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FILE: LIN 06 069 51696 Office: NEBRASKA SERVICE CENTER Date: MAR 10 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 Acting Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer and distributor of motors and controllers. It seeks to employ the beneficiary permanently in the United States as an engineering manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the acting director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the acting director determined that the beneficiary did not possess a bachelor's degree in engineering. The acting director also found that the petitioner had failed to demonstrate the continuing ability to pay the proffered wage beginning on the priority date.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the acting director's decision of denial the issues in this case are whether or not the petitioner has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification and whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

One issue in this matter is whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The regulation at 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.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on October 20, 2003. The proffered wage as stated on the Form ETA 750 is \$70,000 per year.

The Form I-140 petition in this matter was submitted on January 4, 2006. On the petition, the petitioner stated that it was established during April 1995 and that it employs 89 workers. The petition states that the petitioner's gross annual income is \$8,963,666.21 and that its net annual income is \$1,403,315.83. On the Form ETA 750, Part B, signed by the beneficiary on September 27, 2003, the beneficiary claimed to have

worked for the petitioner [REDACTED] since March 1995, and as an engineering manager in three different locations in the United States since March 2001.¹ The petition and the Form ETA 750 both indicate that the petitioner would employ the beneficiary in Vernon Hills, Illinois.

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 evidence properly in the record including evidence properly submitted on appeal.² In the instant case the record contains (1) the petitioner's 2002, 2003, and 2004 Form 1120, U.S. Corporation Income Tax Returns, (2) the 2002, 2003, 2004, and 2005 audited consolidated financial statements of the petitioner and its majority-owned subsidiaries, (3) the 2003, 2004, and 2005 financial statements of the petitioner alone, without its majority-owned subsidiaries, (4) the petitioner's income statements for the first quarter, the first half, and the first three quarters of 2005, (5) 2003, 2004, and 2005 Form W-2 Wage and Tax Statements, (6) check stubs showing wages paid to the beneficiary, and (7) the 2003, 2004, and 2005 joint Form 1040 U.S. Individual Income Tax Returns of the beneficiary and his spouse. The record does not contain any other evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's tax returns show that it is a corporation, that it incorporated on March 22, 1995, and that it reports taxes pursuant to accrual convention accounting and the calendar year.

The petitioner's 2002 tax return shows that it declared taxable income before net operating loss deduction and special deductions of \$457,459 during that year. The corresponding Schedule L shows that, at the end of that year, the petitioner had current assets of \$24,164,965 and current liabilities of \$19,993,632, which yields net current assets of \$4,171,333. This office notes, however, that because the priority date of the instant petition is October 20, 2003, evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's 2003 tax return shows that it declared a loss of \$34,844 as its taxable income before net operating loss deduction and special deductions during that year. The corresponding Schedule L shows that, at the end of that year, the petitioner had current assets of \$19,531,795 and current liabilities of \$15,681,114, which yields net current assets of \$3,850,681.

The petitioner's 2004 tax return shows that it declared taxable income before net operating loss deduction and special deductions of \$2,290,848 during that year. The corresponding Schedule L shows that, at the end of

¹ The beneficiary also claimed to have worked for [REDACTED], an apparently related company, from March 1988 to March 1995.

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

that year, the petitioner had current assets of \$32,268,601 and current liabilities of \$27,655,181, which yields net current assets of \$4,613,420.

The balance sheet included with the petitioner's 2002 audited financial statements shows that at the end of that year the petitioner had current assets of \$34,497,464 and current liabilities of \$30,130,113, which yields net current assets of \$3,147,213. The income statement shows net income before provision for income taxes of \$1,391,088. Again, because it pertains to a year prior to 2003, this evidence is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The balance sheet included with the petitioner's 2003 audited financial statements shows that at the end of that year the petitioner had current assets of \$29,564,598 and current liabilities of \$25,279,144, which yields net current assets of \$4,285,454. The income statement shows net income before provision for income taxes of \$155,842.

The balance sheet included with the petitioner's 2004 audited financial statements shows that at the end of that year the petitioner had current assets of \$48,588,477 and current liabilities of \$43,754,048, which yields net current assets of \$4,834,429. The income statement shows net income before provision for income taxes of \$2,395,523.

The balance sheet included with the petitioner's 2005 audited financial statements shows that at the end of that year the petitioner had current assets of \$50,347,101 and current liabilities of \$44,078,193, which yields net current assets of \$6,268,908. The income statement shows net income before provision for income taxes of \$2,269,606.

Each of the accountant's report that accompanied the 2003, 2004, and 2005 financial statements of the petitioner itself, without its majority-owned subsidiaries, stated, "We have compiled the accompanying **balance sheet** of [the petitioner]." [Emphasis provided.] The accountant's report that accompanied the petitioner's financial statements for the first three quarters of 2005 stated, "We have compiled the accompanying **balance sheet** of [the petitioner]." [Emphasis provided.] Each of the accountant's reports that were appended to the three 2005 income statements submitted states, "We have compiled the accompanying **balance sheet** of [the petitioner]." [Emphasis provided.] Why those accountant's reports refer to a balance sheet, rather than all of the financial statements submitted under that cover, including the income statements, is unclear.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, the petitioner must resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence sufficient to demonstrate where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (Comm. 1988).

The W-2 forms submitted show that the petitioner paid the beneficiary gross wages of \$53,074.37, \$62,205.53, and \$53,229.54 during 2003, 2004, and 2005, respectively.

The check stubs provided show that the petitioner paid the beneficiary gross wages of \$1,941.78 for his employment during the two-week pay periods ending May 22, 2006 and June 5, 2006. The more recent of those two check stubs also shows that the petitioner paid the beneficiary year-to-date gross wages of \$22,820.07 for work performed before June 5, 2006.

The beneficiary's tax returns confirm the amounts that the W-2 forms show the petitioner paid him during 2003, 2004, and 2005.

On appeal, as to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, counsel stated, "The petitioner does have the capability to pay, and did pay the beneficiary of more than \$70,000/yr. [sic]"

In a brief filed to supplement the appeal, counsel elaborated on that assertion. Counsel stated,

The company has made two kinds of salary payments to the beneficiary. One of which is paid to the beneficiary within the United States, and the other of which is paid to the beneficiary in Japan, due to his employment status in the United States as an alien.

Counsel noted that the beneficiary's tax returns show, at Line 21, Other income, foreign income from [REDACTED] of \$62,041 during 2003, \$68,297 during 2004, and \$70,188 during 2005. This income is in addition to the amounts shown above as having been paid to the beneficiary by the petitioner.

[REDACTED] however, is not the petitioner in this matter. The petitioner in this matter is [REDACTED]. Notwithstanding that those two companies may be, as counsel appears to assert, related companies, they are different companies.

The petitioner is a corporation. A corporation is a legal entity separate and distinct from its owners or stockholders. *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958; AG 1958). The debts and obligations of the corporation are not the debts and obligations of the owners, the stockholders, related corporations, or anyone else.³ See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [Citizenship and Immigration Services (CIS)] to consider the financial resources of individuals or entities with no legal obligation to pay the wage."

As individuals and the other entities are not obliged to pay the petitioner's debts and obligations, the income and assets of individuals and other entities, and their ability, if they wished, to pay the petitioning corporation's debts and obligations, are irrelevant to this matter and shall not be further considered. The petitioner must show the ability to pay the proffered wage out of its own funds.

The petitioner's reliance on the compiled financial statements in the record is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2), set out above, makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Some of the

³ Although this general rule may be amenable to modification by contract or otherwise, nothing in the record indicates that the general rule is inapplicable to the instant case.

accountant's reports in the record show that some of the financial statements provided were produced pursuant to audit. Some of the accountant's reports in the record make clear that some of the financial were not produced pursuant to audit, but pursuant to compilation. The level of assurance, if any, expressed pertinent to some income statements in the record is unclear, as they are accompanied by accountant's reports that indicate that balance sheets were produced pursuant to compilation, but do not acknowledge those income statements.

Financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. The financial statements pursuant to compilation, and those with no indication of any level of assurance, will be accorded little evidentiary value. The audited financial statements will be accorded considerably more weight.

The petitioner must establish that its job offer to the beneficiary is realistic. Because filing 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. 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).

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 established that it paid the beneficiary \$53,074.37 during 2003, \$62,205.53 during 2004, and \$53,229.54 during 2005. The petitioner must show the ability to pay the balance of the proffered wage during those years. The evidence also demonstrates that the petitioner had paid the beneficiary year-to-date wages of \$22,820.07 for work performed before June 5, 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during a given period, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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). *See also* 8 C.F.R. § 204.5(g)(2).

Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded it, is insufficient. Similarly, showing that the petitioner paid total wages in excess of the proffered wage, or greatly 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during that period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets -- the petitioner's year-end cash and those assets expected to be consumed or converted into cash within a year -- may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets minus its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically⁴ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$70,000 per year. The priority date is October 20, 2003. The record contains both tax returns and audited financial statements pertinent to some of the salient years. Because audited financial records are typically a more accurate index of a company's financial position than its tax returns, this office will address the information from its tax returns.

During 2003 the petitioner paid the beneficiary \$53,074.37. The petitioner is obliged to show the ability to pay the remaining \$16,925.63 balance of the annual amount of the proffered wage during that year. The petitioner's 2003 audited financial statements show net income before provision for income taxes of \$155,842. That amount exceeds the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2003.

During 2004 the petitioner paid the beneficiary \$62,205.53. The petitioner is obliged to show the ability to pay the remaining \$7,794.47 balance of the annual amount of the proffered wage during that year. The petitioner's 2004 audited financial statements show net income before provision for income taxes of

⁴ The location of the taxpayer's current assets and current liabilities varies slightly from one version of the Schedule L to another.

\$2,395,523. That amount exceeds the remaining balance of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2004.

During 2005 the petitioner paid the beneficiary \$53,229.54. The petitioner is obliged to show the ability to pay the remaining \$16,770.46 balance of the annual amount of the proffered wage during that year. The petitioner's 2005 audited financial statements show net income before provision for income taxes of \$2,269,606. That amount exceeds the annual amount of the proffered wage. The petitioner has demonstrated the ability to pay the proffered wage during 2005.

The petition in this matter was submitted on January 4, 2006. On that date the petitioner's 2006 tax return was unavailable. On October 4, 2006 the service center issued a request for evidence in this matter, requesting additional evidence of the petitioner's continuing ability to pay the proffered wage beginning on the priority date and, specifically, the petitioner's 2003, 2004, and 2005 tax returns. CIS received counsel's response to that request on April 13, 2006, and the record is deemed to have closed on that date. The request for evidence did not request the petitioner's 2006 tax return and, in any event, that tax return was unavailable on the date the record closed. For the purpose of today's decision, the petitioner is relieved of the burden of demonstrating its ability to pay the proffered wage during 2006 and later years.⁵

The petitioner demonstrated that it was able to pay the proffered wage during 2003, 2004, and 2005, which were all of the salient years. It has therefore demonstrated its continuing ability to pay the proffered wage beginning on the priority date, and has overcome that basis for the decision of denial.

The remaining issue in this matter is whether the petitioner has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 750 Labor Certification Application.

Qualifications of the Beneficiary for the Job Offered

The Form ETA 750 indicates that the proffered position requires a bachelor's degree in engineering and one year of experience in the proffered position. DOL assigned the occupational code of 11-9041.00, Electronics Engineering Manager, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. Further, according to DOL's public online database at <http://online.onetcenter.org/link/summary/11-9041.00> (accessed January 31, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Five. Positions in Job Zone Five, according to DOL, require "extensive preparation." DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means "[a] bachelor's degree is the minimum formal education required for these occupations. However, most also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)." See <http://online.onetcenter.org/link/summary/11->

⁵ The record demonstrates that the petitioner paid the beneficiary \$22,820.07 for work performed between January 1, 2006 and June 5, 2006. If the petitioner were obliged to show the ability to pay the proffered wage during that year, it would be obliged to show the ability to pay the remaining \$47,179.93 during that year.

9041.00#JobZone (accessed December 31, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience. For example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job.

See id.

Because of the various requirements of the proffered position, both those imposed by the regulations and those listed by the petitioner on the Form ETA 750, the proffered position is necessarily a position for a professional. Further, section 101(a)(32) of the Act states, "The term 'profession' shall include but not be limited to . . . engineers"

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 record shows that the beneficiary possesses a bachelor's degree in International Relations, but no other degree, and that his studies included no engineering classes. We must consider, therefore, whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

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

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9th Circuit that covers the jurisdiction for this matter.

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

* * *

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

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

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

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

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

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

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

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

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

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

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

We 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.

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

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not

include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

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

Block 14:

Education: College: 4 years
 College Degree Required: Bachelor's
 Major Field of Study: Engineering

Training: None

Experience: 1 year in the job offered

Block 15: Special Requirements: None

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.*

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 who 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 “a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers.” BALCA concluded:

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

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

Significantly, when DOL raises the issue of the alien’s qualifications, it is to question whether the labor certification 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 professional regulation, CIS must examine “the language of the labor certification job requirements” in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Notwithstanding that the language of the Form ETA 750 explicitly states that the proffered position requires a bachelor’s degree in engineering and provides for no substitution for that degree, on October 4, 2007 this office issued a request for evidence asking that the petitioner provide, *inter alia*, evidence that when it applied for the labor certification it made clear that the proffered position does not necessarily require a bachelor’s degree in engineering, contrary to that clearly stated requirement on the Form ETA 750.

In response, the petitioner's president sent a letter in which he asserted that the petitioner explicitly expressed that an unrelated bachelor's degree combined with experience would qualify an applicant for the proffered position. The petitioner's president asserted, "[s]uch intent has been illustrated specifically through the documents provided to the Department of Labor, and became the basis for the approval of [the instant] labor certificate."

In support of that assertion, the petitioner's president noted the description of the duties of the proffered position stated on a letter dated October 1, 2003, which was apparently attached to the Form ETA 750 when it was sent to the Illinois Department of Employment Security. That letter states, "The [proffered position] requires . . . at least a Bachelor's degree or its equivalent," but does not indicate that, contrary to the plain language that the petitioner placed on the Form ETA 750, the degree need not be in engineering. The petitioner's president cited, in addition, an internal posting and on-line postings of the proffered position, which state that a bachelor's degree is required but also do not specify a major course of study.

The petitioner's president further noted, apparently in support of the proposition that the requisite bachelor's degree may be in a discipline other than engineering, that a classified advertisement of the proffered position did not mention any bachelor's degree requirement at all. This office does not perceive that as solid support for the proposition that a degree in international relations may be substituted for the engineering degree required by the Form ETA 750.

The petitioner's president provided a list of names and educational qualifications. Although the petitioner's president did not so state, this office gathers that it is a list of people who applied for the proffered position pursuant to the various listings of it. Two of the applicants have bachelor's degrees in mechanical engineering; one has a bachelor's degree in chemistry; one has an associate's degree in applied science and several years of experience; and the last has a year of education and 20 years of experience.⁶

The petitioner's president apparently provided that list as support for the proposition that a degree in international relations may be substituted for the degree in engineering required by the Form ETA 750. This office notes that none of those applicants had qualifications similar to those of the beneficiary and that, in any event, the record does not indicate that the petitioner found any of those applicants to be qualified for the proffered position. This office does not perceive that list to support the proposition that the petitioner clearly expressed to DOL that a bachelor's degree in a subject unrelated to engineering, with or without experience, would qualify an applicant for the proffered position.

Finally, the petitioner's president added, "We have never stated the requirement of an engineering degree in order to meet the requirements of an Engineering Manager at this Company." This office notes, however, that the petitioner did, explicitly and unambiguously, state that the proffered position requires four years of college culminating in a bachelor's degree in engineering. That requirement was stated on the Form ETA 750 Application for Alien Employment Certification, which the petitioner's president himself signed on September 27, 2003, before submitting that form to the Illinois Department of Employment Security.

The Form ETA 750 in the instant case makes clear that the proffered position requires four years of college culminating in a bachelor's degree in engineering. The evidence does not make clear that any other intent was expressed to DOL when it oversaw the recruitment for the proffered position. Under these circumstances, this office cannot now allow the petitioner to make an exception to that requirement for the

⁶ In a letter dated October 1, 2003, the petitioner's president stated that none of the candidates who applied to fill the proffered position were found to be qualified, but did not elaborate.

beneficiary. To do so would undermine the labor certification process. Specifically, under those circumstances, the employer could decline to hire a U.S. applicant for the proffered position on the basis that the applicant did not possess the requisite bachelor's degree, and then seek to employ the beneficiary notwithstanding that he does not have the requisite bachelor's degree.

The beneficiary does not have the requisite bachelor's degree in engineering. The beneficiary is not qualified for the proffered position pursuant to the terms of the approved labor certification and the petition may not, therefore, be approved. The petition was correctly denied on this basis, which has not been overcome on appeal.

The burden of proof in these proceedings rests solely upon the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.