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U.S. Citizenship and Immigration Services

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MAR 11 2009

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

LIN 04 236 50562

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 or reopen, 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 is an information technology solutions and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the petitioner had not established the beneficiary had the equivalent of a four-year bachelor's degree in computer science, information systems, math or business. The director determined that the beneficiary's three-year bachelor of commerce degree from the University of Delhi, her GNIIT studies and postgraduate diploma from the Institute of Management & Technology, Ghaziabad, India were insufficient to meet the requirements of the Form ETA 750 as drafted. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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 August 8, 2005 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position. The AAO will also address additional issues raised by the AAO in its RFE after consideration of whether the beneficiary's academic qualifications meet the minimum educational requirements stipulated by the Form ETA 750.

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

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

> 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

Section 203(b)(3)(A)(i) of the Act 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. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

The petitioner must 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 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). Here, the Form ETA 750 was accepted on July 17, 2002.

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 brief and the following new evidence:

An affidavit[2] from [redacted], the petitioner's president, dated August 31, 2005. In his affidavit, [redacted] states that software consultants hired by the petitioner did not necessarily have to have four years of college education leading to a bachelor's degree. He also states the following:

> [T]he educational background of the [petitioner's] consultants varies from having U.S. baccalaureate degrees, to combinations consisting of 2+ years of college education, 3 years of college education, and 3 years of college education plus various 1 year of Post Graduate Degree, or Diplomas, or Certificates, all of which result in Bachelor's degree or education equivalent to a Bachelor's degree.

[redacted] also states that the petitioner considers the words "or equivalent" to mean that any combination of education is acceptable as equivalent to a bachelor's degree in conformance with the petitioner's hiring practices.

A copy of an Internet excerpt from the Board of Alien Labor Certification Appeals (BALCA) Benchbook, Chapter 4. According to the Benchbook excerpt, in cases in

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[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).

[2] This affidavit is contained in Exhibit H.

which applicants for labor certifications were required to hold a bachelor of science degree or its equivalent, the INS equivalency regulations at 8 C.F.R.§ 214.2(h)(4)(iii)(c)[3] were persuasive, but not binding. This excerpt cites a BALCA decision, *Syscorp International*, 89-INA-212 (April 1, 1991) in which the BALCA court determined that if an alien was found qualified for an H-1 visa, that requires a bachelor's degree or equivalent, this fact supported a finding that the alien was qualified for the job offered in the *Syscorp* decision. In this case, the beneficiary had obtained a degree from a foreign university with two years of coursework and various work experience, training courses and published articles, and the panel found the alien qualified for the position offered.

An additional educational equivalency report dated September 3, 2005, and written by [redacted] Evaluator, Education Evaluation and Immigration Services (EEIS), Potomac, Maryland. In this document, [redacted] provided an analysis of the beneficiary's three-year coursework for her degree from the University of Delhi. Dr. [redacted] examined the beneficiary's coursework and utilizing the Carnegie Unit equivalence, determined the beneficiary had 133 U.S. credit hours based on her studies. The evaluator determined that the beneficiary had more than the 120 credit hours generally required for completing a bachelor's degree in the United States.

Copies of newspaper advertisements from *The St. Louis Post-Dispatch*, April 21, 2002, and May 5, 2002 for the proffered position. The advertisements state that petitioner will accept "Bachelor's + 5 years progressive exp. as equiv. to Masters & 3 years exp."

Copies of two letters written by [redacted] Director, Business and Trade Services, U.S. Citizenship and Immigration Services (USCIS) dated January 7, 2003 and July 23, 2003 in response to inquiries from two immigration practitioners; and

An Internet excerpt from the Wharton School MBA program website that answers frequently asked questions about the MBA program. Counsel highlights a question with regard to whether a student with a three-year undergraduate baccalaureate degree was eligible to apply to the Wharton MBA program.

In a letter dated November 18, 2005, counsel also submits a copy of *Grace Korean United Methodist Church v. Chertoff,* 437 F. Supp.2d 1174 (D. Ore. Nov. 3, 2005) and described the holdings in this district court decision. Counsel also notes that the instant labor certification did not require four years of college for a bachelor's degree. Counsel also states that the applicant has a three-year bachelor's degree that is equivalent to a U.S. bachelor's degree and the petition is approvable under the "professional worker" qualification, or in the alternative, the petition is approvable under the skilled worker classification that does not require a bachelor's degree.

[3] The AAO notes that this regulation pertains to beneficiaries for H-1B nonimmigrant petitions, and not for the employment-based third preference petitions.

With the initial petition, the petitioner submitted the following documents:

A copy of a diploma from Lindenwood University, St. Charles, Missouri, dated December 30, 2003 that states the beneficiary received a Master of Business Administration;[4]

A copy of a diploma from the University of Delhi dated 1998, that states the beneficiary completed her studies in the three-year Bachelor of Commerce (Honours Course) under the 10+2+3 scheme;

A copy of the beneficiary's Statement of Marks dated July 7, 1996 that examined marks received for eleven papers;

A copy of the beneficiary's Statement of Marks for a Distance Learning Program with IMT, Ghaziabad, India. The document notes the session for which the marks are provided was July [with rest of the date illegible]. The document lists eight subject codes with marks obtained and is dated October 7, 1999.

A copy of a document from the Academic Council of NIIT (National Indian Institute of Technology). The document states that the beneficiary's performance was good and that she had achieved the Title of GNIIT in Systems Management, as of July 20, 1998.

A copy of two NIIT transcripts dated December 27, 1994 and January 31, 1996 for semester P and Q respectively; and

A copy of two additional NIIT transcripts dated July 10, 1998 for two Professional Practice sessions from June 30, 1997 to June 30, 1998; and

Copies of Microsoft training undertaken by the beneficiary in 1998 and 1999, as well as copies of the beneficiary's Marks Statement for her secondary school examination in 1992, and her senior school examination in 1994.

[4] The beneficiary received this degree in December 30, 2003 after the July 17, 2002 priority date for the instant petition was established. Thus, the beneficiary's MBA degree from Lindenwood University is not dispositive of the beneficiary's qualification as of the 2002 priority date, and will not be discussed further in these proceedings.

In response to the director's Request for Further Evidence,[5] dated April 29, 2005, the petitioner submitted an initial EEIS academic evaluation report written by [redacted] dated May 11, 2005. The evaluator stated that the beneficiary's three-year baccalaureate degree in commerce from the University of Delhi was "equivalent to a bachelor's degree in a business-related field from an accredited U.S. college or university." The evaluator stated that bachelor of commerce degree programs in India are very intensive in terms of number of lecture hours, and thus, a student completed the equivalent of the number of credit hours required in a U.S. college or university.

The evaluator also noted that the beneficiary was awarded a diploma in business management by the Institute of Management Technology (IMT) in Ghaziabad, India. The evaluator stated that the diploma is dated October 7, 1999 and is the equivalent of one year of management education from a U.S. accredited college or university. The evaluator also noted that the beneficiary was awarded the title of GNIIT in Systems Management on July 20, 1998 by NIIT. The evaluator stated that to complete the NIIT program an individual had to complete five semesters of coursework and a year of practical training. Finally the evaluator appears to state that in conjunction with the beneficiary's bachelor of commerce degree, her diploma in business management and the nature of courses and credit hours completed as part of the beneficiary's coursework for GNIIT, the beneficiary's academic qualifications were equivalent to a bachelor's degree in business administration with a major in computer information systems from an accredited U.S. university. The evaluator also concludes that the three-year bachelor of commerce degree alone is equivalent to a four-year U.S. bachelor's degree. The second part of the evaluator's conclusion is based on a combination of the beneficiary's three programs of study.

The record does not contain any other evidence relevant to the beneficiary's educational qualifications to perform the duties of the proffered position.

On appeal, counsel cites *Grace Korean* and questions USCIS' qualifications to review the labor certification. Counsel also outlines five issues that counsel asserts are "factual and legal errors" that the director made. These five issues are:

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[5] The record reflects that the petitioner responded three times to the director's RFE, and dated all responses May 23, 2005. The RFE responses were received on May 24, 2005, June 16, 2005, and June 23, 2005. In the second response, counsel stated that the beneficiary's education had been evaluated to be the equivalent of a U.S. baccalaureate in business administration with a major in computer information systems. Counsel requested that in the alternative, the I-140 petition be processed under the EB3 category. In the third response, counsel further elaborated that the petitioner in the instant I-140 application was seeking classification under Section 203(b)(3)(A)(i) as a "skilled or professional worker." Counsel stated that the AAO in a recent decision referred to the Federal Register, and stated that persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience.

The petitioner's labor certification does not require four years of college education to obtain a bachelor's degree or equivalent;

The words "or equivalent" as listed in the labor certification do not mean a U.S. bachelor's degree or a foreign single-source degree, or a four-year degree;

The underlying I-140 petition is alternatively approvable as an employment-based third preference skilled worker under Section 203(b)(3)(A)(i) of the Act;

There is no statutory, regulatory, or policy requirement that a bachelor's degree for purposes of skilled worker has to be a single-source foreign degree equivalent or that it has to be a four-year degree; and

Department of Labor (DOL) and USCIS policy is to accept and allow three-year bachelor's and/or combination of other education for bachelor degree equivalencies for the skilled worker classification.

On August 5, 2008, the AAO issued a Request for Evidence (RFE) to the petitioner. The RFE requested further evidence to demonstrate that the beneficiary was qualified to perform the duties of the proffered position as set forth on the petitioner's Form ETA 750. Specifically, the RFE sought whether the beneficiary attended college and possessed a U.S. bachelor's degree or a foreign equivalent degree in computer science, information systems, mathematics or business, and also possessed two years of work experience in the proffered position or two years of work experience in software design and development or systems development.

The AAO noted that the record of proceedings reflected that the beneficiary possesses a three-year Bachelor of Commerce from the University of Delhi, attended a Distance Learning program at the Institute of Management Institute, Ghaziabad, India and was given the award of the title of GNIIT in Systems Management from the Academic Council of National Indian Information Technology on July 20, 1998 based on two years of instruction and one year of professional practice.

The AAO further noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees. Additionally, the AAO noted that the labor certification, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent when DOL oversaw the petitioner's labor market test.[6]

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[6] The U.S. Department of Labor (DOL) has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from [redacted] Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of

The AAO then noted that the documentation in the record of proceeding as currently constituted created ambiguity concerning the actual minimum requirements of the proffered position. Although the clearly stated requirements of the position on the certified labor certification application did not include alternatives to a U.S. bachelor's degree, the petitioner was now contending during the petition process before USCIS that the actual minimum requirements did include at least what the beneficiary has achieved through her three-year degree in commerce, and her subsequent education at IMT and NIIT.[7]

The AAO then noted that on appeal counsel submitted copies of newspaper advertisements from the *St. Louis Post-Dispatch* dated April 21 and May 5, 2002 that stated the petitioner sought employees with bachelor or master degrees. These advertisements did not provide any further explanation of the term "equivalent" related to the bachelor's requirement. The advertisements did state that the petitioner would accept a bachelor's degree with five years progressive experience as the equivalent to a master's degree and three years experience. The AAO stated that the petitioner's newspaper advertisements appeared to contradict the petitioner's comments made on appeal with regard to hiring individuals with less than a four-year baccalaureate degree in the fields outlined in the Form ETA 750.

The AAO requested a complete copy of the Form ETA 750 as certified by DOL including any documentation that summarized the petitioner's recruitment efforts[10] and its explicitly expressed intent

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"Equivalent Degree," 2 (June 13, 1994). DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. F[redacted] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [redacted] (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From [redacted] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [redacted], INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

[7] The AAO accessed NIIT's website to determine what type of educational services it provides. NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student. There is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program.

[10] Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). The petitioner's submission of the evidence requested therefore may help demonstrate that U.S. workers without four years of college and without bachelor's degrees were in fact put on notice that they were eligible to apply for the proffered position, despite the stated requirements of the Form ETA 750, and that the

concerning the actual minimum requirements of the proffered position.[11] The AAO also asked that the petitioner provide a copy of all supporting documents that might overcome any deficiencies or defects in the record, and that such documentation might include the individuals interviewed for the proffered position, and their academic qualifications. The petitioner did not respond.[12]

With regard to the beneficiary's actual academic credentials, the AAO outlined the evidence previously submitted to the record with regard to the beneficiary's academic credentials and also requested further clarification. The AAO noted that in the initial educational evaluation report written by [redacted], the evaluator stated that the beneficiary's baccalaureate degree in commerce from the University of Delhi was equivalent to a bachelor's degree in a business related field from an accredited U.S. college or university. The AAO noted that in the additional educational equivalency report dated September 3, 2005, provided an analysis of the beneficiary's three-year coursework for her degree from the University of Delhi, examined the beneficiary's coursework and utilizing the Carnegie Unit equivalence, determined the beneficiary had 133 U.S. credit hours based on her studies.

The AAO then stated that [redacted] provided a list of courses in his analysis submitted on appeal that was not found in the record, and was also not corroborated by the beneficiary's Statement of Marks for the University of Delhi previously submitted to the record. The AAO then stated that it could not determine the accuracy of [redacted]'s assertions. Further, the AAO noted that although [redacted] in his or her initial evaluation referred to the beneficiary's diploma from the IMT program at Ghaziabad, India, the record only contains a copy of a Statement of Marks with seven courses and a project listed, and that the record contained no copy of any diploma received through the IMT program. The AAO requested that the petitioner submit the beneficiary's IMT diploma.

The AAO also stated that for further information on these two institutions and on the beneficiary's Institute of Management Technology, (IMT) Ghaziabad coursework, and the NIIT and GNIIT credentials, it consulted the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). See the AACRAO website at http://www.aacrao.org/about/ (Accessed on July 25, 2008). The AAO noted that EDGE provides that both the University of Delhi and the IMT Ghaziabad are accredited

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petitioner did not in fact exclude U.S. workers with qualifications similar to those of the beneficiary from applying for and filling the position.

[11] This item requests recruitment information in order to allow DOL to determine whether the petitioner put forth good faith efforts to recruit U.S. workers which meet the regulatory guidelines found at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) or 20 C.F.R. § 656.21(j)(1)(i)-(iv),[11] depending on whether or not the Form ETA 750 was submitted under a supervised or unsupervised advertising or recruitment process.

[12] The regulation at 8 C.F.R. § 204.5(g)(2) states that the director, and by extension the AAO, may request additional evidence in appropriate cases. Although specifically and clearly requested by the AAO, the petitioner declined to provide its recruitment documentation. As previously stated, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

university programs, and that the IMT program is accredited through the Indian National Board of Accreditation. The AAO also noted that the website for the IMT program also provides additional information with regard to the Post Graduate Diploma in Management (PGDM) Programmes. *See*, for example, http://www.imt.edu/admissions_data.asp?option=PGDM&cat= (Accessed July 25, 2008.)

The AAO also stated that while EDGE confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. The AAO notes that the EDGE information conflicted with petitioner's submitted evaluation, which asserts that the beneficiary's three-year degree would be equivalent to a four-year U.S. Bachelor's degree.[13]

With regard to [redacted]s assertions that the beneficiary's coursework at the University of Delhi constituted the equivalent credit hours for a U.S. baccalaureate degree, the AAO stated that it consulted two of AACRAO's PIER publications: *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). One of the PIER publications reveals that a year-for-year analysis of credit hours is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at 180 explicitly states that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis."[14] The AAO noted that this information seriously undermined Dr. [redacted] evaluation submitted on appeal that attempts to assign credits hours for the beneficiary's three-year baccalaureate that are equivalent to or beyond a U.S. four-year baccalaureate.

The AAO also stated that EDGE discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. The AAO also noted that while EDGE provides that a Post Secondary Diploma is comparable to a year of university study in the United States it does not suggest that, if combined with a three-year degree, it may be deemed a

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[13] *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."

[14] The AAO also notes that the Carnegie Unit, the measure used by [redacted] evaluation is utilized to evaluate high school credits, and is not used for higher education credits. *See* http://www.carnegiefoundation.org/general/sub.asp?key=17&subkey=1874&topkey=17 (accessed November 8, 2008).

foreign equivalent degree to a U.S. baccalaureate, and that a Postgraduate Diploma following a three-year bachelor's degree, "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provide:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The AAO then noted that in the instant petition, the record was not clear that the beneficiary had a Post Graduate Diploma from the IMT Program, in addition to her three-year program at the University of Delhi. Thus, the AAO requested further clarification of the length and nature of the beneficiary's studies at the IMT program, as well as a copy of her diploma from the same program. The AAO stated that at a minimum, the petitioner needed to provide documentation as to the beneficiary's diploma from the program, and the necessary entrance requirements. The petitioner did not provide this documentation.

The AAO also noted that on page 47 of the 1997 *P.I.E.R.* report, it indicated that the GNIIT title requires a Class/Grade XII certificate and is considered primarily a vocational/technical qualification, while page 17 indicates that the National Institute of Information Technology (NIIT) is a proprietary non-university postsecondary education program. The AAO stated that for this reason, the AAO requested further corroboration as to the beneficiary's graduation from the NIIT program and the nature of her eligibility for the program.

The AAO also asked for further evidence with regard to the petitioner's continuing ability to pay the proffered wage, and also requested an additional letter of work verification for the beneficiary's prior work experience in India.

Although the AAO provided the petitioner with twelve weeks to respond to the RFE, as of the date of this decision, the petitioner has not provided any further evidence or documentation with regard to any of the issues raised by the AAO. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director, and by extension the AAO, may request additional evidence in appropriate cases. Although specifically and clearly requested by the AAO, the petitioner declined to provide its recruitment documentation and other requested evidence. As previously stated, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). For purposes of this proceeding, the AAO will review the matter based on the record as presently constituted.

With regard to counsel's reference to *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D.Or. 2005), and counsel's question as to USCIS's interpretation of the term foreign equivalent degree to mean a foreign, single source degree equivalent to a U.S. baccalaureate degree, the AAO notes that, relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit has 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 the 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, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

> 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 AAO is cognizant of the decision in [redacted], which finds that USCIS "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." A judge in the same district held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D. Ore Nov. 30, 2006). That court further concluded that while USCIS was reasonable in considering only education as equivalent to a degree, it was not reasonable in requiring

a single degree without considering the employer's intent. *Id.* at 8-9. *But see Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree).

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.

In this matter, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, has held that USCIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS 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. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS 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.

On appeal, counsel claims that the first error the director made in his denial of the petition is based on the fact that the labor certification does not require four years of college education to obtain a bachelor's degree or equivalent. Counsel's assertion is not persuasive. In the absence of a specific number of years, or the use of an undefined or unexplained "x" in the space for number of years, or further documentation from the petitioner as to its intentions with regard to minimum educational requirements, the director is well within his authority to determine that the stipulated bachelor's degree or equivalent for a professional classification is four years of college level instruction, pursuant to the precedent decision, *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). With the AAO's RFE, the petitioner was allowed an opportunity to submit further evidence to demonstrate that it allowed for the equivalent of a bachelor's degree based on a combination of education or experience in it recruitment and hiring. However, the petitioner failed to respond or submit further evidence.

Counsel claims the second error the director made in his denial is that the words "or equivalent" as listed on the labor certification do not mean a U.S. bachelor's degree or a foreign single source degree, or a four-year degree.

The petitioner, however, has provided no further evidentiary documentation on appeal or in response to the AAO's RFE to further explain its actual intentions with regard to these terms. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

With regard to the remaining three claimed errors, counsel states that the I-140 petition is approvable under the skilled worker classification, that no statutory, regulatory, or policy requirement exists that a bachelor's degree for skilled worker classification is a single source foreign degree equivalent or that it be a four-year degree, and that USCIS and DOL policy is to accept and allow three-year foreign bachelor's degrees and/or combination of other education for bachelor degree equivalencies for skilled worker petitions.

Counsel's comments on this issue are not persuasive. First, based on the DOL classification category and experience requirements for the proffered position, the petition appears to be for a professional position. Second, the Form ETA 750 specifically requires a bachelor's degree for the position. The petitioner must demonstrate that the beneficiary meets the requirements of the petition, even if the petition is considered as a skilled worker classification. The AAO cannot ignore or add to the terms of the certified Form ETA 750 in trying to determine the petitioner's intent at the time of filing the labor certification with DOL.

Related to the issue of equivalency, the petitioner has provided none of the requested documentation to establish this equivalency or to clarify the beneficiary's education in response to the RFE. Additionally, the petitioner's ads set forth only that a Master's degree and three years of experience would be accepted in lieu of a Bachelor's degree and five years of experience.

On appeal, counsel also relies on a letter from [redacted], Director of the Business and Trade Services Branch of USCIS' Office of Adjudications to support the petitioner's combining of degrees to arrive at the equivalent of a U.S. baccalaureate degree. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from [redacted], Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal

memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

Further, with regard to the January 7, 2003 and July 23, 2003 letters from [redacted] he does not purport to issue an opinion pertinent to the instant visa category, but only pertinent to visas filed pursuant to 8 C.F.R. § 204.5(k)(2). The regulations at 8 C.F.R. § 204.5(k)(1) and (2) refer to professionals holding advanced degrees. Mr. [redacted]s response clearly references I-140 petitions for members of the professions holding advanced degrees or aliens of exceptional ability. As such, the [redacted] letters are irrelevant to the instant visa category.

The AAO also notes that the BALCA Benchbook excerpt that the petitioner submitted on appeal references the INS [now USCIS] educational equivalency regulations at 8 C.F.R. 2014.2(h)(4)(iii)(c) that apply to non-immigrant H-1B beneficiaries, rather than the beneficiaries of employment based petitions. While the H-1B regulations do layout a path for the consideration of beneficiaries' education and progressive work experience in the determination of a baccalaureate degree, the employment-based regulations for the professional category do not allow for such a combination. Thus the Benchbook excerpt is also irrelevant in the present proceedings.

The instructions for the Form ETA 750A, item 14, provide:

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

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

14.	Education	
	Grade School	Completed
	High School	Completed
	College	Blank
	College Degree Required	Bachelor's Degree or equiv.
	Major Field of Study	Computer Science, Info. Systems, Math or Business

The applicant must also have two years of experience in the job offered or two years of work experience in the related occupation of software design and development or systems development. The duties of the proffered job are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A did not state any further special requirements.

The beneficiary set forth her credentials on Form ETA750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated she attended Bhagat Singh College,[15] New Delhi, India, studying commerce from July 1994 to May 1997, and received a bachelor's degree. She also stated she attended NIIT, in New Delhi, India, studying computer science, from March 1994 to June 1997, and received a diploma in computers. Finally the beneficiary stated that she studied at the Institute of Management Technology, in Ghaziabad, India, studying Business Administration, from July 1997 to July 1998, and received a postgraduate diploma.

With regard to her work experience, the beneficiary, in Section 15 of Form ETA 750B, stated she worked for the petitioner as a programmer analyst from January 2001 to the time she signed the ETA 750 Form on June 3, 2002, and that she worked for NIIT, Ltd., New Delhi, India as a senior system executive from July 1997 to June 2000.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA 750 which, in this case, includes an unspecified number of years of college, with a bachelor's degree or equivalent in computer science, information systems, math or business and two years in the proffered position or two years of work in software design and development or systems development. As counsel notes on appeal, the petitioner did not delineate four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A. However, it is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. at 244. 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 244. This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

8 U.S.C. §1153(b)(3)(A) currently provides:

> Visas shall be made available . . . to the following classes of aliens . . . (ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision for the requirement that the immigrant hold a baccalaureate.

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[15] This college is identified on the beneficiary's Statement of Marks from the University of Delhi.

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 USCIS), 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:

> Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both 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 (Nov. 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 as a member of the professions 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. *Matter of Shah*, 17 I&N Dec. at 245. 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."[16] As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context,

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[16] Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*)(defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). As previously stated, the regulations pertaining to the immigrant classification sought in this matter do not contain similar language. Further, the petitioner did not respond to the AAO's RFE regarding the beneficiary's education and the definition of equivalents.

Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree.* A diploma or certificate from an institution of learning other than a college or university is a different and distinct type of credential.

In evaluating the beneficiary's actual credentials, we look to the 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: "[USCIS] 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." With regard to [redacted] initial educational equivalency document and the second document submitted to the record on appeal, both documents state that the beneficiary's three-year bachelor's degree in commerce is the equivalent of a U.S. baccalaureate degree. This conflicts with the EDGE evaluation of a three-year bachelor of commerce degree. The petitioner did not respond to the AAO's RFE and address this point. The AAO notes that [redacted] did not provide any information on the documents that he or she consulted with respect to the beneficiary's courses at the University of Delhi.

The AAO also notes that the record does not contain any Statement of Marks with a breakdown of courses similar to the ones analyzed by [redacted] The record contains only one Statement of Marks for the year 1996 that pertains to the beneficiary's coursework at the University of Delhi. Thus, [redacted] expanded analysis of the beneficiary's coursework is given no weight in these proceedings without the supporting documentation. With regard to his or her initial evaluations, Dr. [redacted] appears to combine the beneficiary's NIIT studies with her three-year course of studies at the University of Delhi in arriving at his or her conclusion that the beneficiary had the equivalent of a bachelor of business administration with a major in computer information systems from an accredited U.S. university. However, the petitioner failed to establish that it would accept a degree based on equivalency. Thus, [redacted] evaluations are only given limited weight in these proceedings.

The proffered position requires a bachelor's degree or equivalent in computer science, information systems, math or business, and two years of experience. DOL assigned the occupational code of 030.062-010, Software Engineer, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g+Go (accessed July 24, 2008) 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" for the occupation type closest to the proffered position. According to DOL, 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." Additionally,

DOL states the following concerning the training and overall experience required for these occupations:

> 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 in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

The proffered position may be analyzed as professional since the position requires a bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation.

As the petitioner did not clearly establish whether it was filing the instant petition under the employment-based professional or skilled worker classification, the AAO will comment on the requisites of both classification in these proceedings.

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(l)(2). As noted, the regulation uses a *singular* description of foreign equivalent degree. The beneficiary does not have this.

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).

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 ETA 750 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 requirement on the Form ETA 750 of an equivalent foreign degree to a U.S. bachelor's degree, which the petitioner has not demonstrated.[17]

[17] Under the skilled worker classification, the petitioner would also have to establish that the

The beneficiary was required to have a bachelor's degree or equivalent on the Form ETA 750. Based on the beneficiary's educational documentation, namely, her diploma from the University of Delhi for a three-year baccalaureate degree, and her NIIT studies, she does not possesses a four-year bachelor degree in computer science, information systems, math or business, the fields stipulated on the Form ETA 750. Accordingly, the petition may not be approved under the professional category.

As stated previously, the AAO requested further documentation with regard to the beneficiary's educational studies at NIIT and IMT. The AAO also requested the petitioner's ETA Form 750 recruitment report with further information on the applicants recruited and their qualifications to evaluate further the petitioner's definition of equivalent. The petitioner failed to respond. Further, the AAO notes that in the newspaper advertisement submitted to the record, the petitioner defined what it would accept as equivalent to a Master's degree, but failed to designate any such equivalency for a Bachelor's degree. Thus, the petitioner has not met its burden. As the petitioner failed to establish that it would accept a bachelor's degree based on an equivalent combination or education, the petition may not be approved under the skilled worker category. The appeal is dismissed.

Beyond the decision of the director, the AAO finds that the petitioner has not established its ability to pay the proffered wage. 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).

In its RFE to the petitioner dated August 5, 2008, the AAO requested further evidence with regard to the petitioner's ability to pay the proffered wage as of the July 17, 2002 priority date. The AAO also requested a more substantive letter with regard to the beneficiary's previous work experience as a software engineer prior to the July 17, 2002 priority date.

With regard to the petitioner's ability to pay the proffered wage, the regulation at 8 C.F.R. § 204.5(g)(2) states:

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

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beneficiary had two years of relevant experience. The AAO will discuss whether the petitioner has established the beneficiary has the requisite work experience further in these proceedings.

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. Department of Labor. *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 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).

Here, the Form ETA 750 was accepted on July 17, 2002. The proffered wage as stated on the Form ETA 750 is $73,250 per year. The Form ETA 750 states that the position requires two years of work experience in the job offered.

The evidence in the record of proceeding shows that the petitioner is structured as a partnership. On the petition, the petitioner claimed to have been established in September 2, 1998, to have a projected gross annual income of $750,000 and a project net annual income of $175,000, and to currently employ "15 + 30"[18] workers. On the Form ETA 750B, signed by the beneficiary on June 3, 2002, the beneficiary claimed to have worked for the petitioner from January 2001 to the date she signed the Form ETA 750, Part B.

The petitioner with the initial petition submitted its Form 1065 U.S. Return of Partnership Income for tax year 2002, copies of the beneficiary's Forms W-2 Wage and Tax Statement for tax years 2002 and 2003 that indicate the petitioner paid the beneficiary $46,005 in 2002 and $43,497.50 in 2003, less than the proffered wage of $73,250. The petitioner also submitted copies of the beneficiary's pay statements for July 21, 2004 and August 5, 2004 that indicated she earned $22.50 an hour and had earned $1,800 for 80 hours of work in August and $2,295 for 102 hours of work in July 2004.

In its RFE, the AAO requested that the petitioner establish its ability to pay the proffered wage from the priority date to the present by supplying the most recent available W-2 forms for the beneficiary, annual reports, federal tax returns, audited financial statements, or other evidence showing that the petitioner could pay the beneficiary the proffered wage in 2002, the priority date year, and onwards, through the examination of wages paid to the beneficiary and the net income or net current assets.

The AAO also noted that 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 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 (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 AAO stated that based on USCIS internal computer records, the petitioner had submitted forty-eight petitions for either temporary or permanent employment-based petitions from November 2000 to the present, and that during the

[18] The petitioner in its cover letter stated it had 15 employees and 30 subcontractors.

period of time from the 2002 priority date to the present, the petitioner filed seven I-140 petitions. The AAO requested that the petitioner submit evidence to demonstrate that it has established the ability to pay the beneficiaries for all petitions pending or approved during the pertinent period of time in question. As stated previously, the petitioner submitted no further documentation to the record.

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

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 employed and paid the beneficiary the following wages: $46,005 in 2002, and $43,497.50 in 2003. The petitioner also submitted copies of the beneficiary's pay statements for July 21, 2004 and August 5, 2004 that indicated she had year-to-date earnings of $29,857.50 in August 2004. The petitioner therefore did not establish that it paid the beneficiary the full proffered wage as of the 2002 priority date and to the present time. Thus the petitioner has to establish its ability to pay the difference between the beneficiary's actual wages paid in tax years 2002 to 2004, and the proffered wage of $73,250.[19]

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*,

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[19] It is noted that the record of proceedings closed with the submission of the petitioner's response to the director's request for further evidence dated May 23, 2005. The AAO acknowledges that the issue of the petitioner's ability to pay the proffered wage was not raised by the director in his RFE; however, at the time the record closed the petitioner's 2003 and 2004 tax returns would have been available.

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 and wage expense 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.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. [USCIS] 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* 719 F. Supp. at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of $73,250 per year from the priority date:

- In 2002, the Form 1120 stated an ordinary net income[20] of $346,266.

Therefore, for the priority year 2002, the petitioner had sufficient net income to pay the difference between the beneficiary's wages in 2002 and the proffered wage. However, as stated previously, based on USCIS internal computer records, the petitioner had submitted forty-eight petitions for either temporary or permanent employment-based petitions from November 2000 to the present, and that during the period of time from the 2002 priority date to the present, the petitioner filed seven I-

[20]For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 22 of the petitioner's Form 1065, U.S. Partnership Income Tax Return. However, where a partnership has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf (Accessed November 5, 2007). In the instant case, the petitioner's Schedule K has relevant entries for additional income, deductions, investment interest and self-employment and, therefore, its net income is found on line 1 of the Analysis of Net Income (Loss) of Schedule K.

140 petitions. If the positions and respective salaries of the beneficiaries for these petitions were similar to the those of the beneficiary, the petitioner would not be able to establish its ability to pay the wages for all beneficiaries for whom the petitioner submitted petitions during the relevant period of time. Further, the record does not establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage for any later years, including tax years 2003 and 2004.

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, 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.[21] 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 net current assets during 2002 were $495,448.

Therefore, for the priority year 2002, the petitioner did have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage in 2002 based on its net current assets. However, again, the question arises as to whether the petitioner had the ability to pay the wages of all the remaining beneficiaries for whom the petitioner submitted petitions during tax year 2002. Further, the record contains no evidence as to the petitioner's ability to pay the wages of all beneficiaries during tax years 2003 and 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay all the beneficiaries on pending I-140 petitions 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. Thus, based on the petitioner's inability to pay the proffered wages for the beneficiary and any other beneficiaries in the relevant period of 2002 to 2004, the petition may not be approved.

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[21] 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.

Finally, the AAO notes that the petitioner has not established that the beneficiary has the requisite two years of prior work experience as stipulated on the Form ETA 750. In its RFE dated August 5, 2008, the AAO also requested a more substantive letter with regard to the beneficiary's previous work experience as a software engineer prior to the July 17, 2002 priority date. With the I-140 petition, the petitioner had submitted a letter of work verification and recommendation written by [redacted] NIIT Green Park Centre, New Delhi, India. The letter writer identified herself or himself as a group leader until November 1999, and stated that he or she knew the beneficiary for the last three years as a Senior System Executive from July 1997 to June 2000.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* 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.

In its RFE, the AAO noted that the letter submitted to the record from a coworker at NIIT appeared to be a letter of recommendation for the beneficiary and lacked detail as to the beneficiary's work duties and whether she worked full-time or part-time. The AAO requested a more substantive letter with regard to the beneficiary's previous work experience which the petitioner failed to provide. Therefore, the question with regard to the letter of work verification is not sufficiently answered, and is an additional ground to dismiss the appeal and deny the instant petition.

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.