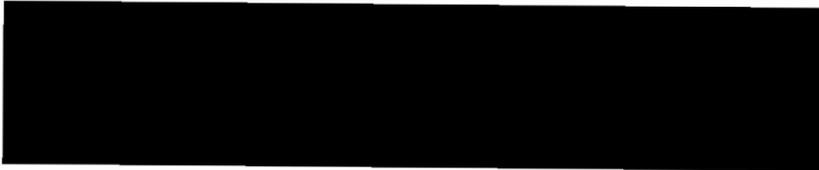




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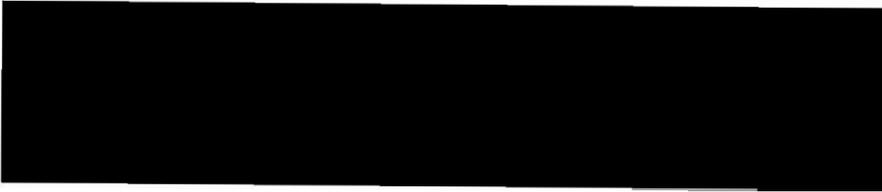
Office: TEXAS SERVICE CENTER

Date: **MAY 28 2008**

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The director dismissed a subsequent motion to reopen/reconsider (MTR) and affirmed the denial of the petition. Now the matter is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a religious Korean language publication. It seeks to employ the beneficiary permanently in the United States as a sales representative, advertising (advertising/marketing representative). 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.

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 to classify the beneficiary either as a professional or skilled worker, and that by requiring a "B.A. Advertising/Marketing, or related field, or equivalent job experience" in newspaper advertisements and in-house postings, the petitioner intended to accept experience in lieu of the degree to meet the minimum requirements for the proffered position. However, the labor certification application, as certified, does not require any experience and does not demonstrate that the petitioner would accept a combination of lesser education and/or quantifiable amount of work experience to meet the minimum requirement of a bachelor's degree in advertising or marketing. In order to determine whether the instant petition could also be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirement of a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on January 4, 2008 granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. The AAO received the petitioner's response on March 28, 2008.

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

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years

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

training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The original Form ETA 750 was accepted on September 13, 2002 and approved on September 22, 2004. The approved labor certification in the instant case requires four years of college studies and a Bachelor's Degree in advertising or marketing. DOL assigned the occupational code of 254.357-014, advertising sales representative, the closest type of occupation as the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=254.357-014+&g+Go> (accessed April 15, 2008) and its extensive description of the position and requirements for the position most analogous to advertising sales representative position, the position falls within Job Zone Three requiring "medium preparation" for the occupation. According to DOL, previous work-related skill, knowledge or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 6-7 to the occupation, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." See <http://online.onetcenter.org/link/summary/41-3011.00#JobZone> (accessed April 15, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

Employees in these occupations usually need one or two years of training involving both on-the-job experience and informal training with experienced workers.

See id.

Therefore, generally an advertising/marketing representative position could be properly analyzed as a professional,² or a skilled worker. In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A) of the Act by checking box e in Part 2 of the I-140 form. **The box e is for either a professional or a skilled worker. Therefore, Citizenship and Immigration Services (CIS) will examine the petition under the professional and skilled worker categories.** The skilled worker category requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application. 8 C.F.R. § 204.5(l)(3)(ii)(B).

² 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 management analyst positions are not included in this section.

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is September 13, 2002. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The beneficiary set forth her 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), she indicated that she attended Sungil Women's High School from March 1977 to February 1980, culminating in the receipt of a "HS Diploma." She provides no further information concerning her 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 certificate of graduation issued by Sungil Women's High School to certify that the beneficiary graduated from that high school on February 25, 1980, and evaluation reports from [REDACTED] of Foundation for International Services, Inc. (FIS), James Fisher of Saint Louis University, and [REDACTED] and [REDACTED] of Josef Silny & Associates, Inc. (JS&A).

The beneficiary possesses a high school diploma from Sungil Women's high School in Seoul, South Korea. A high school diploma from South Korea may be evaluated as the equivalent of a U.S. high school diploma, but is not the equivalent of a U.S. bachelor's degree. None of the evaluation reports submitted in the record show that the beneficiary possessed a single U.S. bachelor's degree or a foreign equivalent degree in advertising or marketing.³ CIS may, in its discretion, use as advisory opinions statements submitted as expert

³ The evaluation report from [REDACTED] of FIS states that the beneficiary has the equivalent of graduation from high school in the United States and has, as a result of her employment experience (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in advertising from an accredited college or university in the United States. James Fisher of Saint Louis University evaluates in his report that the beneficiary has attained the equivalent of a

testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act as she does not have the minimum level of education required for the equivalent of a bachelor’s degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director’s ground for 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 as if the petitioner had requested the proffered position be analyzed under the skilled worker category.

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

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(1)(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 advertising or marketing as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary’s education includes a high school diploma from South Korea and fourteen (14) years of experience in the advertising field. Thus, the issue is whether it is appropriate to consider the beneficiary’s experience as the equivalent to the requisite degree. We must also consider whether the beneficiary meets the job requirements of the proffered position as set forth on the labor certification.

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

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

Bachelor of Science degree in Marketing from an accredited institution of higher education in the United States on the basis of the more than thirteen years of work experience and professional training in Marketing and related areas. The evaluation reports from JS&A conclude that the beneficiary has the equivalent of graduation from a college-preparatory program at an accredited high school in the United States and her equivalent to a U.S. Bachelor of Business Administration with a major in marketing degree is based on her fourteen years and nine months of documented professional experience in marketing.

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

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

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

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

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

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

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

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

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

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

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

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

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

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated.

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

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

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

14. EDUCATION	
Grade School	Blank
High School	Blank
College	4 [years]
College Degree Required	B.A. [bachelor of arts]
Major Field of Study	Advertising/Marketing

Item 15 reflects special requirements as follows:

Fluency in written and spoken Korean language is a business necessity, as the newspaper is published in the Korean language, and almost all customers and subscribers are Korean-speaking. Also requires proficiency in 'Hancorn' Korean language publishing/layout software.

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 an unrelated degree when a

labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

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

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

of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

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

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

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

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

The regulation at 8 C.F.R. § 204.5(1)(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 four years of college and a Bachelor's degree in advertising or marketing. The petitioner clearly required a bachelor's degree in advertising or marketing, however, the labor certification does not further define the degree equivalent. Nor does the certified labor certification demonstrate that the petitioner would accept a

combination of degrees that are individually all less than a U.S. bachelor's degree or its foreign equivalent and/or 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, and/or a quantifiable amount of work experience. It is noted that the Form ETA 750 does not indicate that the petitioner would accept an equivalent to the degree.

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.* at 11-13. In the instant case, the petitioner failed to submit any documentary evidence showing that the certified labor certification ever required an equivalent to the bachelor's degree and ever defined or specified that the bachelor's degree requirement might be met through a combination of education and/or a quantifiable amount of work experience.

On appeal and in response to the AAO's RFE, counsel submits the recruitment efforts conducted by the petitioner related to the relevant labor certification prior to the filing the application as evidence showing that the petitioner specified that the minimum academic requirement of a bachelor's degree might be met through a combination of lesser degrees and/or quantifiable amount of work experience in the petitioner's labor market test. These recruitment efforts include newspaper advertisements and in-house posting notices. The advertisements placed in the Atlanta Journal Constitution on June 8, 15, and 22, 2002 require a bachelor of arts degree in advertising, marketing or related field, or equivalent work experience. Notices of job availability posted from June 1 to June 15, 2002 and from June 15 to July 1, 2002 require "at least a B.A. Advertising/Marketing, or related field, or equivalent job experience." Counsel argues that these recruitment efforts evidence that the petitioner intended to accept work experience in lieu of a bachelor's degree.

However, as previously noted the relevant Form 750A does not include any requirements of work experience for the proffered position, nor does the certified labor certification indicate that the employer would accept a combination of lesser education and/or quantifiable amount of work experience as an "equivalent" to meet the minimum educational requirement of a bachelor's degree in advertising/marketing. The petitioner even did not indicate whether it would accept an equivalent to the bachelor's degree to meet the minimum education requirement set forth on the Form ETA 750. The recruitment efforts were conducted in June 2002 and the labor certification application was filed with DOL on September 13, 2002. If the employer had intended to require work experience as an alternative to meet the minimum education requirement of a bachelor's degree, it should have stated so on the Form ETA 750 when it prepared and filed the labor certification application two months later. However, the petitioner did not indicate an alternative education requirement on the form, nor did the petitioner submit any correspondence or other evidence showing that the petitioner submitted to DOL the petitioner's "equivalent job experience" requirement as part of requirements for the proffered position. The petitioner must demonstrate that the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). A requirement not stated on the Form ETA 750 cannot be considered as a requirement certified by DOL.

In addition, the record shows that the petitioner never mentioned, indicated or drew attention to its "equivalent job experience" requirement until the instant appeal from the denial of the petition by the director. In the submission letter dated November 8, 2004 from [REDACTED], the petitioner stated that "[t]he position requires a minimum of a Bachelor's degree in Advertising," nothing else. In response to the director's notice of intent to deny (NOID) dated February 16, 2005, which noted that the beneficiary does not possess a baccalaureate degree, counsel tried to rebut the ground of denial with its arguments that the beneficiary's 14 years of work experience is the equivalent to a bachelor's degree because her position with Fashion Focus Corporation requires a baccalaureate degree in arts and/or marketing and DOL assigns SVP 8 to the position of advertising manager. Counsel did not assert in response to the NOID that the position itself requires job experience. The petitioner also submitted evaluation reports to support its assertion that the beneficiary met the bachelor's degree requirement through the equivalence from her 14 years of prior experience in the job offered. Therefore, it cannot be concluded from the documentation and discussion above that the petitioner had the intent to permit job experience as an equivalent to the education requirement for the proffered position.

Further, it is noted that the beneficiary has been employed by the petitioner in the proffered position under H-1B status⁴ since May 2002. Counsel argues that the instant petition must be approved since the beneficiary's H-1B petition for the instant professional occupation has been approved by the Texas Service Center. However, the AAO is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). In addition, counsel did not explain why the proffered position is a skilled worker position for purposes of this immigrant petition while it has been a professional position in the nonimmigrant petition. The record does not contain any evidence to resolve this inconsistency. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

On appeal, counsel also argues that the petitioner's intent to accept experience for the proffered position was not written on the Form ETA 750 due to counsel's error. The instant appeal appears to be based upon a claim of ineffective assistance of counsel. However, any appeal or motion based upon a claim of ineffective assistance of counsel requires:

- (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard,
- (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and
- (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

⁴ The I-129 nonimmigrant petition SRC-02-156-52163 was filed on April 24, 2002 and approved on May 3, 2002 for a period from May 3, 2002 to April 25, 2005.

Matter of Lozada, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988).

The record does not contain any evidence that the instant appeal meets these requirements.

As previously discussed, the beneficiary does not hold a bachelor's degree in advertising or marketing and the petitioner failed to demonstrate that it required experience as an alternative requirement for the proffered position on the certified Form ETA 750. The record contains evaluation reports, which state that the beneficiary has, as a result of progressively more responsible employment experiences, the equivalent of an individual with a bachelor's degree in advertising or marketing from an accredited university in the United States. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The evaluations in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to **nonimmigrant H-1B petitions, not to immigrant petitions.** See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Moreover, the approved labor certification specifically requires four (4) years of college education. The beneficiary's high school diploma and 14 years of experience in the job offered do not satisfy the four-year requirement. 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, and thus, the petition cannot be approved under the skilled worker category.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. 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 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 C.F.R. § 204.5(d). The priority date in this case is September 13, 2002. The proffered wage as stated on the Form ETA 750 is \$24,500 per year. On the Form ETA 750B signed by the beneficiary on May 17, 2002, she claimed to have worked for the petitioner in the proffered position since May 2002.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's W-2 form for 2003 and an alleged paycheck in the amount of \$893.26 issued by the petitioner to the beneficiary on October 30, 2004 as evidence to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary in the years 2002 through the present. Although the beneficiary claimed on the Form ETA 750B that she has been working for the petitioner since May 2002 and CIS records show that the petitioner had a I-129 H-1B nonimmigrant petition approved on behalf of the beneficiary for a period from May 3, 2002 to April 25, 2005 with an offered annual salary of \$24,500,⁵ the petitioner did not submit the beneficiary's W-2 forms for 2002 and 2004. The beneficiary's W-2 form for 2003 shows that the petitioner paid the beneficiary \$18,375.12. The alleged paycheck does not indicate the pay period of the check or the gross amount paid for the period. It is not clear whether the amount of \$893.26 is equal to or greater than the proffered wage rate. The record does not contain any evidence of any other compensation payments from the petitioner to the beneficiary in the year 2004. Therefore, the petitioner failed to demonstrate that it paid the full proffered wage in the relevant years from 2002, the year of the priority date, to the present. The petitioner is obligated to demonstrate that it could pay the proffered wage of \$24,500 in 2002 and the difference of \$6,124.88 in 2003 and \$23,606.74 in 2004 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

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

⁵ See Footnote 3 above.

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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

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

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

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

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

The record contains the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2002. The tax return for 2002 demonstrates that the petitioner had a net income⁷ of \$(876) and net current assets of \$9,603 in the year of 2002. Therefore, for the year 2002, the petitioner did not have sufficient net income to pay the proffered wage, nor did the petitioner have sufficient net current assets to pay the proffered wage that year.

⁶According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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

The petitioner submitted copies of the Form 990 Return of Organization Exempt from Income Tax as evidence to establish its ability to pay the proffered wage for 2003. For a nonprofit organization, CIS considers net income to be the figure shown on line 18, excess or deficit for the year on the Form 990 Return of Organization Exempt from Income Tax. The petitioner's tax return for 2003 shows that the petitioner had a net income⁸ of \$9,965 in 2003, which was sufficient to pay the beneficiary the difference of \$6,124.88 between wages actually paid to the beneficiary and the proffered wage for 2003. Therefore, the petitioner established its ability to pay the beneficiary the proffered wage for 2003 through the examination of wages actually paid to the beneficiary and its net income.

The record before the director closed on March 17, 2005 with the receipt by the director of the petitioner's submissions in response to the director's NOID. As of that date the petitioner's federal tax return for 2004 should have been available. However, the petitioner did not submit its tax return for 2004, nor did the petitioner submit any other regulatory-prescribed evidence to establish the petitioner's ability to pay the proffered wage, such as annual report or audited financial statements for 2004. 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 tax return, annual report or audited financial statements would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. Because the petitioner failed to submit such regulatory-prescribed evidence, it failed to establish its ability to pay the proffered wage for 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor except for 2003, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, its net income or its net current assets.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition, which the petitioner did for the year 2003. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner is also obligated to pay the prevailing wage to each of its H-1B employees.

CIS records show that the petitioner had filed six (6) Immigrant Petitions for Alien Worker (Form I-140) including the instant petition, and thirteen (13) nonimmigrant petitions (Form I-129). Among the six

⁸ Excess or (deficit) for the year as reported on Line 18 of the Form 990.

immigrant petitions, four petitions were approved⁹ and two of them including the instant petition are still pending with CIS.¹⁰ Therefore, the petitioner must establish its ability to pay two proffered wages in 2002, three in each year of 2003 through 2005, two in 2006 and three in 2007 for those approved and pending petitions.¹¹

As previously noted, the petitioner did not have sufficient net income or net current assets to pay a single beneficiary the proffered wage in 2002. Therefore, the petitioner failed to demonstrate that it could pay the two proffered wages in 2002. In 2003, the petitioner had a net income of \$9,965, which was just sufficient to pay the beneficiary the difference of \$6,124.88 between wages actually paid to the beneficiary and the proffered wage that year. However, the record does not contain any evidence that the petitioner had extra funds to pay two more proffered wages. Therefore, the petitioner failed to demonstrate that it could pay the three proffered wages in 2003. The record does not contain any evidence of the petitioner's ability to pay the proffered wage for 2004 and onwards, and therefore, the petitioner failed to establish its continuing ability to pay all the proffered wages from 2004 to the present. Given the record as a whole, the petitioner's history of filing immigrant petitions, and the number of nonimmigrant petitions, we cannot determine that the petitioner established its continuing ability to pay all the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

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.

⁹ The four approved petitions are as follows:

SRC-99-052-53759 filed on December 3, 1998 with the priority date of October 17, 1996, approved on June 10, 1999, and the beneficiary obtained lawful permanent residence on February 13, 2001;

SRC-04-108-52486 filed on March 4, 2004 with the priority date of April 14, 2003, approved on March 5, 2005, and the beneficiary obtained lawful permanent residence on March 30, 2005;

SRC-04-157-50312 filed on April 29, 2004 with the priority date of April 30, 2001, approved on March 8, 2005, and the beneficiary obtained lawful permanent residence on June 7, 2005;

SRC-07-084-52439 filed on January 16, 2007 with the priority date of July 19, 2006, and approved on September 4, 2007.

¹⁰ The other pending petition except the instant petition is as follows:

SRC-07-281-57323 was filed on July 26, 2007 and is currently pending.

¹¹ CIS records do not contain the priority date information for the pending petition. The calculation is based on the petition filing date.