



U.S. Citizenship
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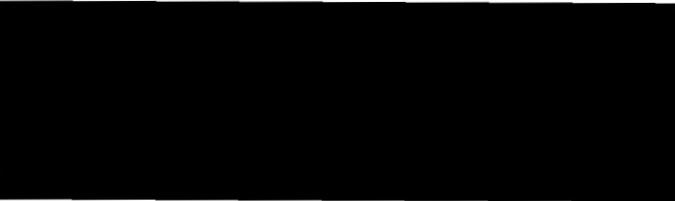
Petitioner:

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, Nebraska Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer (QA software specialist). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as required on the Form ETA 750. Accordingly, the director denied the petition on January 22, 2007.

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.

On appeal counsel asserts that pursuant to DOL, the education requirement stated on the labor certification includes either a single source degree or a combination of education equivalent to the bachelor degree, and that the beneficiary earned a single source foreign equivalent bachelor degree on his completion of his final program. However, the record does not contain any evidence showing that the beneficiary's three-year degree from India is the equivalent to a U.S. bachelor's degree, or that the petitioner specified on the Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent in engineering, mathematics, computer science or management of information systems might be met through a combination of lesser degrees and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. In order to determine whether the instant petition could be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on January 7, 2008 granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. The AAO received the response on March 28, 2008.

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 pertinent evidence in the record, including new evidence properly submitted upon appeal and in response to the AAO's RFE.

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

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 original Form ETA 750 was accepted on December 26, 2003 and certified on December 7, 2005. The certified ETA 750 in the instant case requires a Bachelor's Degree or equivalent in engineering, mathematics, computer science or management of information systems. DOL assigned the occupational code of 030.062-010, software engineer, the closest type of occupation as the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.062-010+&g+Go> (accessed June 9, 2008) and its extensive description of the position and requirements for the position most analogous to QA software specialist position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to QA software specialist position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (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://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed June 9, 2008). 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.

Therefore, a QA software specialist position could be properly analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.² In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification of the skilled worker category pursuant to section 203(b)(3)(A)(i) of the Act. Therefore, Citizenship and Immigration Services (CIS) will examine the petition under the skilled worker category, which requires a showing that the alien has two years of training or

² A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that QA software specialist positions are not included in this section.

experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application. 8 C.F.R. § 204.5(l)(3)(ii)(B).

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, and any other requirements of the individual labor certification.”

The certified Form ETA 750 expressly requires a bachelor’s degree or equivalent in engineering, mathematics, computer science or management of information systems as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary’s education includes a three-year bachelor of science degree from the University of Rajasthan in India, and a one-year diploma in management from Indira Gandhi National Open University (IGNOU). Thus, the issues are whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary’s diploma in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered position as set forth on the labor certification.

Authority to Evaluate Whether the Alien is Eligible for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL’s role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Act certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

- (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now CIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year

bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

As stated above, however, the petitioner seeks to classify the beneficiary as a skilled worker.

Authority to Evaluate Whether the Alien is Qualified for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, 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 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, revisited this issue, stating:

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).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

We are cognizant 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." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same 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 the Circuit Court decisions cited above. 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 the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (Ore. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* 2006 WL 3491005 at *8-9. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *10. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated. But See *Maramjaga v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)

The key to determining the job qualifications specified in the labor certification is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification, as filled in by the petitioner, reflects the following requirements:

14. EDUCATION
Grade School
High School
College X
College Degree Required Bachelors Degree / Equivalent
Major Field of Study
TRAINING
Number of Years
Number of Months 6
Type of Training Software

The applicant must also have two years of experience in the job offered or in the related occupation of software testing and coding. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A states the following as other special requirements:

The employer will accept a Bachelor Degree in Engg, Math, Computer Science, MIS, and two years experience in skills such as WinRunner, XRunner, LoadRunner, Test Director, DDTs, ClearCase, ClearQuest, SQA Suite, and Webtrak.

To determine whether a beneficiary is eligible for a preference immigrant visa, 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*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor

certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification “must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.” As noted previously, the certified Form ETA 750 requires a Bachelor’s degree or equivalent in Engineering, Math, Computer Science or MIS. The petitioner clearly required a bachelor’s degree or equivalent in engineering, mathematics, computer science or management of information systems, however, the labor certification does not further define the degree equivalent. Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. bachelor’s degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner’s labor market test. The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor’s degree might be met through a combination of lesser degrees, diplomas, and/or quantifiable amount of work experience.

Furthermore, the AAO’s RFE dated January 7, 2008 requested the petitioner to submit evidence showing that the petitioner specified that the minimum academic requirements of a bachelor’s degree might be met through a combination of lesser degrees and/or quantifiable amount of work experience in the petitioner’s labor market test. The AAO specifically requested evidence demonstrating that the petitioner communicated its express intent about the actual minimum requirements of the proffered position to DOL during the labor certification process. The AAO received the response on March 28, 2008. Counsel submits recruitment efforts conducted related to the relevant labor certification, including the internal posting notice and newspaper advertisements. While the internal posting notice indicated that the position requires a minimum of Bachelor degree in engineering, or math, or computer science, or MIS with at least two years experience along with one year and half technical training,³ the newspaper advertisements require 1-3 years experience in QA software testing automation tools. Counsel did not provide any explanation or submit evidence to resolve the inconsistencies between these recruitment efforts and the ETA 750. Nor did counsel submit the petitioner’s results report of recruitment efforts which is regulated by 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) and requested by the AAO in its RFE. The record does not contain any other evidence showing that the petitioner actually applied the 1-3 years of requirement set forth in the advertisements submitted in the recruitment procedures in the instant case. The record does not contain any documents indicating that the employer would accept a combination of lesser degree(s) and quantifiable amount of work experience as an “equivalent” to meet the minimum educational requirement of a bachelor’s degree in engineering, math, computer science or MIS. The AAO does not find that US workers were on notice that a combination of lesser degree(s) and work experience as an equivalent would meet the minimum educational requirement of a bachelor’s degree in engineering, math, computer science or MIS. Therefore, the petitioner failed to demonstrate its intent to accept a combination of lesser degree(s) and work experience as an equivalent of a

³ The internal posting notice includes different requirements of training from the ETA 750. While the ETA 750 requires 6 months of training in software, the internal posting notice requires one year and half technical training.

bachelor's degree in engineering, math, computer science or MIS on the Form ETA 750 and the relevant recruitment materials.

Additionally, the court in *Snapnames.com, Inc.* determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. See *Snapnames.com, Inc.* 2006 WL 3491005 at *8-9. In the instant case, the petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor's degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing.

The petitioner asserts that the beneficiary possessed the equivalent to a U.S. bachelor's degree according to private credential evaluations from [REDACTED] of the The Trustforte Corporation (Trustforte), [REDACTED] of A.E.S.F. Inc. (AESF), [REDACTED] of Baruch College – The city University of New York (Prof. [REDACTED]). All of the three evaluations evaluate the beneficiary's three-year bachelor's degree in chemistry, botany and zoology as the equivalent of three years of academic studies toward a bachelor of science degree at an accredited college or university in the United States. The Trustforte's evaluation concludes that the beneficiary attained the equivalent of a bachelor of science degree, with a dual major in management science and biology, from an accredited college or university in the United States based on the beneficiary's three-year bachelor's degree in chemistry, botany and zoology from the University of Rajasthan and his diploma in management from IGNOU. The AESF's evaluation concludes that the beneficiary attained the equivalent of a bachelor of science degree in management information systems from an accredited college or university in the United States based on the beneficiary's three-year bachelor's degree in chemistry, botany and zoology from the University of Rajasthan, his diploma in computer programming from Dahanukar Institute of Management, and the diploma in management from IGNOU. However, as previously discussed, a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate since a bachelor degree is generally found to require four years of education, *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977) and the petitioner has not established that either the diploma in computer programming from Dahanukar Institute of Management or the diploma in management from IGNOU is a post graduate diploma. In addition, the petitioner did not submit the diploma in computer programming from Dahanukar Institute of Management as a part of the beneficiary's education qualifications but as evidence of his training in software. Prof. [REDACTED] evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The record shows that the beneficiary possesses a three-year bachelor of science degree in chemistry, botany and zoology from the University of Rajasthan in India. AS stated in our January 7, 2008 notice, in determining whether the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree in engineering, mathematics, computer science or MIS, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, <http://www.aacrao.org>, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who

represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” EDGE provides a great deal of information about the educational system in India. While it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary’s three-year bachelor of science degree in chemistry, botany and zoology from the University of Rajasthan in India, which alone represents attainment of a level of education comparable to three years of university study in the field of mathematics in the United States, but cannot be deemed as an equivalent of a U.S. bachelor’s degree in engineering, mathematics, computer science or MIS.

EDGE also discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor’s degree “represents attainment of a level of education comparable to a bachelor’s degree in the United States.” The “Advice to Author Notes,” however, provide:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor’s degree.

The beneficiary also holds a diploma in computer programming (one year) from Dahanukar Institute of Management and a diploma in management (one year) from IGNOU. However, the petitioner submitted the diploma in computer programming from Dahanukar Institute of Management as evidence that the beneficiary met the six months of training in software requirement. Therefore, the AAO will examine and consider the diploma in management from IGNOU only in determining whether the beneficiary meets the educational requirement in the instant case. There is no evidence in the record of proceeding that the entrance requirement to the one year diploma program in management at IGNOU is a three-year bachelor’s degree, and the program provides college senior level education in its relevant field.⁴

⁴ The AAO accessed IGNOU’s website to determine what type of educational services it provides. IGNOU’s management programs include Master of Business Administration (MBA), Diploma in Management (DIM), Post Graduate Diploma in Management (PGDIM) and the Specialisation Diploma Programmes (PGSDMs). IGNOU clearly differs DIM from PGDIM. While the one year DIM program requires five courses (three

Moreover, CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In the instant case, the beneficiary holds a three-year bachelor's degree in chemistry, botany and zoology, however, his diploma from IGNOU is in the field of management. All the beneficiary's college level educations alleged to be used in equivalent evaluation are three years in chemistry, botany and zoology, and one year in management. The beneficiary never completed his four-year college studies in any field of chemistry, botany and zoology, or management. Therefore, the AAO finds that the petitioner failed to demonstrate that the beneficiary possesses a bachelor's degree or educational equivalent in engineering, mathematics, computer science or MIS, and thus the beneficiary did not meet the minimum educational requirements for the proffered position prior to the priority date under the skilled worker category. The director's January 22, 2007 decision is affirmed.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified additional grounds of ineligibility and will discuss these issues below. 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), *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 appeals on a de novo basis).

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). The petitioner must demonstrate that, on the priority date, that is December 26, 2003 in the instant case, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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

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

compulsory courses: MS-1, MS-2 and MS-3 and two elective courses from MS-4 to MS-7), the one year and a half PGDIM program requires students complete all eleven courses from MS-1 to MS-11). The diploma and transcripts from IGNOU clearly shows that the beneficiary completed five courses (MS-1, MS-2, MS-3, MS-4 and MS-6) and that the diploma the beneficiary obtained from IGNOU is a Post Secondary Diplomas, not a Post Graduate Diploma. Therefore, the beneficiary's diploma from IGNOU cannot be considered as a post-graduate diploma or senior year level of undergraduate diploma from an accredited institute following a three-year bachelor's degree, and thus, the petitioner failed to demonstrate that the beneficiary's three-year bachelor's degree plus his diploma from IGNOU is the equivalent to a U.S. baccalaureate in engineering, mathematics, computer science or MIS.

The certified ETA 750 requires two years of experience in the job offered, i.e. QA software specialist, or two years of experience in related occupation of software testing and coding. Item 15 of the Form ETA 750A specifically defines two years of experience in skills such as WinRunner, XRunner, LoadRunner, Test Director, DDTs, ClearCase, ClearQuest, SQA Suite, and Webtrak. The beneficiary set forth his work experience on the Form ETA 750B. He listed his experience as a full-time "Computer Consultant" at Future Technology Foundation Inc. from February 2003 to October 2003, as a full-time "Information Technology Consultant" at Ohm Technologies from September 2000 to February 2003 and as a full-time "Information Technology Analyst" at [REDACTED] from November 1999 to September 2000.

The initial filing of the petition came with two experience letters pertinent to the beneficiary's experience qualifications as required by the above regulation. One is dated March 24, 1987 and from [REDACTED] E.D.P. Manager of Colgate Palmolive (India) Ltd. This letter verifies that the beneficiary worked for that company as D.P. Operator from September 21, 1977 and then as a programmer from April 2, 1980 to June 6, 1986. However, the letter does not contain a specific description of the duties performed by the beneficiary during the employment period. Without such a description, the AAO cannot determine whether the experience as a DP operator or programmer with Colgate Palmolive qualifies the beneficiary to perform the duties of the proffered job. The second letter is from [REDACTED] the director of Ohm Technologies Pvt. Ltd. dated July 3, 2002 verifying the beneficiary's employment with them as an information technology consultant from September 2000 to the date of the letter. The letter verifies for one year and ten months only and it does not verify the beneficiary's full-time employment. In addition, with the description of the duties performed by the beneficiary at Ohm Technologies, it is not clear whether the beneficiary's experience as an information technology consultant there qualifies him to perform the duties described in item 13 of the Form ETA 750A. Therefore, the AAO notified the petitioner that these letters could not be accepted as primary evidence to establish the beneficiary's requisite two years of experience and requested for regulatory-prescribed evidence to demonstrate that the beneficiary possessed the requisite two years of experience.

In response to the AAO's RFE, counsel submits additional items as evidence to establish the beneficiary's requisite two years of experience set forth on the Form ETA 750A. These items include a letter dated April 2, 1980 from [REDACTED] of E.D.P. Manager of Colgate Palmolive; two affidavits from Colgate Palmolive employees [REDACTED] and [REDACTED] respectively; two letters dated April 1, 1996 from [REDACTED] the director, and from [REDACTED] IT Manager of Kwaliti Ice Creams (India) Ltd. respectively; a letter dated December 13, 1999 to the beneficiary from [REDACTED] with job description and contractual employment; a letter dated September 5, 2002 from [REDACTED] Vice President of Future Technology Foundation, Inc. and two co-worker letters dated January 30, 2008 from [REDACTED] and dated February 20, 2008 from [REDACTED] respectively.

The letter from [REDACTED] was dated April 2, 1980 and signed by [REDACTED] as E.D.P. Manager of Colgate Palmolive. However, this is not an employment verification letter, but a letter from then E.D.P. Manager informing the beneficiary of his promotion to a programmer position effective on April 2, 1980. Nor are the two affidavits from [REDACTED] and [REDACTED] regulatory-prescribed experience letters because they are from the beneficiary's former coworkers instead of his former employers

or trainers. The record does not contain any objective evidence to support the beneficiary's employment history with this company. Thus, the petitioner failed to establish the beneficiary's requisite two years of experience from the employment with Colgate Palmolive with regulatory-prescribed evidence.

Both letters from [REDACTED], the director of [REDACTED] and from [REDACTED] IT Manger of the company dated April 1, 1996 are experience letters from the beneficiary's former employers. These two letters verify that the beneficiary worked for this company as an assistant manager from June 6, 1986 and as a system manager from April 2, 1993 until October 1, 1995. According to these letters, the duties performed by the beneficiary during this period include implementing online computerized billing systems, sales analysis and developing complete financial accounting packages using HTML, JavaScript, VBScript, C, C++ as programming language and backend work on Oracle 7 and 8i database created on UNIX servers. However, it is not clear whether experience as an assistant manager or a system manager could qualify the beneficiary to meet the requirement of two years experience in the job offered, i.e. QA software specialist, or in the related occupation of software testing and coding. In addition, within the description of the duties performed by the beneficiary does not appear the experience in skills such as WinRunner, XRunner, LoadRunner, Test Director, DDTs, ClearCase, ClearQuest, SQA Suite, and Webtrak as set forth by item 15 of the Form ETA 750A. Therefore, the petitioner failed to demonstrate that the beneficiary possessed the experience qualifications with his experience obtained from the employment with Kwaliti Ice Creams (India) Ltd. prior to the priority date.

The letter dated December 13, 1999 from Abdul Montem Ltd with job description and contractual employment dated October 30, 1999 are the job offer documents. They show that the company offered the beneficiary an information technology analyst position for three years to perform the duties described in the attached job description. However, they did not verify the beneficiary's employment history. A job offer letter and employment contract cannot be considered as primary evidence to establish the beneficiary's qualifications in experience. Therefore, the petitioner in the instant case failed to submit regulatory-prescribed evidence to establish the beneficiary's qualifying experience with Abdul Montem Ltd.

The record also contains an employment offer letter dated September 5, 2002 from the beneficiary's former employer, Future Technology Foundation, Inc. However, as previously discussed, an employment offer letter cannot be accepted as primary evidence to establish the beneficiary's requisite experience in lieu of the experience letters required under the regulation at 8 C.F.R. § 204.5(g)(1). The record does not contain any experience letter from Future Technology Foundation, Inc. Therefore, the petitioner also failed to establish the beneficiary's qualifying experience with Future Technology Foundation, Inc. with regulatory-prescribed evidence.

In response to the AAO's RFE, counsel also submits two letters dated January 30, 2008 from Wade Towles as the former team lead and dated February 20, 2008 from Eric Tilton as the current team lead respectively. Both letters were submitted to verify the beneficiary's employment experience as a contractor for Software Development Life Cycle (SDLC) Tools support for IBM Global Services (IGS) since March 14, 2005. However, 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 DOL. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date in the instant case is December 26,

2003. Any experience obtained after December 26, 2003, cannot be used to qualify the beneficiary for the proffered position in this case. The experience both V [REDACTED] and [REDACTED] are trying to verify for the beneficiary was obtained by the beneficiary after March 14, 2005, almost one year and a half after the priority date. Therefore, the petitioner cannot establish the beneficiary's requisite experience with his experience with IGS.

The record does not contain any experience letter from former employer(s) or trainer(s) to verify that the beneficiary possessed the requisite two years of experience in the job offered or software testing and coding prior to the priority date as required by the regulation quoted above. Therefore, the petitioner failed to establish the beneficiary's qualifications in experience with regulatory-prescribed evidence.

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 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, 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 U.S. DOL. See 8 CFR § 204.5(d). The priority date in this case is December 26, 2003. The proffered wage as stated on the Form ETA 750 is \$76,250 per year.

In determining the petitioner's ability to pay the proffered wage during a given period, 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 petitioner submitted the beneficiary's W-2 forms for 2003 through 2007. These W-2 forms show that the petitioner paid the beneficiary \$5,400.00 in 2003, \$38,547.00 in 2004, \$55,408.13 in 2005, \$68,380.00 in 2006 and \$74,640.00 in 2007. Therefore, the petitioner did not establish its ability to pay the proffered wage in these relevant years through the examination of wages actually paid to the beneficiary. However, the petitioner is obligated to demonstrate that it could pay the difference of \$70,850.00 in 2003, \$37,703.00 in 2004, \$20,841.87 in 2005, \$7,870.00 in 2006 and \$1,610.00 in 2007 between wages actually paid to the beneficiary and the proffered wage with its net income or net current assets.

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. *See 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). Reliance on the petitioner's gross income and gross profit is misplaced. Showing that the petitioner's total income 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* 719 F. Supp at 537.

The petitioner submitted its Form 1120S U.S. Income Tax Return for an S Corporation for 2003 through 2007 as evidence of the petitioner's ability to pay the proffered wage. According to the tax returns in the record, the petitioner is structured as an S corporation, and its fiscal year is based on a calendar year. The tax returns for 2003 through 2007 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$76,250 per year from the year of the priority date:

- In 2003, the Form 1120S stated a net income⁵ of \$43,854.

⁵ 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 1120S 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 line 23 or line 17e of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. For example, an S corporation's rental real estate income is carried over from the Form 8825 to line 2 of Schedule K. Similarly, an S corporation's income from sales of business property is carried over from the Form 4979 to line 5 of Schedule K. *See Internal Revenue Service, Instructions for Form 1120S (2003), available at*

- In 2004, the Form 1120S stated a net income of \$47,097.
- In 2005, the Form 1120S stated a net income of \$91,620.
- In 2006, the Form 1120S stated a net income of \$226,894.
- In 2007, the Form 1120S stated a net income of \$265,752.

Therefore, for the years 2004 through 2007, the petitioner had sufficient net income to pay the difference between wages actually paid to the beneficiary and the proffered wage, but the petitioner's net income in 2003 was not sufficient to pay the difference of \$70,850 between wages actually paid to the beneficiary and the proffered wage that years and thus failed to establish its ability to pay the proffered wage with its net income in 2003.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ 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 net current assets during 2003 were \$39,110.

Therefore, for the year 2003, the petitioner did not have sufficient net current assets to pay the difference of \$70,850 between wages actually paid to the beneficiary and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it had ability to pay the beneficiary the proffered wage as of the priority date in 2003 through an examination of wages paid to the beneficiary, its net income or net current assets.

Furthermore, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant

<http://www.irs.gov/pub/irs-prior/i1120s--2003.pdf>; Instructions for Form 1120S (2002), available at <http://www.irs.gov/pub/irs-prior/i1120s--2002.pdf>.

⁶According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750A job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner filed 284 petitions (48 immigrant petitions and 236 nonimmigrant petitions). Among the immigrant petitions filed, the petitioner has 31 petitions approved and 6 currently pending.⁷ For these approved and pending immigrant petitions, the petitioner must establish its ability to pay the proffered wages to each of the beneficiaries of its pending or approved petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. Therefore, the petitioner must also show that it had sufficient income to pay three proffered wages in 2003, thirteen in 2004, fourteen in 2005, thirty-one in 2006 and twenty-seven in 2007.⁸

As previously discussed, the petitioner had net income of \$43,854 and net current assets of \$39,110 in 2003, neither of which was sufficient to pay the difference of \$70,850 between wages actually paid to the instant beneficiary and the proffered wage that year. The petitioner did not submit any evidence showing that it established its ability to pay all the other three proffered wages through examination of wages actually paid to the beneficiaries. Therefore, the petitioner failed to establish its ability to pay all the four proffered wages with its net income or net current assets.

The petitioner had net income of \$47,097 and net current assets of \$47,471 in 2004, either of which was sufficient to cover the difference of \$37,703 between wages actually paid to the instant beneficiary and the proffered wage that year. However, the balance of \$9,768 after paying the difference between wages paid to the beneficiary and the proffered wage from the net current assets would not be sufficient to pay a single proffered wage. The record does not contain any evidence such as W-2 forms for 2004 showing that the petitioner paid the full proffered wages to the thirteen beneficiaries of the approved and pending petitions. Therefore, the petitioner failed to establish its ability to pay all the thirteen proffered wages through the examination of wages actually paid to the beneficiaries and with its net income or net current assets in 2004.

The petitioner had net income of \$91,620 and net current assets of \$57,184 in 2005, either of which was sufficient to cover the difference of \$20,841.87 between wages actually paid to the instant beneficiary and the proffered wage that year. The balance of \$70,778.73 after paying the difference between wages paid to the beneficiary and the proffered wage from the net income appears to be sufficient to cover a single proffered wage. However, the petitioner did not submit the beneficiaries' W-2 or 1099 forms for 2005 showing that the

⁷ For most of the approved petitions and pending petitions, counsel submits the approval notices and receipt notices in response to the AAO's RFE.

⁸ The figures are mostly based on the priority date and the approval date for the approved petitions and based on the filing date for the pending petitions. If the calculation is based on the priority date and the date the beneficiary obtains lawful permanent residence for the approved petitions and based on the priority date for the pending petitions, the number of proffered wages the petitioner is responsible to pay each year would be more.

petitioner paid the proffered wages to any of the fourteen beneficiaries of the approved and pending petitions. Therefore, the petitioner failed to establish its ability to pay the other thirteen proffered wages through the examination of wages actually paid to the beneficiaries and with its net income or net current assets in 2005.

The petitioner had net income of \$226,894 and net current assets of \$248,458 in 2006. The balance of \$240,588 after paying the difference of \$7,870.00 between wages paid to the beneficiary and the proffered wage from the net current assets appears to be sufficient to cover three proffered wages at the same level with the instant proffered wage. In response to the AAO's RFE, counsel submits the 2006 W-2 forms for the petitioner's employees. However, these W-2 forms show that the petitioner did not pay any wages to eight, and paid partial proffered wages (less than the proffered wage in the instant case) to most of thirty-one beneficiaries for whom the petitioner was obligated to establish its ability to pay in 2006. Therefore, the AAO cannot conclude that the petitioner established its ability to pay all the thirty-one proffered wages through the examination of wages actually paid to the beneficiaries and with its net income or net current assets in 2006.

The petitioner had net income of \$265,752 and net current assets of \$214,755 in 2007. The balance of \$264,142 after paying the difference of \$1,610.00 between wages paid to the beneficiary and the proffered wage from the net income appears to be sufficient to cover three and a half proffered wages at the same level with the instant proffered wage. In response to the AAO's RFE, counsel submits the 2007 W-2 forms for the petitioner's employees. However, these W-2 forms show that the petitioner had at least six beneficiaries for which needed to establish its ability to pay the full proffered wage with its net income or net current assets because the petitioner did not pay any compensation to these six. The petitioner paid partial proffered wages (less than the proffered wage in the instant case) to many of twenty-seven beneficiaries for whom the petitioner was obligated to establish its ability to pay in 2007. Therefore, the AAO cannot conclude that the petitioner established its ability to pay all the twenty-seven proffered wages through the examination of wages actually paid to the beneficiaries and with its net income or net current assets in 2007.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

ORDER: The appeal is dismissed.