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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

DATE: APR 20 2011 Office: TEXAS SERVICE CENTER FILE: [redacted] SRC 06 026 50301

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was approved by the Director, Texas Service Center and certified to the Administrative Appeals Office (AAO) on appeal. The AAO withdrew the director's decision and denied the petition. The matter is now before the AAO on a motion to reconsider. The AAO will grant the motion to reconsider and affirm its previous decision to deny the petition.

The petitioner, SS&T International, Inc., is a medical and laboratory equipment sales and service company. It sought to employ the beneficiary permanently in the United States as an Instrumental Manager Analyst Consultant. As required by statute, a ETA Form 9089, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

The director determined that the evidence established that the beneficiary satisfied the minimum requirements of the ETA Form 9089 as a professional, and approved the petition. The director then certified the decision to the AAO.[1]

On July 30, 2007, the AAO withdrew the director's decision to approve the petition.[2] It determined that the petitioner had failed to demonstrate that the beneficiary qualified as for the professional visa classification.[3] The AAO found that the petitioner had failed to establish that the beneficiary possessed

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[1] Certifications may occur when the regional center directors determine that the case involves an unusually complex or novel issue of law or fact. 8 C.F.R. § 103.4(a)(1).

[2] The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

[3] 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. 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.

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

a U.S. bachelor's degree or a foreign equivalent degree as required by the ETA Form 9089, Section H-4 to 4-A. The AAO additionally found the beneficiary's employment history as certified on the ETA Form 9089, contained inconsistencies unresolved by the record,[4] namely that the ETA Form 9089, which was signed by the beneficiary on October 22, 2005 had omitted his employment for the petitioner as a manager analyst consultant since June 1, 2003, as claimed by Peter Lue, the petitioner's president. Other payroll documents, however, reflected that the beneficiary had worked for other entities during the claimed time period that he worked for the petitioner.

The petitioner, through current counsel, filed a motion for reconsideration. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. A motion to reopen must state the new facts to be submitted in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Because this motion is submitted with new evidence that is consistent with the regulation, it will also be considered as a motion to reopen in accordance with 8 C.F.R. § 103.5(a)(2).

In this case, the priority date by which the beneficiary must have all the education, training, and experience specified on the labor certification was June 21, 2005.[5] The petitioner must also establish that it has had the ability to pay the proffered wage of $50,000 per year pursuant to 8 C.F.R. § 204.5 (g)(2). On the Form I-140 petition, filed on November 2, 2005, the petitioner claims to have been established on September 2, 1997, to gross "over $7,000,000," to have a net annual income of "Over $2,000,000 and to currently employ thirty workers.

It is noted that the ETA Form 9089, Part H set forth the minimum requirements for the position of instrumental manager analyst consultant. The proffered position requires a bachelor's degree in business administration and 12 months (or one year) of experience in the job offered or 12 months in the alternate occupation of clinical laboratory equipment technical services. Part H Item 7 and 7-A indicates that the employer will accept an alternate field of study to business administration defined

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> 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.

[4] The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[5] *See* 8 C.F.R. § 103.2(b)(1) and (12) and *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977).

as a "related field." Part 8 indicates that the employer will accept an alternate combination of education and experience defined in 8-A as "Other." The employer indicated the alternate level of education required in 8-B as "Credentials Evaluations or U.S. Equivalent." Item 14 of Part H reflects specific skills or requirements that the beneficiary must possess in an addendum to the ETA Form 9089. It states:

> Bachelor's Degree or Equivalent in Business Administration or Related Field; Adequate Analytical, Problem-Solving and Communication Skills; Familiarity with Clinical Laboratory Instruments, Preventative Maintenance, Service Contracts, and Repair Services such as Chemistry Analyzers, Hematology Analyzers, Blood Gas & Electrolytes, Coagulation Instruments, Immuno Assays and Elisa; Advance Computer Skills; Available to frequent travel to visit company's customers; Background Check; Drug Test; Immediately Available; Written Reference Required; Non Smoking at Place of Employment; Able to Work under Strict Time Constraints; Strong Oral and Written Communication Skills; Good Interpersonal Skills; Must be detail-Oriented; Must have excellent analytical skills.

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a "Other." In 11-A, the beneficiary further states that "other" means "U.S. equivalent of a bachelor's degree in business administration." He claims that this education was completed in 2003 on item 13. On item 14 in response to the query where this relevant education was received, it is stated "Foundation for International Services," which is a credentials evaluation service, not an educational service.

In corroboration of the ETA Form 9089, the petitioner provided a copy of the beneficiary's transcript from the [redacted] in Venezuela indicating that he had attended approximately two years of university-level studies at that institution.

As noted above, the AAO concluded in its prior decision that the beneficiary did not possess a single U.S. baccalaureate or foreign equivalent degree necessary to receive a professional visa classification.[6]

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[6] The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. The regulatory history affirms this position where the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added). There is no indication that a foreign equivalent degree to a U.S. bachelor's degree was contemplated to be a two or three year foreign bachelor's degree will not be considered to be the "foreign equivalent

While the skilled worker classification minimum requirements do not require that an applicant possess a baccalaureate degree to be classified as a skilled worker, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B).

The above regulation requires that the alien meet the requirements of the labor certification. As noted above, the ETA Form 9089 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.

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 the position and the alien are qualified for a specific immigrant classification. 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).[7] 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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degree" to a U.S. baccalaureate degree, which is generally found to require four years of eduction. *See Matter of Shah,* 17 I&N Dec. 244 (Reg. Comm. 1977). Further, where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees and/or work experience, the result does not represent a single degree from a college or university. This beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" from a college or university in the required field of study and does not qualify as a professional under section 203(b)(3)(A)(ii) of the Act.

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

* * *

> 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).

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

As noted in the AAO's prior decision, the petitioner submitted a credentials evaluation from the [redacted] in Bothell, Washington in support of the claim that the beneficiary possesses a foreign equivalent baccalaureate degree in Business Administration. First, neither the record nor this evaluation supports a claim that standing alone, the beneficiary's academic credentials represent a Bachelor's degree in Business Administration or any related field. The FIS determination that the beneficiary had a bachelor's degree was calculated from [redacted] combination of the completion of two years of academic study at the [redacted] and employment experience of approximately 11 ¼ years. This evaluation arrives at a U.S. bachelor's equivalency only by using a calculation equating three years of work experience to one year of university level study. However, this formula applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). Second, even if equating employment experience with baccalaureate study were acceptable in evaluating immigrant petitions, which, here it is not, the FIS evaluation based its calculation on two questionable employment verification letters. As stated in the AAO's request for evidence, the January 12, 2000, letter from Orientacion [redacted] claiming the beneficiary worked as an Administrative Services and Technical Support employee from January of 1991 to December of 1999 failed to specify the beneficiary's duties as a person engaged in "administrative services and technical support" and failed to identify whether the beneficiary worked full-time or part-time to determine the overall length of the experience.

A second letter from Orientacion [redacted] dated February 15, 2010, was submitted in response to the AAO's request for evidence. Although it described the beneficiary's duties for this company, it failed to specify whether this job was part-time or full-time. The second letter also changed the beneficiary's position title to "sales and technical support manager" without explanation for the difference in title between the two letters. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The other letter upon which FIS based its evaluation is dated June 2, 2003, and is signed by "Danny [redacted] as Secretary of the [redacted] The letter is on this company's letterhead. The letter states that the beneficiary was the "[redacted] from January 2001 until his voluntary resignation in May 2003. The letter describes the

[8] A United States baccalaureate degree is generally found to require four years of baccalaureate education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

beneficiary's duties and endorses his qualifying experience. It is noted that online Florida corporation records indicate that the beneficiary was the president of this company. Therefore Mr. [redacted] endorsement does not establish that he was the beneficiary's employer or trainer as required by the regulation at 8 C.F.R. § 204.5(g)(l) or that he worked full-time in the position stated by [redacted] It is noted that the company is inactive and was administratively dissolved on September 19, 2003.[9] Neither letter would be sufficient proof of the matter stated and, as stated above, could not form a basis for equating experience with baccalaureate study, even if we accepted it, which we do not. The USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (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." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13, which is asserted in this case. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

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[9] *See* http://sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=P00000007527&in. (Accessed March 31, 2011).

In the instant case, the petitioner's intent regarding educational equivalence does not include clearly defined alternatives to a four-year bachelor's degree in business administration but merely indicates a nonspecific alternate level of education as "Credential Evaluations or U.S. Equivalent." The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. See also 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*). (Emphasis added.)

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a combination of two years of undergraduate study and employment experience based on a formula of three years of work experience equating to one year of undergraduate study, will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent baccalaureate degree," he may not qualify as a professional under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the foreign equivalent of a bachelor's degree.

The beneficiary is also not eligible for qualification as a skilled worker under section 203(b)(3)(A)(i) of the Act. For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides that:

> *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 [redacted] occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In this case, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements set forth on the ETA Form 9089.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. 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." *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 [labor certification application form]." *Id.* at 834 (emphasis added). 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.

In some cases, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS also looks at the actual minimum educational requirements of the proffered position as the petitioner may have expressed those requirements to DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary possesses.

Thus, the AAO issued a request for evidence (RFE) on February 2, 2010, soliciting such evidence. In response, the petitioner submitted a copy of a "notice of job availability" in which the educational requirement was stated as "Bachelor's Degree or Equivalent in Business Administration or Related Field." No other specific equivalency of education or experience, or reference to a credential evaluation showing a U.S. equivalent was stated. The petitioner also provided a copy of South Florida Workforce job order that merely contained the job title and no information as to experience, duties, salary or education. Further provided is a copy of an newspaper advertisement confirmation for an advertisement appearing in *The Miami Herald,* which stated the salary, but specified no experience and stated that an applicant must have "B.S. in Bus. Admin. Related Field or Equiv."[10] The petitioner also provided copies of two online advertisements appearing in "SearchCorp." The job, salary and duties are described and the education are described as "Bachelor Degree or Equivalent in Business Administration or Related Field." Similarly, a copy of what appears to be an internal advertisement also lists the job, salary, and duties, but does not state a specific quantity of work experience and states the education required as "Bachelor Degree or Equivalent in Business Administration or Related Field." No specific quantity of work experience is stated as being required while the certified labor certification

[10] Where the Form ETA 750 [now ETA Form 9089] indicates that a "U.S. bachelor's degree or the equivalent" may qualify an applicant for a position, where no specific terms are set out on the Form ETA 750 or in the employer's recruitment efforts to define the term "equivalent", "we understand [equivalent] to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From [redacted], U.S. Dept. of Labor's Empl. & Training Administration, to [redacted] INS (October 27, 1992). Where the Form ETA 750 indicates, for example, that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor's degree, "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 [to the degree] in order to qualify for the job." *See* Memo. from [redacted].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 "Equivalent Degree," 2 (June 13, 1994). State Employment Security Agencies (SESAs) should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From [redacted]ertifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [redacted]March 9, 1993). Finally, 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." *Id.* To our knowledge, the field guidance memoranda referred to here have not been rescinded.

requires one year of experience. Like the ETA Form 9089, none of the advertisements clearly specified that the educational requirement of a bachelor's degree in business administration or related field could be met through a defined combination of lesser diplomas, academic study and/or experience. Additionally, the advertisements did not clearly and consistently state the full experience requirement as listed on the certified labor certification to adequately apprise U.S. workers of the position's full requirements. *See* 20 C.F.R. 656.17(f)(3).

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).

In this matter, it may not be concluded that the beneficiary possesses the requisite Bachelor's degree in Business Administration or a foreign equivalent Bachelor's degree. No specific equivalency of the proffered position's educational requirements was clearly set forth on the ETA Form 9089 nor clearly communicated to U.S. workers as part of the petitioner's recruitment efforts.

Because the beneficiary does not meet the job requirements as stated on the ETA Form 9089 labor certification, the petition may not be approved under either the professional or the skilled worker category pursuant to section 203(b)(3) of the Act.

Included with the motion, counsel submits a letter, dated August 16, 2007, from the petitioner's president, [redacted] reiterating that the beneficiary is qualified for the position and has worked for the petitioner since June 2003, but fails to explain why this employment was omitted from the ETA Form 9089 which both the beneficiary and [redacted] signed. [redacted] also states that the beneficiary has been paid by a payroll service provided called "Alpha Staff-Chem Index / SST International Inc. that is responsible for Petitioner's payroll." Another letter from [redacted], also dated August 16, 2007, simultaneously claims that the beneficiary has been employed by the petitioner as an Instrumental Manager Analyst Consultant from March 2001 to the present and was also paid by a payroll processing services, "Alpha Staff-Chem [redacted] under [redacted] from March 2001 thru July 2004." This claim is in obvious conflict with both [redacted] and the beneficiary's own statements (Part K of the ETA Form 9089) that claim that the beneficiary was working for "Campodonico's Medical Supplies, Inc. as an Instrumental Manager Analyst from January 2001 to May 15, 2003." As the FIS educational evaluation also relies on the beneficiary's experience with Campodonico Medical Supplies, this further calls into question the reliability of the evaluation. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

With respect to the petitioner's obligation to establish its ability to pay the proffered wage from the priority date in 2005 onward, the AAO requested evidence of this ability pursuant to the requirements of 8 C.F.R. § 204.5(g)(2). It is noted that the petitioner, SS&T International Inc., federal employer identification number (FEIN) #65-xxx8976 submitted copies of its federal corporate Form 1120-IC-DISC for 2003, 2004, 2007 and 2008. Although the petitioner's 2007 and 2008 returns showed sufficient taxable income before net operating loss deduction and dividends-received deduction to cover the proffered wage of $50,000 and demonstrate its ability to pay the proffered wage for these years, as the petitioner failed to submit sufficient evidence consisting of a tax return, audited statement or annual report that would show its ability to pay in 2005 and 2006, it has not established its ability in those years. 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). Other evidence submitted in support of its ability to pay the proffered wage includes copies of the beneficiary's individual federal income tax returns Form 1040s, along with copies of corresponding Wage and Tax Statements for 2003, 2004, 2005, 2007, 2008 and 2009. It is noted that the W-2s issued in 2005, 2007, 2008 and 2009 were issued by the following:

Year	Entity	FEIN
2005 2006 2007 2008 2009	[redacted]	

As noted in the prior decision, the beneficiary's 2003 W-2 was issued by [redacted] and his 2004 W-2 was not provided. Copies of some checks dated in 2009 and 2010 issued by [redacted] on behalf of [redacted], Inc. to the beneficiary have been provided as well as a cost allocation report internally generated by [redacted] for 2008 and 2009 that contain the beneficiary's name.

It is the petitioner's contention that it has employed the beneficiary but he has been paid through [redacted], a payroll services company, according to the petitioner's president in a letter submitted with the petitioner's response to the AAO's request for evidence. In a letter, dated November 5, 2008, from [redacted] Beach, Florida, he characterized the legal relationship "between Chem-Index/SST Intl., Inc. and Oasis is one of co-employment based on contract. The contract spells out the rights and obligations of both parties and allocates the responsibilities each has to the other and to the leased employees they co-employ." In a letter dated August 16, 2007, the petitioner's president also describes the petitioner's payroll services as changing over to FLSUB-37 as of August 2004 to the present (date of signing).

The regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) or (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i)or (ii). *See* 8 C.F.R. § 204.5(c).

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN).

In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In *Clackamas*, the specific inquiry was whether four physicians, actively engaged in a medical practice as shareholders, could be considered employees to determine whether the petitioner could qualify as an employer under the American with Disabilities Act of 1990 (ADA), which necessitates an employer with fifteen employees. The court cites to *Darden* that "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Clackamas*, 538 U.S. at 444, (*citing Darden*, 503 U.S. at 318, 322). The court found the regulatory definition to be circular in that the ADA defined an "employee" as "individual employed by the "employer." *Id. (citing* 42 U.S.C. § 12111(4)). Similarly, in *Darden*, where the court considered whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA), the court found the ERISA definition to be circular and adopted a common-law test to determine who would qualify as an "employee: under ERISA. *Id.* (*citing Darden*, 503 U.S. at 323). In looking to *Darden*, the court stated, "as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning in common law. Congress has overridden judicial decisions that went beyond the common law." *Id.* at 447 *(citing Darden*, 503 U.S. at 324-325).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control."[11] *Id.* at 448. The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id. (citing* § 220(2)(a)). The court also looked to the EEOC's focus on control[12] in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered that an employer can hire and fire employees, assign tasks to employees and supervise their performance, and decide how the business' profits and losses are distributed. *Id.* at 449-450.

In determining a petitioner's ability to pay a given wage, and before examining a petitioner's net income or net current assets during a given period, USCIS will first review whether the petitioner

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[11] Section 220, Definition of a Servant, in full states:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

a. The extent of control which, by the agreement, the master may exercise over the details of the work;
b. Whether or not the one employed is engaged in a distinct occupation or business;
c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the director of the employer or by a specialist without supervision;
d. The skill required in the occupation;
e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. The length of time for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not the work is a part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of master and servant; and
j. Whether the principal is or is not in business.

[12] Additionally, as set forth in the recent Memorandum from [redacted], Associate Director, Service Center Operations, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements, HQ 70/6.2.8, January 8, 2010, USCIS should look to whether the employer has the "right to control" where, when and how the beneficiary performs the job. The memo's guidance considers many of the factors set forth in *Darden, Clackamas,* and the Restatement, including who provides the tools necessary to perform the job duties, control to the extent of who hires, pays and fires, if necessary, the beneficiary, and who controls the manner and means by which the beneficiary's work product is completed.

may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent 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. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now 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. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d. at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).[13]

It is noted that SS&T International Inc. with the FEIN #65xxx8976 is the entity named as the prospective employer on both Part C of the ETA Form 9089 and on Part I of the Form I-140 petition.

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[13] Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are generally shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.

Chem-Index, Inc. is a separate corporation with a separate FEIN according to pertinent state online records.[14] No contracts or agreements between these two entities or between [redacted] and [redacted] or between any of these entities and the beneficiary have been submitted by the petitioner that would clearly establish which entity should have been stated as the employer on the ETA Form 9089 and on the Form I-140. No W-2s or Form 1099s issued by the petitioner, SS&T International to the beneficiary have been submitted. It is incumbent upon 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

We note that neither the statutory nor the regulatory provisions relevant to employment-based immigrant petitions in this visa classification provide for multiple or co-employers. The DOL regulation as noted above identifies the prospective employer as having a single FEIN and does not contemplate multiple entities with multiple FEINs as co-employers. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). As it has not been made clear that the petitioner and any of the other entities should be regarded as one employer,[15] the financial information of any entity except the petitioning corporation will not be considered in the review of the petitioner's ability to pay the proffered wage. As the record currently stands, the petitioner has not established its own ability to pay in 2005 and 2006 and has therefore not demonstrated its continuing financial ability to pay the proffered wage from the priority date of June 21, 2005 onward.[16]

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[14] *See* Florida Department of State Division of Corporations corporate search at *http://www.sunbiz.org/scripts/cordet.exe?action=DETFIL&inq_doc_number=G29419&in...* (accessed March 31, 2011).

[15] There is nothing in the governing regulation at 8 C.F.R. § 204.5 related to the ability to pay, that permits [USCIS] to consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). 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.

[16] 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

The petitioner has not established that the beneficiary's educational credentials meet the job requirements as stated on the ETA Form 9089 labor certification for either the professional or skilled worker visa classification. The petition may not be approved under either the professional or the skilled worker category pursuant to section 203(b)(3) of the Act. Further, the petitioner has not established that it has had the *continuing* financial ability to pay the beneficiary's proposed wage offer beginning at the priority date.

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

ORDER: The motion to reconsider is granted. The prior decision of the AAO, dated July 30, 2007, is affirmed. The petition remains denied.

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wages, although the overall 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 this case, in the absence of the submission of the information as identified in the decision and information relevant to 2005 and 2006, a decision cannot be reached as to the petitioner's overall circumstances pursuant to *Matter of Sonegawa*. The petitioner has not established its continuing ability to pay the proffered wage as of the June 21, 2005, priority date.