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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

FEB 12 2008

LIN-07-098-52725

IN RE:

Petitioner:

Beneficiary:



PETITION:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an information technology, consulting and accounting firm. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750,¹ 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. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as required on the Form ETA 750. Accordingly, the director denied the petition on July 6, 2007.

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 evaluation reports of the beneficiary's education in the record find that, based on the beneficiary's education alone, the beneficiary has the equivalent of a U.S. bachelor's degree in accounting with fulfillment of the Final Examination program at the Institute of Chartered Accountants of India (ICAI).

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. On appeal, counsel submits a brief, a new educational evaluation from Professor [REDACTED] of Hofstra University and copies of documents for the beneficiary's educational qualifications. Other relevant evidence concerning the beneficiary's education includes a Bachelor of Commerce degree from the University of Bombay, Certificate of Membership, Final Examination Certificate, Final Examination Statement of Marks, Intermediate Examination Statement of Marks, and Entrance Examination Statement of Marks issued by the ICAI, and evaluation reports from Foundation for International Services, Inc. and The Trustforte Corporation. The record does not contain any other evidence concerning the beneficiary's educational qualifications.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The priority date for the instant petition is May 3, 2004. The approved labor certification in the instant case requires a Bachelor's degree or equivalent in finance or accounting and one year of experience in the job offered. Moreover, DOL assigned the occupational code of 13-2011.01, accountants, to the proffered position. DOL assigns such codes based on normalized occupational standards. According to the DOL public online database at <http://online.onetcenter.org/crosswalk/SOC?s=13-2011&g=Go> (accessed January 14, 2008), the DOL description of the position of accountant and the requirements for the position indicate that the position of accountant falls within Job Zone Four. This means that the position requires "considerable preparation." According to the DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. The DOL assigns a standard vocational preparation (SVP) range of 7 to 8 to the occupation. This means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See* <http://online.onetcenter.org/link/summary/13-2011.01#JobZone> (accessed January 14, 2008). The DOL also states the following concerning the training and overall experience required for these occupations:

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

See Id.

Therefore, an accountant position may be analyzed as a professional position or as skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience. In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A) of the Act by checking box e in Part 2 of the I-140 form. The box e is for either a professional or a skilled worker. Therefore, CIS will examine the petition under the professional and skilled worker categories, which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application.

For the professional category, 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.

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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 14, 2002. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended N.M. College of Commerce & Economics in Mumbai, India in the field of "Accounts & Audit" from June 1987 to March 1990, culminating in the receipt of a Bachelor of Commerce; and that he attended the Institute of Chartered Accountant of India (ICAI) in Mumbai, India in the field of "Accounts, Costing Audit, Taxation" from May 1990 to November 1994, culminating in the receipt of "C.A." He provides no further information concerning his educational background on this form, which is signed by the beneficiary under penalty of perjury that the information was true and correct.

In corroboration of the beneficiary's educational background, the petitioner provided a copy of the beneficiary's Bachelor of Commerce degree from the University of Bombay, Certificate of Membership, Final Examination Certificate, Final Examination Statement of Marks, Intermediate Examination Statement of Marks, and Entrance Examination Statement of Marks issued by the ICAI, and evaluation reports from Foundation for International Services, Inc., the Trustforte Corporation and Professor [REDACTED] of Hofstra University.

The beneficiary possesses a three-year bachelor of commerce degree from the University of Bombay, and a certificate of membership from the ICAI. In determining whether the beneficiary possessed a U.S. bachelor's degree or equivalent in finance or accounting, 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. While 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, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. However, EDGE confirms that ICAI associate membership upon passing the ICAI final examination represents attainment of a level of education comparable to a bachelor's degree in the United States. The record contains documentary evidence showing the beneficiary in the instant case passed the ICAI final exam and was awarded a certificate of membership as an associate of the ICAI, which represents that the beneficiary attained an equivalent to a US bachelor's degree in accounting. However, the professional regulation contains a degree requirement in the form of an

official college or university record. ICAI is not an academic institution that can confer an actual degree with an official college or university record.

While no 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 issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(l)(3)(B) (“the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification”). As noted above, the ETA 750 in this matter is certified by DOL.

The beneficiary possesses a foreign three-year bachelor’s degree and ICAI associate membership. Thus, the issues are whether either the degree, ICAI membership or the combination is equivalent to a U.S. baccalaureate degree. 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). *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).

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*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (CIS) “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at 8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court

determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated.

The 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.

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. EDUCATION
 - Grade School
 - High School
 - College
 - College Degree Required Bachelors or Equivalent
 - Major Field of Study Finance or Accounting

The applicant must also have one (1) year 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, 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).

Once again, we are cognizant of the recent holding in *Grace Korean*, which held that CIS is bound by the employer’s definition of “bachelor or equivalent.” In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary’s credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *K.S.* 20 I&N Dec. at 719. In this

matter, the court's reasoning cannot be followed as it is inconsistent with the actual practice at DOL. Regardless, that decision is easily distinguished because it involved a lesser classification, skilled workers as defined in section 203(b)(3)(A)(i) of the Act. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree.

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.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. See *American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

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. If we were to accept the employer's definition of "or equivalent," instead of the definition DOL uses, we would allow the employer to "unlawfully" tailor the job requirements to the alien's credentials after DOL has already made a determination on this issue based on its own definitions. We would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education "equivalent" to a degree at the recruitment stage as represented to DOL.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition 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.

In this case, instant petition contains a position that qualifies in the skilled worker category. 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 a Bachelor's degree or equivalent in finance or accounting, and one year of experience in the job offered. The singular degree requirement is not applicable to skilled workers and the regulation governing skilled workers only requires that the beneficiary meet the requirements of the labor certification. As previously discussed, EDGE confirms that ICAI associate membership upon passing the ICAI final examination represents attainment of a level of education comparable to a bachelor's degree in the United States. All the educational evaluations from Professor [REDACTED] of Hofstra University, Foundation for International Services, Inc. and The Trustforte Corporation concur with EDGE and evaluated the beneficiary's ICAI final examination and associate membership as the equivalent to a US bachelor's degree in accounting. The record contains documentary evidence showing the beneficiary in the instant case passed the ICAI final exam and was awarded a certificate of membership as an associate of the ICAI. Therefore, the AAO finds that the beneficiary holds an equivalent to a US bachelor's degree in accounting and thus, meets the educational requirements specifically set forth on the certified labor certification as a skilled worker in the instant case. This ground of the director's denial is withdrawn.

However, beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful

permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. See 8 CFR § 204.5(d). The priority date in this case is May 3, 2004. The proffered wage as stated on the Form ETA 750 is \$38,480 per year.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 forms for 2003 through 2006. The W-2 form for 2003 is not necessarily dispositive since the priority date is in 2004. The W-2 forms for 2004 through 2006 show that the petitioner paid the beneficiary \$24,000.31 in 2004, \$30,033.33 in 2005 and \$30,000.00 in 2006. The petitioner failed to demonstrate that it paid the beneficiary at the full proffered wage in 2004 through 2006. The petitioner is obligated to demonstrate that it could pay the beneficiary the difference of \$14,479.69 in 2004, \$8,446.67 in 2005 and \$8,480.00 in 2006 respectively between wages actually paid to the beneficiary and the proffered wage 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 record contains copies of the petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2004 and 2005 as evidence of the petitioner's ability to pay the proffered wage. These tax returns show that the petitioner is structured as an S corporation and its fiscal year is based on a calendar year. The petitioner's tax returns for 2004 and 2005 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$38,480 per year from the priority date:

In 2004, the Form 1120S stated a net income² of \$316,645.

In 2005, the Form 1120S stated a net income of \$134,845.

Therefore, for the years 2004 and 2005, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage respectively.

² 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 1120S 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 line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4797 to line 5 of Schedule K. *See* Internal Revenue Service, Instructions for Form 1120S (2003), available at <http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

As alternative method to determine the petitioner's ability to pay the proffered wage, 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.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2004 were \$226,430.
- The petitioner's net current assets during 2005 were \$352,317.

Therefore, for the years 2004 and 2005, the petitioner had sufficient net current assets to pay the instant beneficiary the proffered wage.

The record does not contain the petitioner's 2006 tax return or other regulatory-prescribed evidence of the financial information for 2006, therefore, the AAO cannot determine whether the petitioner had sufficient net income or net current assets in 2006 to pay the difference between wages actually paid to the beneficiary and the proffered wage.

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, which the petitioner did for the years 2004 and 2005. 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 *Mater 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.

³According 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.

CIS records show that the petitioner had filed twenty-six (26) Immigrant Petitions for Alien Worker (Form I-140) including the instant petition, and one hundred and ninety-seven (197) nonimmigrant petitions (Form I-129). Sixteen petitions were approved.⁴ The petitioner must establish its ability to pay for the ten in 2004 and seven in 2006. In addition, six petitions are still pending with CIS.⁵ If any of the pending petitions have a priority date in 2004 or 2005, the number of beneficiaries for which the petitioner must pay the proffered

⁴ The sixteen approved petitions are as follows:

EAC-99-177-53584 filed on May 21, 1999 with the priority date of November 27, 1995, approved on August 31, 1999, and the beneficiary obtained lawful permanent residence on May 19, 2001;
EAC-00-029-51219 filed on November 6, 1999 with the priority date of August 15, 1996, approved on June 23, 2000, and the beneficiary obtained lawful permanent residence on June 22, 2001;
EAC-00-115-52112 filed on March 6, 2000 with the priority date of April 24, 1996, approved on September 28, 2000, and the date when the beneficiary obtained lawful permanent residence is not recorded;
EAC-00-252-50293 filed on August 14, 2000 with the priority date of March 10, 1997, approved on October 26, 2000, and the beneficiary obtained lawful permanent residence on January 2, 2002;
EAC-01-109-51554 filed on February 20, 2001 with the priority date of October 2, 2000, approved on August 22, 2001, and the beneficiary obtained lawful permanent residence on February 7, 2005;
EAC-01-251-54765 filed on August 13, 2001 with the priority date of March 27, 2001, approved on October 16, 2001, and the beneficiary obtained lawful permanent residence on November 4, 2003;
EAC-01-263-54115 filed on August 28, 2001 with the priority date of March 27, 2001, approved on October 18, 2001, and the beneficiary obtained lawful permanent residence on August 11, 2004;
EAC-02-021-52120 filed on October 17, 2001 with the priority date of August 29, 1997, approved on November 20, 2001, and the beneficiary obtained lawful permanent residence on April 2, 2004;
EAC-03-209-50033 filed on July 1, 2003 with the priority date of April 30, 2001, approved on April 9, 2004, and the beneficiary obtained lawful permanent residence on January 19, 2005;
LIN-07-025-52537 filed on November 2, 2006 with the priority date of October 20, 2003, approved on February 16, 2007, and the beneficiary's adjustment of status application is currently pending;
LIN-07-054-52489 filed on December 14, 2006 with the priority date of May 24, 2006, approved on February 26, 2007, and the beneficiary's adjustment of status application is currently pending;
LIN-07-054-52558 filed on December 14, 2006 with the priority date of January 15, 2002, approved on May 10, 2007, and the beneficiary's adjustment of status application is currently pending;
SRC-01-223-58941 filed on May 15, 2001 with the priority date of April 5, 2000, approved on February 20, 2002, and the beneficiary obtained lawful permanent residence on August 26, 2004;
SRC-07-023-52643 filed on October 31, 2006 with the priority date of October 28, 2003, approved on December 22, 2006, and the beneficiary's adjustment of status application is currently pending;
SRC-07-163-52293 filed on May 2, 2007 with the priority date of May 3, 2004, approved on October 11, 2007, and the beneficiary's adjustment of status application is currently pending;
SRC-07-190-52849 filed on June 6, 2007 with the priority date of December 3, 2004, approved on November 9, 2007, and the beneficiary's adjustment of status application is currently pending.

⁵ The six pending petitions are as follows:

EAC-05-800-25394 filed on May 10, 2005 and the beneficiary's application for adjustment of status (LIN-07-088-51904) is pending;
LIN-07-059-52227 filed on December 21, 2006 and still pending;
SRC-07-204-53856 filed on June 22, 2007 and still pending;
SRC-07-265-57308 filed on July 3, 2007 and still pending;
SRC-07-283-51296 filed on July 26, 2007 for the instant beneficiary again and still pending; *See Footnote 1*
SRC-08-003-59365 filed on August 9, 2007 and still pending.

wage will increase even more. The record does not contain information about the proffered wages for each of the petitions, however, assuming all these beneficiaries were offered the proffered wage at the same level as the instant beneficiary, neither the petitioner's net income of \$316,645 nor the petitioner's net current assets of \$226,430 was sufficient to pay ten beneficiaries the proffered wage in 2004.

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.

Therefore, the petitioner had not established that it had the ability to pay all the beneficiaries of the approved and pending petitions the proffered wage for the year 2004 through an examination of wages paid to the beneficiary, or its net income or its net current assets.

The record of proceeding does not contain any regulatory-prescribed evidence, such as tax returns, annual reports and audited financial statements, for 2006 and onwards, therefore, the AAO cannot determine that the petitioner established its ability to pay the nine proffered wages in 2006 and fourteen in 2007.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request any additional evidence to consider whether the petitioner had the ability to pay all the beneficiaries in 2004 and continues to the present. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action consistent with this decision.