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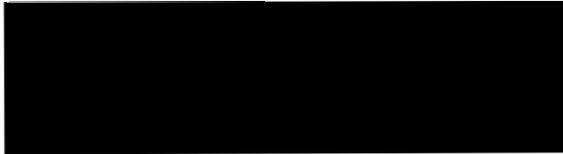
Office: NEBRASKA SERVICE CENTER

Date: AUG 19 2009

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:



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.

John F. Grissom,  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (“AAO”). The AAO affirmed the director’s decision and dismissed the appeal. The petitioner filed a motion to reopen the dismissed appeal. The AAO dismissed the motion to reopen and again affirmed the director’s decision. The petitioner filed another motion to reopen. The motion will be granted. The appeal will be sustained, and the petition will be approved.

The petitioner is a business, which specializes in custom embroidery for various garments, and seeks to employ the beneficiary permanently in the United States as a manager, sales (“Marketing Manager”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). 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 listed on Form ETA 750. Further, the director determined that the petitioner failed to establish its ability to pay the proffered wage from the priority date onward. The AAO affirmed the director’s decision.<sup>1</sup>

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating

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<sup>1</sup> 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).

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 the beneficiary's qualifications, U.S. Citizenship & Immigration Services (USCIS) must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on July 10, 2000. The proffered wage as stated on the Form ETA 750 is \$63,549 per year based on a 40 hour work week.<sup>2</sup> The Form ETA 750 was certified on July 14, 2001, and the petitioner filed the I-140 petition on the beneficiary's behalf on August 20, 2001. The petitioner listed the following information on the I-140 Petition: date established: 1990; gross annual income: \$600,000; net annual income: "see attached tax returns;" and current number of employees: 10.

On August 20, 2002, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not establish that the beneficiary had a four-year Bachelor's degree, which was listed as a requirement on the certified labor certification. Further, the director denied the petition as the petitioner failed to establish its ability to pay the proffered wage.

The petitioner filed an appeal and submitted additional evidence. The AAO upheld the director's decision related to both reasons for the petition's denial. The petitioner filed a motion to reopen the AAO's determination. The AAO upheld the director's determination and dismissed the petitioner's motion to reopen. The petitioner filed a second<sup>3</sup> motion to reopen the AAO's decision.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or

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<sup>2</sup> The petitioner initially listed a wage of \$29,500, but DOL required that the petitioner increase the wage to \$63,549 prior to certification.

<sup>3</sup> Separate counsel filed the petitioner's second motion to reopen the AAO decision.

USCIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

The petitioner has provided new and relevant evidence to the matter at hand. We will reopen the petition and reconsider the matter.

On October 19, 2007, the AAO director issued an RFE related to the issue of the beneficiary's educational qualifications, and the petitioner's consideration of equivalent education. The RFE requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner responded.

On appeal, counsel states that USCIS was in error, as the beneficiary had an equivalent bachelor's degree exhibited by the evaluation that the petitioner submitted. Further, counsel states that judicial precedent would allow for the combination of degrees as the equivalent of a bachelor's degree.

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.

The proffered position requires a four-year bachelor's degree and two years of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.<sup>4</sup> DOL assigned the occupational code of 163.167-018, "Manager, Sales," to 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/link/summary/11-2022.00> (March 4, 2009) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a 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/11-2022.00#JobZone> (accessed March 4, 2009).<sup>5</sup> Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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<sup>4</sup> Section 101(a)(32) of the Act provides: "The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." This section does not include information technology or computer related positions in the category of professionals, or professional positions.

<sup>5</sup> DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O\*Net. Under the DOT code, the position of Manager, Sales (any industry) had a SVP of 8 allowing for four or more years of experience.

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

*See id.*

The 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.

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 possesses a foreign three-year bachelor's degree, as well as a several diplomas, a certificate and prior work experience. Thus, the issues are whether the beneficiary's three-year foreign degree is equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's work experience and/or additional diplomas as well as his three-year degree. We must also consider whether the beneficiary meets the job requirements of the proffered job 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 Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) 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).<sup>6</sup> *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

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<sup>6</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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 (the Service), 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.

#### **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 (9<sup>th</sup> 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 9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (USCIS) “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*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9<sup>th</sup> Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, 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 (D. Or. 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.* 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 USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at \*17, 19.

The key to determining the job qualifications 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.

On the Form ETA 750A, the “job offer” position description for a Marketing Manager provides:

For a company specializing in custom embroidery for all kinds of garments, responsible for design and development of marketing strategies of company’s products to wholesale customers in the U.S. This includes coordination, quality control and delivery of goods; establishing marketing plan for company including reviewing company’s products; research market on potential new products and processing new ways to market company’s products; forecasting monthly/annual sales and profit figures.

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

Education:                    Grade School: 8 years;  
                                      High School: 4 years;  
                                      College: 4 years;  
                                      College degree: Bachelor’s degree or equivalent;

Major Field Study: Business, Marketing or a related field

Experience: 2 years in the job offered, Marketing Manager, or 2 years in a related occupation with marketing experience.

Other special requirements: The required experience in item #14 must include designing and developing market strategies for embroidery or garments industry and usage of embroidery design software. Proficiency in corel draw and photoshop graphic designs software.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS 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, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) G.G. N. Khalsa College of Pharmacy, Ludhiana, India; Field of Study: Pharmacy; from August 1988 to September 1989, for which he received a Diploma; and (2) CITI Datalinkers, Ludhiana, India; Field of Study: Computers; from July 1997 to December 1997, for which he received a Certificate; (3) Institute of Distance Education & Research, Tagore, Nagar, Ludhiana, India, Field of Study: Marketing Management; from June 1996 to June 1997, for which he received a Diploma; and (4) Panjab University, Chandigarh, India; Field of Study: Liberal Arts; from August 1986 to April 1989, for which he received a Bachelor's degree.

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

**Evaluation One:**

- Evaluation: CIE Education Specialists, Houston, TX.  
The evaluation considered the beneficiary's "pre-university exam" at Panjab University from 1986; his diploma issued by the State Board of Technical Education from 1989; Bachelor of Arts degree from Panjab University, 1989; and certificates from the Institute of Distance Education and Research, and Citi Datalinkers, 1997.
- The evaluator concluded that the foregoing education would be the equivalent of a Bachelor of Science degree in Political Science with a minor in Pharmacy and equal to 120 completed credits.

- A second page of the evaluation entitled, “Industrial Experience Equivalency Certification,” determined that the beneficiary had the equivalent of a Bachelor of Arts in Business based on his “academic and industrial experience.” This determination considered the beneficiary’s employment from 1986 to 1998 in various positions in India: a production supervisor for a hosiery company; production manager for a hosiery factory; sales manager, hosiery factory, export/import business consultant; and a president for a knitting works company.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor’s degree, and petitioner submitted transcripts to demonstrate only three years of study.<sup>7</sup> Based on Form ETA 750, the petitioner did not demonstrate that the beneficiary met the requirements of the position.

The petitioner filed a motion to reopen and resubmitted the first evaluation, and asserted that the petitioner “intended to have the equivalency requirement based on education and/or experience,” and that the evaluation submitted concluded that the beneficiary had the equivalent of a bachelor’s degree based on his education and experience.

The AAO issued a decision on January 1, 2004, which upheld the director’s determination that the three-year degree would not be the equivalent of a four-year degree, and further that the petitioner failed to establish its ability to pay the proffered wage.

The petitioner filed a motion to reopen the AAO decision, and cited to case law,<sup>8</sup> which it asserted would support using an equivalency based on education and experience to meet the bachelor’s

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<sup>7</sup> The director additionally denied the petition, as the petitioner failed to demonstrate its ability to pay the proffered wage, which will be discussed below.

<sup>8</sup> Counsel cites to the following cases:

In *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966), the District Director determined that the individual was a professional economist and qualified for an immigrant visa based on his extensive employment experience, and high level of occupational attainment, despite his lack of a degree in the field of economics, although he had completed coursework at several universities.

In *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967), the Regional Commissioner determined that the beneficiary’s education, including a bachelor of commerce degree in accounting with postgraduate work toward a master of commerce degree, combined with nine years of specialized experience in accounting would “collectively” be equivalent to a bachelor’s degree in accounting and that the beneficiary would qualify as a member of the professions within the meaning of 101(a)(32).

In *Matter of Sun*, 12 I&N Dec. 535 (D.D. 1966), the district director determined that the position of a hotel manager is a profession based on the complexity of the duties involved, not the existence of a degree.

degree requirement. The AAO upheld its initial decision that the petitioner failed to demonstrate that the beneficiary had the required education and that it failed to establish its ability to pay the proffered wage.

The petitioner filed another motion to reopen and submitted a new evaluation.

**Evaluation Two:**

- Evaluation: The Trustforte Corporation, New York, New York.

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In *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969), the Regional Commissioner determined that the beneficiary would qualify as a professional librarian under section 101(a)(32) based on a combination of her education, three and a half years, and her experience, over twelve years. Part of the decision was based on “it is recognized that in a few areas of the professions, it is not always possible to obtain the usual formal education. In this case, it has been pointed out that in Israel, at the time the subject resided there, there were no school offering degrees in library science.”

In *Matter of Devnani*, 11 I&N Dec. 800 (Acting D.D. 1966), the Acting District Director determined that the beneficiary’s high level of education, a master’s degree from a U.S. university, combined with the beneficiary’s “extensive specialized experience in the chemical industry qualifies him for professional status as an organic chemist.” The beneficiary completed a bachelor of science in chemistry in India, determined to be the equivalent of two years of U.S. studies, as well as a master of business administration completed at a U.S. university. He additionally had over ten years of experience in the chemical industry.

We note that based on the time period for the cases cited that the preference categories, and immigration framework was different. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job related basis: the third and sixth preferences under 8 U.S.C.A. § 1153(a) and (6). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended under 8 U.S.C.A. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled.

Further, prior to IMMACT 90, there was no definition of the term “professional.” Now, however, professional is defined at 101(a)(32) of the Act and 8 C.F.R. § 204.5(l)(3)(ii)(C) explicitly requires a bachelor’s degree. Therefore, the cases that counsel cites, which were all decided prior to IMMACT 90, are irrelevant.

- The evaluation states that the beneficiary has the equivalent of a Bachelor of Science degree in Marketing Management and Pharmaceutical Science from a regionally accredited institution of higher learning in the U.S.
- In making this determination, the evaluator considered the beneficiary's Bachelor of Arts program at Panjab University; his post-secondary Diploma program at G.G.N. Khalsa College of Pharmacy under "the auspices of the State Board of Technical Education," Punjab, India; and a post-graduate program in Marketing Management at the Institute of Marketing and Management in India.
- The evaluator considered the coursework completed for his bachelor's degree, including in his area of concentration: English, Political Science, and Physical Education. Based on the coursework completed at Panjab University, the evaluator concluded that this was equivalent to three years of study toward a bachelor's degree.
- The beneficiary additionally completed a diploma in Pharmacy, and his studies there "satisfies the academic requirements for a bachelor's level concentration in the field of Pharmaceutical Science."
- The evaluator also considered the beneficiary's studies at the Institute of Marketing and Management, "a recognized distance-learning educational institution in India." The evaluator concluded that the beneficiary's studies at the Institute of Marketing and Management would satisfy "the academic requirements for a bachelor's level concentration in the field of Marketing Management."
- In looking at the three programs of study involved, the evaluator concluded that the beneficiary had the equivalent of a bachelor's degree with a dual major in Marketing Management and Pharmaceutical Science.

The second evaluation relied on the beneficiary's combined studies from three different schools, and failed to show that the beneficiary had a four-year bachelor's degree as listed on Form ETA 750.

In response to the AAO's RFE, the petitioner submitted a third evaluation:

**Evaluation Three:**

- Evaluation: [REDACTED] Professor of Marketing, Former Graduate Program Chair, Lubin School of Business, Pace University, Westchester, NY.
- The evaluator states that he believes the beneficiary completed "academic qualifications commensurate with a bachelor's level degree in Marketing Management and Pharmaceutical Science." The evaluator bases this conclusion on the beneficiary's studies at Panjab University, the G.G.N. Khasla College of Pharmacy, and the Institute of Marketing & Management.
- The evaluator finds that the beneficiary, "has attained the foreign equivalent of a Bachelor of Science degree, with a dual major in Marketing Management and Pharmaceutical Science from an accredited US college or university."
- Specifically, the beneficiary completed a three-year Bachelor of Arts program at Panjab University from 1986 to 1989. The program "encompassed core liberal arts requirements,"

and additional courses in “concentrated studies in his fields of specialization, English, Political Science, and Physical Education.” The evaluator found this education to be equivalent to three years of academic studies toward a Bachelor’s degree at an accredited college or university in the U.S.

- The evaluator describes the beneficiary’s additional education, that he completed an “advanced post-secondary program in Pharmacy.” The evaluator states that the beneficiary “entered the program with advanced standing based on his prior completion of bachelor’s-level studies.” The program “was an advanced bachelor’s program involving upper-level courses in the sciences (Organic Chemistry, Physics, Biology and Physiology) and concentrated studies in Pharmacy.” In June 1989, the beneficiary was awarded “an advanced bachelor’s level Diploma in Pharmacy.” The evaluator states that in completing this program, the beneficiary “attained the functional equivalent of a Bachelor of Science Degree in Pharmaceutical Science from an accredited US college or university.”
- The beneficiary later entered the Institute of Marketing & Management, “an advanced post-secondary program in Marketing Management . . . with recognition from the All India Council for Technical Education (AICTE).” Admission to the program is based on completion of a bachelor’s degree and competitive entrance exams. At the Institute, the beneficiary completed upper-level courses in Marketing Management, including such classes as Industrial Marketing, Sales Management & Salesmanship, Marketing Research, Marketing Principles & Practice, and other related courses.

Based on the beneficiary’s completion of his studies at Panjab University, his Post-Graduate Diploma in Marketing Management, and his advanced post-secondary program of study at G.G.N. Khalsa College of Pharmacy, the evaluator concludes that the beneficiary attained the foreign equivalent of a Bachelor of Science degree with a dual major in Marketing Management and Pharmaceutical Science from an accredited U.S. college or university.

- Separately, the evaluator states that completion of the advanced post-secondary program in Pharmacy at G.G.N. Khasla College of Pharmacy would represent the equivalent of “a single source degree, to a bachelor’s level degree in Pharmaceutical Science.” Further, the evaluator states that the beneficiary’s completion of studies at the Institute of Marketing & Management “standing alone, is equivalent to a Bachelor’s Degree in Marketing Management.”

Further, in determining whether the beneficiary’s diploma from Panjab University, India, is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, [www.aacrao.org](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.”

Form ETA 750B lists that the beneficiary has a bachelor's degree from Panjab University, India. The documentation in the record reflects that the degree is a Bachelor of Arts degree.

EDGE provides that a Bachelor of Arts degree in India represents the attainment of a level of education comparable to two or three years of university study in the United States. Based on information in the record, this degree would be equivalent to three years of study. A post-graduate diploma following the completion of a Bachelor's degree would be equivalent to one year of study with a two year bachelor's degree, and two years of study with a three year bachelor's degree. EDGE does not provide that the beneficiary's certificate in computers would have any U.S. educational equivalent. Further, we note that based on a review of the All India Council for Technical Education <http://www.nba-aicte.ernet.in/nmna.htm> site, accessed on October 17, 2007, CITI Datalinkers, Ludhiana, India, is not an accredited institution within the state of Punjab, India. However, as EDGE confirms, none of the beneficiary's individual degrees are equivalent to a four-year U.S. bachelor's degree as required by the certified ETA 750.

On appeal, counsel cites to *Grace Korean*, 437 F. Supp. 2d 1174, that it is the employer and DOL that establishes the requirements for the position. Counsel states that it listed "or equivalent" as it had the beneficiary in mind.

The proper inquiry, however, is what are the position's actual minimum requirements, and how the position's actual minimum requirements were expressed to DOL, advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position.

Related to these issues, is the question of how the position's actual minimum requirements were expressed to DOL, advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position. To ascertain the petitioner's expressed intent in advertising the position requirements, the AAO sent the petitioner an RFE.

In the petitioner's response to the AAO's RFE, counsel submitted a copy of the Form ETA 750 as sent to DOL, including a copy of the petitioner's posting notice, a copy of the recruitment ads underlying the labor certification, and the recruitment report.

The submitted materials contain a posting notice, which lists the requirements as "Bachelor's degree or equivalent in Business, Marketing or a related field," and "2 years of experience in job offered or 2 years marketing experience." The posting also listed the special skills required. The recruitment also contains copies of ads from The Birmingham News, dated January 23, 2000, February 6, 2000, and Sunday, February 20, 2000, which state, "Bachelor's degree or equiv. in Bus., Marketing or a related field. 2 yrs. exp. in job offered or 2 yrs. marketing exp. Exp. must inc. designing & developing market strategies for embroidery or garments industry and usage of embroidery design software. Proficiency in Corel Draw & Photoshop graphic design softwares."

The petitioner's submission additionally includes correspondence from DOL to the petitioner and the petitioner's response. Specifically, DOL stated that if "the degree requirements indicate 'or equivalent' in Item 14 of the 750A, then the Regional Office requires a degree equivalency evaluation."<sup>9</sup>

In response to DOL's inquiry, the petitioner submitted the evaluation from C.E.I. Education Specialists, discussed above.

Counsel asserts in his RFE response that the Department of Labor was informed that the "employer did not require a single source four year bachelor's degree for its position."

Based on the recruitment materials submitted, which all state "Bachelor's degree or equivalent," as well as DOL's request to the petitioner to submit an evaluation to demonstrate the beneficiary's equivalent education, we find that the petitioner did set forth that an individual may qualify through a degree determined to be the equivalent of a U.S. degree. In the present matter, the petitioner has submitted evaluations that conclude that the beneficiary has the "equivalent of a degree."

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act. However, if we were to consider the petition under the skilled worker category,<sup>10</sup> as the

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<sup>9</sup> DOL also specifically inquired as to whether the beneficiary was related to the petitioner's listed Agent and Secretary.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See also Paris Bakery Corporation*, 1998-INA-337 (Jan. 4, 1990) (en banc), which addressed familial relationships: "We did not hold nor did we mean to imply in *Young Seal* that a close family relationship between the alien and the person having authority, standing alone, establishes, that the job opportunity is not *bona fide* or available to U.S. workers. Such a relationship does require that this aspect of the application be given greater attention. But, in the final analysis, it is only one factor to be considered. Assuming that there is still a genuine need for the employee with the alien's qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of the certification."

In response, the petitioner indicated that the beneficiary was the Agent/Secretary's brother-in-law, but that the recruitment was done in good faith, and the position was *bona fide*.

<sup>10</sup> A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

petitioner argues should be done based on the logic of *Grace Korean*, the beneficiary would meet the requirements of the certified ETA 750 based on having the equivalent of a bachelor's degree. Here, the petitioner has listed on Form ETA 750 that it would accept an equivalent degree, has advertised that it would accept an equivalent degree, and documented correspondence with DOL that it would accept an equivalent. Accordingly, the petition may be approved under the skilled worker category.

Based on the foregoing, the director's decision related to the issue of whether the beneficiary meets the requirements of the position is withdrawn as we find that the petitioner has established that the beneficiary has the required education and qualifies as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Related to the second issue, regarding the petitioner's ability to pay the proffered wage, counsel submits with its motion to reopen a letter from its accountant detailing "other investments" listed on its 2000 tax return.

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).

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence,

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

such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [USCIS].

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on July 10, 2000. The proffered wage as stated on the Form ETA 750 is \$63,549 per year based on a 40 hour work week.<sup>11</sup> The Form ETA 750 was certified on July 14, 2001, and the petitioner filed the I-140 petition on the beneficiary's behalf on August 20, 2001. The petitioner listed the following information on the I-140 Petition: date established: 1990; gross annual income: \$600,000; net annual income: "see attached tax returns;" and current number of employees: 10.

First, in determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship & Immigration Services ("USCIS") will 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. On Form ETA 750, signed by the beneficiary on June 15, 2000, the beneficiary listed that he has been employed with the petitioner since October 1998. With the initial I-140 petition filing, the petitioner submitted the beneficiary's 2000 and 2001 W-2 statements. A subsequent filing contained additional W-2 statements, and that the petitioner has paid the beneficiary the following amounts:

<u>Year</u>	<u>W-2 Wages</u>	<u>Amount of Wage Remaining to be paid</u>
2007	\$56,223	\$7,326
2006	\$55,849	\$7,700
2005	\$52,104	\$11,445
2004	\$52,104	\$11,445
2003	\$43,846	\$19,703
2002	\$49,806	\$13,749
2001	\$40,806	\$22,743
2000	\$28,549	\$35,000
1999	\$22,890	N/A - before the priority date

As the W-2 statements reflect wages less than the proffered wage, the petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v.*

<sup>11</sup> The petitioner initially listed a wage of \$29,500, but DOL required that the petitioner increase the wage to \$63,549 prior to certification.

*Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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The petitioner's tax returns reflect that is a C corporation. For a C corporation, USCIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u> <sup>12</sup>	<u>Net income or (loss)</u>
2007	\$143,410
2006	\$44,258
2005	\$57,847
2004	\$79,599
2003	\$9,373
2002	\$25,671
2001	\$57,229
2000	\$8,741

Based on the petitioner's net income, combined with the wages paid to the beneficiary, it can demonstrate its ability to pay in 2001, 2002, 2004, 2005, and 2006. The petitioner can demonstrate its ability to pay based on its net income in 2007 alone. The petitioner would not be able to demonstrate its ability to pay in tax year 2000, or 2003.

Next, we will examine the petitioner's continuing ability to pay the required wage under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>13</sup> A corporation's year-end current assets are shown

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<sup>12</sup> The petitioner files its taxes based on a tax year, which runs from April 1 to March 31 of each year.

<sup>13</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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

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 are as follows:

<u>Tax Year</u>	<u>Net Current Assets</u>
2007	\$4,928
2006	\$122,815
2005	\$83,103
2004	\$213,835
2003	\$273,286
2002	\$335,319
2001	\$343,241
2000	-\$7,324

Based on the above, the petitioner would be able to pay the proffered wage in 2003. The petitioner would not be able to demonstrate its ability to pay for the year 2000 even if the wages paid to the beneficiary were added to the petitioner's net current assets.

We additionally note the following factors from the petitioner's tax returns.

<u>Tax Year</u>	<u>Gross Receipts</u>	<u>Salaries Paid</u>
2007	\$3,342,837	\$389,538
2006	\$2,987,417	\$385,328
2005	\$1,762,343	\$332,800
2004	\$1,012,380	\$279,179
2003	\$932,613	\$221,912
2002	\$964,583	\$197,625
2001	\$747,382	\$183,281
2000	\$528,322	\$139,536

*Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years, but must be viewed in comparison to a petitioner's prior profitable or successful years. The petitioning entity in *Sonogawa* had been in business for over eleven years, and during that time period had routinely earned a gross annual income of approximately \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations. The petitioner provided evidence to show that as a result of the move, that the petitioner had sustained significant expenses in one year related to the relocation, including an increase in rent, as the company paid rent on both the old and new locations for five months. The petitioner also sustained large moving costs. Further, the petitioner was unable to do regular business for a period of time. All of the foregoing factors accounted for the petitioner's

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

decrease in ability to pay the required wages. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. The articles provided helped to establish the petitioner's reputation, and potential future growth, particularly when viewed against the company's prior performance.

In examining the totality of the petitioner's circumstances pursuant to *Matter of Sonogawa*, the petitioner has been in business since 1990, for almost twenty years, and has employed the beneficiary for over eight years. The petitioner has demonstrated through W-2 statements that it has paid the beneficiary the majority of the proffered wage. In examining the petitioner's tax returns, it can demonstrate the ability to pay the proffered wage from 2001 through 2007 either through net income, net current assets, or a combination of wages with net income, or net current assets. Additionally, the amount paid to the beneficiary has steadily increased since his initial hire. Over the eight year time period where tax returns were submitted, the petitioner's gross receipts have increased significantly to over three million dollars and salaries paid to all workers have also increased significantly. In viewing the totality of the petitioner's circumstances, we would conclude that the petitioner has demonstrated its ability to pay the proffered wage.

Based on the foregoing, the petitioner has established that the beneficiary met the qualifications of the certified labor certification, and based on a totality of the circumstances that it can pay the proffered wage. 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 motion is granted. The appeal is sustained. The petition is approved.