as a system accountant, and further failed to establish that the beneficiary is qualified for the proffered position. The petitioner's assertions on appeal fail to overcome the ground of denial in the director's decision.

The third issue is whether or not the petitioner established that it had the continuing ability to pay the proffered wage beginning on the priority date to the present.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 CFR § 204.5(d). The priority date in this case is April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$53,020 per year.

⁶ The record of proceeding for the petitioner's third immigrant petition (SRC-07-10551263) on behalf of the instant beneficiary contains an experience letter dated January 12, 2005 from [REDACTED], which verifies the beneficiary's experience as an Advisory I/T Specialist from January 24, 2000 to the time of the letter. While this letter establishes that the beneficiary is qualified for the position on the new labor certification with the priority date of February 25, 2005, it cannot demonstrate that the beneficiary possessed the requisite two years of experience as a system accountant prior to the priority date of April 30, 2001 in the instant case.

On appeal, counsel submits a letter dated February 7, 2007 from ██████████ CEO of the petitioner stating that the petitioner has the financial resources to pay the proffered wage to the beneficiary, and the petitioner has 170 employees and a gross annual revenue in excess of \$2,347,848. The regulation at 8 C.F.R. § 204.5(g)(2) gives the director the discretion to decide to request or accept a statement from a financial officer of the employer with more than 100 employees by using the word "may." It is not the director's obligation to accept such a statement; the director may exercise discretion and require regulatory-prescribed evidence of a petitioner's continuing ability to pay the proffered wage beginning on the priority date.

Given the record as a whole in the instant case, we find that CIS need not exercise its discretion to accept the letter from Mr. ██████████. Although Mr. ██████████ states in his letter that the petitioner currently employs 170 workers, he did not submit any documents or evidence to verify that the petitioner has more than 100 employees. Instead, the petitioner's 2005 tax return indicates that the petitioner paid salaries and wages of \$1,231,431 in the year of 2005; which does not evidence that the petitioner had more than 100 employees. In addition, CIS records indicate that the petitioner has filed seven (7) Form I-140 petitions and eight (8) Form I-129 nonimmigrant petitions. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Considering the number of immigrant and nonimmigrant petitions filed by the petitioner, we cannot rely on a letter from Mr. ██████████ referencing the ability to pay a single unnamed beneficiary. As we decline to rely on Mr. ██████████ letter, we will examine the other financial documentation submitted. **These documents do not clearly support Mr. ██████████ contention.**

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 submitted the beneficiary's paystubs for 1997 and 1998, and W-2 form for 1997, and 1999 through 2004. However, none of these documents shows that the petitioner hired and paid the beneficiary in the relevant years from 2001 to the present. The petitioner failed to demonstrate that it paid the beneficiary at the level of the proffered wage beginning on the priority date in 2001 and onwards. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage of \$53,020 per year in 2001 through the present with its net income or its net current assets.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's

corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

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

The petitioner did not submit its tax returns for the instant petition. However, the record of proceeding for the petitioner's third immigrant petition contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2005. According to the tax return, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year. The tax return for 2005 demonstrates that the petitioner had a net income⁷ of \$(1,290,307). Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁸ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The tax return shows that the petitioner had net current assets of \$(6,588,206) in 2005. Therefore, for the year 2005, the petitioner did not have sufficient net current assets to pay the proffered wage.

On appeal, counsel argues that the petitioner submitted audited financial statements for 2003 and 2004, which established the petitioner's ability to pay the proffered wage. The record contains copies of the petitioner's

⁷ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

⁸ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

financial statements for 2003 and 2004 submitted in response to the director's RFE. However, these financial statements are not audited. 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.

In addition, the financial statement for 2004 indicates that the petitioner had a net income of \$(5,365,023) and net current assets of \$(5,638,924) in 2004. The financial statement for 2003 indicates that the petitioner had a net income of \$(503,832) and net current assets of \$(707,343) in 2003. Therefore, the petitioner failed to establish its ability to pay the proffered wage for 2003 and 2004 even if the financial statements were audited.

The petitioner did not submit its annual reports, tax returns or audited financial statements for 2001 and 2002. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The annual reports, tax returns or audited financial statements would have demonstrated the amount of taxable income and net current assets, and further reveal its ability to pay the proffered wage. Without the petitioner's tax returns, annual reports or audited financial statements for 2001 and 2002, the AAO cannot determine whether the petitioner had the ability to pay the beneficiary the proffered wage in those years. Despite the director's specific request for these documents in a July 15, 2005 request for evidence, the petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage for 2001 and 2002 because it failed to submit any of these documents for these years. The failure to submit initial evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

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

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 MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). See also 8 C.F.R. § 204.5(g)(2). The petitioner is also obligated to pay the prevailing wage to each of its H-1B employees.

CIS records show that the petitioner had two more beneficiaries of Immigrant Petitions for Alien Worker (Form I-140) and the obligation to pay their proffered wage in each of the years 2001, 2002, 2003 and 2004.⁹ As previously noted, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage for the years 2001 through 2005. Given the record as a whole, the petitioner's history of filing immigrant petitions, and the number of nonimmigrant petitions, we cannot determine that the petitioner established its continuing ability to pay all 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 status.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss these issues. 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 beneficiary provides inconsistent information about his employment history. On the Form ETA 750 filed on April 30, 2001, the beneficiary stated that he was unemployed from April 1998 to January 1999 and from January 2001 to the present, i.e. April 2001, however, he worked for IBM from January 1999 to December 2000. However, the Form ETA 750 filed on February 25, 2005 indicates that the beneficiary worked for IBM from January 2000 to the date the form was signed on August 20, 2004, while his W-2 forms and paystubs show that he worked for Paige Temporary, Inc. in 1997, for ██████████ in 1997 and 1998, for Allstate Insurance Company in 1999, for Integrated Partnership, Inc. in 1999 and for IBM in 2000 through 2004. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." The record does not contain any independent objective evidence to resolve these inconsistencies.¹⁰

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.

⁹ These petitions are as follows:

LIN-01-201-56793 filed on May 3, 2001 with the priority date of December 7, 2000, approved on July 28, 2001, and the beneficiary obtained lawful permanent residence status on October 8, 2002;

LIN-02-115-50843 filed on February 15, 2002 with the priority date of May 9, 2001, approved on April 18, 2002, and the beneficiary obtained lawful permanent residence status on June 3, 2004;

LIN-04-028-52416 filed on November 7, 2003 with the priority date of May 7, 2003, approved on December 17, 2004, and the beneficiary obtained lawful permanent residence status on December 17, 2004.

¹⁰ Additionally, the record shows that the beneficiary is working for IBM as an advisory I/T Specialist. The beneficiary earned \$97,612.27 from his position with IBM in 2004. His W-2 form issued by IBM for 2001 shows that his annual salary from IBM was \$86,942.72. However, in the same year, the petitioner offered the proffered position and the beneficiary accepted the job offer at annual salary of \$53,020. It seems doubtful that the petitioner offered a *bona fide*, permanent and full time position to the beneficiary and the beneficiary would perform the duties as a system accountant at almost a half of his current compensation after he obtained his lawful permanent residence.

ORDER: The appeal is dismissed.