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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 03 2005
LIN-03-207-51843

IN RE: Petitioner: [Redacted]
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:



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 Analyst/Business Development Manager." 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 May 3, 2003.

On the Form ETA 750B, signed by the beneficiary on May 1, 2003, the beneficiary claimed to have worked for the petitioner beginning in December 2002 and continuing until the date of the ETA 750B.

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 June 24, 2003. On the petition, the petitioner claimed to have been established in 2002, to currently have 12 employees, and to have a gross annual income of \$500,000.00. 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 9, 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 29, 2004.

In a decision dated August 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 additional evidence, plus duplicate copies of several documents which were previously submitted for the record. The evidence newly submitted on appeal consists of a letter dated October 12, 2004 from Morningside Evaluations and Consulting, New York, New York, an educational evaluation firm. The October 12, 2004 letter supplements an earlier evaluation of the beneficiary's educational credentials dated November 25, 2002 from that same company, which was submitted prior to the director's decision. The only other documents newly submitted on appeal are copies of two I-797 receipt notices issued by CIS, one upon the filing of an I-485 adjustment of status application by the beneficiary and the other upon the filing of the instant appeal. Neither of those documents is an evidentiary document, and they merely confirm procedural matters already reflected in the file.

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). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, no specific request was made by the director for a supplement to the educational evaluation dated November 25, 2002. Therefore no grounds would exist to preclude the October 12, 2004 letter from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

The evidence relevant to the beneficiary's qualifications consists of the following: a copy of a Provisional Certificate issued to the beneficiary on January 3, 2000 by Sri Venkateswara University, Tirupati, India, certifying the beneficiary's passing of the final examination of the bachelor of medicine and surgery held in May 1992, with accompanying course transcript; a copy of a diploma issued to the beneficiary on May 26, 1994 by the Sai Softech Institute of Information Technology, Hyderabad, India, for studies in client server technology, with accompanying course transcript; a copy of a diploma issued to the beneficiary on May 27, 1994 by the Sai Softech Institute of Information Technology for post graduate studies in computer applications, with accompanying course transcript; a copy of the beneficiary's professional resume; a copy of an undated letter from the managing director of Infotrack Investments and Systems, Pvt. Ltd., Hyderabad, India, stating the beneficiary's experience with that company as a software marketing and research analyst from January 5, 1995 to June 10, 1997; a copy of an undated letter from the director of Grit Software Services, Pvt. Ltd., Bakatpa, Hyderabad, India, stating the beneficiary's experience with that company as marketing manager from June 10, 1997 to September 20, 1999; a copy of an educational evaluation dated November 25, 2002 from Morningside Evaluations and Consulting, New York, New York; and a letter dated October 12, 2004 from Morningside Evaluations and Consulting.

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 three years of experience in the job offered or three years in the related occupation of "Software/Marketing Analysis, Programmer Analyst." (ETA 750, block 14). Other special requirements are stated as "Knowledge of clinical trials." (ETA 750, block 15).

The beneficiary's education is summarized in the evaluation report dated November 25, 2002 by Morningside Evaluations and Consulting. That reports states that the beneficiary completed coursework in general studies and in his area of concentration, medicine, at Sri Venkateswara University, and received a provisional certificate in 1992. The report states that the courses completed and the credits earned by the beneficiary "satisfied requirements substantially similar to those required toward the completion of academic studies leading toward the completion of a Bachelor's degree from an accredited institution of higher education in the United States.

(Morningside Evaluations and Consulting, evaluation report, November 25, 2002, at 2). The report states that the beneficiary thereafter completed courses in computer applications at Sai Softech Institute of Information Technology and was awarded a post graduate diploma by that institution in 1993. The report states that in considering the beneficiary's "completion of two degrees," the beneficiary "satisfied substantially similar requirements to the completion of academic studies leading to a Bachelor's degree from an accredited institution of higher education in the United States." (Morningside Evaluations and Consulting, evaluation report, November 25, 2002, at 2).

The report then summarizes the beneficiary's work experience from January 1995 through the November 25, 2002 date of the report, and finds that the beneficiary had completed more than seven years of professional training and work experience in computer information systems and related areas. The report concludes that in considering the beneficiary's course work completed and his work experience, the beneficiary "has attained the equivalent of Bachelor of Science in Computer Information Systems and Bachelor of Science in Mechanical Engineering degrees, from an accredited institution of higher education in the United States." (Morningside Evaluations and Consulting, evaluation report, November 25, 2002, at 2).

In a letter dated October 12, 2004, submitted for the first time on appeal, a senior evaluator for Morningside Evaluations and Consulting offers a revised evaluation of the beneficiary's education. In that letter the evaluator states that the beneficiary's bachelor's degree program is a five and one-half year program which is at least the equivalent of a four year bachelor's level degree program in the United States. The evaluator also states that the provisional certificate issued to the beneficiary by Sri Venkateswara University constitutes completion of that program. (Morningside Evaluations and Consulting, letter, October 12, 2004, at 1).

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(1)(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 initial educational evaluation report, dated November 25, 2002, 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 two institutions in finding that the beneficiary "satisfied substantially similar requirements to the completion of academic studies leading to a Bachelor's degree from an accredited institution of higher education in the United States." (Morningside Evaluations and Consulting, evaluation report, November 25, 2002, at 2). Nonetheless, the letter dated October 12, 2004 from the same evaluation firm finds that the beneficiary's studies at the Sri Venkateswara University alone were equivalent to a U.S. bachelor's degree. The revised evaluation in the October 12, 2004 letter is sufficient to establish that the beneficiary holds a single foreign degree in medicine and surgery which is equivalent to a U.S. bachelor's degree.

Nonetheless, even if the if the beneficiary's certificate from Sri Venkateswara University is considered to be a foreign equivalent degree to the U.S. bachelor's degree, neither the initial evaluation report nor the later evaluation letter states that the beneficiary's education alone would be equivalent to a bachelor's degree in the field of studies required by the ETA 750, namely studies in computer science or in a computer related field.

The evaluation letter of October 12, 2004 makes no reference to the field of computer science, nor to the beneficiary's work experience. The earlier evaluation report of November 25, 2002 considers the beneficiary's seven years of work experience from 1995 to 2002 and finds that in considering the beneficiary's education combined with that work experience, the beneficiary "has attained the equivalent of Bachelor of Science in Computer Information Systems and Bachelor of Science in Mechanical Engineering degrees, from an accredited institution of higher education in the United States." (Morningside Evaluations and Consulting, evaluation report, November 25, 2002, at 2). The reference to mechanical engineering studies by the beneficiary is unexplained in the report, and none of the beneficiary's educational documents in the record indicate any studies in that field.

Concerning the field of studies of computer information systems, the evaluation report's finding is based in part on the beneficiary's work experience in that field. However, the regulation which allows for consideration of work experience as an equivalent to education is relevant only to nonimmigrant petitions, not to immigrant

petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). No regulation permits work experience to substitute for education with regard to immigrant petitions.

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 a computer related field on May 8, 2003 or a foreign equivalent degree.

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, and that multiple lesser degrees or multiple lesser degrees in combination with work experience did not constitute a foreign equivalent degree. 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, based on the evidence then in the record, which did not include the letter dated October 12, 2004 from Morningside Evaluations and Consulting. The record on appeal contains that letter, which is sufficient to establish that the beneficiary holds a single foreign degree which is equivalent to a U.S. bachelor's degree. Nonetheless, that letter fails to establish that the beneficiary's degree is in the field of studies required by the ETA 750.

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 May 8, 2003. For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the director's decision.

Beyond the decision of the director, another issue raised by the record is whether the evidence establishes the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. As the analysis below indicates, the evidence is found sufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary of the instant case, based on evidence of the petitioner's employment of the beneficiary during the relevant period. Although a detailed analysis of this issue is not needed to decide to the instant appeal, another I-140 petition is also pending before the AAO¹ in which the evidence is found insufficient to establish the petitioner's ability to pay the proffered wage to the beneficiary of that petition. The evidence in the two cases differs, mainly because the record in the other case lacks evidence of the petitioner's employment of the beneficiary of that petition during the entire relevant period. In order to explain the reasons for the different conclusions of the AAO concerning the petitioner's ability to pay the proffered wages in the two cases, an analysis of the relevant evidence in the instant case follows below.

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

¹ LIN-03-261-51791.

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 \$66,851.00 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 Sonegawa*, 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 May 1, 2003, the beneficiary claimed to have worked for the petitioner beginning in December 2002 and continuing until the date of the ETA 750B.

The record contains copies of the beneficiary's Form W-2 Wage and Tax Statement for 2003 showing compensation received from the petitioner in the amount of \$68,750.00. That amount is higher than the proffered wage of \$66,851.00

The also record contains copies of pay statements of the beneficiary showing employment by the petitioner in 2003. The statements are dated in April and May 2003. The statements show payments at the rate of \$6,250.00 per month. The first of the statements shows total wages to date as of April 30, 2003 in the amount of \$12,500.00, thereby suggesting that the beneficiary's employment began during the previous month of March 2003. The second statement shows total wages to date as of May 30, 2003 in the amount of \$18,750.00. Those statements indicate payments to the beneficiary at a monthly rate higher than the proffered wage.

The record also contains payroll records of the petitioner dated in 2003 and 2004. The payroll records for 2003 show information which is consistent with the Form W-2 and with the pay statements discussed above, and the payroll records for 2004 show continued employment of the beneficiary at a rate of pay higher than the proffered wage through April 2004.

The copies of the beneficiary's Form W-2 Wage and Tax Statement for 2003, the copies of pay statements for the beneficiary, and the payroll records are sufficient to 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 fact that the petitioner has paid the beneficiary compensation at a rate higher than the proffered wage is sufficient

to satisfy the petitioner's burden of proof on the issue of its ability to pay the proffered wage, without any need to consider whether the petitioner also had the ability to pay the proffered wages to the beneficiaries of any other petitions filed by the petitioner.

Another issue raised by the evidence in the instant case 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; San Carlos, California; Comstock Park, Michigan; Fremont, California; Houston, TX; 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).

Evidence in the record show connections of both the petitioner and the beneficiary with the state of California.

The beneficiary's Form W2 Wage and Tax Statements for the years 1999, 2000, and 2001, issued by "Insync Information Systems Cor," and for 2002, issued by Techaspect Solutions LLC, all show addresses for the beneficiary in California. The beneficiary's Form W-2 Wage and Tax Statements for 2002 and 2003, issued by the petitioner, show an address for the beneficiary in Sioux Falls, South Dakota. However the address of the petitioner on those Form W-2's is shown as [redacted] rather than the address at [redacted] which appears as the petitioner's address on the ETA 750 application and on the I-140 petition. On the beneficiary's pay statements for March and April 2003, mentioned above, the beneficiary's address is shown as in Sioux Falls, South Dakota, but the petitioner's location is stated as Fremont, California.

A South Dakota quarterly wage report in the record for the first quarter of 2003 shows that the petitioner paid South Dakota wage payments to the beneficiary in the amount of \$6,250.00 for that quarter. That amount equals the amount the beneficiary earned for one month of work, as shown on the pay statement for March 2003. The March 2003 pay statement shows that the beneficiary had earned \$12,500.00 for the year from the petitioner as of March 31, 2003, that is, during the first quarter of 2003. The fact that the beneficiary earned only \$6,250.00 in South Dakota during the first quarter of 2003 implies that he earned the rest of his pay for that quarter, \$6,250.00, in some other state. The quarterly report states that the beneficiary's total wages for that quarter were \$6,250.00, but that figure is inconsistent with the figure of \$12,500.00 for total wages to date shown on the March 2003 pay statement.

Similarly, a South Dakota quarterly wage report in the record for the first quarter of 2004 shows that the petitioner paid South Dakota wage payments to the beneficiary in the amount of \$7,000.00 for that quarter. That report

states the beneficiary's total wages for that quarter to be \$18,750.00. Those figures imply that the beneficiary earned \$11,750.00 in the first quarter of 2004 in a state other than South Dakota.

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 \$38,000.00 per quarter in the states of Alabama, Florida, Michigan, Missouri, New York, 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 has worked 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 establish the actual facility of location of the beneficiary's intended employment. Moreover, the evidence that the beneficiary has worked 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. Concerning the petitioner's ability to pay the proffered wage, the evidence in the instant petition is sufficient to establish the petitioner's ability to pay the beneficiary the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Beyond the decision of the director, 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.