

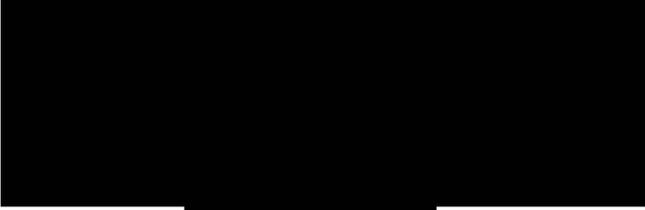


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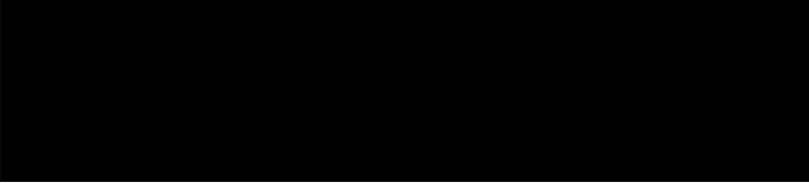
Date: JUL 12 2007

In re: 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.

Wiemann

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and computer consulting company, and seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director’s August 3, 2005 denial, the petition was denied for failure to document that the beneficiary met the requirements of the certified labor certification. Further, the petitioner failed to submit sufficient evidence to document the petitioner’s ability to pay the proffered wage.

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

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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is 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.”

The proffered position requires a four year bachelor’s degree in Commerce, Computer Applications, Management Information Systems or Science and two years of experience in the position offered as a programmer analyst, or two years in a related occupation as an analyst, programmer, or developer. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 03.162-014, programmer analyst, to the proffered position. DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database at <http://www.oalj.dol.gov/PUBLIC/DOT/REFERENCES/DOT01B.HTM> (accessed July 11, 2007) the dictionary of occupational titles (“DOT”) code lists the position as requiring specific vocational preparation (“SVP”) of a 7, which is equivalent to “over 2 years up to and including 4 years”² <http://www.flcdatacenter.com/faq.aspx> (accessed July 11, 2007). Additionally, DOL has an updated online resource for standardized occupational norms, O*Net. According to its website at <http://online.onetcenter.org/link/summary/15-1051.00> (accessed July 11, 2007)³ and its extensive description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Four requiring “considerable preparation” for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a SVP range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” *See* <http://www.flcdatacenter.com/JobZone.aspx> (accessed July 11, 2007); *see also*

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

² *See* <http://www.flcdatacenter.com/svp.aspx>, accessed on July 11, 2007 for explanation of SVP.

³ The Employment and Training Administration created the DOT, and was last updated in 1991. O*Net has replaced the DOT.

<http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed December 12, 2006). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

The proffered position may be properly analyzed as professional since the position requires a four year bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(1)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements, and was specifically requested by the petitioner by correspondence dated April 15, 2004.

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 priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on May 27, 2003. The proffered wage as stated on Form ETA 750 is \$54,000 per year based on 40 hours per week. The labor certification was approved on August 20, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on April 19, 2004. On the I-140 petition, the petitioner listed the following information related to the petitioning entity: established: August 1995; gross annual income: \$6 million; net annual income: not listed; and employees: 65.

On August 3, 2005, the director denied the petition on the basis that the petitioner failed to demonstrate that the beneficiary possessed the required Bachelor's degree. Further, the petitioner failed to submit sufficient evidence to demonstrate the petitioner's ability to pay the proffered wage. The petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). 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 Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the "job offer" position description for a programmer analyst provides:

Analyze, design, develop and implement software applications using Oracle, C, C++, Unix, SQL, DB2, Cobol, PeopleSoft HRMS on Windows NT platform.

Further, the job offered listed that the position required:

Education: College: 4 years;
College degree: Bachelors;
Major Field Study: Commerce, Computer Applications, Management Information Systems, or Science.
Experience: 2 years in the job offered, Programmer Analyst, or 2 years as an Analyst, Programmer, Developer.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed prior education as: (1) Osmania University, Hyderabad, Andhra Pradesh, India; Field of Study: Commerce; from April 1991 to April 1994, for which he received a Bachelor of Commerce degree; (2) Nehru Yuva Kendra, New Delhi, India; Field of Study: Computer Applications; from May 1994 to April 1995, for which he received a "Post Graduate Diploma" in Computer Applications; (3) Maharashtra State Board of Higher Secondary Education, India; Field of Study: Math, English, Commerce; from April 1988 to March 1991, for which he received a Higher Secondary Certificate; and (4) Board of Secondary Education, Andhra Pradesh, India; Field of Study: Math, Science, English; from March 1978 to March 1988; Secondary School Certificate.

The regulations define professional under the third preference category 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) specifies for professional classification that:

(C) *Professionals*. 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.

A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

The petitioner submitted an evaluation of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

Evaluation:

- Evaluation: The Trustforte Corporation, New York, New York.
- The evaluation provided that the beneficiary completed a Bachelor of Commerce degree at Osmania University in India. Enrollment in Osmania University is based on graduation from high school and competitive entrance exams.
- Additionally, the beneficiary completed Post Graduate studies at the Nehru Yuva Kendra, New Delhi, India in Computer Applications, where he earned a Post Graduate diploma in Computer Applications.
- The evaluation provides that admission to Nehru Yuva Kendra is based on graduation from high school and competitive entrance exams. The evaluation does not provide that completion of a bachelor's degree program is necessary for admission.
- The beneficiary then completed a six month Base Program in Systems Management at the National Institute of Information Technology ("NIIT"), in Warangal, India.
- Based on his studies at NIIT,⁴ the beneficiary was awarded a "Base Diploma" in Systems Management.
- The evaluation concludes that the Post Graduate Diploma and the Base Diploma would result in two years of "concentrated bachelor's or master's level academic coursework."
- The evaluation concludes that based on the beneficiary's studies at the three institutions, the combined studies are the "equivalent of a Bachelor of Science Degree in Management Information Systems from an accredited institution of higher education in the United States."

The evaluation concludes that the beneficiary combined studies are equivalent to a Bachelor's degree. However, educational programs cannot be combined to meet the bachelor's degree standard. *See* 8 C.F.R. § 204.5(l)(3)(ii). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree.

If we examined the beneficiary's studies individually, the beneficiary would not qualify. The beneficiary's initial studies were only three years in length, and the labor certification as drafted specifically requires four years of studies resulting in a bachelor's degree. The post graduate diploma is only one year in length and insufficient standing alone. Similarly, the beneficiary's six-month program of study at NIIT is insufficient to satisfy the degree requirement of the certified ETA 750.

⁴ Based on a review of the NIIT website, NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. NIIT has no admission requirements posted on its website, but the website does reflect that it provides online courses to colleges and develops college graduates' technical skills to prepare graduates for better employment positions. From the website, it appears that NIIT does not require a college degree in order to admit a student; however, in the instant case, the "base diploma" was issued pursuant to completion of post-graduate studies. There is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program.

On appeal, counsel contends that 8 C.F.R. § 204.5(k)(3)(i)(A) refers to a “United States advanced degree or its foreign equivalent;” and 8 C.F.R. § 204.5(k)(3)(i)(B) refers to a “United States baccalaureate degree or a foreign equivalent degree.” Counsel contends that it is not necessary to provide that the petitioner will accept a Bachelor’s degree or foreign equivalent on the ETA 750, as “equivalent” is implied by statute.

In support, he refers to the January 7, 2003 letter from Efred Hernandez III of the legacy INS Office of Adjudications (now CIS) to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). At the outset, we note that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). The Hernandez letter also addresses a different preference category than the instant matter before us.

In his January 2003 letter, Mr. Hernandez states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor’s degree to satisfy the advanced degree requirement. Counsel argues that the letter’s premise that more than one degree is acceptable to meet the advanced degree requirement should similarly apply to satisfy the third preference baccalaureate requirement. He quotes Mr. Hernandez’ response, “it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement. Provided that the proper credential evaluations service finds that the foreign degree or degrees are the equivalent of the required US degree, then the requirement may be met.”

The petitioner provided an evaluation of the beneficiary’s education completed by the Trustforte Corporation. The evaluation submitted did not contain the name of the evaluator, or provide the evaluator’s credentials. CIS uses an evaluation by a credentials evaluation organization of a person’s foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Further, as noted above, the Hernandez letters are not binding, and they were written in reference to a different preference category. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language’s plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree.⁵ In the case at hand, the beneficiary’s post-graduate diploma would not qualify him for the

⁵ We are aware of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (CIS) “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” We note that the AAO is not bound to follow the published decision of a United States district court in matters, which arise in another district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from other Circuit Court decisions discussed below. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by

position based on that degree alone, but relies on the combination of his post-graduate work with his undergraduate studies, which fails to meet the singular degree requirement.

the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

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

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983). *See also Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

While we do not lightly reject the reasoning of a District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(1)(2).

The labor certification was not drafted to consider a bachelor's degree or equivalent in education, or the equivalent in "education, training, or experience." The ETA 750 did not define equivalency in either manner, and to argue that the ETA 750 should be read to include the equivalent in education or education and experience, or otherwise, would be unfair to U.S. workers without degrees, but with the equivalent in education based on several programs of study, that may not have responded to advertisements during the labor certification recruitment phase. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner did not set forth any alternative requirements or definition of equivalent to include a combination of educational programs, or education and experience.

Based on a review of evaluations, the petitioner has failed to demonstrate that the beneficiary has a bachelor's degree or foreign equivalent as required by the certified ETA 750 to qualify for the proffered position. Therefore, this issue was properly decided by the director.

Further, since the petitioner required a bachelor's degree rather than merely college studies, the petition may not be considered under the lesser category of a skilled worker. The certified ETA 750 requires the completion of a Bachelor's degree. The petitioner has not demonstrated that the beneficiary has a bachelor's degree, and accordingly does not meet the requirements of the certified ETA 750.

The director's decision additionally provides that the petitioner failed to submit sufficient evidence to demonstrate the petitioner's ability to pay the beneficiary the proffered wage.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, 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): 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.

We will initially examine the petitioner's ability to pay based on the petitioner's prior history of wage payment to the beneficiary, if any. 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, on the Form ETA 750B, signed by the beneficiary on May 4, 2003, the beneficiary did not list that he has been employed with the petitioner. The petitioner did provide in a letter of support that the beneficiary has been employed with the petitioner since November 2003 in H-1B status. The petitioner submitted a 2003 W-2 Form exhibiting payment of wages in the amount of \$5,890, and pay statements with end dates of February 13, 2004, March 1, 2004, March 15, 2004, March 30, 2004 for year to date payments in the amount of \$18,903.

The pay statements and W-2 Form submitted would be insufficient standing alone to exhibit the petitioner's ability to pay the proffered wage. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage.

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. 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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, 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. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner is structured as an S corporation. 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. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. See Internal Revenue Service, Instructions for Form 1120S, 2003, at <http://www.irs.gov/pub/irs-03/i1120s.pdf>, Instructions for Form 1120S, 2002, at <http://www.irs.gov/pub/irs-02/i1120s.pdf>, (accessed February 15, 2005). The petitioner did not submit schedule K, so that we will take the net income from line 21:

<u>Tax year</u>	<u>Net income or (loss)</u>
2004	\$180,979 ⁶

The petitioner's net income would allow for payment of the beneficiary's proffered wage in 2004. However, CIS records reflect that the petitioner has filed for fourteen beneficiaries for permanent residence within the last three years and the petitioner would need to be able to demonstrate its ability to pay each petitioned for beneficiary the proffered wage. Further, we note that the petitioner's 2004 federal tax return submitted does not list that the petitioner paid any wages to any employees. Therefore, we would not conclude that the petitioner's net income reflects the petitioner's ability to pay the proffered wage to each sponsored beneficiary.

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 the difference between the petitioner's current assets and current liabilities.⁷ Current assets include cash on hand, inventories, and receivables expected to be

⁶ The petitioner did not provide its 2003 tax return, which based on the date of filing the I-140 petition should have been available. Further, the petitioner did not submit its 2003 tax return on appeal, but instead submitted only its 2004 tax return.

⁷According 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

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 on the Forms 1120S. 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, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

The petitioner submitted only the first page of its 2004 federal tax return, and did not submit Schedule L. We are, accordingly, unable to calculate the petitioner's net current assets.

As evidence of the petitioner's ability to pay in 2003, the petitioner submitted a financial statement. 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, counsel contends that had the director issued an Request for Additional Evidence (RFE), the petitioner could have submitted its 2004 tax return, which was not available at the time of filing, but would have been available at the time of an RFE. Further, counsel contends that based on the petitioner's net income, the 2004 tax return would exhibit the petitioner's ability to pay the proffered wage in that year. As noted above, the petitioner's net income is insufficient to demonstrate the petitioner's ability to pay all the sponsored beneficiaries the proffered wage.

Regarding the petitioner's ability to pay in 2003, counsel asserts that the 2003 tax return filed with the petition reflects the petitioner's "declared" income of \$331,861.43. We note that the record of proceeding does not reflect that the petitioner submitted its 2003 federal tax return. The petitioner did submit the beneficiary's individual Form 1040 tax return, which is not required and insufficient to document the petitioner's ability to pay the proffered wage. Further, counsel provides that the financial statement reflects that the petitioner had \$832,693.24 of total equity as of December 2003. We have addressed the financial statement above, which we find to be lacking as it is in the form of a compilation, and was not audited in accordance with 8 C.F.R. § 204.5(g)(2).

Accordingly, the petitioner has failed to submit evidence of its ability to pay all petitioned for beneficiaries the respective proffered wages, and, therefore, has failed to demonstrate its ability to pay the present beneficiary the proffered wage.

The petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750. Further, the petitioner has not demonstrated its ability to pay the proffered wage and the petition was properly denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.

ORDER: The appeal is dismissed.