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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS2090
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U.S. Citizenship and Immigration Services

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[redacted]

File: EAC 06 091 51956 Office: NEBRASKA SERVICE CENTER Date: APR 07 2009

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner's business is legal services, business services, travel and tours. It seeks to employ the beneficiary permanently in the United States as an interpreter/translator. The petition is accompanied by a copy of the Form ETA 750, Application for Alien Employment Certification, certified by the U.S. Department of Labor (DOL).[1] As set forth in the director's denial dated January 17, 2007, 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.

Beyond the decision of the director, an issue in this case is whether or not the petitioner has the ability to pay the proffered wages to each of the beneficiaries that it sponsored from the priority date of each petition and continuing until the beneficiary of each petition 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*, 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).

Also beyond the decision of the director, another issue in this case is whether or not the beneficiary is qualified to perform the duties of the proffered position and satisfied the minimum level of education stated on the labor certification, specifically a Bachelor of Arts in linguistics (or a related field) in English language or English literature.

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.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of

[1] As required by statute, the petition is not accompanied by an original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor. *See* 8 C.F.R. § 103.2(b)(4). The petitioner has the burden to submit the original labor certification by requesting USCIS secure from DOL a duplicate original. Should the original be in another case file, counsel may identify and request that USCIS secure that case file and consolidate it with the current matter. Counsel identified that this matter involved the substitution of a beneficiary, but did not indicate the receipt number to coordinate the original Form ETA 750.

> employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the proffered wage beginning on the priority date.

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 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 750 Application for Alien 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 750 was accepted on April 17, 2001. The proffered wage as stated on the Form ETA 750 is $38,355.00 per year. The petitioner filed the Form I-140 on February 8, 2006. According to the record of proceeding the petitioner requests to substitute another **beneficiary.**[2,3]

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[2] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services ("USCIS") based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

[3] The petitioner submitted the substituted beneficiary's qualification and work experience on Form ETA 9089, new labor certification format available after implementation of PERM. New U.S.

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.

Relevant evidence in the record includes letters from the petitioner dated January 7, 2006, inter alia, requesting substitution of the beneficiary; a copy of Form ETA 750, Application for Alien Employment Certification, approved by DOL; an uncertified Form ETA 9089 listing the substitute beneficiary's qualifications and work experience (i.e. Application for Permanent Employment Certification); two letters from the petitioner's accountant: one dated December 29, 2005, with an exhibit, and one dated September 11, 2006, also with an exhibit; an "automatic loan payment" statement dated as of December 22, 2005, mentioning two individuals;[4] two individual's money market, checking, savings and certificate of deposits account statements for the time period November 24, 2005, to December 22, 2005; the petitioner's U.S. Internal Revenue Service (IRS) Form 1120 tax returns for 2001, 2002, 2003, 2004, and 2005; a letter from counsel dated September 9, 2006; a letter from Colonial American Bank dated September 9, 2006; two individual's money market, checking, and certificate of deposits account statements for the time period May 23, 2006, to June 22, 2006; and, copies of documentation concerning the beneficiary's qualifications as well as other documentation.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1989 and to currently employ eight workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. The net annual income and gross annual income stated on the petition were $2,220.00 and $924,648.00 respectively. On the Form ETA 9089, signed by the beneficiary on January 31, 2006, the beneficiary listed that he worked for the petitioner from January 2004 to January 2005 as a project director.

On appeal, counsel asserts that additional evidence submitted demonstrates the petitioner's ability to pay the proffered wage.

Accompanying the appeal, counsel submits an explanatory letter from the petitioner dated February 14, 2007; a letter from the petitioner's accountant dated February 14, 2007, with an exhibit; a letter from Colonial American Bank dated February 15, 2007; and an appraisal report for 923 Arch Street,

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Department of Labor (DOL) labor certification regulations "PERM" became effective as of March 28, 2005. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[4] There is no information in the record concerning these individuals' ownership interests, if any, in the petitioner corporation.

Philadelphia, Pennsylvania, which shows that the property is owned by individuals (i.e. not the petitioner) dated as of April 6, 2004, including a copy of a deed.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) 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 Sonegawa,* 12 I&N Dec. 612 (BIA 1967).

Ability to Pay the Proffered Wage and the regulation at 8 C.F.R. § 204.5(g)(2)

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 has not submitted any Wage and Tax Statements (W-2) to establish that it employed and paid the beneficiary the full proffered wage from the priority date.

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, USCIS 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 sales and profits that exceeded the proffered wage is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's tax returns demonstrate the following financial information concerning the petitioner's ability to pay:

- In 2001, the Form 1120 stated net income[5] of $544.00.

[5] For corporations, net income is taken from Line 28 of Form 1120.

- In 2002, the Form 1120 stated net income of $13,357.00
- In 2003, the Form 1120 stated net income of $10,218.00
- In 2004, the Form 1120 stated net income of $2,220.00
- In 2005, the Form 1120 stated net income of $41,219.00.

Since the proffered wage is $38,355.00 per year, the petitioner did not have sufficient net income to pay the proffered wage for years 2001, 2002, 2003, and 2004 (from the April 17, 2001 priority date).

If the net income the petitioner demonstrates it had available during the 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, USCIS 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, USCIS 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[7] are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The petitioner's net current assets during 2001, 2002, 2003, 2004, and 2005 were $5,465.00, $16,237.00, $40,684.00, $52,948.00, and $104,740.00.

Based on the petitioner's net current assets, it cannot demonstrate its ability to pay the proffered wage from the petitioner's net current assets for 2001 and 2002, but it would have sufficient net income for 2003, 2004 and 2005 to pay the instant beneficiary. However, the petitioner has filed for

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[6] 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

[7] The petitioner's accountant in several exhibits submitted into evidence through an additive calculation included corporate assets and liabilities, with "cash reserves" presumably those referred to as held by the owners of the petitioner in their individual capacities, and the valuation of an office building all as evidence of the petitioner's ability to pay the proffered wage. As stated in this discussion, assets of the petitioner's shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage

several other beneficiaries as noted below. The evidence submitted in the record does not demonstrate that the petitioner's net current assets would be sufficient in 2003, 2004 or 2005 to pay all sponsored workers whom have petitions pending.

USCIS electronic records indicate that the petitioner has filed three other I-140 petitions[8] which have been pending during the time period relevant to the instant petition; of four total petitions filed three were denied by USCIS (including the subject petition) and one was approved. 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. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending 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 petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (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). *See also* 8 C.F.R. § 204.5(g)(2).

The record in the instant case contains no information about the proffered wages for the beneficiaries of the other three petitions submitted by the petitioner, nor about the current immigration status of those beneficiaries. The record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition for the time period in question. Additionally, from the record it is unclear whether the petitioner could pay the respective proffered wages for all sponsored workers.

Counsel has submitted two individuals personal market, checking, savings and certificate of deposits account statements. As further evidence of the ability to pay, the petitioner's accountant in his letter dated December 29, 2005, stated that the owners of the petitioner have personal assets including a four-story office building at [redacted], and cash deposits as well as a "business reserve," which the accountant asserts is all evidence of the petitioner corporation's ability to pay the proffered wage.

Contrary to the petitioner's evidence submission, USCIS may not "pierce the corporate veil" and look to the assets of the corporation's owner(s) 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.

[8] Identified in the electronic records of USCIS as EAC 04 075 51512 (denied on May 25, 2004); EAC 04 250 50482 (approved on May 25, 2004); and EAC 03 181 52053 (denied on April 12, 2004).

The petitioner's accountant submitted letters dated December 29, 2005, September 11, 2006, and February 14, 2007, with exhibits evidencing various financial calculations as evidence of the ability to pay the proffered wage. The petitioner's accountant in an additive calculation included corporate assets and liabilities, with "cash reserves" presumably those referred to as held by the owners of the petitioner in their individual capacity, and the appraised valuation of an office building as evidence of the petitioner's ability to pay the proffered wage. As already stated in this discussion, assets of the petitioner's shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Further the petitioner's accountant has opined that by deducting the petitioner's operating expenses and cost of goods sold for years 2003, 2004 and 2005 from revenues for each of those years, the petitioner's resultant pretax income for those years is evidence of the petitioner's ability to pay the proffered wage. However the accountant has not explained why the petitioner's net income is not a realistic figure for those same years.[9]

The petitioner's accountant contends that with the permanent employment of the beneficiary as an interpreter/translator, its business income that will increase. No detail or documentation has been provided to explain how the beneficiary's employment as an interpreter/translator will significantly increase petitioner's profits since the beneficiary did claim to have worked for the petitioner from **January 2004 to January 2005 as a project director. Going on record without supporting** documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The petitioner's net income is examined from the priority date. It is not examined contingent upon some event in the future. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

The evidence submitted fails to establish that the petitioner has the continuing ability to pay the instant beneficiary the proffered wage beginning on the priority date in years 2001 and 2002. Further, it is unclear from the record of proceeding whether the petitioner can pay the proffered wage for all sponsored workers in 2003, 2004 or 2005.

Qualifications of the Beneficiary and the Regulation at 8 C.F.R. § 204.5(l)(2)

An issue in this case is whether or not the beneficiary's education satisfies the minimum level of education stated on the labor certification, which is a Bachelor of Arts degree in linguistics, or related field of the English language or English literature.

With the petition counsel submitted the beneficiary's resume; a letter dated November 30, 2005, from [redacted], president of [redacted], [redacted] Peoples Republic of China, with English translation stating that the beneficiary was employed there as an English-Chinese translator/interpreter from September 1, 1998 to November 1, 2001; a diploma from the

[9] As established by settled precedent, net income is the proper figure for consideration in these matters. *See Elatos Restaurant Corp. v. Sava,* 632 F. Supp. at 1054.

University of North Carolina at Pembroke dated 2004 conferring upon the beneficiary a Master of Business Administration degree; and a credential evaluation dated September 27, 2004; from Evaluation Service, Inc., by [redacted] director.

On June 22, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence that the beneficiary had the required a Bachelor of Arts in linguistics (or a related field) in the English language or English literature by the time of the priority date.

The petitioner responded to the RFE on September 9, 2006, by submitting an academic credential evaluation report dated August 14, 2006, from World Academic Research Center, Inc. (no business address provided); a foreign language document with an English translation of the beneficiary's Bachelor's degree from Tianjin College of Finance and Economics as issued June 26, 1999; and a letter dated July 12, 2006, from [redacted] president of [redacted], Nanning Guangxi, Peoples Republic of China, with an English translation stating that the beneficiary was employed there as an English-Chinese translator/interpreter from September 1, 1998 to November 1, 2001.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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

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

According to the beneficiary's resume, the Application for Permanent Employment Certification, ETA Form 9089, as well as described in the petitioner's letter dated January 7, 2006, the beneficiary possesses a Bachelor of Science degree in accounting based on four years of education received at Tianjin College of Finance and Economics.

The beneficiary additionally has a diploma from the University of North Carolina at Pembroke dated 2004 conferring upon the beneficiary a Master of Business Administration degree.

Thus, the issues are whether the beneficiary's four-year degree is equivalent to a U.S. baccalaureate degree in the required field of a Bachelor of Arts in linguistics (or a related field) in the English language or English literature, or, if not, whether it is appropriate to consider the beneficiary's Master of Business Administration degree[10] and work experience in addition. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

[10] The beneficiary obtained his MBA after the priority date and therefore it would not be considered in determining whether the beneficiary had the requisite education credentials. Further, the beneficiary's MBA is unrelated to the required field of study.

> (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).[11] **Id. at 423. The necessary result of these two grants** of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

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. 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.

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[11] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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).

The key to determining the job qualifications is found on Form ETA 750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions

of the job offered. It is important that the ETA 750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

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

On the Form ETA 750A, the "job offer" position description for an interpreter/translator provides:

> Translates English and Chinese spoken passages or translates documents and other material from one language to another: Provides consecutive or simultaneous translation between languages for individuals, business establishments, government agencies and academic institutions. In consecutive interpreting listens to complete statements in one language, translates to second, and translates responses from second into first language. Expresses either approximate or exact translation, depending on nature of occasion. Reads material and rewrites material in specified language or languages, following established rule pertaining to factors, such as word meanings, sentence structure, grammar, punctuation, and mechanics.

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

Education:	Grade School: none listed; High School: none listed; College: 4 years; College degree: "BA in linguistics or related field"
Major Field Study:	"English language or English Literature"
Experience:	2 years in the position offered, or 2 years as an Interpreter or Translator.

Other special requirements: Must be able to interpret English and Chinese.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

The petitioner submitted two evaluations of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

Evaluation One.

- Evaluation: from Evaluation Service, Inc. of Hopewell Junction, New York, dated September 27, 2004, by [redacted], director.
- There is no reference in the evaluation concerning the beneficiary's educational documents, what documents were examined, or did the evaluator provide any information concerning her expertise, training, education, accreditation or ability to evaluate the beneficiary's credentials.
- According to the evaluator the beneficiary has the academic equivalent of a bachelor's degree in accounting and computer science from a regionally accredited institution in the United States.

The evaluator's opinion therefore is that the beneficiary's has a university degree in accounting and computer science, which is a degree in a field unrelated to the required "BA in linguistics or related field" in English language or English Literature.

Evaluation Two:

- Evaluation: World Academic Research Center, Inc., dated August 14, 2006.
- The evaluation referenced an educational document specifically a "certificate of Bachelor's Degree and Diploma granted by the Tianjin College of Finance & Economics."
- According to the evaluator the beneficiary majored in English linguistics described as a second major in the Department of Foreign Language for Business and Economics.
- According to the evaluator the beneficiary was awarded the degree of Bachelor of Arts in July of 1999 by the Tianjin College of Finance & Economics, and that this degree is the equivalent of the Bachelor of Arts degree in foreign languages (English).

The record of proceeding does not contain the beneficiary's transcripts to verify his program of study. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

As already stated according to the beneficiary's resume, the Application for Permanent Employment Certification, ETA Form 9089, as well as described in the petitioner's letter dated January 7, 2006, the beneficiary possesses a Bachelor of Science degree in accounting based on four years of

education received at Tianjin College of Finance and Economics. Therefore, both the petitioner's and beneficiary's description of the beneficiary's university degree was a Bachelor of Science degree in accounting, not a Bachelor of Arts degree in foreign languages (English). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The second evaluator's opinion is not supported by evidence in the record and in fact is inconsistent with the beneficiary's sworn statements in the form ETA 9089 and the petitioner's letter mentioned above that the beneficiary possesses a Bachelor of Science degree in accounting. Although we note that the translation of the diploma[12] in the record states that the beneficiary has specialized in English linguistics "in the department of foreign language" for business and economics in Tianjin College of Finance and Economics, the diploma translation does not mention a Bachelor of Science degree in accounting or studies in computer science specified in the first evaluation. Therefore, the diploma translation is inconsistent with other evidence in the record.

Also, the petitioner did not list that the beneficiary could meet the requirements of the petition through any field of accounting, or through any alternate combinations of education and experience.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the education requirements of the certified labor certification; and, the petitioner has not demonstrated its ability to pay the proffered wage for the entire period from the priority date, and for all the beneficiaries for which petitions have been filed and are pending.

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.

[12] There is a note on the diploma translation that states "(This is the double major degree)," but no course transcript or any explanation is provided in the record to support this written comment.