

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

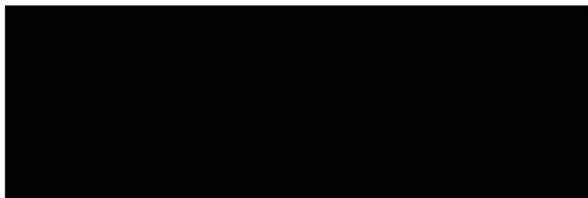
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: 
LIN-07-002-53099

Office: NEBRASKA SERVICE CENTER

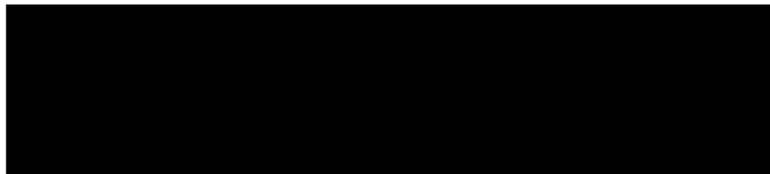
Date: JUL 21 2008

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a convenience store. It seeks to employ the beneficiary permanently in the United States as a first-line supervisor/manager of retail sales workers (store manager). 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 January 30, 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 the petitioner requested classification under either the skilled worker or professional category pursuant to Section 203(b)(3)(A)(i) or (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i) or (ii); if the beneficiary is determined ineligible for classification as a professional, eligibility for classification as a skilled worker must also be considered. Counsel also asserts that by using "Bachelor's Degree or equivalent" in all recruitment efforts, the petitioner intended for "Bachelor's degree" to mean a (1) bachelor degree from foreign university even if not equivalent to a U.S. bachelor degree, (2) bachelor degree from United States' universities, (3) bachelor degree from foreign universities equivalent to a bachelor degree from universities in the United States and (4) combination of education and experience equivalent to a bachelor degree from universities in the United States.

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.² On appeal, counsel submits a brief, a letter dated March 16, 2007 from the petitioner regarding its intent in using the term "Bachelor's degree" on the Form ETA 750, evaluations from Educational Assessment, Inc. (EAI), and recruitment efforts including newspaper advertisements, internal postings and website postings, etc. Other relevant evidence in the record includes the beneficiary's bachelor of commerce degree and transcripts from Punjab University in India, ServSafe Certification & dBase III Certificate, National Trade Certificate, and an evaluation report

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

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

from [REDACTED] of Foundation for International Services, Inc. (FIS). The record does not contain any further evidence concerning the beneficiary's educational qualifications.

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

The original Form ETA 750 was accepted on April 23, 2001 and certified on August 25, 2006. The certified ETA 750 in the instant case requires a Bachelor's degree in any field. DOL assigned the occupational code of 41-1011, first-line supervisor/manager of retail sales workers, the closest type of occupation to 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/find/result?s=41-1011&g> (accessed May 7, 2008) and its extensive description of the position and requirements for the position most analogous to store manager position, the position falls within Job Zone Two requiring "some preparation" for the occupation type closest to store manager position. According to DOL, some previous work-related skill, knowledge or experience may be helpful in these occupations, but usually is not needed. DOL assigns a standard vocational preparation (SVP) range of 4-6 to the occupation, which means "[t]hese occupations usually require a high school diploma and may require some vocational training or job-related course work. In some cases, an associate's or bachelor's degree could be needed." See <http://online.onetcenter.org/link/summary/41-1011.00#JobZone> (accessed May 7, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Some previous work-related skill, knowledge, or experience is may be helpful in these occupations, but usually is not needed. For example, a teller might benefit from experience working directly with the public, but an inexperienced person could still learn to be a teller with little difficulty.

Employees in these occupations need anywhere from a few months to one year of working with experienced employees.

See id.

Therefore, generally a first line supervisor/manager of sales workers position could be properly analyzed either as a professional,³ skilled or unskilled worker. However, in the instant case, the certified ETA 750 requires a bachelor's degree and two years of experience. A bachelor's degree from a college or university is also required for professionals by 8 C.F.R. § 204.5(l)(3)(ii)(C). The proffered position is a supervisory

³ 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 office manager positions are not included in this section.

position since the beneficiary will supervise two employees. Further, the petitioner checked the box “e” in Part 2 of the I-140 form, which is for either a professional or a skilled worker. On appeal counsel claims that the petition should also be considered under the skilled worker category. The AAO concurs with counsel’s assertion on appeal that the instant petition should be properly evaluated under either the professional category or the skilled worker category. Accordingly, the AAO will examine the instant appeal and the petition under both categories and determine whether or not the petitioner establish the beneficiary’s qualifications for the proffered position as a professional or skilled worker.

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

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL’s role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

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

- (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

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 Citizenship and Immigration Service (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.

For the professional category, the regulation at 8 C.F.R. § 204.5(1)(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 from a college or university that is determined to be the foreign equivalent of a U.S. baccalaureate degree.

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 April 23, 2001. *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 Punjab University in Chandigarh, India in the field of "Commerce" from January 1981 to December 1984, culminating in the receipt of a "BA (Bachelor of Arts)" degree. 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 and transcripts from Punjab University, ServSafe Certification & dBase III Certificate, National Trade Certificate, and an evaluation report from FIS.

The record indicates that the beneficiary does not hold a U.S. bachelor's degree or a foreign equivalent degree. The beneficiary possesses a three-year bachelor's degree from Punjab University. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's degree from Punjab University cannot be considered a foreign equivalent degree.

The beneficiary also holds ServSafe Certification, dBase III Certificate, and National Trade Certificate. However, the record does not demonstrate any of these certificates is a single academic degree that is a foreign equivalent degree to a U.S. bachelor's degree. As stated above, the regulation 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. The combination of a degree deemed less than the equivalent to a U.S. baccalaureate degree and a diploma or certificate does not meet that requirement. Further, the credentials evaluation does not conclude that the applicant's course of instruction that led to the certificate to be the equivalent of any specific amount of time spent at a U.S. college or university.

On appeal, the petitioner asserts that the beneficiary possesses the equivalent of a U.S. bachelor's degree according to private credential evaluations from FIS and EAI, which evaluate a combination of the beneficiary's three-year Bachelor of Commerce degree from Punjab University in India and his experience as the equivalent of a bachelor's degree in business administration from an accredited institution of higher education in the United States. The evaluations in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

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" from a college or university, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) 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 as a professional and the director's ground denying the petition under professional category must be affirmed.

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 under the skilled worker category.

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

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

The certified Form ETA 750 requires a bachelor's degree in any field 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 commerce degree from Punjab University, ServSafe Certification, dBase III Certificate, and National Trade Certificate. Thus, the issue is whether it is appropriate to consider the beneficiary's training certificates and experience in addition to his three-year bachelor of commerce degree since as discussed above, the beneficiary's bachelor of commerce degree is not a foreign degree equivalent to a U.S. baccalaureate degree. We must also consider whether the beneficiary meets the job requirements of the proffered position as set forth on the labor certification.

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), upon which counsel relies on appeal. This case finds that 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*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The 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. Specifically unlike either *Grace Korean* or *Snapnames.com, Inc.*, the petitioner indicated on the ETA 750 that a "Bachelor's" was required, not a "Bachelor or equivalent."

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 | C[omplete] |
| High School | C[omplete] |
| College | C[omplete] |
| College Degree Required | Bachelor's degree |

Major Field of Study

Any field

The applicant must also two years of 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).

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

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

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

plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." As noted previously, the certified Form ETA 750 requires a Bachelor's degree. The petitioner clearly required a bachelor's degree; the labor certification does not indicate that the petitioner will accept a degree equivalent. Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees, diplomas or certificates that are individually all less than a U.S. bachelor's degree and/or a 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, certificates and/or quantifiable amount of work experience.

On appeal, counsel submits a letter from the petitioner concerning the definition of the term "equivalent" used in its recruitment process and supporting documents, including newspaper advertisements, internal postings, recruitment report and correspondences between the petitioner and DOL. In the letter dated March 16, 2007, the petitioner stated that the petitioner intended the word "Equivalent" used during its recruitment process "to mean a (1) bachelor degree from foreign universities equivalent to a bachelor degree from universities in the United States, and (2) combination of education and experience equivalent to a bachelor degree from universities in the United States as evaluated by any academic credentialing agency."

Additionally, the court in *Snapnames.com, Inc.* determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. See *Snapnames.com, Inc.* 2006 WL 3491005, *6. In the instant case, the petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor's degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing.

As previously discussed, the beneficiary holds a three-year bachelor of commerce degree, which, according to the evaluations submitted, alone represents attainment of a level of education comparable to three years of university study in the United States, but cannot be deemed as an equivalent of a U.S. bachelor's degree in **business administration**. **The beneficiary also holds ServSafe Certification from National Restaurant Association Educational Foundation for completion of the ServSafe Food Protection Manager Certification Examination, Certificate from Case Computers, Diva Computer Systems Private Limited for completion of dBASE III course during November- December 1989, and National Trade Certificate from India Ministry of Labor National Council for Training in Vocational Trades for completion of the course of Training and passing of the trade test in the trade of Welder.** The record does not contain any evidence showing that any of these three certificates represents college or university level post-secondary education. Therefore, the beneficiary's certificates cannot be considered alone or in combination with the beneficiary's three-year bachelor's degree as equivalent to a U.S. baccalaureate.

On appeal, counsel refers to decisions issued by the AAO, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified additional grounds of ineligibility and will discuss whether or not the petitioner has demonstrated with regulatory-prescribed evidence that the beneficiary possessed the requisite two years of experience in the job offered prior to the priority date, and whether 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).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 406. *See also, Mandany v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d at 1. In the instant case, the Form ETA-750 requires two years of experience in the job offered, store manager.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked as an accounts assistant for Punjab Power Packs Ltd. from July 1983 to July 1984; as an accountant for Elektromek Ltd. from August 1984 to October 1985; as an accountant for Him Chemicals & Fertilizers Ltd. from November 1985 to July 1987; as an accounts assistant for Northern Digital Exchanges Ltd. from August 1987 to February 2000; and for the petitioner in the proffered position since May 2000. He did not provide any additional information concerning his employment background on that form.

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

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the

training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The record contains the following letters from the beneficiary's former employers pertinent to the beneficiary's qualifications as required by the above regulation: a letter dated August 13, 1985 from [REDACTED] Assistant Manager (Personnel & Administration) of Punjab Power Packs Limited (Punjab Power August 13, 1985 letter), a letter dated March 25, 1986 from [REDACTED] Partner of Elektromek (Elektromek March 25, 1986 letter); a letter dated December 18, 1995 from [REDACTED] of Northern Digital Exchanges Ltd. (NODE), Associate Company of Grompton Greaves (NODE December 18, 1995 letter); a letter dated August 20, 1996 from [REDACTED] of Crompton Greaves Limited (Crompton August 20, 1996 letter); a letter dated July 20, 1998 from [REDACTED], Executive (P&A) of Crompton Greaves Limited (Crompton July 20, 1998 letter); and a letter undated from Deputy Secretary of Punjab Bio-medical Equipments Limited (Punjab Bio-medical letter).

The Punjab Power August 13, 1985 letter verifies that the beneficiary worked for the company for one year from July 20, 1983 to July 20, 1984, however, the beneficiary worked as a "Trainee Accounts Clerk". In addition, this letter does not verify the beneficiary's full-time employment and does not include a specific description of the duties performed by the beneficiary. Therefore, this letter cannot be accepted as evidence to establish that the beneficiary possessed the requisite two years of experience as a store manager prior to the priority date.

The Elektromek March 25, 1986 letter verifies that the beneficiary worked for the company for one year from September 6, 1984 to October 9, 1985, however, the beneficiary worked as an "Accountant". In addition, this letter does not verify the beneficiary's full-time employment and does not include a specific description of the duties performed by the beneficiary. Therefore, this letter cannot be accepted as evidence to establish that the beneficiary possessed the requisite two years of experience as a store manager prior to the priority date.

The NODE December 18, 1995 letter was a job or position offer letter instead of an employment verification letter. The letter was dated December 18, 1995 and the job offer was effective on December 1, 1995. Therefore, this letter cannot be accepted as evidence to establish that the beneficiary possessed the requisite two years of experience as a store manager prior to the priority date.

Similarly, the Crompton August 20, 1996 letter cannot be accepted as evidence to establish that the beneficiary possessed the requisite two years of experience as a store manager prior to the priority date because it was a promotion letter addressed to the beneficiary himself instead of an employment verification letter. The letter was dated August 20, 1996 and states that the beneficiary was promoted from Grade E2, Accounts Officer, to Grade E3, Senior Accounts Officer effective on April 1, 1996.

The Crompton July 20, 1998 letter verifies that the beneficiary worked for the company from August 19, 1987 to July 20, 1998, however, the beneficiary worked as an "Executive", which is inconsistent with other statements in the record. This letter indicates that the beneficiary's title was an executive while the beneficiary's statements on the Form ETA 750B, the NODE December 18, 1995 letter and the Crompton August 20, 1996 letter state that the beneficiary worked as an accounts assistant, accounts officer or senior

accounts officer. The record does not contain any evidence to resolve this inconsistency. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is noted that the Crompton July 20, 1998 letter was signed by [REDACTED] as an Executive (P&A), however, the letter does not provide further information on the beneficiary's title of Executive. In addition, this letter does not verify the beneficiary's full-time employment and does not include a specific description of the duties performed by the beneficiary. Without a specific description of the duties performed by the beneficiary as an executive, the AAO cannot determine whether the beneficiary's experience with Crompton Greaves Limited qualifies him to perform the duties described at item 13 of the Form ETA 750 in the instant case. Therefore, this letter cannot be accepted as evidence to establish that the beneficiary possessed the requisite two years of experience as a store manager prior to the priority date.

Finally, the Punjab Bio-medical letter was not dated. While the letter is signed by someone as Deputy Secretary, the letter does not include the name of the writer. This letter verifies that the beneficiary worked for the company from July 22, 1986 to January 31, 1987, however, the beneficiary claimed on ETA 750B that he worked for Him Chemicals & Fertilizers Ltd from November 1985 to July 1987. The record does not contain any explanation how the beneficiary managed his two full-time employments with Punjab Bio-medical Equipments Limited and Him Chemicals & Fertilizers Ltd during the period from July 22, 1986 to January 31, 1987. In addition, this letter indicates that the beneficiary worked as an accountant and the letter does not include a specific description of the duties performed by the beneficiary. Without a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the beneficiary's experience as an accountant at Punjab Bio-medical Equipments Limited meets the two years of experience as a store manager as set forth by the Form ETA 750. Therefore, this letter cannot be accepted as evidence to establish that the beneficiary possessed the requisite two years of experience as a store manager prior to the priority date.

The record does not contain any other evidence pertinent to the beneficiary's requisite two years of experience as a store manager. Therefore, the petitioner failed to establish the beneficiary's experience qualification for the proffered position with regulatory-prescribed evidence.

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

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

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 CFR § 204.5(d). The priority date in this case is April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$21.38 per hour (\$44,470.40 per year). On the petition, the petitioner claimed to have a gross annual income of \$1,432,625, to have a net annual income of \$523,313, and to currently employ six workers. On the Form ETA 750B, the beneficiary claimed to have worked for the petitioner since May 2000.⁴

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not submit the beneficiary's W-2 forms, 1099 forms, payroll records or any other documentary evidence to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary in the years 2001 through the present although the beneficiary claimed on the Form ETA 750B that he has been working for the petitioner since May 2000. Therefore, the petitioner failed to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary.

The petitioner submitted Form 1040 U.S. Individual Income Tax Returns filed by [REDACTED] and [REDACTED] jointly for 2004 and 2005. The tax returns indicate that the petitioner in the instant case is a sole proprietorship. Unlike a corporation, a sole proprietorship is not legally separate from its owner. Therefore the sole proprietor's income, liquefiable assets, and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage. In addition, they must show that

⁴ The AAO notes that the petitioner claimed on the petition that it was established on March 7, 2001 while the beneficiary claimed to have worked for the petitioner since May 2000. It is not clear which statement is correct.

they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 (approximately thirty percent of the petitioner's gross income).

Therefore, for a sole proprietorship, CIS considers net income to be the figure shown on line 33⁵, Adjusted Gross Income, of the owner's Form 1040 U.S. Individual Income Tax Return. The record shows that Brinderjit Dhillon is the sole proprietor of the petitioner. The tax returns for 2004 and 2005 in the record demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage in these two years:

In 2004, the Form 1040 stated adjusted gross income of \$77,168.

In 2005, the Form 1040 stated adjusted gross income of \$51,042.

Therefore, the sole proprietor's adjusted gross income on Form 1040 was sufficient to pay the beneficiary the proffered wage of \$44,470.40 in 2004 and 2005.

However, sole proprietors must also show that they can sustain themselves and their dependents. The petitioner did not submit a statement of the sole proprietor's household living expenses. The 2004 tax return in the record shows that the sole proprietor had a family of five and reported total deductions of \$33,353 (taxes of \$11,694, home mortgage interest and points of \$15,309, and gifts to charity of \$6,350) on Schedule A. Although the itemized deductions reported on Schedule A do not cover all living expenses for the family, it is unlikely that the balance of \$32,697.60 after paying the proffered wage from the adjusted gross income could cover the sole proprietor's household living expenses for that year. In 2005, the sole proprietor's family of five reported total deductions of \$29,770 (taxes of \$8,271, home mortgage interest and points of \$14,419, and gifts to charity of \$7,080) on their Schedule A of Form 1040. Therefore, the balance of \$6,571.60 after paying the proffered wage from the adjusted gross income was not sufficient to cover their living expenses that year. The AAO finds that the petitioner failed to demonstrate that the sole proprietor could also sustain himself and his family of five although it established that the sole proprietor's adjusted gross income was sufficient to pay the proffered wage in 2004 and 2005, and therefore, the petitioner failed to establish its ability to pay the proffered wage in these two years.

CIS will consider the sole proprietorship's income and his or her liquefiable assets and personal liabilities as part of the petitioner's ability to pay. In the instant case, the record of proceeding does not contain any documents showing the sole proprietor's liquid assets, such as cash balances in accounts of savings, money market, certificates of deposits, or other similar accounts showing extra available funds for the sole proprietor to pay the proffered wage and/or personal expenses. Therefore it is not clear whether the sole proprietor had

⁵ The line for adjusted gross income on Form 1040 is Line 33 for most years, however, it is Line 36 for 2004 and Line 37 for 2005.

extra available funds sufficient to cover the shortage between the proffered wage plus the sole proprietor's living expenses and the adjusted gross income at the end of 2004 and 2005.

In addition, the priority date in the instant case is April 23, 2001, and therefore, the petitioner must establish its ability to pay the proffered wage from 2001, the year of the priority date, to the present. However, the record does not contain any regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage in 2001 through 2003. 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 petitioner failed to submit the sole proprietor's tax returns or other regulatory-prescribed evidence for 2001 through 2003, and thus failed to establish its ability to pay the proffered wage for these years.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and meet the personal expenses of the sole proprietor's family as of the priority date through an examination of wages paid to the beneficiary, its adjusted gross income or other liquefiable assets in 2001 through 2005.

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.