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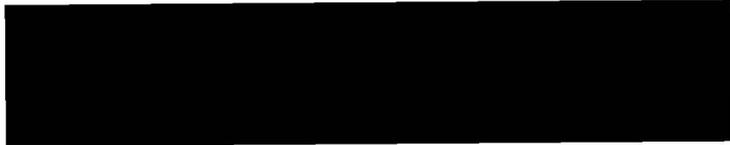
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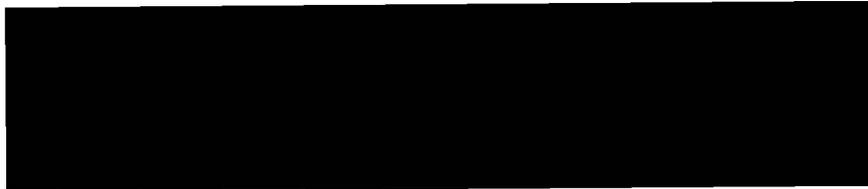
FILE: EAC 06 081 51409 Office: VERMONT SERVICE CENTER Date: NOV 18 2008

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.

Kevin S. Poulos for

John F. Grissom, Acting Chief
Administrative Appeals Office

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

The petitioner is a consulting company. The AAO notes that the petitioner's tax returns indicate its principal business activity is computer graphics. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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.

As set forth in the director's September 27, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on November 3, 2005. The proffered wage as stated on the Form ETA 9089 is \$52,520.00 per year. The Form ETA 9089 states that the position requires a bachelor's degree

in computer science or engineering and five years of experience in the job offered, or a Master's degree and no experience in the job offered.

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.¹ On appeal, counsel submits a copy of the petitioner's IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2005; a copy of the beneficiary's Form W-2 Wage and Tax Statement issued by the petitioner for 2005; a copy of the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return, for 2005; copies of the beneficiary's bi-weekly earnings statements issued by the petitioner for January 6, 2006 to July 7, 2006; letters dated July 27, 2006 and October 13, 2006 from [REDACTED] a, C.P.A.; copies of income statements and balance sheets for the petitioner from January 1, 2006 to July 31, 2006 and January 1, 2006 to September 30, 2006; a copy of the Condensed Payroll Journal – 3rd Quarter for the petitioner; and copies of the president of the petitioner's IRS Form 1040, U.S. Individual Income Tax Return, for 2004 and 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and to currently employ one worker. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 9089, signed by the beneficiary on January 17, 2006, the beneficiary claims to have worked for the petitioner from June 11, 2001 to October 31, 2005 as a programmer/analyst. Additional documentation submitted on appeal in the form of earnings statements for the beneficiary and a Condensed Payroll Journal for the petitioner shows the beneficiary to have worked for the petitioner from January 6, 2006 through September 29, 2006

On appeal, counsel asserts that the petitioner has the ability to pay the beneficiary in 2005 until the present time. Counsel states that a DOL Board of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO. Citing to *Ohsawa America*, 1988-INA-240 (BALCA 1988), counsel states that this case stands for the proposition that the \$4 million personal assets of the corporate owner were sufficient and should have been considered in determining the ability to pay the proffered wage in that case. Counsel does not state how DOL precedent is binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS) are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

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

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 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, counsel asserts that as of July 2006, the petitioner has paid the beneficiary a bi-weekly salary of \$2,019.23 which is equivalent to \$54,519.21 per year and thus has demonstrated its ability to pay the proffered wage. In support of his assertions, counsel submits a Condensed Payroll Journal for the 3rd Quarter of Spline Technologies, Inc. showing that from July 7, 2006 to September 29, 2006 the beneficiary received a bi-weekly salary of \$2,019.23. The AAO notes that the petitioner must show its ability to pay the proffered wage as of the priority date, in this case November 3, 2005. The AAO observes that the record includes bi-weekly earnings statements for the beneficiary from January 6, 2006 to July 7, 2006 showing that the petitioner paid the beneficiary \$20.00 an hour for a 40 hour work week which is equivalent to an annual salary of \$41,600.00. The record also includes the beneficiary's IRS Form 1040, U.S. Individual Income Tax Return, for 2005 showing that his wages totaled \$41,600.00 for the year. The AAO thus finds that the petitioner has not established that it paid the beneficiary an amount at least equal to the proffered wage during the given period.

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

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

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

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

The record before the director closed on August 18, 2006 with the receipt by the director of the petitioner's response to the director's request for evidence (RFE). As of that date, the petitioner's 2006 federal income tax return was not yet due. The petitioner's tax returns demonstrate its net income for 2005 as shown in the table below.

- In 2005, the Form 1120S stated net income² of \$250.

Therefore, for the year 2005, the petitioner did not have sufficient net income to pay the difference between the wages paid of \$41,600.00 and the proffered wage of \$52,520.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005.

- In 2005, the Form 1120S stated net current assets of \$1,985.

Therefore, for the year 2005, the petitioner did not have sufficient net current assets to pay the difference between the wages paid to the beneficiary and the proffered wage.

Thus, from the date the Form ETA 9089 was accepted for processing by the DOL, 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, or its net income or net current assets.

On appeal, counsel submits individual income tax returns on behalf of the president of the petitioner to show the petitioner's ability to pay the proffered wage. Contrary to counsel's assertion, CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

² Ordinary income (loss) from trade or business activities as reported on Line 21.

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

Counsel also submits letters dated July 27, 2006 and October 13, 2006 from [REDACTED] C.P.A. compiling the balance sheets and including an income statement of the petitioner as of July 31, 2006 and September 30, 2006. The regulation at 8 C.F.R. § 204.5(g)(2) 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. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, 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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 9089 was accepted for processing by the DOL.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified for the proffered position.⁴ 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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The ETA Form 9089 submitted with the instant petition, indicates in Section H, Items 4 and 4-B, that a bachelor's degree is the minimum education level with major studies in computer science. In Section H, Item 6, the petitioner also indicated that sixty months (five years) of work experience in the proffered job was required. In Item 7 through 7-A, the petitioner indicated that an alternate field of study was acceptable in engineering, and in Item 8 through 8-A, indicated that an alternate combination of education and experience was acceptable with a master's degree and no experience required. The petitioner did indicate in Section H, Item 9, that a foreign educational equivalent was acceptable. Since this is a public record, the duties of the proffered position will not be recited in this decision. Section H, Item 14 of Form ETA 9089 states the following special requirements: Must have experience in graphic design, web design, windows networking, HTML, 3D Studio, AutoCad & Corel Draw required.

⁴ The director did not note this issue in his decision, nor did the petitioner address this issue on appeal.

The beneficiary set forth his credentials on the Form ETA 9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. In Section J, Items 11 through 16, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation was a bachelor's degree in engineering (computer science), and that his education at Gulbarga University in Gulbarga, Karnataka, India ended in 1996.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA 9089 which, in this case, includes a bachelor's degree in computer science or engineering or a foreign equivalent degree in the same field, with sixty months of relevant work experience or a master's degree and no prior experience prior to the 2005 priority date. To document the beneficiary's experience, the record includes a letter of employment from [REDACTED], President and CEO, Softpath Systems, dated June 30, 2006 stating that the beneficiary was employed as a Programmer/Analyst from December 4, 2000 to April 30, 2001; a letter of employment from Bharat Patel, Technical Director, Creative Consultants, dated August 14, 2006 stating that the beneficiary was associated with the company as a Trainee Programmer and was subsequently promoted to Programmer which he held from February 1, 1996 to April 30, 1999; and a letter from [REDACTED], HR – Manager, Bharat Infotech, dated October 12, 2000 stating that the beneficiary was working as an Executive in Information Systems from June 1999 to the date of the letter. The record also includes an offer of employment to the beneficiary from Bharat Infotech dated May 27, 1999 stating that the beneficiary was appointed as a Programmer as of June 2, 1999. The AAO observes that the total experience of the applicant equates to five months at Softpath Systems; three years and three months at Creative Consultants; and one year, 4 months and 10 days at Bharat Infotech. As such, the record establishes the beneficiary's relevant work experience as totaling in excess of the requisite five years of prior work experience. The AAO will not address the beneficiary's work experience any further in these proceedings.

The petitioner did not clearly delineate four years as the number of years required for the bachelor's degree requirement on the Form ETA 9089. It is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

Evaluating the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea, Inc.*, 19 I&N 817 (Comm. 1988), provides: “[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.”

The AAO notes that the statement of equivalency submitted by The Trustforte Corporation does not explain how it analyzed the beneficiary's coursework in either general studies or computer science and engineering while he studied at Gulbarga University. The evaluator comments that the general studies include entry-level courses in the social sciences, mathematics, and the sciences, which are a requisite component of a bachelor's degree from an institution of higher education in the United States and that most such courses would qualify as equivalent courses in US colleges and universities. The evaluator also notes that the beneficiary completed specialized courses in his area of concentration, and that the nature of the courses and the credit hours involved indicate that he attained the equivalent of a Bachelor of Science Degree in Computer Engineering from an accredited college or university in the United States. While the AAO acknowledges the evaluator's assertions and the copy of the beneficiary's degree issued by Gulbarga University, it notes that the record fails to include a transcript of the beneficiary's course of studies at Gulbarga University that would document the

specific courses taken by the beneficiary, the amount of time studied at the university, and an explanation of how the evaluator arrived at his conclusions. Thus the evaluation report submitted to the record is given only limited weight in these proceedings. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In the instant matter, the beneficiary is required to have a bachelor's degree or master's degree on the Form ETA 9089 based only on his academic studies. Thus, the beneficiary's academic qualifications alone may or may not establish the beneficiary's eligibility for an immigrant employment based classification.

In examining the beneficiary's academic qualifications, the AAO notes that the applicant received his bachelor's degree from Gulbarga University in India. The record does not establish that the beneficiary has obtained a master's degree or its equivalent.

The proffered position identified on the Form ETA 9089 requires a bachelor's degree and five years of experience or a master's degree and no experience. Because of those requirements, the proffered position would appear to be for a professional. However, DOL assigned the occupational code of 15-1051.00, Computer Systems Analysts, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database, O*NET, 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 Four requiring "Considerable Preparation Needed" for the occupation type closest to the proffered position. *See* <http://online.onetcenter.org/link/summary/15-1051.00> (accessed November 17, 2008). According to DOL, a minimum of two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See id.* O*NET also states "[a] minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years of accounting to be considered qualified." *See id.*

Based on the above description, while the proffered position could be analyzed as a professional in most instances, it appears that some of the positions in this classification could also be analyzed as a skilled worker since the stated occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience. However, if the AAO were to consider the instant petition as filed as a skilled worker, the petitioner still has to establish that the beneficiary has the equivalent foreign degree stipulated in the Form ETA 9089.

The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(1)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language 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. The petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. In the instant petition, the Form ETA 9089 stipulates a bachelor's degree, which usually requires four years of university level studies, or a master's degree.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years employment experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, *and any other requirements of the individual labor certification*, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the beneficiary must have a four-year bachelor's degree or its foreign equivalent in agriculture.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a “skilled worker,” the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form 9089 which, in this case, includes a bachelor's degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirements on the Form 9089 of a U.S. bachelor's degree or an equivalent four year foreign degree to a U.S. bachelor's degree.⁵

The beneficiary was required to have a bachelor's degree or master's degree on the Form ETA 9089. Based on the beneficiary's educational documentation, namely, his degree from Gulbarga University in India, he does not possess a bachelor degree or its equivalent in computer science or engineering, the fields stipulated in the Form ETA 9089. Thus the petitioner has not met its burden. The appeal is dismissed.

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

ORDER: The appeal is dismissed.

⁵ Under the skilled worker classification, the petitioner would also have to establish that the beneficiary had five years of relevant experience. The record, based on various letters of work verification, clearly establishes the beneficiary's requisite five years of work experience.