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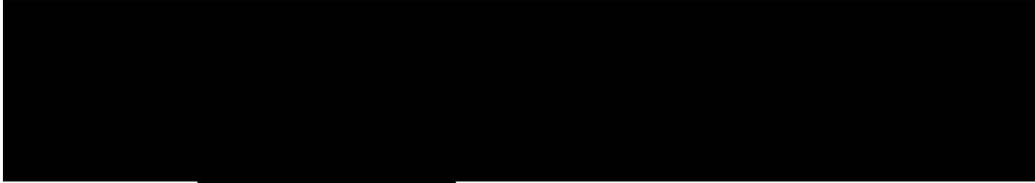
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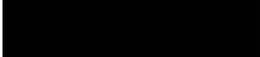
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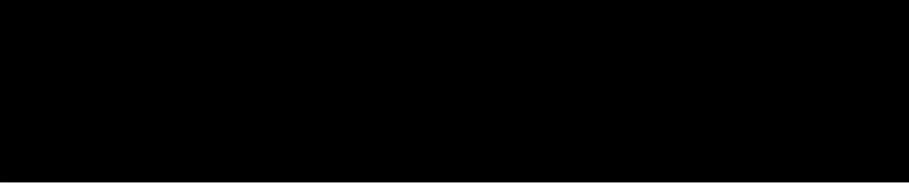
Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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, Chief
Administrative Appeals Office

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

The petitioner is an apparel sales company. It seeks to employ the beneficiary permanently in the United States as a Vice President. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director also determined that the beneficiary does not possess the educational requirements set forth on the Form ETA 750, Application for Alien Employment Certification. The director denied the petition accordingly.

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

As set forth in the director's November 10, 2004 denial, the two issues in this case are whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the beneficiary possesses the educational requirements set forth on the Form ETA 750, Application for Alien Employment Certification.

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

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on May 25, 2001. The proffered wage as stated on the Form ETA 750 is \$110,750.00 per year. The Form ETA 750 states that the position requires a Bachelor of Arts degree in Marketing & Sales and two years of experience in the job offered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹ On appeal, counsel submits a brief, a letter dated December 9, 2003 from the petitioner's accountant and a previously submitted letter dated August 27, 2004 from the petitioner's accountant. Other relevant evidence in the record includes the petitioner's unaudited financial statements for 2001, 2002 and 2003, the petitioner's IRS Forms 1120S, U.S. Income Tax Returns for an S Corporation, for 2001 and 2002, IRS Forms W-2, Wage and Tax Statements, issued by the petitioner to the beneficiary for 2001 and 2002, and IRS Forms 1099-MISC, Miscellaneous Income, issued by the petitioner to the beneficiary for 2001 and 2002. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ three workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on May 20, 2001, the beneficiary claimed to have worked for the petitioner as a Vice President of Marketing & Sales from May 1997 to the date he signed the Form ETA 750B.

On appeal, citing a letter from the petitioner's accountant, counsel asserts that there are discrepancies between the petitioner's sales figures in its financial statements, which are prepared on an accrual basis of accounting, and its tax returns, which are prepared on a cash basis of accounting. He asserts there is an approximate six-month lag time from when the petitioner recognizes income to when the money is received. He states that by focusing on the petitioner's income in 2001 and 2002, the director ignores the petitioner's potential for future growth and the steady growth of the petitioner's business since 1996. Counsel also asserts that the events of September 11, 2001 adversely affected the petitioner's business in 2002. He states that the petitioner posted strong numbers in 2003 and that the petitioner established several multi-million dollar contracts with high-end apparel retailers in 2004.

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 determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary's IRS Forms W-2 and IRS Forms 1099-MISC for 2001 and 2002 show compensation received from the petitioner, as shown in the table below.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

- In 2001, the Form W-2 stated compensation of \$27,695.00.²
- In 2001, the Form 1099-MISC stated compensation of \$60,000.00.
- In 2002, the Form W-2 stated compensation of \$5,000.00.
- In 2002, the Form 1099-MISC stated compensation of \$23,000.00.

Therefore, for the years 2001 and 2002, the petitioner has not established that it employed and paid the beneficiary the full proffered wage, but it did establish that it paid partial wages in both years. Since the proffered wage is \$110,750.00 per year, the petitioner must establish that it can pay the difference between the wages actually paid to the beneficiary and the proffered wage, which is \$23,055.00 and \$82,750.00 in 2001 and 2002, respectively.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The record before the director closed on September 2, 2004 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2003 federal income tax return was due, but was not provided by the petitioner. Therefore, the petitioner's net income and net current assets may not be analyzed against the proffered wage in 2003. The petitioner's tax returns demonstrate its net income for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120S stated net income³ of \$9,613.00.⁴
- In 2002, the Form 1120S stated net income of \$9,860.00.

² This office notes that the numbers listed for the beneficiary's social security number on his IRS Form W-2 for 2001, his IRS Form W-2 for 2002 and his IRS Forms 1099-MISC for 2001 and 2002 are different on each form. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

³ Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income or additional credits, deductions or other adjustments, net income is found on line 23 of Schedule K. Because the petitioner had additional deductions shown on its Schedule K for 2001 and additional income and deductions shown on its Schedule K for 2002, the petitioner's net income is found on line 23 of Schedule K of its tax returns.

⁴ This office notes that in response to the director's request for evidence dated June 10, 2004, the petitioner submitted an amended IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for 2001. The amended federal income tax return submitted by the petitioner is not an IRS-certified copy, which is required to establish that the amended return was actually filed with the IRS.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net income to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2001 and 2002, as shown in the table below.

- In 2001, the Form 1120S stated net current assets of -\$15,931.00.
- In 2002, the Form 1120S stated net current assets of -\$6,272.00.

Therefore, for the years 2001 and 2002, the petitioner did not have sufficient net current assets to pay the difference between the wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.⁶

The record contains the petitioner's financial statements for 2001, 2002 and 2003. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

On appeal, citing a letter from the petitioner's accountant, counsel asserts that there are discrepancies between the petitioner's sales figures in its financial statements, which are prepared on an accrual basis of accounting, and its tax returns, which are prepared on a cash basis of accounting. He asserts there is an approximate six-month lag time from when the petitioner recognizes income to when the money is received, and that accrual accounting supports the petitioner's continuing ability to pay the proffered wage. The petitioner's tax returns were prepared pursuant to cash convention, in which revenue is recognized when it is received, and expenses

⁵ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁶ The director erroneously stated in her decision that the petitioner possessed the ability to pay the proffered wage at the time of filing in 2001. She also stated in her decision that the record does not establish that the petitioner had the ability to pay the proffered wage at the time of filing. This discrepancy does not alter the ultimate outcome of this appeal.

are recognized when they are paid. This office would, in the alternative, have accepted tax returns prepared pursuant to accrual convention, if those were the tax returns the petitioner had actually submitted to the IRS.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting. The amounts shown on the petitioner's tax returns shall be considered as they were submitted to IRS, not as amended pursuant to the accountant's adjustments. If the petitioner's accountant wished to persuade this office that accrual accounting supports the petitioner's continuing ability to pay the proffered wage beginning on the priority date, then the accountant was obliged to prepare and submit audited financial statements pertinent to the petitioning business prepared according to generally accepted accounting principles.

Further, on appeal, counsel also asserts that the events of September 11, 2001 adversely affected the petitioner's business in 2002. He states that the petitioner posted strong numbers in 2003 and in 2004, he asserts that the petitioner established several multi-million dollar contracts with high-end apparel retailers. Further, counsel states on appeal that by focusing on the petitioner's income in 2001 and 2002, the director ignores the petitioner's potential for future growth and the steady growth of the petitioner's business since 1996. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record of proceeding contains no evidence specifically connecting the petitioner's business decline to the events of September 11, 2001, not even a statement from the petitioner showing a loss or claiming difficulty in doing business specifically because of that event. A mere broad statement by counsel that, because of the nature of the petitioner's industry, its business was impacted adversely by the events of September 11, 2001, cannot by itself, demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. Rather, such a general statement merely suggests, without supporting evidence, that the petitioner's financial status might have appeared stronger had it not been for the events of September 11, 2001. In addition, although not specifically requested by the director, the petitioner could have submitted its federal income tax returns for tax years prior to 2001 to establish the steady growth of the petitioner's business since 1996. It also could have submitted its 2003 federal income tax return to establish its financial growth and continuing ability to pay the proffered wage in 2003. **It failed to do so. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings.** *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, a petitioner must establish eligibility at the time of filing. A visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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

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

The director also determined that the beneficiary does not possess the educational requirements set forth on the Form ETA 750, Application for Alien Employment Certification. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of Vice President. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	blank
	High School	blank
	College	4
	College Degree Required	Bachelor of Arts
	Major Field of Study	Marketing & Sales

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A states that extensive travel is required.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he represented that he received a Bachelor of Arts degree in Marketing & Sales from Laurentian University of Sudbury in Canada in 1983, that he took management coursework at Ryerson Polytechnic Institute in Canada from January 1985 to January 1987 and that he took international marketing studies coursework from York University in Canada from May 1987 to January 1989. He does not provide any additional information concerning his education on that form.

Relevant evidence in the record includes the beneficiary's diploma evidencing his Bachelor of Arts degree from Laurentian University of Sudbury in Canada, the beneficiary's transcripts from Laurentian University of Sudbury and an educational evaluation report from A&M Logos International Inc. dated July 3, 2003. The record does not contain any other evidence relevant to the beneficiary's education.

On appeal, counsel asserts that the beneficiary holds an H-1B nonimmigrant visa for the proffered position, and that the job criteria for the H-1B position and the proffered position are similar. He states that the beneficiary is a professional who holds a baccalaureate degree and is a member of the professions. He also states that the cases cited by the director, *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), are irrelevant.

The regulations define a third preference category professional as 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." See 8 C.F.R. § 204.5(1)(2). The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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. Pursuant to the Form ETA 750, the beneficiary must possess a Bachelor of Arts degree in Marketing & Sales.⁷

The record indicates that the beneficiary does not hold a United States Bachelor of Arts degree in Marketing & Sales or a foreign equivalent degree. The educational evaluation report from A&M Logos International Inc. states that upon evaluation of the beneficiary's academic records from Canada, the beneficiary possesses the equivalent of a United States Bachelor of Arts degree. The evaluation cites the beneficiary's diploma awarded in 1983 from Laurentian University of Sudbury in Canada. The evaluation does not state the beneficiary's area of concentration of study. The transcripts from Laurentian University of Sudbury clearly indicate that the beneficiary earned a Bachelor of Arts degree in May 1983, with a major in sociology and a minor in history. The transcripts indicate that the beneficiary took continuing education courses in marketing after earning his degree in 1983; however, the beneficiary's transcripts indicate that he took no marketing or sales courses at Laurentian University of Sudbury while pursuing his Bachelor of Arts degree. As stated above, the beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree. The Form ETA 750 requires a Bachelor of Arts degree in Marketing & Sales. The beneficiary has submitted evidence that he obtained a Bachelor of Arts degree in May 1983, with a major in

⁷ Counsel asserts that the job criteria for the beneficiary's H-1B position and the proffered position are similar. If the H-1B nonimmigrant petition filed by the petitioner on behalf of the beneficiary required that the beneficiary possess a Bachelor of Arts degree in Marketing & Sales, and that petition was approved based on the same evidence that is contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

sociology and a minor in history. Therefore, the beneficiary does not possess the educational requirements set forth on the Form ETA 750, Application for Alien Employment Certification.⁸

Further, A&M Logos International Inc. is not a member of the National Association of Credential Evaluation Services (NACES). The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector. In light of the AAO's findings concerning the beneficiary's educational program, the credential evaluation provided by A&M Logos International Inc. carries little evidentiary weight in these proceedings.

Moreover, if the AAO were to consider the petition under the "skilled worker" classification, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The regulations for the skilled worker classification contain a minimum requirement of two years of training or experience. While they do not contain a requirement of a bachelor's degree, the ETA 750 does contain such a requirement. As previously stated herein, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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). While the petitioner has established that the beneficiary possesses the required two years of experience in the proffered job, the petitioner has not established that the beneficiary possesses a Bachelor of Arts degree in Marketing & Sales as required by the terms of the labor certification. Therefore, the petitioner has not established that the beneficiary meets the requirements for the skilled worker classification.

Beyond the decision of the director, the petitioner has not established that it made a bona fide offer of employment to the beneficiary.⁹ Under 20 C.F.R. 656.20(c)(8) and 656.3, the petitioner has the burden to

⁸ Counsel asserts that the beneficiary is a professional who holds a baccalaureate degree and is a member of the professions. However, the beneficiary does not possess the degree required by the Form ETA 750. Counsel also states that the cases cited by the director, *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971) and *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977), are irrelevant. While the beneficiary did not submit that after acquired experience should be considered by CIS, the basis for the cited decisions is relevant; the beneficiary must have the education and experience specified on the labor certification as of the petition's filing date in order to be eligible for approval. In this case, the beneficiary did not possess the required education.

⁹ 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 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 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews

show that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992). In the instant case, the petitioner's tax returns indicate that the beneficiary owns 100% of the stock of the petitioner. Therefore, the petitioner has not made a *bona fide* offer of employment to the beneficiary.¹⁰

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.

appeals on a de novo basis).

¹⁰ This office notes that a job offer of Vice President is not credible where the beneficiary owns 100% of the stock of the petitioner. It is doubtful that the beneficiary would be subservient to another individual (i.e. the President) when he is the sole owner of the company. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). If the petitioner attempts to overcome this appeal with a motion, it should address this issue.