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)

[redacted]

DATE: JUL 0 8 2013 OFFICE: TEXAS SERVICE CENTER

[redacted]

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:

SELF-REPRESENTED

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,

Josh E
FOR

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner provides hotel management, construction management, and information technology services. It seeks to employ the beneficiary permanently in the United States as a weblogic administrator. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).[1] The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 19, 2010. *See* 8 C.F.R. § 204.5(d).

The director determined that the petitioner failed to establish its continuing ability to pay the beneficiary's proffered wage from the petition's priority date onward. The director also found that the petitioner did not demonstrate that the beneficiary, as of the priority date, met the minimum education and employment experience requirements for the offered position as set forth on the labor certification. On December 1, 2011, the director denied the petition accordingly.

The record shows that the appeal is properly filed 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.

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.[2]

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

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[1] The labor certification identifies the area of intended employment as Atlanta, Georgia. The Form I-140, Immigrant Petition for Alien Worker, states that the beneficiary will work in Norcross, Georgia. Because Atlanta and Norcross are in the same Metropolitican Statistical Area (MSA), the labor certification appears to remain valid for the new worksite. *See* 20 C.F.R. § § 656.3, 656.30(c)(2) (explaining that a change in the proposed "area of intended employment" renders a labor certification invalid and defining "area of intended employment" to include locations within the same MSA).

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

DOL certified the labor application in this matter. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i), 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 [of the Act] 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) [of the Act].[3] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, the Ninth Circuit stated:

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

> [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) [of the Act], 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), *citing Madany*, 696 F.2d at 1008. 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.*

Id. at 1009 (emphasis added.) The Ninth Circuit, citing *K.R.K. Irvine*, 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) [of the Act], 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) [of the Act], 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine*, 699 F.2d at 1008.
>
> 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 the beneficiary qualify for the requested employment-based immigrant visa classification.

The Beneficiary's Qualifications for the Requested Classifications

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).[4] 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 "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the statute does not define the offered position as a profession, "the 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 accompanying a professional petition "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 petition's priority date. 8 C.F.R. § 103.2(b)(l), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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

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[4] The version of the Form I-140 that the petitioner filed does not contain separate boxes for the professional and skilled worker classifications. The petitioner selected Box "e" in Part 2 of the form, indicating a request for classification as a professional or a skilled worker. The record does not contain any evidence that the petitioner requests only one of the classifications. The AAO will therefore consider the petition for both professional and skilled worker classification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) contains a singular description of the degree required for professional classification. In 1991, when the final rule for the regulation at 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 a bachelor's degree and prevented the substitution of experience for education. After reviewing section 121 of the Immigration and Nationality Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service noted that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (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). Congress therefore presumably intended to require a single "degree" for professional classification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) 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." (emphasis added). For aliens of exceptional ability, Congress broadly required "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. Professional classification, by contrast, clearly requires a degree from a "college or university."

In *Snapnames.com, Inc. v. Chertoff*, the federal 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 bachelor's degree or a foreign equivalent is required. 2006 WL 3491005 (D. Or. Nov. 30, 2006); *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 a foreign equivalent degree).

Thus, the plain meanings of the Act and the regulations require the beneficiary of a professional petition to possess a single degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the beneficiary received a bachelor's degree in computers and electronics from the
The record contains a copy of the beneficiary's Bachelor of Science degree in engineering, transcript

[5] The beneficiary's resume states that he possesses a "master of science" degree, awarded in 2006 by However, the record does not contain any evidence of this purported degree.

and supplement from the , issued in 2004.

The record on appealcontained two evaluations of the beneficiary's education credentials. The first evaluation, dated April 17, 2006, was prepared by Inc. The evaluation describes the beneficiary's Bachelor of Science degree as a three-and-a-half-year program, equivalent to a U.S. Bachelor of Science degree in electronic and computer engineering. The evaluation does not identify the resources used to evaluate the beneficiary's academic credentials, and simply states its equivalency conclusion. No analysis or reasoning supports the evaluation's conclusion that the beneficiary's three-and-one-half-year degree is equivalent to a four-year, U.S. bachelor's degree.

The second credentials evaluation, dated December 19, 2011, was prepared by Stuffman, a professor of management at This evaluation states that the combination of the beneficiary's academic credentials, including his engineering degree and his coursework at the represents "the equivalent of a four-year bachelor of science degree."[6] Further, the evaluation also concludes that the beneficiary's bachelor's degree, alone, equates to a U.S. Bachelor of Science degree in electronic and computer engineering. This evaluation is therefore internally inconsistent in its conclusions, and also differs in part from the previous evaluation, which found only the engineering diploma to equal a U.S. bachelor's degree.

USCIS may, in its discretion, consider expert testimony as advisory opinions. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). USCIS, however, is ultimately responsible for determining an alien's eligibility for the benefit sought. *Id.* The submission of expert letters in support of a petition is not presumptive evidence of eligibility. USCIS may evaluate the contents of the letters to determine whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is uncorroborated, inconsistent 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 AAO 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.* The EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php.

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[6] The petitioner does not claim that the beneficiary received degrees from these institutions.

Authors for the EDGE must work with a publication consultant and a liaison to the AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[7] If placement recommendations are included, the council liaison works with the author to respond, and the publication is subject to final review by the entire council. *Id.* USCIS considers the EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[8]

According to the EDGE, a Bachelor of Science degree in engineering from Denmark is comparable to "3.5 years of university study in the United States."

Therefore, based on the conclusion in the EDGE, the record on appeal did not establish that the beneficiary possesses a foreign equivalent degree of a U.S. bachelor's degree. The AAO informed the petitioner of the EDGE's conclusion in a Notice of Derogatory Information/Request for Evidence (RFE) dated May 1, 2013.

In response to the RFE, the petitioner submits three additional evaluations of the beneficiary's education credentials and an addendum to a previously submitted evaluation. A June 11, 2013 evaluation from [redacted] concludes that the beneficiary's bachelor's degree from Denmark alone is equivalent to a U.S. Bachelor of Science degree in electronics and computer engineering.

A May 28, 2013 evaluation from [redacted] concludes that the beneficiary's Bachelor of Science degree from Denmark alone is "the equivalent of a four-year Bachelor of Science Degree in Engineering from an accredited U.S. college or university." The evaluation suggests that the beneficiary completed the baccalaureate program earlier than other students. The evaluation states "[i]t is not uncommon for students to be able to comp[l]ete a Bachelor's degree within three-and-a-half years." The evaluation also states that the beneficiary completed "high-level courses" that "would qualify as equivalent to courses in U.S. institutions." The evaluation also

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[7] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[8] In *Confluence Intern., Inc. v. Holder*, the federal court determined that the AAO provided a rational explanation for its reliance on AACRAO information to support its decision. 2009 WL 825793 (D.Minn. March 27, 2009). In *Tisco Group, Inc. v. Napolitano*, the federal court found that USCIS properly weighed credentials evaluations and information in the EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and foreign "Master's" degrees equaled only a U.S. bachelor's degree. 2010 WL 3464314 (E.D.Mich. August 30, 2010). In *Sunshine Rehab Services, Inc. v. USCIS*, the federal court upheld a USCIS determination that the beneficiary's 3-year bachelor's degree did not constitute a foreign equivalent degree of a U.S. bachelor's degree. Specifically, the court concluded that USCIS did not abuse its discretion by preferring information in the EDGE to the petitioner's evidence. The court also noted that the labor certification accompanying the petition did not allow a combination of education and experience to the meet the educational requirements of the offered position.

asserts that the EDGE "concludes that the Bachelor of Science in Engineering from the is indeed equivalent to a Bachelor of Science degree from an accredited institution of higher education in the United States."

The petitioner also submits a June 8, 2013 evaluation from University, which states that the beneficiary completed a three-and-a-half-year baccalaureate program that included six semesters of academic study and one semester of "industrial placement." The evaluation concludes that the beneficiary's bachelor's degree is "the foreign equivalent of [a] Bachelor of Science degree in Electronics and Computer Engineering from an institution of postsecondary education in the United States of America."

In addition, the petitioner submits an addendum to the April 17, 2006 evaluation of The addendum, which is unsigned and undated, states the resources that purportedly used to complete the evaluation and the reasoning behind her conclusions. The addendum states that "[i]t was the judgment of Inc. that the combination of [the beneficiary's] one year of university study in Pakistan, one or more years of post-secondary study in Australia, and 3-1/2 years of university-level study in Denmark, for which he was awarded a Bachelor's degree in Denmark (for a total of at least 5-1/2 years of post-secondary, university-level study), are equivalent to the degree, Bachelor of Science in Electronic and Computer Engineering, from a regionally accredited university in the United States."

addendum contradicts her evaluation. The addendum states that "the combination" of the beneficiary's post-secondary studies in Pakistan, Australia and Denmark are equivalent to a U.S. Bachelor of Science degree in electronic and computer engineering. The evaluation, however, states that the beneficiary's Danish bachelor's degree, by itself, equals a U.S. Bachelor of Science degree in electronic and computer engineering. The conflicting conclusions of evaluation and addendum cast doubt on the validity of her evaluation and makes her ultimate conclusion unclear. The petitioner must resolve inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Because the addendum is unsigned and undated, the AAO also questions its authenticity. For these reasons, the this evaluation and addendum do not appear to be probabtive. *See Matter of Caron International*, 19 I&N at 795.

most recent evaluation asserts that information in the EDGE equates the beneficiary's bachelor's degree from Denmark to a U.S. bachelor's degree. However, the AAO's review of the EDGE, a copy of which was provided to the petitioner, at both the time of the RFE and of this decision, shows that the EDGE concludes that the beneficiary's Danish degree "represents attainment of a level of education comparable to 3.5 years of university in the United States." The EDGE report does not state that the beneficiary's degree is comparable to any U.S. degree. The contradiction in the statements of and the EDGE report casts doubt on the validity of evaluation and its conclusion. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition).

most recent evaluation states that "it is not uncommon for students to be able to compete [*sic*] a Bachelor's degree within three-and-a-half years." appears to be suggesting that because a four-year U.S. bachelor's degree might be completed in less than four years of study, the beneficiary's three-and-a-half year program is equivalent to a four-year U.S. bachelor's degree. This conclusion ignores that the U.S. bachelor degree itself is a four year program of study, regardless of whether a student takes additional courses or attends additional semesters in order to complete the degree in less than four years. does not state that the beneficiary's program of study was actually a four-year degree program. Further, other information in the record indicates that the beneficiary's baccalauareate program was no longer than the three-and-a-half years in which the beneficiary completed it. The EDGE evaluation states that the beneficiary's bachelor's degree is "[a]warded after completion of 3.5 years of university study of engineering including 6 months of practical training." evaluation also describes the beneficiary's studies in Denmark as "a three and one-half year program of post-secondary education." These findings of the EDGE and the other evaluations regarding the length of the beneficiary's baccalaureate program conflict with latest evaluation. Where an evaluation does not agree with previous equivalencies or is in any way questionable, USCIS may discount it or give less weight to it. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

The evaluations of do not provide any analysis or reasoning to support their conclusions that the beneficiary's three-and-a-half-year bachelor's degree from Denmark equals a four-year U.S. bachelor's degree. It is unclear if evaluation was prepared based on the beneficiary's credentials; while the evaluation indicates that reviewed the beneficiary's "Bachelor of Science in Electronics and Computer Engineering" degree, the evaluation, dated June 8, 2013, also states that website "URLs in this document were correct as of 1/1/09." This suggests that the evaluation was written in 2009, and is perhaps a standardized form evaluation, rather than an evaluation of the beneficiary's particular program of study and credentials. Further, other than listing the beneficiary's name in a reference line at the top of the evaluation, the remainder of the evaluation refers to the beneficiary as "client." This casts doubt on whether the evaluation provided by represents an evaluation of the beneficiary's academic credentials. *See Matter of Ho*, 19 I&N Dec. at 591. Similarly, evaluation does not provide any analysis of the beneficiary's program of study, but rather simply provides a conclusion as to the equivalency of the beneficiary's degree.

The AAO finds the peer-reviewed evaluation of the EDGE to be more reliable than the conflicting evaluations that the petitioner proffers.

In response to the AAO's RFE, counsel argues that the EDGE's evaluation "suffers from a similar flaw." Counsel asserts that the EDGE evaluation also fails to provide reasoning or analysis to support its conclusion that the beneficiary's degree does not equal a U.S. bachelor's degree.

As stated above, the AAO gives the EDGE report weight because it is a peer-reviewed source. Further, precedent case law supports the the EDGE report's conclusion in this matter. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Comm'r 1977) (U.S. bachelor's degrees generally require four-year programs). The evaluations that the petitioner proffers, which assert that three-and-a-half years of

study equal four years of study, or that a combination of the beneficiary's study are equivalanet to a four-year U.S. bachelor's degree, break with that precedent but do not provide reasoning or evidence that supports their conclusions. As discussed above, a three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N at 245. 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.

After reviewing all of the evidence in the record, the AAO concludes 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. The petitioner has failed to overcome the conclusions of the EDGE and precedent case law with reliable, peer-reviewed information. 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 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 requirements of the job offered as set forth on the labor certification determine whether a petition may be approved for a skilled worker. *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 that 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 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 ETA Form 9089 states the following minimum requirements for the offered position of weblogic administrator:

H.4. Education: Bachelor's degree in "electrical and computer science and engineering."
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: Information technology or MIS (management information systems).
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

Part J.21 of the labor certification also states that the beneficiary did not gain any of the qualifying experience for the offered position through employment with the petitioner in a substantially comparable position.

The labor certification states that the offered position requires a bachelor's degree or a foreign equivalent degree in "electrical and computer science and engineering," information technology, or MIS, plus 12 months of employment experience in the job offered. The labor certification specifically states that the petitioner will not accept an alternate combination of education and experience.

The labor certification does not appear to allow any degree less than a single, four-year degree from a college or university in a relevant field to qualify for the offered position. Because the record on appeal did not establish that the beneficiary met the minimum education requirement for the offered position, the AAO, in its RFE, invited the petitioner to submit additional evidence of its intent to accept an alternative to a four-year bachelor's degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.[9]

[9] In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. An employer's subjective intent, however, may not establish 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 how it expressed

Specifically, the AAO requested the petitioner to provide a copy of the signed recruitment report required by 20 C.F.R. § 656.17(g)(1), together with copies of the prevailing wage determination; all online, print and additional recruitment conducted for the position; the job order; the posted notice of the filing of the labor certification; and all resumes received in response to the recruitment efforts.

In response to the RFE, the petitioner has submitted evidence of its recruitment efforts for the offered position, including a signed recruitment report and copies of the prevailing wage determination, job order, posting notice, and advertising.

The recruitment report indicates that no applicants responded to the petitioner's recruitment efforts for the offered position. The report, however, does not comply with the regulation at 20 C.F.R. § 656.17(g)(1) because it does not describe the recruitment steps that the petitioner undertook. The report is also dated June 13, 2013, more than two years after the labor certification was filed. The petitioner therefore appears to have prepared the report solely for the purpose of responding to the AAO's RFE, even though labor department regulations require the petitioner to sign and retain the report for five years from the date of the labor certification's filing. This casts doubt on the authenticity of the recruitment report. *Matter of Ho*, 19 I&N at 591 (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). The petitioner must resolve this issue with independent, objective evidence in any further filings before the estimate can be accepted. *Id.* at 591-92.

The posting notice provided states that the offered position requires a "combination of Bachelor of Science in Computer Engineer/related field and 1 year of experience." The print and online advertisements for the position state that "[a] degree in Comp Eng or eqv is reqd." The job order states that "16 years Education" are required for the offered position in addition to stating that the position requires a "Bachelor's degree in job related field." The prevailing wage request states that "[a] degree in Comp Eng or eqv is reqd," but also lists a bachelor's degree as the minimum education required.

The evidence does not establish that the petitioner intended to require less than a four-year U.S. bachelor's degree or a foreign equivalent degree for the offered position. By omitting any reference to a degree equivalent, the posting notice suggests that the petitioner will only accept a four-year, U.S. bachelor's degree. The job order's indication of "16 years" of education also suggests that a four-year bachelor's degree is required after 12 years of primary and secondary schooling. While the advertisements appear to indicate that an equivalent field of study may be acceptable, it is unclear whether the equivalency would relate to the foreign degree required. Further, both the job order,

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those requirements to the DOL during the labor certification process, not afterwards to USCIS. The date 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 beneficiary's credentials. Expansion of the job requirements would undermine Congress' intent to issue immigrant visas in the professional and skilled worker classifications only when no qualified U.S. workers are available to perform the offered position. *See id.* at 14.

prevailing wage request, and posting notice indicate that the degree required is a bachelor's degree, and that a related field of study is acceptable.

Thus, 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 the AAO concludes that the terms of the labor certification require a four-year U.S. bachelor's degree or a foreign equivalent degree. The petitioner has not established that the beneficiary possesses 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.[10]

In *Snapnames.com, Inc. v. Chertoff*, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." 2006 WL 3491005 (D. Or. Nov. 30, 2006). The U.S. 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. The court also 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, USCIS must defer to the employer's intent. *Snapnames.com, Inc.* at *14.[11] In addition, the court in *Snapnames.com, Inc.* recognized that, even though an employer may prepare a labor certification with the designated 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, Civ. Act No. 06-2158* (upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification required a single, four-year degree).

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[10] 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 alo Matter of Wing's Tea House*, 16 I&N at 159; *Matter of Katigbak,* 14 I&N Dec. at 49.

[11] In *Grace Korean United Methodist Church v. Chertoff,* the U.S. district 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." 437 F. Supp. 2d 1174 (D. Or. 2005), The court in *Grace Korean*, however, 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), which rejected the U.S. Postal Service's determination that it could not legally employ a foreign-born job applicant where the agency had no expertise in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter because federal law charges USCIS, through the authority that the Secretary of Homeland Security delegated to it, with interpretation and enforcement of U.S. immigration laws. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean,* the required education is clearly and unambiguously stated on the labor certification and does not include the language "or equivalent" or any other alternatives to a four-year bachelor's degree. Indeed, the labor certification specifically states that the petitioner will not accept any alternate combination of education and experience.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign degree equivalent from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certificate 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 Petitioner's Ability to Pay the Proffered Wage

The director found that the petitioner did not demonstrate its continuing ability to pay the beneficiary's proffered wage. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be 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 ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on December 1, 2011. The proffered wage as stated on the ETA Form 9089 is $78,300 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.[12]

[12] 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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2001, to have a gross annual income of $2,648,236, and to currently employ 100 workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the ETA Form 9089, signed by the beneficiary on December 5, 2010, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *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 has not established that it employed and paid the beneficiary the full proffered wage, or any wages, from the priority date onward.[13]

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

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newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

[13] While the record contained W-2, Wage and Tax Statements, for the beneficiary, these were issued by and not the petitioner.

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 C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director contained the petitioner's 2010 tax return. The AAO's RFE notified the petitioner that the record also contained the petitioner's unaudited financial statements for 2011, and a letter asserting that the beneficiary is employed by [redacted] employs over 150 persons. As neither of these are the forms of evidence enumerated in 8 C.F.R. § 204.5(g)(2), the AAO's RFE requested that the petitioner provide the regulatory required evidence of its ability to pay the beneficiary's proffered wage. The AAO's RFE requested evidence of the petitioner's continuing ability to pay the beneficiary's proffered wage, including the petitioner's 2011 federal tax return, audited financial statements, or annual report. The petitioner provided its 2011 tax return in response.

The petitioner's tax returns demonstrate its net income for 2010 and 2011, as shown in the table below.

- In 2010, the Form 1120 stated net income of $12,256.
- In 2011, the Form 1120 stated net income of $16,127.

Therefore, for the years 2010 and 2011, the petitioner did not have sufficient net income to pay the 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.[14] 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 2010 and 2011, as shown in the table below.

- In 2010, the Form 1120 stated net current assets of $41,289.
- In 2011, the Form 1120 stated net current assets of $44,372.

Therefore, for the years 2010 and 2011, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

In response to the AAO's RFE, the petitioner has submitted a letter from its Chief Financial Officer, dated June 14, 2013, attesting to the petitioner's ability to pay the beneficiary's proffered wage. In general, 8 C.F.R. § 204.5(g)(2) requires annual reports, federal tax returns, or audited financial statements as evidence of a petitioner's ability to pay the proffered wage. That regulation further

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[14] 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.

provides: "In a case where the prospective United States employer employs 100 or more workers, the director *may* accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage." (Emphasis added.)

Given the record as a whole, including the petitioner's previous provision of a letter from stating that it employs 150 workers, and lack of any evidence to establish that the petitioner, employs 100 workers,[15] we find that USCIS need not exercise its discretion to accept the letter from the petitioner's Chief Financial Officer.

Further, USCIS records indicate that the petitioner has filed over at least one additional Form I-140 petition with USCIS since the priority date of the instant petition. In addition, the petitioner has also filed at least 28 Form I-129 nonimmigrant petitions since December 2009. Consequently, USCIS must also take into account the petitioner's ability to pay the beneficiary's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications and labor condition applications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Given that the petitioner's tax returns do document sufficient income or assets to pay the instant beneficiary's proffered wage, we cannot rely on a letter from the petitioner's Chief Financial Officer referencing the ability to pay without supporting evidence. Therefore, the AAO declines to rely on this letter, as the petitioner does not employ 100 or more workers, and the petitioner has multiple wage obligations.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel asserts that the petitioner's parent corporation has the ability to pay the beneficiary's proffered wage.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the 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. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." The petitioner has not provided sufficient evidence to document that the parent company was obligated to pay the beneficiary's proffered wage from the priority date

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[15] While the petitioner statesd on Form I-140 that it employs 100 workers, quarterly tax and wage report in the record indicate that the petitioner employed only ten employees in the first quarter of 2011. This casts doubt on the petitioner's evidence of its financial viability. *Matter of Ho*, 19 I&N at 591 (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). The AAO notes that the 2011 first quarter tax and wage report for the petitioner's alleged parent corporation, . indicates that corporation only employed 19 people during the quarter.

onward. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

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 ETA Form 9089 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 instant case, the petitioner did demonstrate positive net income and net current assets in 2010 and 2011, however, neither figure in either year was sufficient to meet the proffered wage for the instant beneficiary. In addition, the petitioner has filed an immigrant petition for at least one additional beneficiary since the priority date, which would only serve to decrease its abiulity to pay the beneficiary's proffered wage. While the petitioner claimed to have over two million dollars in revenue on Form I-140, the petitioner's tax returns reflect that its actual gross receipts were significantly less. While the petitioner claimed to employ 100 workers on the labor certification and on Form I-140, and provided a letter from a financial officer to attest to that statement, and to attest to its ability to pay the beneficiary's proffered wage, quarterly wage and tax statements in the record indicate that the petitioner employs significantly fewer workers. While the petitioner claimed on Form I-140 to have been established in 2001, the labor certification indicates it was formed in 2009. The information provided by the petitioner does not reflect historically increasing sales. The petitioner has not established its historical growth since its establishment, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Further, while

the petitioner's quarterly wage and tax statement indicates its employment of only ten individuals, the petitioner has filed petitions for multiple nonimmigrant and immigrant workers. Thus, assessing the totality of the circumstances in this individual case, 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.

The Beneficiary's Employment Experience

The director also found that the petitioner failed to establish that the beneficiary possessed the required employment experience for the offered position by the petition's priority date. The petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the October 19, 2010 priority date. *See Matter of Wing's Tea House*, 16 I&N at 158.

The labor certification states that the offered position requires 12 months of employment experience in the offered position of weblogic administrator.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a weblogic administrator with Connecticut from September 1, 2007 to May 31, 2009, and as a weblogic administrator with North Carolina from June 25, 2010 to the October 19, 2010 priority date.[16]

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

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

The record contains an experience letter from the head of the talent acquisition group on letterhead, stating that the beneficiary worked as a from September 2007 until March 2009. The letter states that the beneficiary's services "were provided to through an agreement with his employer" and that he worked as a "third party contractor."

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[16] The labor certification also states that the beneficiary worked 20 hours per week for the Denmark from June 1, 2006 to March 31, 2007. The petitioner, however, does not assert that this experience demonstrates the beneficiary's qualifications for the offered position.

The record also contains an April 19, 2011 letter from the petitioner's director of human resources. The letter states that the petitioner's parent company, , has employed the beneficiary since April 2007 and that he "is currently working as a programmer analyst on an H-1B visa performing … similar duties as this permanent [offered] position."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) requires evidence of a beneficiary's experience in the form of letters from "employers." As the director noted in his decision, the labor certification does not identify as an employer of the beneficiary. *See Matter of Leung,* 16 I&N Dec. 12, 14-15 (BIA 1976) (the testimony of an applicant for adjustment of status was found not credible where he did not list his claimed prior employment on the labor certification).

Copies of Internal Revenue Service (IRS) Forms W-2 Wage and Tax Statements, H-1B visa petition approval notices, pay stubs and a letter from the petitioner, however, indicate that has employed the beneficiary since 2007. Further, the beneficiary's resume indicates continuous employment with as a "programmer analyst (weblogic administrator)" from March 2007 onward. This documentary evidence conflicts with the statements on the labor certification and casts doubt on whether the beneficiary possessed the required 12 months of experience in the offered position before the petition's priority date. *See Matter of Ho*, 19 I&N at 591-592 (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.).

On appeal and in response to the AAO's RFE, the petitioner argues that the director erred in rejecting the letter as evidence that the beneficiary's qualifying experience for the offered position. The petitioner asserts that did not employ the beneficiary. The petitioner claims that merely performed human resources (HR) services for and therefore verified the beneficiary's work on project. The petitioner also submits a June 14, 2013 letter from , stating that it employed the beneficiary in the United States from 2007 to July 2011.[17] The letter states that contracted the beneficiary's services to clients in the United States and, when he was not assigned to client projects, employed him on internal projects.

However, the petitioner has not provided any competent, objective evidence to establish that was the beneficiary's employer, and that it employed him in the position stated. The June 14, 2013, letter from conflicts with the other experience letters in the record. As the letter is from the petitioner's parent corporation, which leases employees to the petitioner, it cannot be considered to be independent evidence. Inconsistencies in the record must be overcome by independent, objective evidence. *Matter of Ho*, 19 I&N at 591-592. Attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

[17] The record shows that an affiliated company of the petitioner and employed the beneficiary in the United Kingdom beginning in July 2011. Copies of the beneficiary's most recent pay stubs, which the petitioner submitted in response to the RFE, show that the petitioner has employed him in the United States since at least February 2013.

While the petitioner has provided pay roll records to indicate that employed the beneficiary from 2007 to July 2011, these documents do not document the beneficiary's position or describe his duties.

The record on appeal cast doubt on the beneficiary's employment experience. The petitioner's response to the AAO's RFE does not clarify the beneficiary's actual employer, or provide competent, objective evidence of the beneficiary's employment.

For the foregoing reasons, the petitioner has failed to establish that the beneficiary met the minimum experience requirements for the offered position set forth on the labor certification as of the petition's priority date.

In summary, the AAO finds that: the petitioner has failed to establish that the beneficiary possessed the required education set forth on the labor certificate as of the petition's priority date; the petitioner failed to establish that the beneficiary possessed the required experience set forth on the labor certification as of the petition's priority date; and the petitioner failed to establish its ability to pay the beneficiary's proffered wage from the priority date onward.

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.