

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

BLE

FILE:

[REDACTED]
LIN-03-261-51791

Office: NEBRASKA SERVICE CENTER

Date:

JUN 03 2005

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

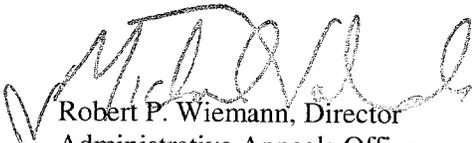
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting services firm. It seeks to employ the beneficiary permanently in the United States as a software engineer, for database systems. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary had the minimum education required on the Form ETA 750, and denied the petition accordingly.

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

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is July 2, 2003.

On the Form ETA 750B, signed by the beneficiary on July 2, 2003, the beneficiary did not claim to have worked for the petitioner.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The I-140 petition was submitted on August 28, 2003. On the petition, the petitioner claimed to have been established in 2002, to currently have 15 employees, and to have a gross annual income of \$150,000.00. The item on the petition for net annual income was left blank.

With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated February 11, 2004, the director requested additional evidence relevant to the beneficiary's qualifications and relevant to the petitioner's ability to pay the proffered wage.

In response to the RFE, the petitioner submitted additional evidence, which was received by the director on April 28, 2004.

In a decision dated June 23, 2004 the director determined that the evidence failed to establish that the beneficiary had the minimum education as required on the ETA 750, namely a baccalaureate degree in computer science or a computer-related field, or a foreign equivalent degree. The director therefore denied the petition.

On appeal, counsel submits a brief and no new evidence. With the brief, counsel submits a duplicate copy of an educational evaluation report which was previously submitted for the record, and a copy of a letter dated January 7, 2003 from the Director, Business and Trade Services, Office of Adjudications, Immigration and Naturalization Service (now CIS) to an attorney in an unrelated case. The January 7, 2003 letter is not an evidentiary document, but is offered by counsel as a legal authority.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The evidence relevant to the beneficiary's qualifications consists of the following: copies of certificates issued to the beneficiary on December 21, 1985 and February 18, 1986 by the S.A.M. Institute of Career Studies, Egmore, Madras, India, for completion of computer software training courses; a copy of an Associate Membership Examination certificate issued to the beneficiary on March 12, 1990 by the Aeronautical Society of India, with accompanying course transcript; a copy of a certificate issued to the beneficiary on October 2, 1992 by Digital Equipment (India) Limited, for completion of a computer software training course; copies of Certificates of Achievement issued to the beneficiary on April 16, 1993 and March 31, 1994 by Data Software Research Co., Ltd., Madras, India, for computer software training courses; a copy of a diploma issued to the beneficiary on January 25, 1994 by Brilliant's Computer Center, Madras, India, for a computer software training course, with accompanying grade report sheet; a copy of a Completion Certification for an Associate Membership Examination issued to the beneficiary on September 5, 1994 by the Aeronautical Society of India, with accompanying course transcript; a copy of a membership certificate dated February 1995 issued to the beneficiary by the Aeronautical Society of India; a copy of a letter dated June 1, 1997 from George J. Petrello, Ph.D., evaluating the educational credentials of the beneficiary; a copy of the beneficiary's professional resume; a copy of a letter dated May 24, 1997 from the managing director of Vindia Exports (P) Limited, Chetput, Madras, India, stating the beneficiary's experience with that company as a programmer from January 1993 to December 1993; a copy of a letter dated May 24, 1997 from the business manager of Lynx Informatics, Perambur, Madras, India, stating the beneficiary's experience with that company as a programmer analyst from January 1994 to March 1995; a copy of a letter dated May 21, 1997 from the managing director of Alkanet Informatics, Bangalore, India, stating the beneficiary's experience with that company as a programmer analyst from March 1995 to the date of the letter; and a copy of an evaluation report on the beneficiary's education dated April 14, 2004 by Alphakom Consultants, Glastonbury, Connecticut.

The ETA 750 supporting the instant petition requires minimum education of a "Bachelor of Science or Equivalent" in the major field of study of "Computer Science or Computer related field." (ETA 750, block 14). The minimum required experience is stated as five years of experience in the job offered or five years in the related occupation of "Software Engineer or related field." (ETA 750, block 14). Other special requirements are stated as, "*Master's in Computer Science or Equivalent with more than 3 years experience is acceptable." (ETA 750, block 15).

The beneficiary's education is summarized in the evaluation report by Alphakom Consultants. That report states that the beneficiary has passed examinations of the Aeronautical Society of India which are recognized by the Indian Ministry of Education as equivalent to an bachelor's degree in aeronautical engineering from an Indian university. The report states that the beneficiary has also completed computer training courses in India which have requirements similar to the completion of more than one year of academic coursework in a baccalaureate

degree program in the United States. The report states that by completing the aforementioned education, the beneficiary “satisfied similar requirements to the completion of a 4 year BACHELOR OF SCIENCE IN AERONAUTICAL ENGINEERING WITH ADDITIONAL SPECIALIZATION IN COMPUTER APPLICATIONS from an accredited institution of tertiary education in the United States.” (Alphakom Consultants, evaluation report, April 14, 2004, at 3).

CIS 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, CIS is not required to accept that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

With regard to the preference category applicable to the instant petition, the record indicates that the I-140 petition was originally submitted with a mark in check box letter “d,” for “A member of the professions holding an advanced degree or an alien or exceptional ability (who is Not seeking a National Interest Waiver).” (See Form I-140 Immigrant Petition for Alien Work, Part 2, Petition Type). The instant petition was later amended at the petitioner’s request, and a mark was made in check box letter “e,” for “A skilled worker (requiring at least two years of specialized training or experience) or professional.” (See Form I-140). It may be noted that the Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professionals, for a single check box, letter “e,” applies both to skilled workers and to professionals.

Nonetheless, even if the instant petition is considered as a petition for a skilled worker, the requirements as stated on the ETA 750 for a bachelor’s degree or the equivalent would be unaffected. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The only regulation specifying the equivalent of a bachelor’s degree in the context of immigrant petitions is one which pertains to professionals. The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part

Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

No provision pertaining to skilled workers specifies the equivalent to a bachelor’s degree. Therefore, even if it were assumed that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor’s degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor’s degree, but the petitioner chose not to do so.

The regulation quoted above uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined

to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

In the instant case, the educational evaluation report does not find that the beneficiary holds a "foreign equivalent degree," as that term is used in the regulation at 8 C.F.R. § 204.5(1)(2). Rather the evaluation report relies on a combination of the beneficiary's education at several institutions in finding that the beneficiary "has satisfied similar requirements" to those of a four year United States bachelor's degree. (Alphakom Consultants, evaluation report, April 14, 2004, at 3).

Moreover, even if it were assumed that the beneficiary had a single foreign degree equivalent to a U.S. bachelor's degree, nothing in the evaluation report finds that the beneficiary's major field of studies was computer science or a related field, as required by the ETA 750, block 14.

Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in computer science or in a computer related field on July 2, 2003 or a foreign equivalent degree.

Counsel submits as an attachment to the petitioner's brief a copy of a letter dated January 4, 2003 to a lawyer who is not a representative in the instant case from Efrén Hernandez III, Director, Business and Trade Services, Office of Adjudications, Immigration and Naturalization Service (now CIS). In the letter, [REDACTED] states concerning 8 C.F.R. § 204.5(k)(2) that it is not the intent of the regulations that a "foreign equivalent degree" be only a single foreign degree and that if a "proper credentials evaluations service finds that the foreign degree or degrees are the equivalent of the required US degree, then the requirement may be met."

Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although a letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

In his decision, the director found that the beneficiary does not have a degree from a single foreign institution which is equivalent to a United States bachelor's degree. The director found, moreover, that even if the beneficiary's foreign education qualified as a foreign equivalent degree, the major field of study in aeronautical engineering will not be considered by CIS to be a computer-related field. The director therefore found that the beneficiary's education failed to satisfy the requirements of the ETA 750. The director therefore denied the petition. The director's analysis was correct, and his decision to deny the petition therefore was also correct.

The petitioner has not established that the beneficiary had a bachelor's degree in computer science or in a computer-related field, or a foreign equivalent degree, on July 2, 2003. For the reasons discussed above, the assertions of counsel on appeal fail to overcome the director's decision.

Beyond the decision of the director, the record in the instant case does not establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. 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. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date. The proffered wage as stated on the Form ETA 750 is \$72,000.00 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on July 2, 2003, the beneficiary did not claim to have worked for the petitioner. The record contains copies of pay statements of the beneficiary showing employment by the petitioner in 2004. The statements are dated in January, February and March 2004. The last of those statements shows total wages to date as of March 31, 2004 in the amount of \$38,000.00. Although those statements indicate payments to the beneficiary at a monthly rate higher than the proffered wage, they fail to establish the petitioner's ability to pay the proffered wage for the entire year of 2004. Moreover, no pay statements for the beneficiary were submitted for 2003, the year of the priority date.

The record also contains payroll records of the petitioner dated in 2003 and 2004. The records for 2003 show no employment of the beneficiary and the records for 2004 show the same information as appears on the beneficiary's individual pay statements, which are discussed above. Therefore those statements also fail to establish the petitioner's ability to pay the proffered wage during the relevant period.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for

determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 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). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, 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. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See *Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record includes a copy of the petitioner's Form 1120-A U.S. Corporation Short-Form Income Tax Return for 2002 and a copy of the petitioner's Form 1120 U.S. Corporation Income Tax Return for 2003.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 25 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the amount of -\$769.00 on line 25 of the 2002 return and \$44,342.00 on line 28 of the 2003 return. The figure for 2002 is not directly relevant to the instant petition because the priority date is July 2, 2003. The figure of \$44,342.00 for 2003 is less than the proffered wage of \$72,000.00, and it therefore fails to establish the petitioner's ability to pay the proffered wage in 2003.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

On the petitioner's Form 1120-A tax return for 2002, no information is entered in Part III, Balance Sheet per Books, the section of the Form 1120-A which is equivalent to the Schedule L of the Form 1120. However, the Schedule L attached to the petitioner's Form 1120 tax return for 2003 does contain figures for the petitioner's assets and liabilities. Calculations based on those figures yield the following amounts for net current assets: -\$7,342.00 for the beginning of 2003; and \$33,561.00 for the end of 2003. Since the figure for the beginning of the year is negative, and since the figure for the end of the year is less than the proffered wage of \$72,000.00, those figures also fail to establish the ability of the petitioner to pay the proffered wage in 2003.

The record also contains copies of unaudited balance sheets of the petitioner dated December 31, 2003. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

The record contains a list of names of the beneficiaries of ten petitions filed by the petitioner, including the instant petition. The list shows the offered salary for each beneficiary and the I-140 receipt number for each petition. With the list are copies of I-797 receipt notices showing the receipt dates of each petition. In order to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition, the evidence would have to also establish the petitioner's ability to pay the proffered wage to the beneficiaries of other petitions filed by the petitioner.

CIS records show that the petitioner has filed a total of fifteen I-140 petitions, with the earliest filed in July 2003. As noted above, the instant petition was filed in August 2003. The petitioner has also filed one hundred twenty I-129 petitions, with the earliest filed in October 2002. One hundred and eight of the I-129 petitions have been filed since July of 2003.

Even if the evidence in the instant case indicated financial resources of the petitioner sufficient to pay the beneficiary's proffered wage, it would be necessary for the petitioner also to establish its ability to concurrently pay the proffered wage to any other beneficiary or beneficiaries for whom petitions have been approved or may be pending. The evidence in the record on appeal, however, fails to give details on the petitioner's other petitions sufficient to establish the petitioner's total proffered wage obligations during each of the years which are relevant to the instant petition.

For I-129 petitions, which pertain to temporary workers, the regulations do not require evidence to establish a petitioner's ability to pay the proffered wages. Nonetheless, the added costs to a petitioner of hiring temporary workers authorized by I-129 petitions are relevant to any I-140 petitions for permanent workers filed by that same petitioner, since the regulations do require the petitioner to establish its ability to pay the proffered wages to the beneficiaries of any I-140 petitions.

The record in the instant case contains no information about the proffered wages for other potential beneficiaries of I-129 petitions filed by the petitioner. Information about proffered wages is provided for only ten of the fifteen I-140 petitions submitted by the petitioner. No information is submitted about the priority dates of any of the I-140 petitions other than the instant petition. No information is provided about the current employment status of each potential beneficiary of an I-129 or I-140 petition. The names of some beneficiaries may be among the names of the petitioner's employees on its payroll statements in the record, but even if that were true, no information is provided on the dates of the hirings of such beneficiaries. Furthermore, no information is provided about the current immigration status of any of the beneficiaries.

Lacking sufficient evidence about the beneficiaries of other petitions submitted by the petitioner, the record in the instant petition would fail to establish the ability of the petitioner to pay the proffered wage to the beneficiary of the instant petition, since the record fails to provide a basis for calculating the petitioner's total proffered wage obligations during the relevant period.

Another issue raised by the evidence concerns the petitioner's compliance with posting requirements of the U.S. Department of Labor.

The record contains copies of ten agreements, each between the petitioner and a client company for which the petitioner agrees to provide temporary staffing. Those agreements indicate that the petitioner's business consists mainly in providing such temporary staffing to other companies. The addresses of the contracting companies are in San Diego, California; Wayne, New Jersey; Comstock Park, Michigan; Fremont, California; Houston, TX; San Carlos, California; Warren, New Jersey; Nashville, Tennessee; and Cupertino, California;

On the ETA 750 supporting the instant petition, the address where the alien will work is stated as an address on N. Dakota Avenue in Sioux Falls, South Dakota, the same street address as that of the petitioner, though in a different room number. The multiple agreements submitted for the record indicate that the employees to be provided by the petitioner will work not in South Dakota, but at the locations of the contracting client companies. For example, an agreement with a company in San Diego, California, states that the employees of the petitioner "may be performing services on the premises of [the contracting company]." (Agreement of December 19, 2003, at 2). An agreement with a company in Houston, Texas, states that the temporary staff persons to be provided by the petitioner "will record the hours they perform Services each day by punching in and out on the time clock located at the Client's office at [an address on Hicks Street], Houston, Tx." (Agreement of April 24, 2003, at 1).

It appears that the beneficiary of the instant petition, although on the payroll of the petitioner beginning in early 2004, has not been living in South Dakota, since the beneficiary's address on his pay statements is an address on North Central Avenue, North Valley Stream, New York. A New York quarterly wage report for the first quarter of 2004 in the record shows wage payments in New York to the beneficiary in the amount of \$38,000.02 for that quarter.

Copies of Form DE-6 California Quarterly Wage and Withholding Reports for 2003 and 2004 in the record show that some employees of the petitioner have worked in California. A California quarterly wage report in the record for the first quarter of 2003 shows wage payments in California by the petitioner to five employees of the petitioner in the following amounts: \$4,153.85, \$10,313.33, \$10,500.00, \$12,000.00, and \$18,500.00. A California quarterly report for the first quarter of 2004 shows similar payments to seven employees of the petitioner.

Other state quarterly wage reports in the record for the first quarter of 2003 and the first quarter of 2004 show payments of state wages to employees of the petitioner in amounts ranging from \$6,000.00 to \$18,000.00 per quarter in the states of Alabama, Florida, Michigan, Missouri, Texas and Virginia

The records summarized above show that at least sixteen of the petitioner's employees, including the beneficiary of the instant petition, worked for substantial periods outside the state of South Dakota during either the first quarter of 2003 or the first quarter of 2004. As noted above, the petitioner claimed to have a total of 12 employees when the I-140 petition was filed on June 24, 2003.

The regulation at 20 C.F.R. § 656.22 states, in pertinent part:

- (a) An employer shall apply for a labor certification for a Schedule A occupation by filing an Application for Alien Employment Certification . . . with the appropriate [CIS] office . . .
- (b) The Application . . . shall include:
 - (1) Evidence of prearranged employment for the alien beneficiary by having an employer complete and sign the job offer description portion of the application form. . . .
 - (2) Evidence that notice of filing the application for Alien Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.20(g)(3) of this part.

The regulation at 20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under . . . [§] 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

(i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.

(ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for at least 10 consecutive days.

(Emphasis added).

The regulation at 20 C.F.R. § 656.20(g)(3) states:

Any notice of the filing of an Application for Alien Employment Certification shall:

(i) State that applicants should report to the employer, not to the local Employment Service Office;

(ii) State that the notice is being provided as a result of the filing of an application for permanent alien labor certification for the relevant job opportunity; and

(iii) State that any person may provide documentary evidence bearing on the application to the local Employment Service Office and/or the regional Certifying Officer of the Department of Labor.

The regulation at 20 C.F.R. § 656.20(g)(8) provides, in pertinent part:

If an application is filed under the Schedule A procedures at § 656.22 of this part, the notice shall contain a description of the job and rate of pay

The evidence indicating that the beneficiary may work at a location other than the petitioner's street address in Sioux Falls, South Dakota is part of the evidence submitted in support of the instant I-140 petition. That evidence presumably was not submitted to the Department of Labor during the labor certification proceedings. The evidence indicates, however, that the petitioner has failed to conform to the posting requirements of the regulations quoted above, since the petitioner has failed to identify the actual facility of location of the beneficiary's intended employment. Moreover, the evidence that the beneficiary is likely to be working at a site other than the petitioner's street address is inconsistent with the information provided on the ETA 750 form about the address where the alien will work.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence noted above.

In summary, the evidence fails to establish that the beneficiary met the minimum educational requirements on the ETA 750 as of the priority date. The finding of the director on that issue was therefore correct. Beyond the decision of the director, the evidence fails to establish the petitioner's ability to pay the beneficiary the proffered wage. Moreover, the evidence fails to establish that the petitioner has complied with posting requirements in regulations of the United States Department of Labor.

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

ORDER: The appeal is dismissed.