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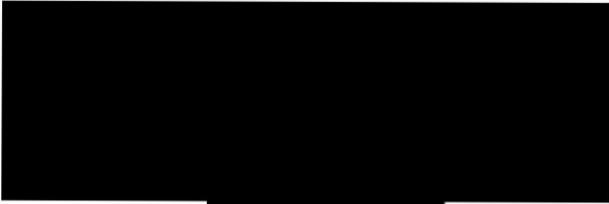
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:

SRC 06 186 51968

Office: TEXAS SERVICE CENTER

Date: JUL 24 2008

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based visa petition that is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a SAP accountant. As required by statute, a Form ETA 9089 Application for Permanent Employment Certification approved by the Department of Labor accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the proffered wage beginning on the priority date and had not established that the beneficiary has the requisite experience as stated on the labor certification application. The director denied the petition accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in 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 decision of denial the issues in this case are whether the petitioner has demonstrated its continuing ability to pay the proffered wage beginning on the priority date, and whether or not the petitioner has demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the approved Form ETA 9089 Application for Permanent Employment Certification.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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 are members of the professions.

Section 203(b)(3)(A)(i) of 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 unavailable in the United States.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* 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.

(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 of 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 regulation at 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 either 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, the day the Form ETA 9089 Application for Permanent Employment Certification was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). Here, the request for labor certification was accepted for processing on January 26, 2006. The proffered wage as stated on the Form ETA 9089 is \$21.11 per hour, which equals \$43,908.80 per year.

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition.¹ *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The certified Form 9089 states at Item I.1, that the proffered position is a professional occupation; that is, that it is a position that typically requires a bachelor's degree. It further states that the position requires a bachelor's degree (Item H.4) with a major field of study in accounting (Item H.4-B) and that no alternative field of study is acceptable (Item H.7), but that a foreign educational equivalent is acceptable. (Item H9) The certified Form 9089 further states that the proffered position requires two years of experience in the job offered, SAP accountant.²

The Form I-140 petition in this matter was submitted on May 26, 2008. On the petition, the petitioner stated that it was established on February 10, 2001 and that it employs 27 workers.

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

That the beneficiary has the requisite experience is uncontested.

The petition states that the petitioner's gross annual income is \$2,332,423 and that its net annual income is a loss of \$39,714. On the Form ETA 9089, signed by the beneficiary on April 5, 2006, the beneficiary did not claim to have worked for the petitioner. The petition indicates that the petitioner would employ the beneficiary in Santa Clara, California. The Form ETA 9089 indicates that the petitioner would employ the beneficiary in Cupertino, California.³ On the Form ETA 9089 the beneficiary stated that he received a bachelor's degree in accounting from the University of Kashmir in 1987.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The AAO considers all evidence properly in the record including evidence properly submitted on appeal.⁴ In the instant case the record contains (1) a diploma and marks sheets from the University of Kashmir, (2) a diploma and marks sheets from the Institute of Cost and Works Accountants of India, (3) a diploma and transcript from the National Institute of Information Technology (NIIT), (4) a transcript from DeAnza College in Cupertino, California, (5) an educational evaluation dated November 7, 2005, (6) a copy of a posting notice of the proffered position, (7) copies of a classified newspaper advertisement of the proffered position, and (8) print-outs of web content advertising the proffered position at careerbuilder.com and at the petitioner's own website. The record does not contain any other evidence relevant to the educational requirement of the proffered position or the beneficiary's claim of qualifying education.

As to the beneficiary's ability to pay the proffered wage, the record contains (1) a copy of the petitioner's 2005 Form 1120S, U.S. Income Tax Return for an S Corporation, (2) a letter dated July 24, 2006 from the petitioner's controller, (3) the petitioner's 2005 Form W-3 transmittal, (4) photocopies of monthly statements pertinent to the petitioner's bank accounts, and (5) copies of contracts for the petitioner to provide services to clients. The record contains no other evidence pertinent to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

The petitioner's 2005 tax return shows that it is a corporation, that it incorporated on April 19, 2001, and that it reports taxes pursuant to cash convention accounting and the calendar year. It confirmed that during 2005 the petitioner reported Line 1c gross receipts of \$2,332,423, and reported a loss of \$39,714 as its Schedule K, Line 17e Income/loss reconciliation. The corresponding Schedule A shows that at the end of that year the petitioner had current assets of \$43,732 and no current liabilities, which yields net current assets of \$43,732.

³ This difference likely indicates a change of plans between the date when the petitioner filed the Form ETA 9089 and the date it filed the Form I-140 petition, and, as such, does not represent a contradiction. Further, as both Santa Clara and Cupertino are located in Santa Clara County, this change does not raise a prevailing wage issue.

⁴ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The petitioner's 2005 W-3 transmittal shows that it paid \$1,005,100 in salaries and wages during that year. The petitioner's Form 941 Employer's Quarterly Tax Return indicates that it paid wages, tips, and other compensation of \$230,819 during the first quarter of 2006.

The July 24, 2006 letter from the petitioner's controller cites the petitioner's gross receipts and total wage expense as indices of its ability to pay the proffered wage, and states that it then had approximately 19 employees.⁵ The diploma and marks sheet from the University of Kashmir shows that in 1987 the beneficiary received a bachelor of commerce degree. Advanced accountancy and auditing are among the six examinations the beneficiary passed.

The diploma and marks sheets from the Institute of Cost and Works Accountants of India show that the beneficiary passed the intermediate examination given in December 1992. The diploma was awarded on July 10, 1993. The diploma and transcript from NIIT shows that it awarded the beneficiary a diploma in systems management on February 3, 1994 based on fair performance. The transcript from DeAnza College shows that the beneficiary has declared a major in accounting and taken BUS 010 Intro. to Business (5 cr. hrs.) and BUS 096A, Princ. of Management (4 cr. hrs.).

The November 7, 2005 educational evaluation states that the beneficiary received a bachelor of commerce degree, requiring at least two years of study, from the university of Kashmir in 1987; an Intermediate Examination Certificate from the Institute of Cost and Works Accountants of India, requiring at least one year of study, in July 1993; a diploma in Systems Management from NIIT, which required one year of study, in February 1994; and "9 Credit Hours in an Accounting major at DeAnza College" in the United States. The evaluation stated that this education, taken as a whole, is equivalent to a bachelor's degree in accounting.

The posting notice of the proffered position indicates that it was posted from November 21, 2005 to December 8, 2005. It states that the proffered position requires a "Bachelor's degree in Accounting or equivalent," and "two years of experience as an Accountant." The classified advertisement and web content print-outs advertising the proffered position also indicate that it requires a bachelor's degree in accounting or equivalent plus two years of experience. None of those documents specify what alternative education would be considered equivalent to a bachelor's degree in accounting.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the beneficiary has the requisite bachelor's degree in accounting or equivalent, the Director, Texas Service Center, on July 8, 2006, requested evidence pertinent to both of those issues.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested that the evidence of the petitioner's ability to pay the proffered wage include copies of annual reports, federal tax returns, or audited financial statements and demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date. As to the

⁵ This office notes that on the Form I-140 petition, submitted on May 26, 2006, the petitioner stated that it then had 27 employees, rather than approximately 19 as the controller stated on July 24, 2006. This decrease in the number of employees, if taken as true, apparently demonstrates a great diminution in the petitioner's size. Today's decision, however, will only regard those two disparate statements as indications that the petitioner has less than 100 employees.

beneficiary's education, the director requested evidence that the beneficiary has a bachelor's degree in accounting or a degree that is equivalent.

In response, counsel submitted the 2005 Form W-3, the Form 941, the bank statements, the contracts, and the July 24, 2006 letter from the petitioner's controller, each of which is described above. Counsel also cited a non-precedent January 20, 2004 decision of this office for the proposition that the beneficiary is able to qualify for the proffered position without a bachelor's degree in accounting.

Counsel's citation of an unpublished, non-precedent decision is without effect. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Pertinent to the reasoning of that decision, counsel urges that the proffered position may be analyzed as a position for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, rather than a position for a professional pursuant to section 203(b)(3)(A)(ii), and that, pursuant to that analysis, the petitioner is not obliged to show that the beneficiary's degree, which is a bachelor's degree on its face, is equivalent to a U.S. bachelor's degree. Again, though, the sole authority cited for that proposition is a non-precedent decision of this office.⁶

The director denied the petition on September 23, 2006, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date and that the evidence submitted did not demonstrate that the beneficiary has the requisite bachelor's degree in accounting.

On appeal, counsel cited the petitioner's gross receipts as an index of its financial health and stated that the contracts for the petitioner's services demonstrate its reasonable expectation of future profits. Counsel asserted, but provided no evidence or calculation to support, that the petitioner's operations would reap profits from performing on those contracts, rather than suffering additional losses. Counsel also argued that, pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the totality of circumstances in this case demonstrates the petitioner's ability to pay the proffered wage.

As to the beneficiary's education, counsel asserted that the educational evaluation submitted demonstrates that the beneficiary's education is equivalent to the requisite bachelor's degree in accounting, and that the Form ETA 9089 submitted makes clear that a foreign educational equivalent of a bachelor's degree in accounting is sufficient qualification for the proffered position. Counsel argued that although a combination of lesser degrees may not suffice to qualify a beneficiary for a position for a professional pursuant to 203(b)(3)(A)(ii) of the Act, any education accrued may be applied to show that a beneficiary has the equivalent of a degree required for a skilled worker position pursuant to 203(b)(3)(A)(i) of the Act. Counsel cited a publication of an immigration attorneys' organization and a non-precedent decision of this office for that proposition.

⁶ This office notes, further, that counsel did not identify the case upon which he intended to rely, and, although he stated that he was providing a copy, he did not.

Again, this office observes that counsel's citation of unpublished, non-precedent decisions is without effect. Further, publications of immigration attorneys' organizations are not binding on this office. Again, counsel was free to note the reasoning of the case and publication cited, and to develop an argument explaining why that reasoning should be applied to this case, but the case cited has no precedential authority and the existence of the article is certainly not, in itself, compelling. This office will address counsel's arguments, but the decision and the article cited are without authority in this matter and their citation is superfluous.

On February 12, 2008 this office issued a RFE in this matter. That request noted that, according to information at the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), obtaining a bachelor of commerce degree in India requires only two to three years of study, and that credit for such study may be accorded on a case-by-case basis. That request further observed that, absent additional evidence, the record in the instant case would not appear to demonstrate that the beneficiary is qualified for the proffered position in the instant case, as he does not appear to have a U.S. bachelor's degree or a foreign equivalent degree as required by the Form ETA 9089. That request also noted that, even assuming that the beneficiary's bachelor's degree were taken to be equivalent to a U.S. bachelor's degree, the evidence does not support the assertion that his major field of study was accounting.

This office requested that counsel or the petitioner provide evidence pertinent to the actual minimum educational requirements of the proffered position as evinced to the Department of Labor (DOL) in the petitioner's attempts to hire U.S. workers to fill the position. This office also asked that counsel or the petitioner provide transcripts from the beneficiary's study at Indian institutions and at DeAnza college, showing what classes the beneficiary took to obtain his bachelor's degree, and that counsel or the petitioner indicate which individual classes requisite to a U.S. bachelor's degree in accounting the beneficiary's education has satisfied.

The notice observed that although the beneficiary was recently in the accounting program at DeAnza College, it is an undergraduate program, the classes he is taking appear to be in business and management rather than accounting, and appear to be freshman-level classes at best. The notice stated that those facts appear to conflict with the assertion that the beneficiary already has the equivalent of a bachelor's degree in accounting. The petitioner was asked to reconcile those apparent discrepancies.

The notice further requested that the petitioner provide evidence that NIIT and the Institute of Cost and Works Accountants are accredited educational institutions. Finally, this office requested that the petitioner or counsel indicate whether the beneficiary has taken or is qualified to take the CPA examination in the United States and, if he has, to provide evidence of that assertion.

In response, counsel noted that the petitioner has made clear that it would accept the foreign equivalent of a U.S. bachelor's degree in accounting, rather than requiring a U.S. bachelor's in accounting or a foreign degree that is equivalent to that U.S. bachelor's. Counsel also cited another non-precedent decision for the proposition that under these circumstances the petition may be considered as a petition for a skilled worker under section 203(b)(3)(A)(i) of the Act. Although counsel quoted at length from the non-precedent decision, he made no argument applying the reasoning of that decision to the instant case, other than urging that it should

control the outcome. Again, this office notes that counsel's citation of unpublished, non-precedent decisions is without effect.⁷

Counsel's submission was not responsive to the February 12, 2008 RFE of this office. Counsel did not provide any transcript or other list of accounting classes the beneficiary has taken and a reckoning of how those classes satisfy the requirements of a U.S. bachelor's degree in accounting. Counsel did not address why, if the beneficiary has the equivalent of a U.S. bachelor's degree in accounting, he is in an undergraduate accounting program taking introductory level classes. Counsel did not indicate whether NIIT and the Institute of Cost and Works Accountants are accredited educational institutions or provide related evidence. Counsel did not state whether or not the beneficiary is able to take the CPA examination in the United States, or whether he has taken it. That information and evidence was expressly requested in the February 12, 2008 request for evidence.

Counsel's reliance on the bank statements in this case is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), which are the requisite evidence of a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner has not demonstrated that the evidence required by 8 C.F.R. § 204.5(g)(2) is inapplicable or that it paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and generally cannot show the sustainable ability to pay a proffered wage.⁸ Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reported on its tax returns.

Showing that the petitioner paid wages in excess of the proffered wage, or greatly in excess of the proffered wage, is insufficient. Showing that the petitioner's gross receipts exceeded the proffered wage, or greatly exceeded the proffered wage, is insufficient. Unless the petitioner can show that hiring the beneficiary would somehow have reduced its expenses⁹ or otherwise increased its net income,¹⁰ the petitioner is obliged to show

⁷ Because counsel appeared to cite that non-precedent decision as authority, rather than providing reasons that its reasoning should be extended, this office is not obliged to address it further. This office notes, however, that the proffered position in the instant case is for an accountant, whereas the case cited involved a petition for a product manager/sales representative. Counsel provided no justification for treating an accountant position as a skilled worker position, rather than as a position for a professional. Even if the non-precedent case on which counsel relies were controlling precedent, counsel provided no reason why the instant case should not be distinguished on that basis, and the case he cited certainly provides no such reason.

⁸ A possible exception exists to the general rule that bank accounts are ineffective in showing a petitioner's continuing ability to pay the proffered wage beginning on the priority date. If the petitioner's account balance showed a monthly incremental increase greater than or equal to the monthly portion of the proffered wage, the petitioner might be found to have demonstrated the ability to pay the proffered wage with that incremental increase during that month. If that trend continued, with the monthly balance increasing during each month in an amount at least equal to the monthly amount of the proffered wage, then the petitioner might have shown the ability to pay the proffered wage during the entire salient period. That scenario is absent from the instant case, however, and this office does not purport to decide the outcome of that hypothetical case.

⁹ The petitioner might be able to show, for instance, that the beneficiary would replace another named employee, thus obviating that other employee's wages, and that those obviated wages would be sufficient to

the ability to pay the proffered wage **in addition to** the expenses it actually paid during a given year. The petitioner is obliged to show that it had sufficient funds remaining to pay the proffered wage after all expenses were paid. That remainder is the petitioner's net income. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985), 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 CIS should have considered income before expenses were paid rather than net income.

The presentation of contracts for the petitioner's services does not demonstrate that the petitioner reasonably apprehends increased profits or, for that matter, smaller losses, during the coming years. The petitioner presumably also had contracts for its services during previous years, but the single tax return provided shows that the petitioner's operations resulted in a loss during that single year. The presentation of those contracts does not demonstrate any changing trend to this office, or any reason to project profits.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine whether the petitioner employed 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 petitioner did not establish that it employed and paid the beneficiary.

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, the AAO will, in addition, examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. CIS may rely on federal income tax returns to assess a petitioner's ability to pay a proffered wage. *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).

Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. 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 CIS should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to add back to net cash the depreciation expense charged for the year. *Chi-Feng Chang* at 537. See also *Elatos Restaurant*, 623 F. Supp. at 1054.

The petitioner's net income, however, is not the only statistic that may be used to show the petitioner's ability to pay the proffered wage. If the petitioner's net income, if any, during a given period, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, the AAO will review the petitioner's assets as an alternative method of demonstrating the ability to pay the proffered wage.

cover the proffered wage.

¹⁰ The petitioner might be able to demonstrate, rather than merely allege, that employing the beneficiary would contribute more to the petitioner's revenue than the amount of the proffered wage.

The petitioner's total assets, however, are not available to pay the proffered wage. The petitioner's total assets include those assets the petitioner uses in its business, which will not, in the ordinary course of business, be converted to cash, and will not, therefore, become funds available to pay the proffered wage. Only the petitioner's current assets, those expected to be converted into cash within a year, may be considered. Further, the petitioner's current assets cannot be viewed as available to pay wages without reference to the petitioner's current liabilities, those liabilities projected to be paid within a year. CIS will consider the petitioner's net current assets, its current assets net of its current liabilities, in the determination of the petitioner's ability to pay the proffered wage.

Current assets include cash on hand, inventories, and receivables expected to be converted to cash or cash equivalent within one year. Current liabilities are liabilities due to be paid within a year. On a Schedule L the petitioner's current assets are typically found at lines 1(d) through 6(d). Year-end current liabilities are typically¹¹ shown on lines 16(d) through 18(d). If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due.

The proffered wage is \$43,908.80 per year. The priority date is January 26, 2006. Although evidence pertinent to previous years is not directly relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date, because complete information pertinent to 2006 and subsequent years was unavailable on October 19, 2006, when the appeal was submitted, this office will consider the petitioner's 2005 tax return.

During 2005 the petitioner declared a loss. The petitioner is unable, therefore, to demonstrate the ability to pay any portion of the proffered wage out of its profit during that year. At the end of that year, however, the petitioner had net current assets of \$43,732. That amount is insufficient, in itself, to pay the annual amount of the proffered wage, but is only slightly less than the proffered wage.

Counsel has argued that the "totality of circumstances" in this case demonstrates the petitioner's continuing ability to pay the proffered wage beginning on the priority date, citing *Matter of Sonogawa*, 12 I&N Dec. 612. Although this office finds that the petitioner's net current assets, its substantial gross income, and the total of its wage expense were not, separately, sufficient to show the petitioner's ability to pay the proffered wage, this office notes that the petitioner's gross income exceeded \$2 million during 2005, and its total wages during that year exceeded \$1 million. The petitioner's end-of-year 2005 net current assets were almost, in themselves, sufficient to pay the annual amount of the proffered wage.

Under these circumstances, this office concurs with counsel that the totality of the circumstances in the instant case show that the petitioner was able to pay the proffered wage during 2005, the only year from which copies of annual reports, federal tax returns, or audited financial statements were provided.

No copies of annual reports, federal tax returns, or audited financial statements were submitted covering any years later than 2005. This office notes, however, that the petitioner's 2006 tax return remained unavailable when the appeal in this matter was timely submitted. The petitioner is excused from demonstrating its ability to pay the proffered wage during 2006 and subsequent years.

¹¹ The location of the petitioner's current assets and current liabilities varies slightly from one version of the Schedule L to another.

Because the petitioner has demonstrated its ability to pay the proffered wage during the most recent year prior to filing the instant petition, and because evidence pertinent to later, more salient, years was unavailable even when the petitioner submitted its appeal brief, this office finds that the petitioner has sufficiently demonstrated its continuing ability to pay the proffered wage beginning on the priority date. The petitioner has overcome that basis of the decision of denial.

The remaining issue is whether the beneficiary is qualified for the proffered position.

The Form ETA 9089 upon which the petition relies indicates that the proffered position requires a bachelor's degree in accounting or a foreign educational equivalent. The educational evaluation in the record indicates that the beneficiary's bachelor of commerce degree from the University of Kashmir, his Intermediate Examination Certificate from the Institute of Cost and Works Accountants in India, his diploma in systems management from NIIT, and his nine credit hours in business management taken at DeAnza College, taken together, are equivalent to the requisite bachelor's degree in accounting.

Even if this office were to accept counsel's position, that a foreign educational equivalent need not be a single degree, the combination of education relied upon by counsel is clearly not a "foreign educational equivalent," as it includes nine credit hours earned in the United States.

More to the point, however, the record shows that the beneficiary's education at the University of Kashmir included few accounting courses. The evidence does not indicate what the beneficiary was obliged to study in order to sit for the Intermediate Examination Certificate administered by the Institute of Cost and Works Accountants. The record contains no evidence that the Institute of Cost and Works Accountants and NIIT are accredited educational institutions. The beneficiary's diploma from NIIT is in systems analysis, not accounting.

CIS uses an evaluation of a person's foreign education by a credentials evaluator as an advisory opinion only. Where an evaluation is questionable in any way, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

This office finds that the evidence submitted, and upon which the educational evaluation relied, does not support the finding that the beneficiary's accumulation of education is in any sense equivalent to the requisite bachelor's degree in accounting. This office therefore rejects the assertion that the beneficiary's education is equivalent to a bachelor's degree in accounting. Therefore, the petitioner has not established that the beneficiary is eligible for the proffered position. The petition was correctly denied on this basis which has not been overcome on appeal.

The record suggests an additional issue that was not discussed in the decision of denial.

On February 12, 2008 this office asked counsel to provide (1) a analysis of the accounting courses the beneficiary has taken and an explanation of how they satisfy the individual course requirements of a bachelor's degree in accounting, (2) evidence that the Institute of Cost and Works Accountants is an accredited educational institution, and (3) evidence to demonstrate that NIIT is an accredited educational institution. Counsel did not comply with any of those requests.

This office also asked counsel (1) to explain why the beneficiary, if he has the equivalent of a bachelor's degree in accounting, is enrolled in the undergraduate accounting program of a college and taking introductory level classes, and (2) to state whether the beneficiary has taken or is eligible to take the CPA examination in the United States. Counsel did not comply with either of those requests.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Because the failure to submit requested evidence occurred during the pendency of the appeal, that failure was not available to the director as a basis for denying the petition.

As was noted above, however, the AAO reviews appeals on a *de novo* basis and retains all of the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. This office finds that the petition is deniable on this additional basis.

The appeal is dismissed both on the basis of the petitioner's failure to demonstrate that the beneficiary is qualified for the proffered position and on the basis of the petitioner's failure to provide requested items of evidence that were relevant to material issues.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *affd.* 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 appeals on a *de novo* basis). The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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.