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U.S. Citizenship
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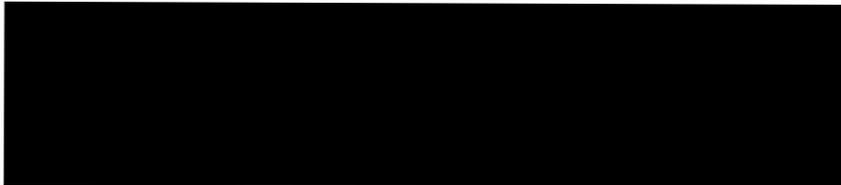
Office: NEBRASKA SERVICE CENTER

Date: OCT 29 2008

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:



INSTRUCTION 1S:

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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an import/export company. It seeks to employ the beneficiary permanently in the United States as a computer programmer analyst. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification (Form ETA 750 or labor certification application), 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 bachelor's degree or foreign equivalent degree as required on the Form ETA 750. The director denied the petition accordingly.

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

As set forth in the director's August 1, 2007 decision, the primary issue in the current petition is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth on the Form ETA 750, that is, whether the beneficiary possesses a four-year U.S. bachelor's degree in any computer related field and one year of experience in the job offered.

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 also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On appeal counsel asserted that the National Institute of Information Technology (NIIT) in Bombay, India is a leading international provider of post secondary academic classes and training program in the computer field and is accredited through the American Council on Education and offers university degrees in three countries including India, Australia and the United Kingdom according to a private credential evaluation from the Trusforte Corporation (Trustforte), and therefore, the beneficiary qualifies under section 203(b)(3)(a)(i) of the Act.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir.

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

1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

- | | |
|-------------------------|----------------------------|
| 14. Education | |
| Grade School | Blank |
| High School | Blank |
| College | 4 [years] |
| College Degree Required | Bachelor |
| Major Field of Study | any computer related field |

The applicant must also have one year of experience in the job offered. Item 15 of Form ETA 750A does not reflect any other special requirements.

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.**² **On appeal, counsel submitted an academic equivalency evaluation dated August 22, 2007 from [REDACTED] of Trustforte (Trustforte August 22, 2007 evaluation) and copies of the beneficiary's education previously submitted. Other relevant evidence in the record includes the beneficiary's bachelor of science degree in mathematics, physics and chemistry from Mohanlal Sukhadia University, Udaipur (MSU) in 1989, the beneficiary's transcripts from the University of Ajmer for the first and second years and from MSU for the third year, a certificate for completion of certificate program in computer applications and transcripts from NIIT, and an academic evaluation dated May 14, 1998 from [REDACTED] of Trustforte (Trustforte May 14, 1998 evaluation). Because the record does not contain any evidence that the beneficiary obtained a four-year U.S. bachelor's degree or foreign equivalent degree in a computer related field prior to the priority date, the AAO issued an RFE on June 10, 2008. The AAO received the response on August 26, 2008 and will examine and consider the materials in adjudicating the instant appeal.**

The original Form ETA 750 was accepted on October 28, 2002 and certified on May 12, 2006. The ETA 750 in the instant case was filed and certified for the position of computer programmer analyst. DOL assigned the occupational code of 15-1051 to the proffered position. DOL's occupational codes are assigned based on

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=15-1051&g=Go> (accessed October 17, 2008) and its extensive description of the programmer analyst position, the position falls within Job Zone Four requiring "considerable preparation." 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/15-1051.00#JobZone> (accessed October 17, 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, according to DOL's general assignment, a computer programmer analyst 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.³ In this case, the petitioner checked box e in Part 2 of the I-140 form, which is for either a professional or a skilled worker. The Nebraska Service Center director evaluated the petition under the professional category and denied it on August 1, 2007. On appeal, counsel asserted that the instant I-140 petition was filed in order to classify the beneficiary pursuant to section 203(b)(3)(a)(i) of the Act and that the beneficiary qualifies as an immigrant under the visa category pursuant to section 203(b)(3)(a)(i) of the Act. The petitioner requested the petition's consideration under the skilled worker category. Therefore, the AAO finds that the petition will be properly analyzed under both the professional and skilled worker categories.

For the professional category, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form 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 that the minimum of a baccalaureate degree is required for entry into the occupation.

³ 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 programmer analyst positions are not included in this section.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary holds a bachelor of science degree from MSU, and the degree and transcripts from the universities show that the beneficiary's bachelor of science degree program is a three-year program. A U.S. bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the record does not establish that the beneficiary's degree can be considered a single source foreign equivalent degree.

In response to the AAO's RFE counsel asserts that the beneficiary's three-year bachelor of science degree alone is equivalent to a four-year U.S. bachelor's degree in computer science according to private credential evaluations from [REDACTED]⁴ of Career Consulting International (CCI), and an expert opinion from Dr. [REDACTED]⁵ of Marquess Educational Consultants (MEC). Both [REDACTED] and [REDACTED] conclude that the beneficiary completed 120 credits in his bachelor of commerce degree program at the University of Delhi, which would be the normal course requirement for a U.S. Bachelor's degree. From the information provided, it is not clear that a "contact hour" would be the same or directly equivalent to a U.S. "credit hour." In the Indian system, students spend more time in the classroom providing more "contact hours," whereas the U.S. system calculates time spent studying outside the classroom into the credit hour determination.⁶ The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable. [REDACTED] reaches this conclusion by assigning 10 credits to each course the beneficiary took in his bachelor of science degree program.⁷ While she explains that her "process" includes using "unit credits" or "clock hours of instruction" from academic records to determine the number of credits, the beneficiary's transcript in the record does not include either figure.

⁴ [REDACTED] indicates that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but does not indicate the field in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, Ecole Superieure Robert de Sorbon awards degrees based on past experience.

⁵ [REDACTED] indicates he has a "canonical diploma of Sacrae Theologiae Professor" from St. David's Oecumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

⁶ U.S. students "are assumed to spend two hours of outside preparation for every 1 hour of lecture." Robert A. Watkins, The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," from http://www.handouts.accrao.org/am07/finished/F034p_M_Donahue.pdf (accessed on September 18, 2008). As the Indian system is not based on credits, but is exam based, transfer credits are based on a calculation of the number of exams taken multiplied to reach "a base line of 30" for credit conversion as the systems do not readily equate. *Id.*

⁷ [REDACTED] did not explain based on what documents she assigned 10 credits to each course the instant beneficiary took in his bachelor of commerce degree program at the University of Delhi in India, nor did she provide any evidence to support her credit assigning method. [REDACTED] assigned different credits to each course for her other clients creating the appearance that [REDACTED] assigns a certain number of credits to a course in order for her client to get a total of 120 credits.

The record contains no published materials about the Indian education system that would support the above opinions. Significantly, the petitioner submitted the covers of *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Placement of Students in Educational Institutions in the United States* (1997). Yet, the petitioner did not submit copies of any of the contents of either publication that might support the evaluations contained in the record.⁸ Instead, the petitioner submits an opinion piece in *ADSEC News* from April 2005. We acknowledge that this opinion article proposes the possibility of considering a three-year degree *after* completion of a Central Board of Secondary Education (CBSE) or Council for The Indian School Certificate Examination (CISCE)-Grade secondary school certificate. The record in this matter, however, contains no evidence the beneficiary received a CBSE or CISCE-Grade secondary school certificate before attending the University of Delhi. In all other situations, the *ADSEC News* opinion piece recommends only that a three-year baccalaureate in combination with a postgraduate diploma be considered for graduate admission. This opinion piece is not consistent with the evaluations asserting that the beneficiary's three-year degree alone is equivalent to a four-year baccalaureate in the United States. Regardless, the record contains no evidence that any peer-reviewed publication on evaluating Indian degrees has adopted the opinion expressed in the *ADSEC News* piece.

In his evaluation concluding that the beneficiary's three-year degree following 12 years of primary and secondary education is equivalent to 120 credits and a four-year degree in the United States, [REDACTED] relies on *Snappnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D. Or. 2006). The judge in that case, however, found that CIS is entitled to deference in interpreting its own regulatory definition of advanced degree. *Id.* at *11. More specifically, the judge found that CIS was entitled to interpret "a degree" in the context of a professional and advanced degree professional to exclude an individual with an Indian three-year degree followed by membership in the Institute of Chartered Accountants of India. *Id.* at *10-11.

Furthermore, 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 cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

⁸ *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* I80 (1986) provides that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The following chart states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." (Emphasis in original.) We note that the undergraduate placement recommendations provided in the 1986 PIER publication were adopted in *the P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Placement of Students in Educational Institutions in the United States* 43 (1997). While the petitioner did not introduce this complete information into the record, it is unclear why the petitioner would submit the covers of these publications if the contents of these publications are not worthy of consideration.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Because of these reasons, the evaluations from CCI and MES cannot be considered as primary evidence to establish that the beneficiary's three-year bachelor of science degree from India alone is a single source degree equivalent to a four-year U.S. bachelor's degree. 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).

Counsel also submits a letter dated July 23, 2003 from Efren Hernandez III of the legacy INS Office of Business and Trade Services to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the letter, Mr. Hernandez states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree. However, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. Hernandez' correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. We do not find the determination of the credentials evaluation probative in this matter. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

As mentioned in our RFE, in determining whether the beneficiary possesses a single U.S. bachelor's degree or a foreign equivalent degree in any computer related field, we have also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).⁹ 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

⁹ The relevant EDGE materials were provided to the petitioner with the RFE.

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.

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.

On appeal, counsel asserted that the beneficiary's certificate from NIIT is equivalent to a U.S. bachelor's degree according to the Trustforte August 22, 2007 evaluation, which states that "[NIIT] is a leading international provider of post-secondary academic classes and training programs in the computer field. [NIIT], founded in 1981, is accredited through the American Council on Education and offers access to university degrees through alliances with university in India, Australia, and the United Kingdom." Again, 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 does not contain any evidence to establish that NIIT is an accredited university or institution approved by AICTE.

In the instant case, the record does not contain any evidence showing the beneficiary holds a four-year US bachelor's degree in any computer related field, nor does the record contain any evidence showing that the certificate from NIIT is a postgraduate diploma issued by an accredited university or institution approved by AICTE and its entrance requirement is a three-year bachelor's degree. Therefore, the beneficiary's certificate from NIIT is not a postgraduate diploma issued by an accredited university or institution approved by AICTE and further, cannot be considered as a single source four-year U.S. bachelor's degree or a single foreign equivalent degree.

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. 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)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position, and the director's ground for denying the petition under the professional category must be affirmed.

The AAO will also discuss whether the beneficiary meets the educational requirements set forth on the Form ETA 750 and is qualified for the proffered position under the skilled worker category.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

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 requires a bachelor’s degree in computer related field as the minimum educational requirement for the proffered position. The petitioner even did not indicate that it would accept an equivalent to the bachelor’s degree on the Form ETA 750. Thus, the issue is whether it is appropriate to consider a combination of lesser degrees, diplomas, certificates or even experience in addition to his three-year degree to meet the educational requirement. 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. 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.

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 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 at *7. 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.* at 11-13. 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. *Snapnames.com, Inc.* at 14. 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. *Snapnames.com, Inc.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated.

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.

Moreover, 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. 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 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).

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (citing *Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. See *American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court.

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." *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(l)(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 in computer related field. The petitioner clearly required a bachelor's degree in computer related field, 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 during the 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, certificates and/or quantifiable amount of work experience.

Furthermore, this office issued a RFE requesting the petitioner to submit documentary evidence as it was indicated in the labor certification process of the labor market test¹⁰ to demonstrate that the employer's express intent about the actual minimum requirements of the proffered position to DOL. In response, the petitioner submits a recruitment report related to the relevant labor certification, the internal posting notice, and newspaper advertisements. The internal posting notice and newspaper advertisements require a "Bachelor in any computer related field plus one year experience" as the minimum requirement, and the recruitment report stated that the employer had not been able to recruit any qualified or willing U.S. workers for the proffered position without details about how many applications were received and why applicants, if any, were not qualified. These recruitment materials do not indicate that the employer would accept an equivalent, nor do they indicate that the employer would accept a combination of lesser degree(s) and quantifiable amount of work experience to meet the minimum educational requirement of a bachelor's degree in a computer related field. The AAO does not find that DOL and U.S. 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 a computer related field for the proffered position. Therefore, the petitioner failed to demonstrate its intent to accept a combination of lesser degree(s) and work experience as an equivalent of a bachelor's degree in a computer related field 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.* at 11-13. 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.

As noted above, the beneficiary holds a three-year bachelor of science degree, which alone represents attainment of a level of education comparable to three years of university study in science in the United States, but cannot be deemed an equivalent of a four-year U.S. bachelor's degree. The record shows that the beneficiary also holds a certificate in computer applications program from NIIT. As previously discussed,

¹⁰ The United States Department of Labor (DOL) has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [Citizenship and Immigration Services (CIS)] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

EDGE does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE also asserts that only a Postgraduate Diploma following a three-year bachelor's degree can "represent attainment of a level of education comparable to a bachelor's degree in the United States" and "Postgraduate Diplomas should be issued by an accredited university or institution approved by AICTE."

However, the record does not contain any evidence to demonstrate that the NIIT certificate is from senior level courses or a post-graduate diploma in a computer related field. Nor is there any evidence showing that NIIT is an AICTE approved college or institute who has the authorization to grant bachelor's degrees. Therefore, the beneficiary's certificate in computer applications from NIIT cannot be considered as a post-graduate diploma or senior year level of undergraduate diploma in computer science from an accredited institute following a three-year bachelor's degree, and thus, the beneficiary's three-year bachelor of science degree plus his NIIT certificate are not equivalent to a U.S. baccalaureate in a computer related field.

Therefore, the AAO finds that the petitioner has failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date under the skilled worker category. The petitioner failed to demonstrate that the beneficiary is qualified for the proffered position either under the professional category or the skilled worker category. The petition must be denied.

Beyond the director's decision and counsel's assertions on appeal, the AAO identified an additional ground of ineligibility and requested the petitioner to submit evidence to establish its continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence in our RFE dated June 10, 2008. In response, the petitioner submits its tax returns for 2006 and 2007 as new evidence for its continuing ability to pay. Other relevant evidence in the record includes the beneficiary's Form W-2 Wage and Tax Statement issued by the petitioner for 2001, 2003, 2004 and 2005, and the petitioner's tax returns for 2002 through 2005. 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).

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for

processing by any office within the employment system of the U.S. DOL. See 8 C.F.R. § 204.5(d). The priority date in this case is October 28, 2002. The proffered wage as stated on the Form ETA 750 is \$65,000 per year. On the Form ETA 750B signed by the beneficiary on October 16, 2002, the beneficiary claimed to have worked for the petitioner in the proffered position since September 1999.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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 2001, 2003, 2004 and 2005. Since the priority date in the instant case is October 28, 2002, the beneficiary's W-2 form for 2001 is not necessarily dispositive. The beneficiary's W-2 forms show that the petitioner paid the beneficiary \$49,166.82 in 2003, which is \$15,838.18 less than the proffered wage that year; that the petitioner paid the beneficiary \$58,958.39 in 2004, which is \$6,041.61 less than the proffered wage that year; and that the petitioner paid the beneficiary \$60,249.96, which is \$4,750.04 less than the proffered wage that year. The petitioner did not submit the beneficiary's W-2 form or any other documentary evidence for his compensation from the petitioner in 2002, 2006 and 2007. Therefore, the petitioner failed to establish that it paid the beneficiary the full proffered wage for these relevant years. The petitioner is obligated to demonstrate that it could pay the full proffered wage of \$65,000 in 2002, 2006 and 2007, and the differences of \$15,833.18 in 2003, \$6,041.61 in 2004 and \$1,115.60 in 2007 between the wages actually paid to the beneficiary and the proffered wage in each relevant year with its net income.

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 contrary to the petitioner's assertions. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

The petitioner's appellate argument that its depreciation expense should be considered as cash is misplaced. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The 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* at 537.

The evidence in the record of proceeding shows that the petitioner is structured as a limited liability company (LLC) and reports its income on schedule C of its member's Form 1040 individual tax return. Although taxed as a sole proprietor, a LLC's owner or member enjoys limited liability similar to owners of a corporation. A LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.¹¹ An investor's liability is limited to his or her initial investment. As the owners and others only are liable to his or her initial investment, the total income and assets of the owners and others and their ability, if they wished, to pay the company's debts and obligations, cannot be utilized to demonstrate the petitioner's ability to pay the proffered wage. The petitioner must show the ability to pay the proffered wage out of its own funds. Similarly, unlike a sole proprietorship, CIS will not consider the single member's adjusted gross income as the LLC's net income and will not consider the single member's other liquefiable assets and personal liabilities as part of the petitioner's ability to pay. Further, the petitioner in the instant case as a LLC is not obligated to establish that the owner of the petitioner had sufficient adjusted gross income and liquefiable assets to support her personal living expenses in addition to pay the proffered wage and business expenses. Therefore, for a LLC filing its tax return with its owner's individual income, CIS considers net income to be the figure shown on line 31, Net profit or loss, of the owner's Form 1040 U.S. Individual Income Tax Return.

The record contains copies of the petitioner's Schedule C Profit or Loss From Business attached to the sole LLC member's Form 1040 U.S. Individual Income Tax Return for 2003 through 2007. According to the tax returns in the record, the petitioner's fiscal year is based a calendar year. The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage.

¹¹ Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

In 2002, Line 31 of the Schedule C stated net income of \$99,665;
In 2003, Line 31 of the Schedule C stated net income of \$241,933;
In 2004, Line 31 of the Schedule C stated net income of \$475,631;
In 2005, Line 31 of the Schedule C stated net income of \$424,589;
In 2006, Line 31 of the Schedule C stated net income of \$657,648;
In 2007, Line 31 of the Schedule C stated net income of \$122,770.

For the years 2003 through 2005, the petitioner had sufficient net income to pay the beneficiary the differences of \$15,833.18, \$6,041.61 and \$1,115.60 between the wages actually paid to the beneficiary and the proffered wage respectively; for the years 2002, 2006 and 2007, the petitioner had sufficient net income to pay the beneficiary the proffered wage of \$65,000 per year; and therefore, the petitioner established its ability to pay the beneficiary the proffered wage of \$65,000 for the years 2002 through 2007.

However, 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 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 has three other I-140 immigrant petitions approved.¹² In addition, the petitioner also filed nine Form I-129 nonimmigrant petitions. The petitioner must establish its ability to pay the three proffered wages in 2002 and 2003, and two in 2004 through 2007 in addition to the instant beneficiary. The evidence in the record shows that the petitioner had sufficient net income to pay three beneficiaries in 2003 and two in 2004 and 2005 of the approved petitions the proffered wages at the same level of the instant beneficiary and the differences between wages actually paid to the beneficiary in each of these relevant years; and that the petitioner had sufficient net income to pay two beneficiaries of the approved petitions and the instant beneficiary the proffered wages at the same level of the instant beneficiary in 2006. However, the petitioner's net income of \$99,665 in 2002 was insufficient to pay the three beneficiaries of the approved petitions the proffered wages; and the petitioner's net income of \$122,770 in 2007 was insufficient to pay the two beneficiaries of the approved petitions. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary and all the beneficiaries the proffered wages in 2002, the year of the priority date in the instant case, and 2007, the most recent year the tax return is available.

¹² The three petitions are as follows:

EAC-01-020-52897 filed on October 23, 2000 with the priority date of December 17, 1999, approved on October 24, 2001, and the beneficiary obtained lawful permanent residence on May 22, 2003;
LIN-06-256-52525 filed on September 5, 2006 with the priority date of November 1, 2002, approved on May 4, 2007; and
SRC-07-269-53453 filed on September 10, 2007 with the priority date of November 1, 2002, and approved on May 4, 2007.

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

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.