



U.S. Citizenship
and Immigration
Services

**data deleted to
prevent clearly unwarranted
invasion of personal privacy**

PUBLIC COPY



BL

FILE: [Redacted]
LIN 06 203 52370

Office: NEBRASKA SERVICE CENTER

Date: NOV 02 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)

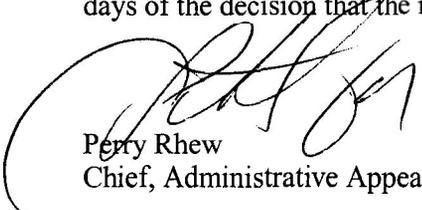
ON BEHALF OF PETITIONER:



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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is engaged in warehouse distribution.¹ It seeks to employ the beneficiary permanently in the United States as a Design and Development Analyst. A Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. The director also concluded that the petitioner had failed to establish its ability to pay the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through former counsel, submitted additional evidence and contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petitioner established that the beneficiary had demonstrated its continuing ability to pay the proffered wage.²

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).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

¹On Schedule B of its tax returns, it describes its business activity as a consulting service.

² It is additionally noted that through current counsel, the petitioner filed a new I-140 on July 23, 2008, on behalf of the beneficiary supported by an ETA Form 9089, Application for Permanent Employment Certification. The visa classification sought is pursuant to section 203(b)(2) of the Act for a member of the professions holding an advanced degree (paragraph (d) of the I-140). The petition was approved on September 5, 2008, based on an advanced degree that the beneficiary obtained after the priority date in the instant proceeding.

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

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

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date which is the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also establish its continuing financial ability to pay the proffered wage. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on September 11, 2003.³ The proffered wage is stated as \$34.58 per hour, which amounts to \$71,926.40 per year.

As noted above, the I-140 was filed on June 30, 2006. Part 5 of the petition indicates that the petitioner was established in 1989, claims a gross annual income of \$239,767, a net annual income of \$61,263, and currently employs fifty-four workers.

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

The Item 14 of the Form ETA 750, sets forth the minimum requirements for the position of a Design and Development Analyst. The proffered position requires four years of college culminating in a

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

B.S. degree in Computer Science. Item 14 also requires two years of work experience in the job offered or two years of experience in a related occupation defined as system design and development. Item 15 states that the applicant's job experience must include at least one year of experience in Oracle database, Visual Age Java, JCL, DB2 database and TN3270. The job duties are set forth on Part 13 of the ETA 750 and are described as follows:

Analyze, design, develop, test tune and support new forecasting and warehouse systems using Visual Age Java, Visual Basic, JCL, COBOL, bar coding software, DB2 database and Oracle database. Convert the existing forecasting and warehouse systems written using JCL, COBOL, DB2 database, and TN3270. Identify incompatibilities between forecasting and warehouse systems and other systems in the supply chain network and create solutions for the incompatibilities. Using Visual Basic and Oracle, develop software to interface with the forecasting and warehouse systems. Support existing applications written using Visual Age Java, Visual Age Generator, Smalltalk, JCL, Websphere and DB2 database.

In determining 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).

As stated on the labor certification, the proffered position of Design and Development Analyst requires four years of college culminating in a B.S. degree in Computer Science.

DOL assigned the occupational code of 030.062-010, software engineer, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at 15-1031.00 for computer software engineers, applications, at <http://online.onetcenter.org/link/summary/15-1031.00>⁴ and extensive description of the position and requirements for the job, 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 id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

⁴ (Accessed 10/2/09).

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.

More specific to this position, O*NET provides that 85 percent of responding computer software engineers, applications have a bachelor's degree or higher.⁵ Further, DOL's Occupation Outlook Handbook, available online at <http://www.bls.gov/oco/ocos267.htm>, provides:

Education and Training. Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs. In 2006, about 80 percent of workers had a bachelor's degree or higher.

Based on the position's job title, job duties, the educational requirements as set forth on the Form ETA 750, the SVP identified by DOL, the majority percentage of respondents that have a bachelor's degree or higher, the job in this case would be characterized as a professional position. Additionally, however, the petitioner has not established that the petition would be eligible for approval as a skilled worker.

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.

⁵See <http://online.onetcenter.org/link/details/15-1031.00>.

baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

As noted above, the Form 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.

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 the position and the alien are qualified for a specific immigrant classification. 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).⁶ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

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

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

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

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

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

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

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R.

§ 204.5(l)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.)

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).

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 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. *Id.* 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. *Id.* 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. *Id.* 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 on the ETA 750 and does not include alternatives to a four-year bachelor’s degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner’s asserted intent, USCIS “does not err in applying the requirements as written.” *Id.*

In *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the ETA 750 described the educational requirement as “Bachelor’s or equivalent” and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien’s other credentials with his three-year diploma to meet the requirements of the ETA 750. *Id.* at

13-14. In this case, the beneficiary must have four years of college and possess a B.S. degree in Computer Science. The petitioner failed to specify any defined equivalency on the Form ETA 750. The beneficiary's bachelor's degree does not equate to the requisite four-year degree. Rather it is a three-year Bachelor of Science degree in Applied Sciences. Therefore, the beneficiary's degree from Bharathiar University cannot be considered a foreign equivalent degree for this purpose and the partial completion of a master's program does not qualify as a credential that would satisfy the requirements of the labor certification. The petitioner failed to provide any evidence in response to the AAO's request for evidence of any recruitment efforts that might have demonstrated its intent to otherwise qualified U.S. workers that it would accept a defined equivalency to a Bachelor of Science degree in Computer Science. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The beneficiary's qualifications do not satisfy the requirements of the labor certification in either a professional or skilled worker category.

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). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to

aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

In this matter, on Part B of the Form ETA 750, signed by the beneficiary on March 31, 2004, the beneficiary indicated the highest level of education that he achieved relevant to the requested occupation is a three-year Bachelor’s degree in Applied Sciences and current attendance at the University of Mary Hardin Baylor in Belton, Texas.

The petitioner, through former counsel, submitted copies of a three-year Bachelor of Science in Applied Science degree from Bharathiar University, India, awarded on March 1, 1994 (based on examinations held in April 1993). The petitioner also submitted a copy of a Master of Science degree awarded on December 16, 2005, from the University of Mary Hardin-Baylor in Belton, Texas. The grade transcript indicates that the beneficiary majored in Information Systems.

On appeal, former counsel indicates that this evidence was submitted to show that the beneficiary had completed 2 semesters of this program and thus reflected a cumulative total of four years of college that had been completed when the labor certification was filed. As noted above, the Master’s degree was not obtained until December 16, 2005 which was more than two years after the priority date of September 11, 2003. A petitioner must establish the beneficiary’s eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

An academic evaluation from Globe Language Services, Inc., dated November 18, 2002, determined that the beneficiary’s degree from Bharathiar University is the equivalent of three years of undergraduate study toward from a regionally accredited educational institution in the United States. The evaluation further concluded that the three years of the beneficiary’s nine years of professional work experience also represents the equivalent of one year of undergraduate study in the United States, and that when combined together, the beneficiary’s formal education and progressive work experience, is the equivalent of a Bachelor’s Degree in Computer Science from a regionally accredited institution of higher education in the United States. It is noted that the formula of three years of experience to one year of education applies to nonimmigrant petitions, but not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). The Form ETA 750 did not state that the degree requirement could be met through a combination of education and experience.

As noted in the request for evidence that this office issued on March 4, 2009, two additional evaluations were provided on appeal. [REDACTED]⁷ of Career Consulting International (CCI),

⁷ indicates that she has a Master’s degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but does not indicate the field

provides an educational evaluation dated April 14, 2007. An additional evaluation, dated April 11, 2007 is submitted from [REDACTED]⁸ of Marquess Educational Consultants (MEC).

Both individuals are affiliated with each other as reflected on the “Affidavit of Accuracy” on page 3 of CCI’s evaluation. They both claim that the beneficiary’s three-year degree from Bharathiar University is, standing alone, equivalent to a Bachelor of Science degree, representing 120 semester credit hours, with a concentration in Computer Science from a regionally accredited Institution in Higher Education in the United States.

Both [REDACTED] and [REDACTED] determine that the beneficiary completed 120 credits in his Bachelor of Science degree from Bharathiar University, which would be the normal course requirement for a U.S. bachelor’s degree. It is not clear that a “contact hour” as discussed in these evaluations would be the same or directly equivalent to a U.S. “credit hour.” In the Indian system, students spend more time in the classroom providing more “contact hours,” whereas the U.S. system calculates time spent studying outside the classroom into the credit hour determination.⁹ The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable. [REDACTED] reaches this conclusion by assigning 2.93 credits to each course that the beneficiary took in his Bachelor of Science degree program.¹⁰ While she generally refers to the Indian 3-year bachelor’s degree as having as many or more classroom hours as a U.S. four-year degree, there is no specific calculation that she specifically points to in order to determine the number of credits assigned to the beneficiary’s course of study, and the beneficiary’s transcript in the record does not include any such figure.

Moreover, both evaluations refer to accelerated programs in the United States that permit a bachelor’s degree to be completed in three years, not four, thus showing that a U.S. bachelor’s program does not necessarily demand a four-year program. The AAO notes that programs that allow students to work at an accelerated pace do not establish that a typical three-year Indian degree is equivalent to a four-year baccalaureate U.S. degree or even an accelerated U.S. program.

Finally, none of the evaluations in the record explain how the beneficiary’s degree from Bharathiar

in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, Ecole Superieure Robert de Sorbon awards degrees based on past experience.

⁸ [REDACTED] indicates that he has a “canonical diploma of Sacrae Theologiae Professor” from St. David’s Oecumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

⁹U.S. students “are assumed to spend two hours of outside preparation for every 1 hour of lecture.”

[REDACTED] The University of Texas at Austin, “Assigning Undergraduate Transfer Credit: It’s Only an Arithmetical Exercise,” (<http://www.handouts.aaccrao.org/am07/finished/F034p-M-Donahue.pdf> (accessed September 8, 2008)). As the Indian system is not based on credits, but is exam based, transfer credits are based on a calculation of the number of exams taken multiplied to reach “a base line of 30” for credit conversion as the systems do not readily equate. *Id.*

¹⁰ [REDACTED] failed to explain how she assigned “2.93” credits to each course that the beneficiary took in his Indian three-year degree, nor did she provide any evidence to support her method of assigning credit.

University somehow represents a major in computer science, when only a maximum of two courses (computer programming and possibly introduction to digital electronics) appear to relate to such a major. It is noted that the Globe Language Services, Inc. evaluation was careful to state that the beneficiary's work experience related to computer science rather than the degree from Bharathiar University.

The evaluations are not consistent and are not probative of the beneficiary's formal education. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The petitioner was also requested to provide evidence of its recruitment efforts in order to demonstrate whether it communicated to otherwise available qualified U.S. workers that some other kind of combination of certificates, diplomas or degrees were acceptable to qualify for the offered position. The petitioner, through former counsel, did not respond to the AAO's request for evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The director denied the petition, in part, based on his determination that the petitioner had failed to establish that the beneficiary's educational credentials satisfied the terms of the labor certification requiring four years of college culminating in a B.S. in Computer Science.¹¹

As advised in the AAO's March 4, 2009 request for evidence, the petitioner was advised that we had 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, 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://accraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE indicates that a Bachelor of Science degree in India is "awarded upon completion of two to three years of tertiary study beyond Higher Secondary Certificate (or equivalent)." In the "credential advice" reference, it is noted that the bachelor of science degree represents a comparable level of

¹¹He also denied the petition based on the petitioner's failure to establish its ability to pay the proffered wage.

education of two to three years of university study in the United States and that credit may be awarded on a course by course basis.

This office elects to rely on the EDGE advisory of the equivalency of the beneficiary's Bachelor of Science degree. There is no suggestion in EDGE that it may be considered as a foreign equivalent degree to a U.S. baccalaureate. It may not be concluded that the evaluations provided by the petitioner are probative of whether the beneficiary's Bachelor of Science degree represents a foreign equivalent degree. 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

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. 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). The addition of two semesters of study in an uncompleted master's program at a U.S. college does not confer such a degree based on this educational combination. No combinations amounting to such an equivalency were defined on the ETA 750. 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," as of the priority date of September 11, 2003, the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Even if considering at most, the beneficiary's attainment of three years of undergraduate university studies represented by the Bachelor of Science degree, this would not qualify as full Bachelor of Science degree as indicated on the Form ETA 750. Moreover, the petitioner failed to delineate any acceptable equivalency on the ETA 750 such as in Item 15 where other requirements relating to his experience were stated.

Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B). Additionally, in such a case, USCIS will also examine whether the petitioner's intent to accept some other form of an academic equivalency was communicated to DOL and to U.S. workers in the labor market test.¹²

¹² For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which states that:

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

The beneficiary is not eligible for a skilled worker classification in this case. As mentioned above, the record supports a finding that the certified position was appropriately classified as a professional by the petitioner's intent expressed in the record, the job title, job duties, the educational requirements as set forth on the Form ETA 750, and the majority percentage of software engineering respondents that have a bachelor's degree or higher as indicated in O*Net.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d, 1174 (D. Or. 2005) which found that [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 CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a). In reaching this decision, the court also concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification.¹³

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.

¹³ Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. See *American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this

It is noted that that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829 at 833, USCIS is obliged to “examine the certified job offer *exactly* as it is completed by the prospective employer.” (Emphasis added) USCIS’ interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added).

The petitioner also failed to provide evidence of its recruitment advertisements in order to demonstrate if it communicated its intent to otherwise qualified U.S. workers that it would accept some kind of combination of degrees, diplomas or certificates in lieu of a four-year B.S. degree in Computer Science as required on the ETA 750. The beneficiary educational credentials do not meet the terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional or as a skilled worker under 203(b)(3)(i) of the Act.¹⁴

With regard to the petitioner’s ability to pay the proffered salary of \$71,926.40, the petitioner provided copies of its 2003, 2004, and 2005 Form 1120S, U.S. Income Tax Return for an S

requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer’s attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that “a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers.” BALCA concluded:

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

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

¹⁴ A skilled worker category requires that a petitioner must show that a beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification.”

Corporation.¹⁵ The returns indicate that the petitioner files its tax returns on a standard calendar year basis. They contain the following information:

Year	2003	2004	2005
Net Income	\$158,394	-\$ 65,889	\$34,025
Current Assets	\$11,482	\$ 87,018	\$16,204
Current Liabilities	\$ -0-	\$153,114	\$27,826
Net Current Assets	\$11,482	-\$ 65,889	-\$11,622

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁶ It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.¹⁷

On appeal, the petitioner also provided copies of Wage and Tax Statements (W-2s) issued to the beneficiary by the petitioner in 2002, 2003, 2004, 2005 and 2006. As the priority date is September 11, 2003, the 2003-2006 W-2s are more relevant. They indicate the following wages paid:

¹⁵ Where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2003), line 17e (2004 and 2005) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007)(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). In this matter, the petitioner's net income may be found on line 23 for 2003, and line 17e for 2004 and 2005.

¹⁶ According 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.

¹⁷ A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

Year	Wage	Difference from Proffered Wage
2003	\$68,845	-\$ 3,081.40
2004	\$60,900	-\$11,026.40
2005	\$66,325	-\$ 5,601.40
2006	\$69,720	-\$ 2,206.40

It is noted that in a subsequent submission relevant to the petitioner's I-140 sponsoring the beneficiary for a visa classification as a member of the professions holding an advanced degree, a copy of the petitioner's 2006 tax return was provided. It indicated net income of \$45,180 declared on line 18 of Schedule K, current assets of \$137,987 and current liabilities of \$170,033 as reported on Schedule L, which yield net current assets of -\$32,046. The AAO's request for evidence issued on March 4, 2009 instructed the petitioner to provide federal tax returns, audited financial statements or annual reports from 2006 to the present as evidence of its continuing financial ability to pay the proffered wage. As the petitioner failed to respond to the AAO's request for evidence, there is insufficient documentation of its *continuing* financial ability to pay the certified wage as of the priority date relevant to this adjudication. It is noted that the petitioner failed to provide either a federal tax return or audited financial statement that relates to 2007.¹⁸

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner may have 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. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. In this case, former counsel provided evidence of payment of wages to the beneficiary on appeal.

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, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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.

¹⁸ It is noted that the I-140 that was approved awarding the beneficiary a visa classification of a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Act was based on a priority date of March 10, 2008 and 2008 payroll records indicating that the petitioner was paying wages at least equivalent to the proffered wage.

1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 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.

As noted above, the record indicates that the petitioner employed and paid wages to the beneficiary in the amounts specified above. In 2003, the petitioner's net income was sufficient to cover the \$3,081.40 shortfall resulting from the comparison of the beneficiary's actual wages paid of \$68,845 and the proffered wage of \$71,926.40. The petitioner established its ability to pay in 2003.

In 2004, neither the petitioner's net income of -\$65,889 nor its net current assets of -\$66,096 was sufficient to cover the \$11,026.40 shortfall resulting from the comparison of the beneficiary's actual wages of \$60,900 and the proffered salary of \$71,926.40. The petitioner failed to demonstrate its ability to pay the proposed wage offer in this year.

In 2005, the petitioner's net income of \$34,025 was sufficient to cover the difference of -\$5,601.40 between the beneficiary's actual wages of \$66,325 and the proposed wage offer of \$71,926.40. The petitioner had the ability to pay the proffered wage in 2005.

Similarly, in 2006, the petitioner's net income of \$45,180 was enough to pay the -\$2,206.40 difference between the beneficiary's actual wages and the proffered wage and establish the ability to pay in this year.

Based on the petitioner's failure to respond to the AAO's request for financial documentation from the priority date to the present, the AAO does not find that the petitioner provided any evidence pursuant to the regulation at 8 C.F.R. § 204.5(g)(2) that would establish the petitioner's ability to pay the proffered wage in 2007.

As initially noted, *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) is sometimes applicable in determining a petitioner's ability to pay a proffered wage where other factors may overcome evidence of small profits. Such circumstances as the expectations of increasing business or the overall magnitude of a petitioner's business activities may be examined. Other factors may include the number of years that a petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, or the occurrence of any uncharacteristic business expenditures or losses, or the petitioner's reputation within its industry. The petitioner in

Sonegawa had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonegawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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.

In this case, the petitioner's tax returns indicate that its gross receipts reached a high of approximately \$4.6 million in 2006 from approximately \$3 million in 2003. Although it reported fifty-four employees on the I-140, it is unclear how many have been paid as direct employees based on the lack of any salaries and wages reported on its tax returns, but approximately one-half of its gross receipts are declared as labor costs. As shown above, although the petitioner's reported net income was \$158,394 in 2003, it sustained a reduction in 2004 to -\$65,889 and reported relatively modest amounts of \$34,025 in 2005 and \$45,180 in 2006. Based on the 2003 to 2006 income tax returns, it may not be concluded that this represents the kind of framework of profitability such as that discussed in *Sonegawa*, or that the petitioner has demonstrated that such unusual and unique business circumstances exist in this case, which are analogous to the facts set forth in that case. The petitioner also failed to provide financial documentation related to 2007 and did not submit any evidence of reputation or other factors similar to *Sonegawa*.

As noted above, the clear language in the regulation at 8 C.F.R. § 204.5(g)(2) requires that the petitioner must demonstrate a continuing ability to pay the proffered wage beginning on the priority date, which in this case is September 11, 2003. Demonstrating that the petitioner is paying the proffered wage in a specific year may suffice to show the petitioner's ability to pay for that year, but the petitioner must still demonstrate its ability to pay for the rest of the pertinent period of time.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the evidence failed to demonstrate that the petitioner has had the continuing ability to pay the proffered wage or that the petitioner has demonstrated that the beneficiary possesses the minimum educational requirements as set forth on the ETA 750.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.