

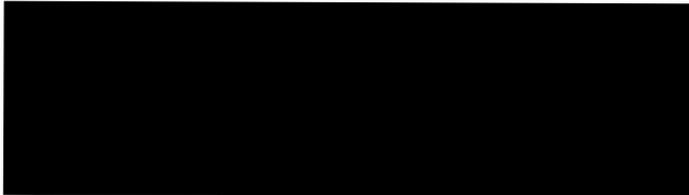
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



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FILE:

SRC 07 800 11938

Office: TEXAS SERVICE CENTER

Date: JUL 06 2009

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner claims to be a retail business. It seeks to employ the beneficiary permanently in the United States as a business manager. As required by 8 C.F.R. § 204.5(l)(3), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL).

The petition requests classification of the beneficiary as a professional worker. Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), also grants preference classification to qualified immigrants who are capable 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.

As set forth in the May 31, 2007 denial, the director determined that the beneficiary did not satisfy the minimum level of education and experience required by the labor certification. The AAO will also consider whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.¹

On appeal, counsel asserts that the beneficiary's master of commerce degree from India is the equivalent of a U.S. bachelor's degree in accounting. Counsel also asserts that the beneficiary possessed the required three years of experience as a business manager or general manager.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b); *see also Janka v. U.S. Dept. of Transp.*, 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*, 891 F.2d at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

¹An 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*, 229 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).

²The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 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).

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.

Here, the labor certification was filed with the DOL on May 12, 2003. The proffered wage stated on the labor certification is \$86,694.00 per year. The labor certification states that the position requires a bachelor's degree in business administration, accounting, or a related field, and three years of experience in the job offered of business manager or in the related occupation of general manager. On the labor certification, signed by the beneficiary on October 24, 2004, the beneficiary claimed to have worked for the petitioner since February 2002.³

Evidence in the record of proceeding includes the following:

- Bachelor of commerce diploma awarded by the University of Bombay in December 1989.
- Certificate showing the beneficiary's passing marks for the bachelor of commerce degree examination. The certificate states that the bachelor of commerce degree is a three year degree.
- Master of commerce diploma awarded by the University of Bombay in December 1991.
- Certificate showing the beneficiary's passing marks for the master of commerce degree examination.

Credentials evaluation by [REDACTED] of Morningside Evaluations and Consulting, stating that the beneficiary's master of commerce degree from the University of Bombay is the equivalent of a U.S. bachelor's degree in accounting.⁴

³It is unclear from the record why the Form ETA-750B was signed by the beneficiary after the petitioner had filed the labor certification with the DOL but prior to its approval.

⁴The credential evaluation submitted is rejected as incompetent evidence by the AAO. Correspondence from Queens College indicates that [REDACTED] does not have the authority to grant academic credit for the beneficiary's academic studies. In December 2001, USCIS received correspondence from [REDACTED] Assistant Vice President and Special Counsel to the President, Queens College. See Letter to [REDACTED] Immigration and Naturalization Service, Texas Service Center, from [REDACTED] Assistant Vice President and Special Counsel to the President, dated November 7, 2001, 2 pages. [REDACTED]'s letter stated that [REDACTED] did not have the authority to grant college-level credit for foreign university studies and then added:

The only college credit that may be given at Queens College for prior work experience and training is that determined to be its equivalent by the Adult Collegiate Education (ACE) Program after a very specific process of portfolio review. It is the ACE program, not an individual faculty member, which has the authority to grant credit.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as

- Letter from [REDACTED], vice president of Appu Ghar/International Amusement Limited, dated July 31, 2001, stating that the beneficiary was employed by the company starting April 28, 1998 for "about three years and four months" as a Senior Accountant. The letter states that the beneficiary "played a pivotal role in inculcating the LAN system and bringing the various point of sales into a focal point and generating excellent MIS." The letter also states that the beneficiary "was heading our accounts department and supervising six staff working under the finance department."
- Letter from [REDACTED] chairman of Appu Ghar/International Amusement Limited, also dated July 31, 2001. The letter states that the beneficiary joined the company on April 28, 1998 and was its "General Manager." The letter states that the beneficiary "played a pivotal role in commissioning and running [the company's] prestigious Water Park - Oysters." The letter states that the beneficiary "specializes in Operations and Marketing" and "was responsible for doubling our past year performance in [group sales]." The letter also states that the beneficiary was "a pioneer in organizing events catering to huge volumes," that his "handling of high volume business as well as man management is par-excellence," and that he was "very competent in handling the various Food & Beverage outlets at our amusement park." Finally, the letter states that "[w]e do not hesitate to recommend [the beneficiary to an] employer who is looking at an individual to run its business as an independent profit-generating unit."
- Letter of [REDACTED] chairman of Indiana Beach Apartment Hotel, from January 12, 1998, stating that the beneficiary was employed as "Resident Manager (Accounts)" from September 1996 to December 1997. The letter does not describe the duties performed by the beneficiary.
- Letter of [REDACTED], director of United Food & Beverage Service, dated August 3, 2001. The letter states that the beneficiary was employed by the company as an accountant from October 1991 to September 1993. This experience was not listed on Form ETA-750B of the labor certification.
- September 1997 issue of *Travel News* publication, which states that Indiana Beach Hotel hired the beneficiary in the position of resident manager. The publication further states that the beneficiary "has worked in the hotel industry for 14 years, most recently as Assistant General Manager for the Ansal Group of Companies in New Delhi, India."
- Undated article from the *Delhi Times* with a picture of three individuals, one of which is identified in the caption as "the general manager of Oysters." The petitioner claims that the person identified in the photograph as the general manager of Oysters is the beneficiary.
- Business card stating that the beneficiary is the "Resident Manager" of Indiana Beach Hotel.
- Business card stating that the beneficiary is the "Assistant General Manager (Marketing)" of Ansal Properties & Industries Ltd.
- Business card stating that the beneficiary is "Restaurant Manager" of the Village Restaurant Complex.

an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

- Business card for The Village Bistro, which contains the beneficiary's name.
- Business card stating the beneficiary is "F&B Manager" of Delhi Golf Club Ltd.
- Exhibitor card for the Kenya International Tourist Exhibition stating that the beneficiary is "Manager" of "Indiana Beach Apartments & Hotel."
- Article from the May 7, 1999 issue of *Hindustan Times* about Oysters water park, which quotes the beneficiary and identifies him as the "General Manager."
- Certificate of Appreciation awarded to the beneficiary by the 40th Airlift Squadron, which identifies him as "Resident Manager."
- Letter to the managing director of Kuldip's Touring Co. Ltd., conveying the thanks of former guests at the Indiana Beach Hotel to the beneficiary.
- Order for Supplies or Services, dated June 4, 1997, stating that the beneficiary is "Resident Mgr" of Indiana Beach Apartment Hotel.
- Copy of the November 29, 1996 issue of *COASTWEEK* with a photograph titled "Wedding of the Week." The caption of the photograph identifies the beneficiary as "Resident Manager" of Indiana Beach Hotel.
- Article from the September 1996 issue of *Travel Observer* about the Chancellor Club Chain, which describes the beneficiary as the "Asst. General Manager-Marketing for the Hospitality & Business Development division," and contains a photograph of the beneficiary. The beneficiary's name is misspelled in the article.
- Wikipedia article and website printout about Appu Ghar, which is described as an amusement park. Oysters Water Park is described as a water park within Appu Ghar.
- Unaudited financial statements for the years ended December 31, 2003 and 2004.
- Forms 1120, U.S. Corporation Income Tax Return, for 2003 and 2004.
- Form 2553, Election by a Small Business Corporation, with an effective date of January 1, 2005.
- Form 1120S, U.S. Income Tax Return for an S Corporation, for 2005.

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

As is noted above, the labor certification in this matter is certified by the DOL. Thus, it is useful to discuss the DOL's role in the employment-based permanent residence 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 certifications 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 the 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 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).⁵ *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

⁵Due to revisions to the Act since the decision, the current citation is section 212(a)(5)(A).

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 the instant case, the labor certification states that the job offered requires a bachelor's degree in business administration, accounting, or related field of study, and three years of experience in the job offered or in the related occupation of general manager. The DOL assigned the offered position the Standard Occupational Classification code of 11-1021, "General and Operations Managers." DOL's occupational codes are assigned based on normalized occupational standards. According to the DOL's O*NET online database, the position falls within Job Zone Three.⁶ The O*NET database states that "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." Therefore, based on the requirements of the position set forth on the labor certification, and taking into consideration the DOL's standard occupational requirements, the job offered is for a professional, but perhaps is better analyzed under the skilled worker category.

The regulation at 8 C.F.R. 204(5)(1)(3)(ii)(B) states the following:

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.

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C), which relates to the professional category, states:

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

⁶O*NET is located at <http://online.onetcenter.org>. O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." The O*NET description for "General and Operations Managers" is located at <http://online.onetcenter.org/link/summary/11-1021.00> (accessed June 5, 2009).

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 regulation uses a singular description of foreign equivalent degree that must be evidenced by a college or university record. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree from a college or university 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.

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.

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

In *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983), the court 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.

Id. at 1008. The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien*

offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine*, 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 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* 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 USCIS 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. Ore. Nov. 30, 2006). In that case, the labor certification 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 USCIS 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 and does not include alternatives to a bachelor's degree.

The Beneficiary's Qualifications for the Job Offered

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, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Iwine*, 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981). To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

In the instant case, Form ETA-750A of the labor certification, Items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of business manager. In the instant case, Item 14 describes the minimum educational requirement of the position as a bachelor's degree in business administration, accounting, or related field of study. Item 14 also describes the minimum experience as three years in the job offered of business manager or three years in the related occupation of general manager. Item 14 does not describe any required training. Item 15 of Form ETA 750A does not reflect any special requirements.

The Beneficiary's Education

The beneficiary set forth his educational credentials on Form ETA-750B of the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Item 11, eliciting information of the beneficiary's education, the beneficiary represented that he has a bachelor of commerce degree and a master of commerce degree from University of Bombay, India. In addition to the Form ETA-750B, the record contains a bachelor of commerce diploma awarded to the beneficiary by the University of Bombay; a certificate showing the beneficiary's passing marks for the bachelor of commerce degree examination; a master of commerce diploma awarded to the beneficiary by the University of Bombay; a certificate showing the beneficiary's passing marks for the master of commerce degree examination; and a credentials evaluation by [REDACTED] of Morningside Evaluations and Consulting, stating that the beneficiary's master of commerce degree is the equivalent of a U.S. bachelor's degree in accounting.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). USCIS 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, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this case, as noted above, USCIS will reject the submitted credentials evaluation.

Further, in determining whether the beneficiary's educational programs are individually foreign equivalent degrees, the AAO has additionally consulted the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). EDGE provides another source to consider in the evaluation of foreign credential equivalencies. AACRAO, according to its website at 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 at <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

The record contains evidence that the beneficiary obtained a bachelor of commerce degree. EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science degree awarded in India represents the attainment of a level of education comparable to two years or three years of university study in the United States. The record also contains evidence that the beneficiary obtained a master of commerce degree. EDGE provides that a Master of Arts/Master of Commerce/Master of Science degree awarded in India "represents attainment of a level of education comparable to a bachelor's degree in the United States."⁷

Two degrees, neither of which is the foreign equivalent of a U.S. baccalaureate, will not be presumed to be the foreign equivalent of a U.S. baccalaureate degree. However, in this case, the provided credentials evaluation and EDGE state that the beneficiary's master of commerce degree is, by itself, equivalent to a U.S. bachelor's degree. The beneficiary therefore meets the educational requirements specified in the labor certification. Further, the petition is approvable in the professional category since the beneficiary holds a single foreign equivalent degree to a U.S. baccalaureate degree and is a member of the professions. The petitioner would also be approvable in the skilled worker category for the same reason. To the extent the director's decision differs, it is withdrawn in part.

The Beneficiary's Experience

The labor certification states that the business manager position requires an individual with three years experience in the job offered or in the related occupation of general manager.

⁷<http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=140> (accessed June 5, 2009).

As set forth in Item 13 of Form ETA-750A, the duties of the required position are:

Plan and administer sales and marketing policies. Discuss and formulate plans for soliciting business. Supervise and train sales representatives. Maintain records of assets, liabilities, profits and loss statements, tax liabilities and other financial records. Maintain business licenses and fuel billing. Food & beverage inventory management.

The duties of the related occupation of general manager are not specified in the labor certification. However, consulting the O*NET system, a general manager performs the following duties:⁸

Plan, direct, or coordinate the operations of companies or public and private sector organizations. Duties and responsibilities include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one functional area of management or administration, such as personnel, purchasing, or administrative services. Includes owners and managers who head small business establishments whose duties are primarily managerial.

The beneficiary set forth his experience on Form ETA-750B of the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Item 15, eliciting information of the beneficiary's experience, the beneficiary represented that he had two jobs related to the offered position prior to the priority date.

First, from April 1998 to August 2001 (a period of three years and four months), the beneficiary claimed to have worked 40 hours per week as a senior accountant and general manager of International Amusement Ltd. in New Delhi, India. In this position, the beneficiary claimed to have performed the following duties:

Generated management information systems. Responsible for banking, balance sheet and handled loans and advances. Maintained books, ledgers, payments, receipts, salaries & [p]ayroll. Headed the marketing & sales department. Actively involved in [b]usiness development, [liaison] with [government] agencies & institutions & corporate sponsorships.

Second, from September 1996 to December 1997 (a period of one year and three months), the beneficiary claimed to have worked 40 hours per week as resident manager of Indiana Beach Hotel, Ltd. in Mombassa, Kenya. In this position, the beneficiary claimed to have performed the following duties:

⁸Summary Report for 11-1021.00 - General and Operations Managers at <http://online.onetcenter.org/link/summary/11-1021.00> (accessed June 5, 2009).

Food and beverage control, internal auditing, payroll, payments, and receipts. Maintained books for the overseas offices of travel agents. Generated P&L statements, overseeing hotel operations a[n]d account related matters. Handling group contract[s], [liaison] with travel groups, [and] agents overseas. Actively involved in [b]usiness [d]evelopment.

The issue is whether the petitioner has established that the beneficiary has three years of full time employment experience in the offered position of business manager or in the related occupation of general manager. This determination requires an analysis of the duties of the job offered and the related occupation, as well as the duties of the positions held by the beneficiary prior to the priority date. It is not sufficient for the petitioner to establish that the beneficiary previously held the *title* of general manager, business manager, or some other similar position. The petitioner must also provide evidence of the *duties* the beneficiary performed.

Accordingly, the regulation at 8 C.F.R. § 204.5(l)(3) states:

(ii) *Other documentation—*

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

The letters and other supporting evidence submitted in support of the beneficiary's experience is described in detail above.

In the denial, the director states that the employment letters submitted as evidence of the beneficiary's experience were not sufficient to establish that the beneficiary met the required qualifying experience for the position. The director noted that the petitioner submitted two letters from Appu Ghar/International Amusement Limited, executed on the same date, one of which states that the beneficiary was a senior accountant and the other which states that he was a general manager. On appeal, counsel asserts that, while at Appu Ghar/International Amusement Limited, the beneficiary "managed a dual portfolio as General Manager of the company and head of the Accounts Department." Counsel claims that the two letters do not conflict with each other, but instead demonstrate that the beneficiary "did in fact maintain multiple positions during his tenure." Counsel submits no evidence to support this claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining

evidence offered in support of the visa petition. *Id.* at 591. Even if counsel's unsupported statements were accepted as fact, they undermine his argument. If, during the beneficiary's employment by Appu Ghar/International Amusement Limited, he served part time as a senior accountant and part time as a general manager, then the beneficiary, by counsel's own admission, did not have three years of full time employment experience as a general manager. Further, there is no evidence in the record describing how much time each week the beneficiary worked in his capacity as a general manager and how much time he worked as a senior accountant. In summary, the petitioner has not established how much of the beneficiary's employment at Appu Ghar/International Amusement Limited, if any, can be counted as qualifying experience for the job offered.

The petitioner also claims that the beneficiary was employed as resident manager of Indiana Beach Hotel, Ltd. in Mombassa, Kenya. On Form ETA-750B, the duties the beneficiary claims to have performed in that position appear to be primarily accounting-related, such as internal audits, payroll, payments, receipts, maintaining books, generating profit and loss statements, and overseeing account related matters. Despite the beneficiary's title, these are not managerial duties. Further, the submitted letter of [REDACTED] chairman of Indiana Beach Apartment Hotel, dated January 12, 1998, only states that the beneficiary was employed in the position of "Resident Manager (Accounts)." The letter does not describe any of the duties that the beneficiary performed, as required by 8 C.F.R. § 204.5(l)(3). In the May 8, 2007 Request for Evidence (RFE), the director stated that letters from former employers "must include detailed descriptions of the duties performed." However, the petitioner failed to provide such a letter for the beneficiary's employment with Indiana Beach Hotel, Ltd. Further, although the record contains other documents stating that the beneficiary possessed the title of resident manager, the documents do not provide any evidence of the duties the beneficiary performed in this position. In summary, the petitioner has not provided sufficient evidence to establish that the beneficiary's employment as resident manager of Indiana Beach Hotel, Ltd. counts towards the required three years of experience in the job offered of business manager or in the related occupation of general manager.

In summary, the AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired three years of experience from the evidence submitted into this record of proceeding. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position in either professional or the skilled work category.

The Petitioner's Ability to Pay the Proffered Wage

Beyond the decision of the director, the petitioner has also not established that it has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful

permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. at 158.

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 the petition based on it, 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, USCIS 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, USCIS will first examine whether the petitioner employed and paid the beneficiary during the required 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner is obligated to establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the \$86,694 proffered wage.

The record contains the beneficiary's 2004 Form W-2. This document states that the petitioner paid the beneficiary \$32,500.00 in wages in 2004.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *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. 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 wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

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

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.⁹

<u>Year</u>	<u>Net Income (\$)</u>
2003	66,293.00 (filed on Form 1120)
2004	21,005.00 (filed on Form 1120)
2005	10,582.00 (filed on Form 1120S)

Therefore, the petitioner did not have sufficient net income for any year to pay the difference between the wage paid, if any, and the proffered wage.

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

⁹For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120. For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 17e of the 2005 version of the form. When the two numbers differ, as in this case, the number reported on Schedule K is used for net income.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁰ 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 tax returns demonstrate its net current assets for the required period, as shown in the table below.¹¹

<u>Year</u>	<u>Net Current Assets (\$)</u>
2003	118,001.00
2004	47,059.00
2005	205,731.00

For 2004, the petitioner did not have sufficient net current assets to pay the difference between the wage paid and the proffered wage.

Therefore, for 2004, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The record contains the petitioner's unaudited financial statements for the years ended December 31, 2003 and 2004. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Furthermore, the director specifically requested a 2004 annual report or audited financial statements in the RFE. The petitioner, however, chose to submit an unaudited financial statement called a "compilation report." Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which

¹⁰According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

¹¹On Forms 1120 and 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner claims to have been in business since 2000 and to employ 18 employees.¹² It is noted that the petitioner's tax returns show gross sales of \$7,287,684 in 2003, \$9,182,979 in 2004, and \$13,618,667 in 2005. There is no evidence in the record of the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service. Finally, and crucially, the petitioner failed to submit audited financial statements or an annual report for 2004 even though this evidence was specifically requested by the director. Although the size and longevity of the petitioner must be considered, the petitioner's failure to submit requested evidence is grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Furthermore, there is no evidence in the record of the petitioner's ability to pay the proffered wage in 2006. The petition was filed on April 30, 2007. The tax returns in the record state that the petitioner's fiscal year is based on a calendar year. Accordingly, the petitioner was required to file its 2006 tax return by March 15, 2007.¹³ The record contains no request for an extension of time to file the tax return, which is filed on Form 7004, Application for Automatic Extension of Time To File Certain Business Income Tax, Information, and Other Returns. The regulation 8 C.F.R. § 204.5(g)(2) states that evidence of the petitioner's ability to pay the proffered salary "*shall* be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.) The petitioner's failure to provide this evidence is also sufficient cause to dismiss this

¹²The petitioner's tax returns state that it was incorporated in 1997. This is corroborated by the Texas Comptroller of Public Accounts website at <http://ecpa.cpa.state.tx.us/coa/Index.html> (accessed June 5, 2009).

¹³See 2006 Instructions for Form 1120S, U.S. Income Tax Return for an S Corporation.

appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises*, 229 F. Supp. 2d at 1043.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.