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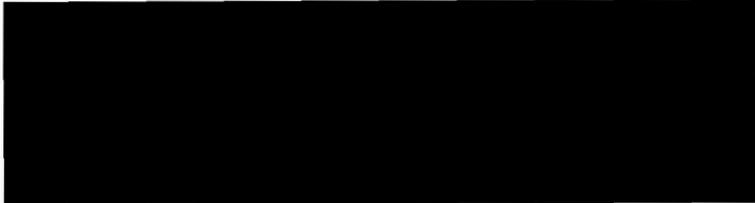
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



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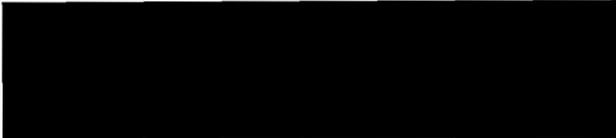
FILE:

LIN 07 033 52349

Office: NEBRASKA SERVICE CENTER

Date: **NOV 02 2009**

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).

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 an information technology services provider. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on October 24, 2003.² The Immigrant Petition for Alien Worker (Form I-140) was filed on November 15, 2006.

The job qualifications for the certified position of programmer analyst are found on Form ETA 750 Part A. Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

² 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 is clear.

Block 14:

Education (number of years)

Grade school	8
High school	4
College	4
College Degree Required	Bachelor's (or equivalent)
Major Field of Study	Comp. Science, Comp., Elect. or Mech. Eng.

Experience:

Job Offered	2 yrs.
(or)	
Related Occupation	2 yrs. (Programmer, Systems Analyst or Software Engineer)

Block 15:

- Other Special Requirements (1) Must have experience in SAP R/3, ABAP/4, VB, ASP, COM, DCOM, MS Access, SQL Server, Crystal Reports, VBScript, JavaScript, HTML, DHTML and Rational Rose.
(2) High mobility preferred.

As set forth above, the proffered position requires four years of college culminating in a Bachelor's degree in Computer Science, Computers, or Electrical or Mechanical Engineering, and two years of experience in the job offered or two years of experience as a Programmer, Systems Analyst or Software Engineer,³ together with the special requirements listed at Block 15 of the Form ETA 750.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: Bachelor of Science degree in Mathematics from the University of Madras in India, where he attended from June 1993 to September 1996; and Diploma in Computer Science from the National Institute of Information Technology (NIIT) in India, where he attended from March 1994 to April 1996.

In support of the beneficiary's educational qualifications, the record contains a copy of the beneficiary's Bachelor of Science degree in Mathematics from the University of Madras dated

³ The petitioner has established that the beneficiary has the required two years of experience.

March 1996.⁴ The Statements of Marks submitted to the record indicate that this was based on a three-year course of studies. The record also contains copies of transcripts for the NIIT program in software technology and systems management. The beneficiary undertook four semesters of studies at NIIT with duration each of 26 weeks with examinations taken on September 22, 1994, March 27, 1995, September 21, 1995, and April 4, 1996.⁵ The record also contains an academic evaluation report, dated December 13, 1999, written by [REDACTED] of Computer Science, Columbia University. In her evaluation, [REDACTED] stated that based on the completion of the beneficiary's Bachelor of Science degree at the University of Madras, along with his coursework at NIIT, the beneficiary had the equivalent of a Bachelor of Science degree in Computer Science from an accredited U.S. institution of higher education.

The director denied the petition on November 28, 2006. He determined that the beneficiary's bachelor of science degree in mathematics, together with his coursework at NIIT, could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in Computer Science, Computers, or Electrical or Mechanical Engineering, because the beneficiary does not have a single degree that is an equivalent degree to a U.S. bachelor's degree.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel states that the director improperly substituted his own interpretation of "or equivalent" in his decision and that he improperly applied the rule that academic degrees cannot be combined in the employment-based visa petition for professional classification to the skilled worker classification. Counsel states that the petition should be considered under the skilled worker classification, and that the petitioner "clearly intended that its use of 'or equivalent' to mean that [the beneficiary's] two foreign degrees could be combined to be evaluated as equivalent to a four-year bachelor's degree" like the petitioner in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005). On appeal, counsel submits a brief and a copy of the decision in *Grace Korean United Methodist Church*.

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 030.162-014 and title programmer analyst, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1051.00> (accessed October 14, 2009, under computer systems analyst, DOL's updated correlative occupation) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four.

According to DOL, two to four years of work-related skill, knowledge, or experience are needed for Job Zone Four occupations. DOL assigns a standard vocational preparation (SVP) range of 7-8 to Job Zone Four occupations, which means "[m]ost of these occupations require a four-year bachelor's

⁴ The beneficiary's degree is not in one of the major fields of study required by Form ETA 750.

⁵ Thus, the beneficiary pursued his studies at the University of Madras and NIIT simultaneously.

degree, but some do not.” *See Id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

See id. Because of the requirements of the proffered position and DOL’s standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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

The regulation at 8 C.F.R. 204(5)(l)(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.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

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

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

the purpose of “matching” them with those of corresponding United States workers so that it will then be “in a position to meet the requirement of the law,” namely the section 212(a)(14) determinations.

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

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 U.S. Citizenship and Immigration Services (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).

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 1289m 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement in 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 a member of the professions 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 degree, we would not consider education earned at an institution other than a college or university.

The petitioner in this matter relies on the beneficiary's combined educational experiences to reach the "equivalent" of a degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification.

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 single-source "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," from a college or university in the required field of study listed on the certified labor certification, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

We are cognizant of counsel's citation to the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (USCIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

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 about the beneficiary’s qualifications. *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.

Further, the employer’s subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner’s intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary’s credentials into requirements that do not seem on their face to include what the beneficiary has.

Thus, the AAO issued a request for evidence (RFE) on December 1, 2008, soliciting such evidence. In response, the petitioner submitted an educational evaluation dated January 5, 2007, from Career Consulting International; and a complete copy of the Form ETA 750, together with documentation of the petitioner’s recruitment efforts for the proffered position. The petitioner later supplemented the response to the RFE with a credentials evaluation from World Education Services, Inc. for an individual other than the beneficiary; a credentials evaluation from Foreign Consultants, Inc. for an individual other than the beneficiary; correspondence addressed to [REDACTED] an article regarding the Bologna Process; a page from the website of the U.S. Office of Personnel Management; correspondence between [REDACTED] for the legacy Immigration and Naturalization Service, and [REDACTED] a research report from

⁷ It is noted that private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced in [REDACTED] correspondence, permits a certain combination of progressive work experience and a bachelor’s

the Council of Graduate Schools; an excerpt from the Foreign Affairs Manual, 9 FAM 41.51; an internet article from The Times of India; a report regarding the regional conventions of the United Nations Educational Scientific and Cultural Organization (UNESCO); an excerpt from Republic of India, an AACRAO publication; an article by [REDACTED] and [REDACTED] UNESCO recommendations and guidelines; an article from World Education News & Reviews; an article from the American Educational Research Association; an article from Financial Mail; The Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific; and a report from the Council of Graduate Schools. The supplemental response contained no brief or detail as to why the documents should be considered by the AAO in connection with the appeal.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner submitted two evaluations of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification. The two evaluations include an academic evaluation report dated January 5, 2007, from [REDACTED] of Career Consulting International,⁸ and an academic evaluation report, dated December 13, 1999, written by [REDACTED] of Computer Science, Columbia University. The report from [REDACTED] states that the beneficiary's Bachelor of Science Degree in Mathematics from the University of Madras is equivalent to a bachelor's degree from a regionally accredited institution of higher education in the United States.⁹ The evaluation, however, does not state that the beneficiary's degree is the

degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree.

⁸ [REDACTED] indicates that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but does not indicate the field in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, Ecole Superieure Robert de Sorbon awards degrees based on past experience.

⁹ The evaluation from [REDACTED] references as exhibits additional correspondence and research regarding educational equivalency, including excerpts from UNESCO regarding recognition of foreign educational qualifications. These items do not establish that the beneficiary's degree is equivalent to a U.S. bachelor's degree. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications

equivalent of Bachelor's degree in Computer Science, Computers, or Electrical or Mechanical Engineering as required by the Form ETA 750. The beneficiary's transcripts from the University of Madras indicate that he took only one computer course and no courses in electrical or mechanical engineering. Thus, the evaluation from [REDACTED] of Career Consulting International does not establish that the beneficiary met the educational requirements of the labor certification.

The report from [REDACTED] states that the beneficiary's degree from the University of Madras is equivalent to three years of coursework at an accredited institution of higher education in the United States, and that his coursework at NIIT is equivalent to two years of coursework at an accredited institution of higher education in the United States. The report concludes that the beneficiary has the equivalent of a bachelor of science degree in computer science from an accredited institution of higher education in the United States, based on the combination of his coursework at the University of Madras and NIIT. The report from [REDACTED] stating that the beneficiary's degree from the University of Madras is equivalent to three years of coursework at an accredited institution of higher education in the United States conflicts with the report from [REDACTED] which states that it is equal to 120 semester hours, or four years, of coursework at an accredited institution of higher education in the United States. 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).¹⁰

Moreover, as advised in the RFE issued to the petitioner by this office, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).¹¹ According to its website,

issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed October 16, 2009).

¹⁰ A Form I-140 petition was filed by a different petitioner on behalf of the instant beneficiary on July 2, 2008. That petition was filed with an evaluation of the beneficiary's credentials dated August 14, 2007, from The Trustforte Corporation. The Trustforte Corporation equated the beneficiary's Bachelor of Science degree in Mathematics from the University of Madras to three years of academic studies toward a Bachelor of Science degree in Mathematics at an accredited college or university in the United States.

¹¹ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on

www.aacrao.org, is “a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials. “An Author’s Guide to Creating AACRAO International Publications” 5-6 (First ed. 2005), available for download at [www.aacrao.org/publications/guide to creating international publications.pdf](http://www.aacrao.org/publications/guide%20to%20creating%20international%20publications.pdf). If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE states that a bachelor of science degree in India “represents attainment of a level of education comparable to two to three years of university study in the United States.” See <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=128> (accessed October 16, 2009).

The Form ETA 750 does not provide that the minimum academic requirements of four years of college culminating in a Bachelor’s degree in Computer Science, Computers, or Electrical or Mechanical Engineering might be met through a combination of educational experiences or some other formula other than that explicitly stated on the Form ETA 750. The copies of the newspaper advertisements and internet advertisements provided with the petitioner’s response to the RFE issued by this office also fail to advise DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. Instead, the newspaper advertisements and internet postings promote five separate jobs and state that some positions require a bachelor’s degree, and others require a master’s degree.¹² In addition, the posting notice submitted by the petitioner does not advise that the educational requirements for the job may be met through a combination of lesser degrees or other defined equivalency. Thus, the alien does not qualify as a skilled worker as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements

information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

¹² Further, we note that the petitioner rejected one applicant for the position because he did not have a bachelor’s degree, although his resume indicates that he attended Bridgewater College and the Computer Programming Institute of Delaware, and took continuing education courses at the University of Delaware, Delaware Technical and Community College and Widener University. The petitioner has not explained why these combined educational experiences failed to qualify the applicant for the position with a combination of educational experiences that are “equivalent” to a bachelor’s degree.

during the labor certification process.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act as either a professional or skilled worker.

Beyond the decision of the director,¹³ the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the 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 its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on October 24, 2003. The proffered wage as stated on the Form ETA 750 is \$71,591.00 per year.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$743,955.00, to have a net annual income of \$77,381.00, and to currently employ 30 workers. On the Form ETA 750B, signed by the beneficiary on October 6, 2003, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date

¹³ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 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).

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 during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date in 2003 or subsequently.

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. 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.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the

years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[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.” *Chi-Feng Chang* at 537 (emphasis added).

In this case, the labor certification was issued to SolutionNet International, Inc., and the I-140 petition was filed by SQL Star International, Inc.¹⁴ With the petition, the petitioner submitted an

¹⁴ The AAO noted in its RFE:

The record as presently constituted contains the successor-in-interest petitioner’s reviewed financial statement dated September 30, 2006 and the Nineteenth Annual Report of the petitioner’s parent company in India for 2005-2006. 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 accountant’s report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants’ Statement on Standards for Accounting and Review Services (SSARS) No.1, and accountants only express limited assurances in reviews. As the accountant’s report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Moreover, to show that the new entity qualifies as a successor-in-interest to the

Agreement for Business Purchase dated March 17, 2006, between SolutionNet Pte. Limited, a Singapore company, SolutionNet Consulting LLC, a New Jersey LLC, and SQL Star International Limited, an Indian company, pursuant to which SolutionNet Pte. Limited and SolutionNet Consulting LLC sold certain business assets to SQL Star International Limited, including certain immigration related interests; reviewed financial statements for the petitioner for the period ending September 30, 2006; and an annual report for 2005-2006 for SQL Star International, Limited, the petitioner's parent company. In response to the AAO's RFE, counsel submits IRS Form 1120, U.S. Corporation Income Tax Return, for SolutionNet International Inc. for fiscal year 2002, which runs from October 1, 2002 to September 30, 2003; IRS Form 1065, U.S. Return of Partnership Income, for Solutionnet Consulting LLC for tax years 2004 and 2005; a Corporate Restructuring Statement dated June 16, 2004; reviewed financial statements for the petitioner for tax year 2006; an annual report for 2007-2008 for SQL Star International, Limited, the petitioner's parent company; and an excerpt from Interpreter Releases, 78 IR 1681. Counsel claims that the petitioner acquired all of the immigration-related liabilities of its predecessor on April 1, 2006, and, therefore, that the petitioner is a successor-in-interest to its predecessor.

If the petitioner is purchased, merges with another company, or is otherwise under new ownership, a successor-in-interest relationship must be established. The successor-in-interest must submit proof of the change in ownership and of how the change in ownership occurred. In the instant case, a Corporate Restructuring Statement dated June 16, 2004, indicates that SolutionNet International, Inc. was reorganized into SolutionNet Consulting LLC, and that SolutionNet Consulting LLC assumed all of the obligations, liabilities and undertakings arising from certain labor condition applications referenced in the statement. However, the statement does not indicate that SolutionNet Consulting LLC assumed all of the obligations, liabilities and undertakings arising from the labor certification applications filed by SolutionNet International, Inc. Therefore, the petitioner has not established that SolutionNet Consulting LLC is the successor-in-interest to SolutionNet International, Inc. for

original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Additionally, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date until acquired by the successor. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). In the instant petition, your organization has provided no evidence with regard to the initial petitioner's ability to pay the proffered wage, such as audited financial statements, tax returns, or annual reports, as of the October 24, 2003 priority date up to the date of acquisition by your organization. Please provide evidence as to the initial petitioner's and your organization's ability to pay the proffered wage in the relevant period of time in question. Further, the agreement submitted to establish the petitioner's successorship specifically excludes certain assets. Please provide evidence that the petitioner has assumed "all of the rights, duties, and obligations of the predecessor company" in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481.

purposes of the instant labor certification application. Further, pursuant to the Agreement for Business Purchase dated March 17, 2006, SolutionNet Consulting LLC sold certain business assets to SQL Star International Limited. However, the petitioner is SQL Star International, Inc., which was not a party to the Agreement. The Agreement does not establish that SQL Star International, Inc. is the successor-in-interest to SolutionNet Consulting LLC. In sum, the petitioner, SQL Star International, Inc., has not established that is a successor-in-interest to SolutionNet International, Inc., the applicant on the Form ETA 750. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Even if we assume that the petitioner established a successor-in-interest relationship with SolutionNet International, Inc. and SolutionNet Consulting LLC, the petitioner has not established its continuing ability to pay the proffered wage from the purported change in ownership on April 1, 2006, nor has it established the ability of its purported predecessors, SolutionNet International, Inc. and SolutionNet Consulting LLC, to pay the proffered wage from October 24, 2003 to June 15, 2004, and from June 16, 2004 to March 31, 2006, respectively. In order to maintain the original priority date, the petitioner must demonstrate that its predecessors had the ability to pay the proffered wage from the priority date in 2003 until the dates of the changes in ownership in June 2004 and April 2006, respectively. Moreover, the petitioner must establish its financial ability to pay the certified wage from the date of the change in ownership. See *Matter of Dial Repair Shop*, 19 I&N Dec. 481 (Comm. 1981).

SolutionNet International, Inc. - October 24, 2003 to June 15, 2004

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The petitioner submitted IRS Form 1120, U.S. Corporation Income Tax Return, for SolutionNet International, Inc. for fiscal year 2002, which runs from October 1, 2002 to September 30, 2003. The priority date is October 24, 2003.¹⁵ Counsel claims that the financial statement for SolutionNet International, Inc. for October 1, 2003 to December 31, 2003, is unavailable.¹⁶ Therefore, for the period from October 24, 2003 to June 15, 2004, the petitioner did not establish the ability of SolutionNet International, Inc. to pay the proffered wage with evidence required by 8 C.F.R. § 204.5(g)(2).

SolutionNet Consulting LLC - June 16, 2004 to March 31, 2006

¹⁵ Evidence preceding the priority date is not necessarily dispositive of the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

¹⁶ The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The record indicates that SolutionNet Consulting LLC is structured as a limited liability company and filed its 2004 and 2005 tax returns on IRS Form 1065.¹⁷ The petitioner's IRS Forms 1065, U.S. Partnership Income Tax Return, stated net income of \$59,361.00 and -\$376,225.00 for tax years 2004 and 2005, respectively.¹⁸ Therefore, for the years 2004 and 2005, the petitioner did not establish that SolutionNet Consulting LLC had sufficient net income to pay the proffered wage. In response to the AAO's RFE, counsel claims that the financial statement for SolutionNet Consulting LLC for January 1, 2006 to March 31, 2006, is unavailable. Thus, for the period from January 1, 2006 to March 31, 2006, the petitioner did not establish that SolutionNet Consulting LLC had sufficient net income to pay the proffered wage with evidence required by 8 C.F.R. § 204.5(g)(2).

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹⁹ A partnership's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). If the total of a partnership's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered

¹⁷ A limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. In the instant case, SolutionNet Consulting LLC is considered to be a partnership for federal tax purposes.

¹⁸ For a partnership, where a partnership's income is exclusively from a trade or business, USCIS considers net income to be the figure shown on Line 22 of the Form 1065, U.S. Partnership Income Tax Return. However, where a partnership 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 or additional credits, deductions or other adjustments, net income is found on page 4 of IRS Form 1065 at line 1 of the Analysis of Net Income (Loss) of Schedule K. In the instant case, the petitioner did not submit Schedule K to the IRS Form 1065 for SolutionNet Consulting LLC for 2004. In 2005, its Schedule K reflects no entries for additional income or additional credits, deductions or other adjustments. Therefore, the numbers for its net income reflect those entries found on Line 22 of its Form 1065 for 2004 and 2005.

¹⁹ 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.

wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner did not submit Schedule L to the 2004 IRS Form 1065 for SolutionNet Consulting LLC for 2004. In 2005, the IRS Form 1065 for SolutionNet Consulting LLC stated net current assets of -\$280,136.00. Therefore, for the year 2005, the petitioner did not establish that SolutionNet Consulting LLC had sufficient net current assets to pay the proffered wage.

Counsel claims that the financial statement for SolutionNet Consulting LLC for January 1, 2006 to March 31, 2006, is unavailable. Therefore, for the period from June 16, 2004 to March 31, 2006, the petitioner did not establish the ability of SolutionNet Consulting LLC to pay the proffered wage with evidence required by 8 C.F.R. § 204.5(g)(2).

SQL Star International, Inc. - April 1, 2006 to December 31, 2007

To demonstrate its ability to pay the proffered wage, the petitioner submitted reviewed financial statements for the petitioner for the period ending September 30, 2006; an annual report for 2005-2006 for SQL Star International, Limited, the petitioner's parent company; reviewed financial statements for the petitioner for tax year 2006; and an annual report for 2007-2008 for SQL Star International, Limited.

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 accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

Further, this office will not accept the annual reports of the petitioner's parent company as evidence of the petitioner's ability to pay the proffered wage, as the annual reports do not contain financial statements specifically for the petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Therefore, for the period from April 1, 2006 to December 31, 2007, the petitioner did not establish its ability to pay the proffered wage with evidence required by 8 C.F.R. § 204.5(g)(2).

In sum, the petitioner has not established its continuing ability to pay the proffered wage from the purported change in ownership on April 1, 2006, nor has it established the ability of its purported predecessors, SolutionNet International, Inc. and SolutionNet Consulting LLC, to pay the proffered wage from October 24, 2003 to June 15, 2004, and from June 16, 2004 to March 31, 2006, respectively.

Therefore, even if we assume that the petitioner established a successor-in-interest relationship with SolutionNet International, Inc. and SolutionNet Consulting LLC, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it or its predecessors 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.

USCIS electronic records show that the petitioner filed at least 14 other I-140 petitions which have been pending during the time period relevant to the instant petition. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring and any current wages of the beneficiaries. Since the record in the instant petition fails to establish the petitioner's ability to pay the proffered wage to the single beneficiary of the instant petition, it is not necessary to consider further whether the evidence also establishes the petitioner's ability to pay the proffered wage to the beneficiaries of the other petitions filed by the petitioner, or to other beneficiaries for whom the petitioner might wish to submit I-140 petitions based on the same approved ETA 750 labor certifications.

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. 612 (BIA 1967). 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 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 was incorporated in Delaware in 1998. On the petition, the petitioner claimed to have a gross annual income of \$743,955.00, to have a net annual income of \$77,381.00, and to currently employ 30 workers. However, the petitioner provided no evidence to support these claims. The petitioner has not established historical growth of its business, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.²⁰ 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.

²⁰ 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, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.