



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **JUN 28 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:  
[REDACTED]

INSTRUCTIONS:

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

If you believe the 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 Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an accounting firm. It seeks to employ the beneficiary permanently in the United States as an audit manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not qualify for the second preference classification.

On appeal, counsel submits a brief, copies of the beneficiary's credentials, certificates showing the beneficiary's membership in professional organizations, and documents relating to foreign educational systems.

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

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

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.<sup>1</sup>

The beneficiary possesses a bachelor's degree in [REDACTED] from [REDACTED] this was a "three year integrated course." The beneficiary is also an associate member in the Institute of Chartered Accountants of India (ICAI). The issue in this case is whether the beneficiary's degree, experience, and membership in the ICAI constitute a foreign degree equivalent to a U.S. baccalaureate degree, and whether or not he has a master's degree or qualifying amount of experience.

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<sup>1</sup> 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).

### Eligibility for the Classification Sought

As noted above, DOL certified the ETA Form 9089 in this matter. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

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

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at \*6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. The AAO must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). In fact, the Senate Conference Report for the Act presumes that a baccalaureate is a "4-year course of undergraduate study."

S. Rep. No. 101-55 at 20 (1989). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (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:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive post baccalaureate experience in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."<sup>2</sup> In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. Specifically, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the

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<sup>2</sup> Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.” The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3<sup>rd</sup> Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction).

We note that in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The alien had a three-year degree and membership in the Institute of Chartered Accountants of India (ICAI). USCIS had concluded that the alien did not qualify for EB-2 or EB-3 (due to the specific job requirements on the labor certification). The court upheld the USCIS determinations on EB-2 and EB-3 as a professional but reversed USCIS in the EB-3 skilled worker classification.

In reaching its conclusions, the federal district court in *Snapnames.com, Inc.* 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. *Id.* 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. *Id.* at \*14. In professional and advanced degree professional cases, however, where the alien is statutorily required to hold a bachelor’s degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at \*17, 19. 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.*

The facts of the instant case, and those present in *Snapnames*, are indistinguishable, and the result is the same.

Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means a bachelor’s degree received *from a college or university*, or an equivalent degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Compare 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, school or other institution of learning relating to the area of exceptional ability”).

The director noted in his decision that the ETA Form 9089 was accepted by DOL on June 8, 2006. In part H of that form the petitioner required that, at a minimum, a prospective employee would have a Bachelor's degree in Accounting, Economics, or a related financial field. The petitioner specified in H-9 that a foreign educational equivalent is acceptable, but in H-8 made it clear that this would not include a combination of an alternated level of education supported with experience. Thus, the labor certification required a United States bachelor's degree or foreign equivalent degree. The employer also required 84 months of experience in the job offered or an acceptable alternate occupation. The director determined that the beneficiary had the requisite work experience, but the record did not include evidence that the beneficiary had a United States bachelor's degree or foreign equivalent degree.

The record indicates that the beneficiary holds a certificate naming him as an associate member of ICAI. However, the record does not demonstrate the certificate from ICAI is a single academic degree that is a foreign equivalent degree to a U.S. bachelor's degree. As stated above, the regulation sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree. The combination of a degree deemed less than the equivalent to a U.S. baccalaureate degree and a diploma or certificate does not meet that requirement.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, [www.aacrao.org](http://www.aacrao.org), 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." <http://www.aacrao.org/About-AACRAO.aspx> (accessed May 26, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed May 26, 2012). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.<sup>3</sup> If placement recommendations are included, the Council 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.<sup>4</sup>

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<sup>3</sup> 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](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>4</sup> 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.

EDGE confirms that ICAI associate membership upon passing the ICAI final examination represents attainment of a level of education *comparable* to a bachelor's degree in the United States. <http://edge.aacrao.org/country/credential/institute-of-chartered-accountants-of-india-icai-final-exam-and-award-of-association-membership?cid=single> (accessed May 26, 2012). EDGE does not say, however, that associate membership in ICAI is the equivalent of a United States bachelor's degree. The advance degree professional category requires that beneficiaries have a bachelor's degree or foreign equivalent degree coupled with experience or an advanced degree. ICAI is not an academic institution that can confer an actual degree with an official college or university record. See *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 \*11 (D. Ore. Nov. 30, 2006) (finding USCIS was justified in concluding that ICAI membership was not a college or university "degree" for purposes of classification as a member of the professions holding an advanced degree).

A United States bachelor's degree, or its foreign equivalent, is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245. (Comm'r 1977). Therefore, the beneficiary's three-year degree from Bombay University cannot be considered a foreign equivalent degree.

On appeal, counsel provides numerous print-outs from colleges and universities in the United States which purportedly accept credentials similar to those held by the beneficiary for matriculation into a master's degree program. Although counsel repeatedly asserts that membership in ICAI is commonly regarded as the equivalent to a United States bachelor's degree, he does not establish how the beneficiary meets the statutory and regulatory requirement needed for the instant visa classification: namely, a degree received for successfully completing a four year long post-secondary education program.

The crux of counsel's argument on appeal is that the beneficiary's three-year degree coupled with his membership in ICAI is the equivalent of a United States bachelor's degree, which when combined with his work experience allows him to be classified as a professional with an advanced degree. It should be noted that ICAI is a professional organization, not an accredited institution of higher learning. ICAI is also not a degree granting institution. The credential evaluations submitted on the record reference course work completed by the beneficiary with ICAI. We also note that nothing in the record supports the assertion contained in the credential evaluations that the beneficiary completed coursework with ICAI. Although the record contains certificates showing the beneficiary passed examinations and was inducted as an associate member of ICAI, there are no transcripts in the record supporting the assertion that additional course work was completed following his studies at Bombay University. The only documentation relating to ICAI are copies of examination results, certificates showing his status in the

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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.

organization and a letter explaining how one becomes a member. That letter states that a person can gain membership following three years of an apprenticeship with a practicing accountant, but does not articulate whether additional classes must be taken directly from the organization to gain admittance, and if so what quantum of coursework is required. The record does not contain evidence which supports the assertion that the beneficiary completed additional course work on top of his three-year degree. The record does not indicate that the beneficiary has ever completed a full fourth year of post-secondary studies.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

Because the beneficiary has neither (1) a U.S. degree above a baccalaureate or a foreign equivalent degree nor (2) a U.S. baccalaureate degree or foreign equivalent degree in Accounting, Economics, or a related financial field and five years of progressive experience in the specialty, the beneficiary does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

#### **Qualifications for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] 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 INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, “Job Opportunity Information,” describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the labor certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor’s degree is the minimum level of education required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary possesses a three-year [redacted] degree from the [redacted]. The beneficiary has also passed the final examination of the Institute of Chartered Accountants of India. For the reasons stated above, the beneficiary does not have the qualifications required for the job as specified on the labor certification.

The beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Beyond the decision of the director,<sup>5</sup> the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage

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<sup>5</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the

from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements... 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.” *Id.*, emphasis added.

The record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner. The record does contain a letter from the petitioner's human resources office which states the petitioner has “425 employees and gross income of \$110 million in 2005.” We first note that petitioners who employ over 100 persons, at the director's discretion, may substitute a letter detailing such facts in lieu of the other forms of evidence listed in the regulation. However, the director is not required to accept such a letter. We further note that this letter is not from a financial officer as required by the regulation, and is not acceptable for establishing the petitioner's ability to pay. While the letter is supporting a visa petition with the priority date of 2006, the information in the letter is only current to 2005. Nothing in the letter or later submissions from the petitioner establishes its continued ability to pay the proffered year from the priority date onward. Furthermore, the letter fails to even allege that the petitioner does indeed have the ability to pay the proffered wage.

The petitioner's failure to provide a letter which complies with the regulation, or complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.

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initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).