**U.S. Department of Homeland Security**
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 07 2008
SRC-06-161-50261

IN RE: Petitioner: [redacted]
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:

[redacted]

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[1] was denied by the Director, Texas Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology, consulting and accounting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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. 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 June 6, 2006.

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 three-year degree from Osmania University is equivalent to a Bachelor of Science Degree in Computer Science from an accredited university in the United States. However, the record does not contain any evidence showing that the beneficiary's three-year degree from India is the equivalent to a U.S. bachelor's degree, or that the petitioner specified on the Form ETA 750 that the minimum academic requirements of a bachelor's degree in engineering, computer science or mathematics might be met through a combination of lesser degrees and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. In order to determine whether the instant petition could be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on October 11, 2007 granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. The AAO received the response on October 30, 2007.

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

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[1] The petitioner filed another identical immigrant petition (SRC-07-283-51296) on behalf of the instant beneficiary with the Texas Service Center on July 26, 2007 while the instant appeal was pending with the AAO, and the new petition is still pending.

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

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

The instant petition is for a substituted beneficiary.[3] The original Form ETA 750 was accepted on January 14, 2002 and approved on February 21, 2006. The approved labor certification in the instant case requires a Bachelor's degree in engineering, computer science or mathematics and six months of experience in the job offered or in any computer related profession. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 15-1021.00, computer programmer, to programmer analyst, the same type of occupation as the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/crosswalk/ DOT?s=030.162-014+&g+Go (accessed November 14, 2007) and its extensive description of the position and requirements for the position most analogous to programmer analyst position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to programmer analyst position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See http://online.onetcenter.org/link/ summary/15-1021.00#JobZone* (accessed November 14, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

*See id.*

Therefore, a programmer analyst position could also be properly analyzed as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.[4] In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien

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[3] An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, et al., Substitution of Labor Certification Beneficiaries, at 3, http://ows.doleta.gov/dmstree/fm /fm96/fm_28-96a.pdf (March 7, 1996).

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

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. The Texas Service Center director evaluated the petition under the professional category and denied it on June 6, 2006. However, the petitioner did not assert that the instant petition should be adjudicated under the skilled worker category on appeal. The record does not contain any evidence showing that the petitioner specifically requested the proffered position in the instant case must be analyzed as a skilled worker.

Instead, Citizenship and Immigration Services (CIS) records show that the petitioner has been claiming that the proffered position is a professional position on its I-129 nonimmigrant petitions for temporary workers under H-1B status.[5] The petitioner filed two H-1B petitions for the original beneficiary of the relevant labor certification in the proffered position (programmer analyst) as a professional position and both of them were approved[6]; the petitioner also filed five H-1B petitions for the instant beneficiary in the proffered position (programmer analyst) as a professional position and all of these petitions were approved.[7] Pursuant to these approvals, the beneficiary has been working for the petitioner in H-1B status in the professional position of programmer analyst for the petitioner since April 23, 2001. In those H-1B petitions, the petitioner required a bachelor's degree and claimed that the beneficiary was qualified for the proffered position because he holds a bachelor's degree.

Therefore, the AAO finds that the director properly evaluated the petition under the professional category since the position requires a bachelor's degree and six months of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and the petitioner has been claiming this classification through its H-1B nonimmigrant petitions on behalf of the beneficiary. However, the AAO will also examine the petition under the skilled

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[5] Pursuant to Section 101(a)(15)(H)(i)(b) of the Act, H-1B status will be granted to an alien "who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1)." Section 214(i)(1) provides that: "For purposes of section 101(a)(15)(H)(i)(b) and paragraph (2) the term 'specialty occupation' means an occupation that requires - (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty or its equivalent) as a minimum for entry into the occupation in the United States."

[6] The petitioner's first Form I-129 nonimmigrant petition (EAC-00-075-52562) for the original beneficiary of the labor certification in the instant case in the proffered position was filed on January 10, 2000 and approved on March 18, 2000; and the second H-1B petition (EAC-02-228-54129) was filed on June 26, 2002 and approved on October 21, 2002.

[7] The petitioner filed Form I-129 nonimmigrant petition (EAC-01-107-53715) for the beneficiary in the proffered position on February 20, 2001 and this H-1B petition was approved on April 23, 2001 for a period from April 23, 2001 to November 1, 2004; on October 24, 2003, the petitioner filed the second H-1B petition (EAC-04-017-53295) for the beneficiary in the same position and the second petition was approved on December 4, 2003 for a period from November 2, 2003 to November 17, 2005; the third petition (EAC-06-006-51111) was filed on October 5, 2005 and approved on January 24, 2006 for a period from November 18, 2005 to November 17, 2006 beyond the sixth year under the American Competitiveness in the Twenty-first Century Act of 2000 (AC 21) (Public Law 106-313); the fourth petition (EAC-07-011-52219) was filed on October 6, 2006 and approved on January 11, 2007 for a period from November 18, 2006 to November 17, 2007 beyond the sixth year under the AC 21; and the most recent H-1B petition (EAC-08-013-50438) was filed on October 15, 2007 and approved on November 1, 2007 for a period from November 18, 2007 to November 17, 2008 beyond the sixth year under the AC 21.

worker category as if the petitioner had so requested since a programmer analyst position may be properly analyzed as a skilled worker in some circumstances pursuant to DOL's guidance.

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 Osmania University in Hyderabad, Andhra Pradesh, India in the field of "Computer Science" from May 1991 to April 1994, culminating in the receipt of a "Bachelors;" that he attended ICFAI (The Institute of Chartered Financial Analyst of India) Business School in the field of "Business Administration" from June 1995 to May 1997, culminating in the receipt of "Post Graduate Diploma in Business Administration;" and that he attended National Institute of Information Technology (NIIT) in India in the field of "Systems Management" from August 1992 to March 1998, culminating in the receipt of an "Advanced Diploma in Computer Applications." 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 Science degree and transcripts from Osmania University on August 3, 1996, Post Graduate Diploma in Business Administration from ICFAI Business School on August 14, 1998, Advanced Diploma in Systems Management from NIIT on October 13, 1998, and evaluation reports from The Trustforte Corporation, Career Consulting International, and Marquess Educational Consultants.

The beneficiary possesses a foreign three-year bachelor's degree, a post graduate diploma and an advanced diploma. The record does not contain any evidence showing that the post graduate diploma and advanced diploma were awarded upon completion of any degree programs. Thus, the issue is whether the beneficiary's

single three-year bachelor of science degree is a foreign degree equivalent to a U.S. baccalaureate degree. In determining whether the beneficiary possessed a U.S. bachelor's degree in engineering, computer science or mathematics, 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 science 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.

On appeal, the petitioner asserts that the beneficiary's three-year bachelor's degree is equivalent to a U.S. bachelor's degree according to private credential evaluations. 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 record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's ground denying the petition under professional category must be affirmed.

However, as previously noted, the AAO will also discuss whether the beneficiary would meet the educational requirements set forth on the Form ETA 750 and thus be qualified for the proffered position as if the petitioner had requested the proffered position be analyzed 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.

The certified Form ETA 750 requires a bachelor's degree in engineering, computer science or mathematics as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary's education includes a three-year bachelor of science degree from Osmania University in the fields of mathematics, statistics and computer science, a two-year post graduate diploma in

business administration from ICFAI Business School and a two-year advanced diploma in systems management from NIIT.

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 possesses a foreign three-year bachelor's degree and two diplomas. Thus, the issues are whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's diplomas in addition to that 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.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

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

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

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

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

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 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 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. | EDUCATION | |
| | Grade School | |
| | High School | |
| | College | |
| | College Degree Required | Bachelors |
| | Major Field of Study | Engineering, or Computer Science, or Mathematics |

The applicant must also have six (6) months of employment experience in the job offered or in any computer related profession. 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. 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 chosen 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.

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 a Bachelor's degree and six months of experience in the job offered or in any computer related profession. The petitioner clearly required a bachelor's degree in engineering, computer science or mathematics, 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. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees, diplomas, and/or quantifiable amount of work experience.

Furthermore, the AAO's RFE dated October 11, 2007 requested the petitioner to submit evidence showing that the petitioner specified that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees and/or quantifiable amount of work experience in the petitioner's labor market test. The AAO specifically requested evidence demonstrating that the petitioner communicated its express intent about the actual minimum requirements of the proffered position to DOL during the labor certification process. The AAO received the response on October 30, 2007. However, the response to the AAO's RFE does not include any documentary evidence showing that the petitioner ever defined or specified that the minimum educational requirements of a bachelor's degree might be met through a combination of

lesser degrees, diplomas, certificates and/or quantifiable amount of work experience during any stage of the labor certification application processing. Instead the petitioner consistently required a bachelor's degree in engineering or computer science or math as the minimum educational requirements in every aspect of the recruitment phase of the labor certification process before DOL, including the internal posting notice. The petitioner even did not indicate that it would accept a foreign equivalent degree to meet the bachelor's degree requirement.

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. As previously noted, the beneficiary holds a three-year bachelor's degree and two diplomas. EDGE provides a great deal of information about the educational system in India. It discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas (PGD), for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a PGD following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provide:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The record contains the beneficiary's PGD in Business Administration from ICFAI Business School upon completion of two academic years of studies. However, the petitioner did not submit any evidence showing that the entrance requirement of the program at ICFAI Business School is a three-year bachelor's degree. Nor did the petitioner submit the beneficiary's transcripts of the two years of studies at ICFAI Business School. The record does not contain evidence showing that ICFAI Business School is an accredited university or institution approved by the AICTE. Nor is the postgraduate diploma in business administration program at ICFAI Business School listed in the List of Accredited Programmes in Technical Institutions by National Board of Accredition (NBA) in India.[8] Furthermore, the beneficiary's bachelor of science degree shows that the beneficiary passed his Part II examinations in the subjects of Mathematics, Statistics and Computer Science, however, his two-year PGD was in business administration. Therefore, it does not suggest that the beneficiary's three-year baccalaureate in mathematics, statistics and computer science plus his two-year PGD in business administration is equivalent to a U.S. baccalaureate in engineering, computer science or mathematics.

The beneficiary also holds an advanced diploma in systems management from NIIT in Hyderabad, Andhra Pradesh, India. The AAO accessed NIIT's website to determine what type of educational services it provides.

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[8] *See* http://www.nba-aicte.ernet.in/nmna.htm (accessed on December 18, 2007).

NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student; however, in the instant case, it did clarify that the diploma it issued was pursuant to completion of post-graduate studies. There is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program. The AAO also accessed AICTE's website, which does not list NIIT as an institute accredited by AICTE in the States of Andhra Pradesh. Therefore, the beneficiary's advanced diploma from NIIT cannot be considered as a PGD from an accredited institute following a three-year bachelor's degree, and thus, the beneficiary's three-year bachelor's degree plus his advanced diploma is not equivalent to a U.S. baccalaureate.

Furthermore, the AAO's request for evidence (RFE) dated October 11, 2007 requested the petitioner to submit evidence showing that the petitioner specified that the minimum academic requirements of a bachelor's degree in engineering, computer science or mathematics might be met through a combination of lesser degrees, diplomas and/or quantifiable amount of work experience in the petitioner's labor market test. The AAO specifically requested evidence demonstrating that the petitioner communicated its express intent about the actual minimum requirements of the proffered position to DOL during the labor certification process. The AAO received the response on October 30, 2007. However, the response to the AAO's RFE does not include any documentary evidence showing that the petitioner ever defined or specified that the minimum educational requirements of a bachelor's degree in engineering, computer science or mathematics might be met through a combination of lesser degrees or diplomas in any other fields and/or quantifiable amount of work experience during any stage of the labor certification application processing. It is noted that the submitted advertisements allegedly run in a newspaper for the proffered position did not include a degree requirement. However, the petitioner did not submit the recruitment report. It is not clear whether the petitioner hired anyone without a bachelor's degree as the results of the recruitment or whether the petitioner rejected any applicants for the proffered position because they did not hold a bachelor's degree in engineering, computer science or mathematics. In fact, the advertisements did not specify any term of experience either. The advertisements were for a computer professional, which show that the petitioner sought someone to fill a professional position instead of a skilled worker or even an unskilled worker. The record contains a copy of the notice of job available the petitioner posted for the proffered position. The notice clearly and expressly requires "Bachelors in Engineering or Computer Science or Math [and] Six (6) months experience in job offered or six (6) months experience in any Computer Related Profession" for the position of "Programmer Analyst" and offered an annual salary of $80,000. The petitioner ran advertisements before it filed the labor certification application with DOL. If the petitioner had not required a bachelor's degree for the proffered position, it should have had its requirements reflected on the Form ETA 750. However, the Form ETA 750 was submitted with a bachelor's degree requirement and so it was certified.

Therefore, the AAO finds that the petitioner would have failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date even if the petition had been considered under the skilled worker category.

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 January 14, 2002. The proffered wage as stated on the Form ETA 750 is $80,000 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 form for 2005. The 2005 W-2 form shows that the petitioner paid the beneficiary $69,666.74 in 2005. In reviewing the relevant H-1B petitions filed by the petitioner for the beneficiary, the AAO notes that the records contain the beneficiary's W-2 forms for 2002 and 2004. The W-2 forms show that the petitioner paid the beneficiary $19,000.02 in 2002 and $28,500.03 in 2004 respectively.[9] The petitioner failed to demonstrate that it paid the beneficiary at the level of the proffered wage beginning on the priority date in 2002 and onwards. The petitioner is obligated to demonstrate that it could pay the beneficiary the full proffered wage of $80,000 per year in 2003 and 2006, and the difference of $60,999.98 in 2002, $51,499.97 in 2004 and $10,333.26 in 2005 respectively between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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[9] The relevant H-1B petitions show that the petitioner offered the beneficiary the prevailing wage of $38,000 per year in the proffered position for the years 2001 through 2006. The petitioner did not pay the beneficiary the full proffered wage as set forth on the H-1B petitions in 2002 and 2004. However, since it is an issue beyond the instant immigrant petition, the AAO will not discuss this issue further in the instant case.

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 2001 through 2004 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. Since the priority date in the instant case is January 14, 2002, the 2001 tax return is not necessarily dispositive. The petitioner's tax returns for 2002 through 2004 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $80,000 per year from the priority date:

- In 2002, the Form 1120S stated a net income[10] of $61,563.

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[10] 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

- In 2003, the Form 1120S stated a net income of $134,845.
- In 2004, the Form 1120S stated a net income of $316,645.

Therefore, for the years 2002 and 2004, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage respectively; and for the year 2003, the petitioner had sufficient net income to pay the proffered wage that year. The petitioner established its ability to pay the instant beneficiary the proffered wage with its net income for the years 2002 through 2004.

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

- The petitioner's net current assets during 2002 were $226,430.
- The petitioner's net current assets during 2003 were $540,020.
- The petitioner's net current assets during 2004 were $412,087.

Therefore, for the years 2002 through 2004, the petitioner had sufficient net current assets to pay the instant beneficiary the proffered wage.

The record before the director closed on April 24, 2006 with the receipt by the director of the petitioner's submissions of the petition. As of that date the petitioner's federal tax return for 2005 should have been available. However, the petitioner did not submit its tax return, annual report or audited financial statements for the year

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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 4979 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.

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

2005. 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 tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Without the petitioner's tax return, annual report or audited financial statements for 2005, the AAO cannot determine whether the petitioner had the continuing ability to pay the beneficiary the proffered wage. The petitioner failed to establish its continuing ability to pay the beneficiary the proffered wage because it failed to submit any of these documents for 2005. 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). On appeal, the petitioner did not submit its tax returns, annual reports or audited financial statements for 2005 to the present. Therefore, the petitioner's assertions on appeal cannot overcome this additional ground of denial.

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 2002 through 2004. 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.

CIS records show that the petitioner had filed twenty-six (26) Immigrant Petitions for Alien Worker (Form I-140) including the instant petition and another petition filed by the petitioner for the instant beneficiary, and one hundred and ninety-seven (197) nonimmigrant petitions (Form I-129). Among the twenty-six immigrant petitions, sixteen petitions were approved[12] and seven of them including the one the petitioner filed for the

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[12] 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 the 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 the 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 the 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 the 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 the 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 the lawful permanent residence on November 4, 2003;

instant beneficiary again are still pending with CIS.[13] Therefore, the petitioner must establish its ability to pay eight proffered wages in 2002, nine in 2003, ten in 2004 seven in 2005, six in 2006 and six in 2007 for those approved petitions and one more in 2005, two more in 2006 and seven more in 2007 for those pending petitions.[14]

As previously noted, the petitioner had a net income of $61,563 and net current assets of $226,430 in 2002. Assuming the petitioner had offered the same salary as the instant petition's wage to the other beneficiaries, the net current assets could be sufficient to pay at maximum three beneficiaries. Therefore, neither the net income nor net current assets were sufficient to pay the nine proffered wages, including the instant beneficiary's proffered wage, the petitioner was obligated to pay that year, and thus, without further evidence showing the petitioner had already paid most of the proffered wages to the other eight beneficiaries of the approved petitions, the petitioner had failed to establish its ability to pay the proffered wages in 2002.

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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 the 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 the 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 the 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 the 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.

[13] The seven 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;
LIN-07-098-52725 filed on February 15, 2007, denied on July 6, 2007 and the appeal is pending with the AAO;
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.

[14] CIS records do not contain the priority date information for pending petitions. The calculation is based on the petition filing date. The actual number of the proffered wages the petitioner is obligated to demonstrate its ability to pay for those pending cases prior to 2007 must be more than this figure.

In 2003, the petitioner had a net income of $134,845 and net current assets of $540,020. Assuming the petitioner had offered the same salary as the instant petition's wage to the other beneficiaries, the net current assets could be sufficient to pay at maximum three beneficiaries. Therefore, neither the net income nor net current assets were sufficient to pay the ten proffered wages, including the proffered wage for the instant beneficiary, the petitioner was obligated to pay that year, and thus, without further evidence showing the petitioner had already paid at least half of the proffered wages to the other nine beneficiaries of the approved petitions, the petitioner had failed to establish its ability to pay the proffered wages in 2003.

In 2004, the petitioner had a net income of $316,645 and net current assets of $412,087. Assuming the petitioner had offered the same salary as the instant petition's wage to the other beneficiaries, the net current assets could be sufficient to pay at maximum three beneficiaries. Therefore, neither the net income nor net current assets were sufficient to pay the eleven proffered wages, including the proffered wage for the instant beneficiary, the petitioner was obligated to pay that year, and thus, without further evidence showing the petitioner had already paid most of the proffered wages to the other ten beneficiaries of the approved petitions, the petitioner had failed to establish its ability to pay the proffered wages in 2004.

The record of proceeding does not contain any regulatory-prescribed evidence, such as tax returns, annual reports and audited financial statements, for 2005 and onwards, therefore, the AAO cannot determine that the petitioner established its ability to pay the nine proffered wages in 2005, nine in 2006 and fourteen in 2007.

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 the beneficiary the proffered wage for the year 2002 onwards through an examination of wages paid to the beneficiary, or its net income or its net current assets.

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

**ORDER:** The appeal is dismissed.