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

(b)(6)

DATE: OCT 10 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental clinic. It seeks to employ the beneficiary permanently in the United States as an operations management analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the petitioner demonstrated that the beneficiary had the educational qualifications required to perform the proffered position. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 4, 2009 denial, the first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

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

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

The 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 DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on October 29, 2003. The proffered wage as stated on the Form ETA 750 is $100,755 per year.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

On appeal, counsel submits a brief; a copy of an obituary for [2]; copy of a trade/fictitious name registration; a copy of the Articles of Incorporation for ; a copy of the petitioner's business license; a copy of the petitioner's property tax bill for fiscal year 2011-12; copies of Form 1099 MISC for 2010 issued to the petitioner with an explanation for medical and healthcare payments made by the petitioner to Blue Cross of California, Cigna Healthcare, Principal Life Insurance Company and United Concordia Companies; a copy of a 2007 Economic Census for Offices of Dentists; a copy of a fictitious name permit issued to the petitioner on February 25, 1997; copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2003, 2004, 2005, 2006, 2007, 2008, and 2009; copies of the petitioner's U.S. Corporation Income Tax Return (Form 1120) for 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010; a letter dated November 25, 2011 from , a Certified Public Accountant; a letter dated May 1, 2009 from , President and Managing Dentist of the petitioning organization; copies of IRS Form W-3, Transmittal of Wage and Tax Statements for the petitioner for 2004, 2005, 2006 and 2007; copies of the petitioner's Employer's Quarterly Federal Tax Return (Form 941) for the four quarters of 2004, 2005, 2006 and 2007; a copy of one newspaper advertisement; and a copy of a prevailing wage request filed with the Employment Development Department of the State of California on June 20, 2006.

The evidence in the record of proceeding shows that the petitioner is structured as a personal services corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of $1,056,592 and currently to employ 18 workers. According to the tax returns in the record, the petitioner's fiscal year is a calendar year. On the Form ETA 750B, signed by the beneficiary on October 6, 2004, the beneficiary claimed to have worked for the petitioner since January 2002.

On appeal counsel asserts that the director erred in his analysis of the petitioner's ability to pay, failing to take into account the fact that the petitioner already employs the beneficiary. Counsel

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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] is the attorney who represented the petitioner before U.S. Citizenship and Immigration Services (USCIS) in the filing of both Form I-140 and Form I-290B. Mr. died on December 1, 2010 after the filing of Form I-290B. After the death of Mr. the petitioner secured the representation of who filed the brief and the documentary evidence supporting the instant appeal.

asserts that when considering the wages which the petitioner has already paid to the beneficiary, the petitioner is able to demonstrate the ability to pay the difference between those wages and the full proffered wage out of the petitioner's net income for at least 2004 and 2005. For 2003, counsel asserts that the proffered wage should be prorated to reflect the fact that the labor certification was filed on October 29, 2003 and that, on this basis, the petitioner is has demonstrated the ability to pay the prorated wage for that year. Counsel also asserts that, for 2006 through the present, the petitioner's failure to demonstrate the ability to pay is attributable to the fact that the petitioner prepares its federal tax returns based upon the cash method of accounting. Counsel asserts the petitioner is able to demonstrate the ability to pay by recalculating its taxes using the accrual method of accounting.

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'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 provided copies of IRS Form W-2 which the petitioner issued to the beneficiary in 2003, 2004, 2005, 2006, 2007, 2008 and 2009.[3] The beneficiary's IRS Form W-2, Wage and Tax Statement, shows compensation received from the petitioner, as shown in the table below.

- In 2003, the Form W-2 stated compensation of $54,169.00.
- In 2004, the Form W-2 stated compensation of $68,229.00.
- In 2005, the Form W-2 stated compensation of $68,662.00.

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[3] IRS Forms W-2 for 2003 and 2004 identify the employer's name as [redacted] IRS Forms W-2 for 2005, 2006, 2007, 2008 and 2009 identify the employer's name as [redacted] DMD. The petitioner provided the Articles of Incorporation for [redacted] D.M.D., Inc. as well as fictitious name registrations for both [redacted] and [redacted] According to the evidence, [redacted] is the corporation which operates two dental clinics each of which operates under a separate fictitious name: 1) [redacted] and 2) [redacted] Taxes and wages are all paid through [redacted] D.M.D., Inc. and one Federal Employer Identification Number is used.

- In 2006, the Form W-2 stated compensation of $70,326.00.
- In 2007, the Form W-2 stated compensation of $67,680.00.
- In 2008, the Form W-2 stated compensation of $59,790.00.
- In 2009, the Form W-2 stated compensation of $62,137.00.

Therefore, the petitioner has not demonstrated that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 through 2009. However, the petitioner has provided evidence of having paid the beneficiary a portion of the proffered wage in each year from 2003 through 2009 and, consequently, must demonstrate only the ability to pay the difference between wages already paid and the full proffered wage for those years, that difference being $46,586 in 2003, $32,526 in 2004, $32,093 in 2005, $30,429 in 2006, $33,075 in 2007, $40,965 in 2008 and $38,618 in 2009.

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. *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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits 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. *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).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that

> depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[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." *Chi-Feng Chang* at 537 (emphasis added).

For a Personal Services Corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. In this case, the record before the director closed on September 15, 2008 with the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 was the most recent return available at that time. However, on appeal, counsel also submitted the petitioner's federal income tax returns for 2008, 2009 and 2010. The petitioner's tax returns demonstrate its net income for 2003, 2004, 2005, 2006, 2007, 2008, 2009 and 2010 as shown in the table below.

- In 2003, the Form 1120 stated a net loss of $4,848.00.
- In 2004, the Form 1120 stated net income of $70,343.00.
- In 2005, the Form 1120 stated net income of $56,706.00.
- In 2006, the Form 1120 stated net income of $0
- In 2007, the Form 1120 stated a net loss of $11,676.00.
- In 2008, the Form 1120 stated a net income of $0
- In 2009, the Form 1120 stated a net loss of $8,134.00.
- In 2010, the Form 1120 stated a net loss of $4,130.00.

Therefore, for the years 2003, 2006, 2007, 2008 and 2009 the petitioner did not have sufficient net income to pay the difference between wages already paid and the full proffered wage.[4] In 2010, the petitioner did not demonstrate sufficient net income to pay the full proffered wage. However, in

[4]In the director's decision, he incorrectly only assessed whether the petitioner had sufficient net income alone to pay the full proffered wage, as opposed to acknowledging wages already paid and ascertaining whether the petitioner had sufficient net income to pay the difference between wages paid and the full proffered wage.

2004 and 2005, the petitioner demonstrated sufficient net income to demonstrate the ability to pay the difference between wages already paid to the beneficiary and the full proffered wage.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003, 2006, 2007, 2008, 2009 and 2010[6] as shown in the table below.

- In 2003, the Form 1120, Schedule L stated net current liabilities of $66,425.00.
- In 2006, the Form 1120, Schedule L stated net current liabilities of $45,308.00.
- In 2007, the Form 1120, Schedule L stated net current liabilities of $41,167.00.
- In 2008, the Form 1120, Schedule L stated net current liabilities of $41,053.00.
- In 2009, the Form 1120, Schedule L stated net current liabilities of $27,505.00.
- In 2010, the Form 1120, Schedule L stated net current liabilities of $36,886.00.

Therefore, for the years 2003, 2006, 2007, 2008 and 2009, the petitioner did not have sufficient net current assets to pay the difference between wages already paid and the full proffered wage. In 2010, the petitioner did not demonstrate sufficient net current assets to pay the full proffered wage.

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[5] 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.

[6] The petitioner did not submit Schedule L for 2003, 2004, 2005, 2006 or 2007 either with its initial petition submission or in response to the director's request for evidence. However, the petitioner supplied Schedule L for all years on appeal. Counsel did not explain why Schedule L was omitted from the petitioner's response to the director's request and this information cannot be obtained since the original attorney who had represented the petitioner in the filing of Form I-140 and I-290B died on December 1, 2010 after filing the instant appeal. The new counsel indicates that he does not have access to the documents submitted by the initial counsel. The AAO will, therefore, consider the Schedule L in this case. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Usually, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, the petitioner's net income and the petitioner's net current assets, with the exception of 2004 and 2005.

In addressing the petitioner's ability to pay, on appeal, counsel relies upon the analysis of CPA, as articulated in his letter dated November 25, 2001. On appeal Mr. asserts that the director erred in his analysis of the petitioner's ability to pay, failing to take into account the fact that the petitioner already employs the beneficiary. Mr. asserts that when considering the wages which the petitioner has already paid to the beneficiary, the petitioner is able to demonstrate the ability to pay the difference between those wages and the full proffered wage out of the petitioner's net income for at least 2004 and 2005. The AAO agrees with this rationale and has implemented this form of analysis when determining the petitioner's ability to pay. Thus, as articulated above, the AAO affirms that the petitioner has demonstrated the ability to pay the beneficiary the proffered wage, taking into account both wages already paid to the beneficiary and the petitioner's net income for 2004 and 2005 only. This method of analysis, however, does not result in a positive determination of the petitioner's ability to pay for any of the other years under consideration.

On appeal, Mr. asserts that USCIS should prorate the proffered wage for the portion of the year that occurred after the priority date in 2003. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

On appeal, Mr. also asserts that, for 2006 through the present, the petitioner's failure to demonstrate the ability to pay is attributable to the fact that the petitioner prepares it federal tax returns based upon the cash method of accounting. Counsel asserts the petitioner is able to demonstrate the ability to pay by recalculating its taxes using the accrual method of accounting.

The petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. *See* http://www.irs.gov/publications/p538/ar02.html#d0e1136 (accessed June 4, 2012). This office would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present

purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.[7] The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa, supra*, the AAO notes that the petitioner's personal service corporation status is a relevant factor to be considered in determining its ability to pay. A personal service corporation is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as

[7] Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. *See* http://www.irs.gov/publications/p538/ar02.html#d0e2874 (accessed June 4, 2012).

services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

The documentation presented here indicates that is the sole shareholder of the company's stock and devotes 100% of her time to performing the personal services of the firm. In each year from 2003 through 2010, Schedule E of Form 1120 identifies compensation paid to Dr. Dr. compensated herself $150,507 in 2003, $132,679 in 2004, $194,257 in 2005, $0 in 2006, $181,929 in 2007, $147,040 in 2008, $207,684 in 2009 and $162,250 in 2010. We note here that the compensation received by the company's owner during these years was not a fixed salary. In the present case, USCIS would not be examining the personal assets of Dr. but, rather, the financial flexibility that she had in setting her salary based on the profitability of the personal service corporation dental clinic. The petitioner provided no documentary evidence, however, demonstrating that Dr. would be willing or able to forego the officer compensation paid to her in order to pay the difference between wages actually paid to the beneficiary and the proffered wage which ranged from approximately $50,000 to $70,000. That would reduce Dr. s compensation fairly significantly. Further, since Dr. devotes 100% of her time to the operation of the business, her officer compensation would constitute her personal salary. Therefore, her ability to forgo all or even a portion of her salary would have to be demonstrated and such a demonstration has not been made. Moreover, a review of the other factors discussed in *Matter of Sonegawa* fails to establish the petitioner's ability to pay the proffered wage.

Specifically, the petitioner provided tax documentation for eight years of operations. The gross receipts, payroll and officer compensation for all eight years remained consistent. The petitioner has not demonstrated the historical growth of its business, the occurrence of any uncharacteristic expenditures or losses, the petitioner's reputation within its industry or whether the beneficiary is replacing a former employee or an outsourced service. Accordingly, after a review of the totality of the petitioner's financial situation and all other relevant evidence, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

As set forth in the director's March 4, 2009 denial, the second issue in this case is whether or not the beneficiary has the educational qualifications required to perform the proffered position.

The director's decision denying the petition concludes that the beneficiary did not possess the required U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification and for classification as a professional.

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> 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 the DOL, or the 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).[8] 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.

[8] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> 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 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, revisited this issue, stating:

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

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

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

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).[9] The AAO will first consider whether the petition may be approved in the professional classification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

> 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.

Section 101(a)(32) of the Act defines the term "profession" to include, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the offered position is not statutorily defined as a profession, "the

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[9] Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation." 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i)

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor's degree as a minimum for entry; the beneficiary possesses a U.S. bachelor's degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor's degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. 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 or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the 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' requirement of a single "degree" for members of the professions is deliberate.

The regulation also 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.*" 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, 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) of the Act (relating to aliens of exceptional

ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree. However, that the regulations also require that the beneficiary satisfy all of the requirements set forth in the job offer portion of the labor certification entails that the beneficiary not only possess the required baccalaureate degree *but also that the degree be in the specific field stipulated on the labor certification.*

In the instant case, the labor certification states that the beneficiary possesses a Bachelor's degree in General Studies from the Philippines, completed in 1981.

The record contains a copy of the beneficiary's Bachelor of Science diploma and transcripts from the Philippines, issued in 1981.

The record also contains an evaluation of the beneficiary's educational credentials prepared by for the on November 8, 2001. The evaluation states that:

> In summary, it is the judgment of the Foundation that [the beneficiary] has the equivalent of a bachelor of science degree from an accredited college or university in the United States and has, as a result of her educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in operations management from an accredited college or university in the United States.

Ms. states that her evaluation was based on the beneficiary's degree certificate, a copy of the beneficiary's resume, copies of three employment certificates which verify the beneficiary's employment and "several certificates equivalent to completion of professional training from a private organization in the United States." In her evaluation, Ms. states that the beneficiary completed a Bachelor of Science degree (General Course) at the in Philippines on March 25, 1981. She then simply notes that the beneficiary's resume included "employment experiences from February of 1981 to April of 2001 (20+ years), including 13 1/3 years in the operations management field."

With respect to the beneficiary's tertiary education, Ms. does not address the fact that, according to the beneficiary's academic transcript, the beneficiary did not complete even one course in business administration, management, operations management, or any related field. Further, Ms. mentions certificates which, she claims, are "equivalent to completion of professional training." However, she neglects to mention that none of the certificates appear to have been granted by organizations which are accredited institutions of higher learning and none of the courses for which the certificates were granted relate to business, management or operations management.

With respect to the beneficiary's work experience, Ms. does not analyze the nature of the beneficiary's work experience with respect to how the individual employment experiences would equate to courses in the field of operations management which one would complete at an accredited institution of higher learning in the United States. Rather, she simply notes the duration of the beneficiary's employment and summarily equates three years of work experience to one year of "university-level credit." However, Ms. 's equivalence formula applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

Further, it should be noted that in support of the beneficiary's experiential qualifications, the petitioner supplied only three employment letters. Only two of the letters assert that the beneficiary worked as an "operations analyst." The first letter from Dr. , General Manager of states that the beneficiary was employed "by as Operation Analyst from March 1991 to December 1999." However, Dr. does not identify any of the duties for which the beneficiary was responsible. The letter from , Managing Dentist of Dr. states, "this is to certify that [the beneficiary] has been employed by from July 1986 to March 1991 as Operation Analyst." With regard to the specific duties which the beneficiary performed while working for her office, Dr. states, "her duties and responsibilities include maintaining office computer software, also handles financial arrangement based on patients' insurance coverage, and insurance claims."

According to Section 13 of Form ETA 750, the proffered position would require the incumbent to:

> Use Add-on, Dentrix 8.0 to coordinate a multi-office dental practice; including security functions/controlled substance access/patient privacy procs. Use Trojan software for diag. codes/treatment finance.

Some of the duties associated with the position at the are similar to those which are associated with the proffered position, Operations Management Analyst. However, the proffered position is broader in scope, requiring the performance of more duties and at a higher level of responsibility and complexity.
While working for the beneficiary maintained office software for a single location and was responsible for processing insurance claims and the financial payment for services. However, the proffered position involves managing a multi-office dental practice, using software to coordinate the activities of both offices. According to the labor certification, the proffered position also involves responsibility for electronic security, managing controlled

substances or prescription medication as well as maintaining patient privacy procedures. Additionally, the proffered position involves maintaining /utilizing software for diagnoses, insurance claims and financial reimbursement.

It is further important to note that the position with is not included on Form ETA 750B. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The petitioner relies on the beneficiary's Bachelor of Science degree in general studies combined with approximately 13 years of claimed experience in the field of operations management, as attested solely by the beneficiary's own resume, in addition to several professional courses in various aspects of basic computer operations, sales, and secretarial skills, as being equivalent to a U.S. bachelor's degree in the field of Operations Management. Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[10] If placement recommendations are included, the Council

[10] *See An Author's Guide to Creating AACRAO International Publications* available at

Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[11]

According to EDGE, a Bachelor of Science degree from the Philippines is comparable to "a bachelor's degree in the United States." However, the mere possession of a general bachelor's degree does not satisfy the requirements either of the classification sought or of the educational requirements as set forth on the labor certification.

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in Operations Management.

The beneficiary's academic transcripts show that the beneficiary completed courses in English, Spanish, Zoology, Math, Library Science, Theology, Physical Education, Philosophy, Chemistry, Literature, Sociology, Psychology, Botany, Physics, and Physiology/Anatomy. However, the beneficiary did not take one course in or even related to Operations Management or any field related to business administration or management.

Therefore, after reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university in the field of Operations Management. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The AAO will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least

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http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[11] In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

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

> 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 [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating 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).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by 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]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION
Grade School: None specified

High School: None specified
College: Four (4) years
College Degree Required: Bachelor's degree
Major Field of Study: Operations Management or equivalent
TRAINING: None Required.
EXPERIENCE: Two (2) years in the job offered
OTHER SPECIAL REQUIREMENTS: None.

As is discussed above, the beneficiary possesses a Bachelor's of Science degree in General Studies from the Philippines, which is comparable to a bachelor's degree in the United States. The beneficiary does not, however, possess a Bachelor's degree in Operations Management but relies upon a combination of her earned bachelor's degree, in general studies, and work experience to equate to the required Bachelor's degree in Operations Management.

The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.[12] Nonetheless, in both the director's July 7, 2008 RFE and on appeal, the petitioner was afforded the opportunity to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.[13]

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[12] The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, 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 "Equivalent Degree," 2 (June 13, 1994). The 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." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The 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 Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

[13] In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the

In response to the director's RFE, the petitioner supplied a letter dated September 10, 2008 from DMD, President of the petitioning entity; a copy of the evaluation which was submitted with the initial petition submission; and various certificates awarded to the beneficiary.

In her letter, states:

> This letter is to confirm that when recruiting for the permanent position of Operations Management Analyst with this office, all candidates with the educational background which was the equivalent of an individual with a bachelor's degree in operations management were considered equally. We were willing to accept candidates for this position with the necessary equivalence irrespective of whether such equivalence was achieved through education, experience or a combination thereof.

Additionally, on appeal, the petitioner provided one advertisement which it posted in a newspaper and the Prevailing Wage Request which the petitioner submitted to the Employment Development Department of the State of California. In both of these documents, the petitioner identifies the educational and experiential requirements for the proffered position as a Bachelor's degree in Operations Management in addition to two years of experience in the job offered.

However, while the petitioner states that it considered all candidates with the educational background which was equivalent of an individual with a bachelor's degree in operations management, the petitioner did not supply the results of its recruitment. The petitioner did not supply evidence of resumes received in response to the advertisement, the results of any interviews, copies of the academic qualifications held by those who applied for the position, the reasons for not hiring any of the applicants, the reasons that the applicants were deemed unqualified, or the petitioner's responses to the applicants.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Further, while the petitioner asserts that it was willing to accept candidates with the necessary equivalence irrespective of whether such equivalence was achieved through education, experience or a combination thereof, the petitioner does not identify the formula which it used to determine what it considers to be equivalent or what it would accept in the alternative to an earned Bachelor's degree in Operations Management. Moreover, the petitioner provided no evidence demonstrating how applicants for the proffered position understood the phrase "or equivalent" or under what circumstances potential

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beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See Id.* at 14.

applicants would have understood the phrase with sufficient clarity to determine to apply for the proffered position.

The petitioner failed to establish that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's or foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in Operations Management or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.[14]

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at 14.[15] In addition, 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* (D.D.C. Mar. 26,

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[14] In addition, for classification as a professional, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

[15] In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded 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." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *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. *See* section 103(a) of the Act.

2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).

In the instant case, the director provided the petitioner the opportunity to establish its intent regarding the term "or equivalent" on the labor certification and the minimum educational requirements of the labor certification. The petitioner failed to establish that "or equivalent" was intended to mean that the required education could be met with an alternative to a four-year U.S. bachelor's degree or foreign equivalent.

It is also important to note that the labor certification not only requires that the beneficiary possess a Bachelor's degree in Operations Management but also that the beneficiary possess two years of experience in the job offered. In his decision, the director did not specifically address this requirement. Further, in our discussion above, the AAO spoke to the beneficiary's work experience as that experience pertained to the assertion of degree equivalence. However, while the petitioner has not demonstrated that the beneficiary has the requisite baccalaureate degree in the field specified on the labor certification, neither has the petitioner demonstrated that the beneficiary has the required two years of experience in the job offered.

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

> 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.

In support of the beneficiary's claimed experience, the petitioner supplied three letters. The first letter is dated April 27, 2001 and is from Dr. , General Manager of Dr. in Philippines. According to Dr. , she employed the beneficiary as an Office Manager from January 2000 to April 2001. Because Dr. does not identify any of the duties which the beneficiary was responsible for performing while working for her and does not indicate whether the beneficiary worked on a full-time basis, the letter fails to demonstrate that the beneficiary gained qualifying employment experience in the proffered position.

The second employment letter is dated December 23, 1998 and is from Dr. DMD, General Manager of Philippines. According to Dr. she employed the beneficiary as an Operation Analyst from March 1991 to December 1999. In her letter, Dr. neglected to include any of the duties which the beneficiary was responsible for performing and did not indicate whether the beneficiary worked on a full-time basis and thus fails to demonstrate that the beneficiary acquired qualifying employment experience in the proffered position at the priority date.

The third employment letter is dated March 15, 1991 and is from Dr. , Managing Dentist of Philippines. According to Dr. she employed the beneficiary from July 1986 to March 1991 as an Operation Analyst. Dr. states that the beneficiary was responsible for "maintaining office computer software" as well as for handling the "financial arrangement [sic] based on patients insurance coverage, and insurance claims." However, while Dr. entitles this position "Operation Analyst," the duties associated with the position are not the same as those which are involved in the proffered position. According to Section 13 of Form ETA 750, the proffered position involves the coordination of a "multi-office dental practice" using "Add-on Dentrix 8.0." Additionally the prospective Operation Management Analyst would be responsible for "security functions/controlled substance access/patient privacy procs" [sic]. Additionally, the position involves using "Trojan software for diag. codes/treatment finance." More importantly, the position identified by this letter is not included on Form ETA 750B.

In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Therefore, the petitioner has not demonstrated that the beneficiary has the required two years of experience which are set forth on Form ETA 750.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree, in Operations Management, from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational and experiential requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

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.