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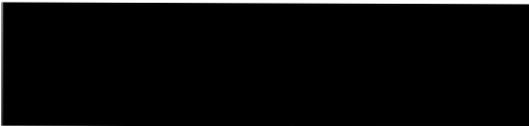
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090

U.S. Citizenship  
and Immigration  
Services

02



FILE: LIN 06 262 52893 Office: NEBRASKA SERVICE CENTER Date: **SEP 16 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:  
[Redacted]

INSTRUCTIONS:

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

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

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, 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 a medical multi-media company. It seeks to employ the beneficiary permanently in the United States as a multi-media specialist. As required by statute, a Form ETA 750,<sup>1</sup> 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).<sup>2</sup>

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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).

The job qualifications for the certified position of multimedia specialist are found on Form ETA-750 Part A. Item 13 describes the job duties to be performed as follows: "Design and produce patient education modules on DVD using Spruce technology turnkey systems; oversee multilingual dimension of products and maintain technical aspects of working relationship with various strategic partnerships; conduct research for most efficient and up-to-date DVD, video and web solutions; devise DVD and web convergence solutions."

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:

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

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

Block 14:

Education (number of years)

Grade school	(Blank)
High school	(Blank)
College	X
College Degree Required	B.S. (or equivalent)
Major Field of Study	Information Technology, Education, Or Related

Experience:

Job Offered (or) Related Occupation	1 year  0 (zero)
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Block 15:

Other Special Requirements (Blank)

As set forth above, the proffered position requires a Bachelor of Science degree (or equivalent) in information technology, education, or a related field.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of educational and work experience evaluations written by [REDACTED], Thomas Edison State College, Trenton, New Jersey, and by [REDACTED] Educated Choices, L.L.C., Upper Montclair, New Jersey. Both evaluations state that the beneficiary completed a four year course of study at the Pontifical University of St. Thomas Aquinas in Rome, Italy and was awarded the Bachelor of Theology in 1986. Dr. [REDACTED] states that based on the beneficiary's combined university-level studies in theology and his three years and seven months of work in interactive multimedia work, the beneficiary had achieved professional recognition as "having attained the equivalent of a U.S. bachelor's degree in Information Technology with an emphasis in Interactive Multimedia." Dr. [REDACTED] also combined the beneficiary's four years of formal university study at St. Thomas Aquinas in Rome, and his nearly four years of professional employment in interactive multimedia to conclude that the beneficiary had demonstrated "a practical and theoretical understanding of Information Technology/ Interactive Multimedia and had achieved professional recognition as having attained the equivalent of a U.S. Bachelor's degree in Interactive Multimedia, or some related discipline, equal to that of an individual who has a U.S. bachelor's degree in that major." The petitioner also submitted the beneficiary's professional resume.

The record also contains a copy of a certificate and a transcript from Computer Graphics College, Sydney, Australia, issued in 1996 that documents the beneficiary's participation in the Interactive Multimedia course; and a letter from [REDACTED] L.C. Centro di Studi Superiori Legionari

de Cristo, Rome, Italy that states the beneficiary studied in the Center from 1976 to 1989 and that his studies included courses in computer sciences, which he completed with satisfactory results. The petitioner submitted the transcript for these studies that included the theory of graphic design, computer aided drawing, and computer science studies in the years 1981 to 1986.

The record also contains the following documentation of the beneficiary's studies submitted in response to the director's RFE dated September 27, 2006:

1. A statement from [REDACTED], Rector of the Novitiate-Juniorate of the Legionaries of Christ in Salamanca, Spain, dated July 14, 1976. This document lists courses taken by the beneficiary in the First Rhetoric Course, Academic year 1975-1976;<sup>3</sup>
2. A Diploma of Licentiate in Philosophy-Theoretical Philosophy from Gregorian University, Rome, Italy, that states the beneficiary was granted his bachelor's degree in June 21, 1980, Magna Cum Laude. This document is dated January 10, 1987. The petitioner also submitted the beneficiary's transcripts for the Gregorian University that indicated two years of academic studies during 1976 and 1977 for the bachelor's degree earning 77 credits, and two years of studies in 1978 and 1979 for the degree of Licentiate of Philosophy, with a specialization in theoretical philosophy, earning 31 credits;
3. Diploma of Bachelor's degree in Sacred Theology from the Pontifical University of St. Thomas Aquinas, Rome, Italy, dated December 16, 1986;
4. A statement dated October 30, 2006 from [REDACTED], Secretary General, that examines the beneficiary's coursework during a three-year course of studies (1983 to 1985) in Sacred Theology at the Pontifical University described as Cycle 1;
5. A certificate in Teaching English to Speakers of Other Languages dated July 1992, from Trinity College, London; and
6. Certificates of training in computer programs and programming from BAKST Consulting and Spruce Technologies.

In the response to the director's RFE, counsel stated that the beneficiary meets the educational requirement listed on the ETA Form 750 without combining the beneficiary's educational qualifications with his work experience. Counsel states that the beneficiary's degrees in philosophy and theology are in a related field as allowed by the labor certification, and notes that philosophy is a closely related field to education.

The director denied the petition on December 21, 2006. He determined that the beneficiary's bachelor of theology and philosophy degrees could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in Information Technology, Education, or related, and that the beneficiary was not qualified to perform the duties of the proffered position.

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<sup>3</sup> This coursework is not noted by the beneficiary in Form ETA 750.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel, submitted Internet excerpts from the websites for departments of philosophy from the following universities: California State University, Pomona, California; Elmhurst College, and Indiana University, Bloomington, Indiana. All brochures address the merits of studying philosophy as an undergraduate. The Indiana University submission contains a handbook for Undergraduate Majors that lists types of non-academic careers for philosophers as drawn from the files of the American Philosophical Association.

The proffered position is for a multi-media specialist, an occupation that is not statutorily prescribed as a professional occupation. Part A of the Form ETA 750 indicates that DOL assigned the occupational code of 25-9011.00 with accompanying job title Audio-Visual Collections Specialist 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/crosswalk/25-9011.00> (accessed August 21, 2009) 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 Five requiring "extensive preparation" for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means that "[A] bachelor's degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)." Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience.

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

*See id.*

The position requires an undefined number of years of college culminating in a Bachelor of Science degree in Information Technology, Education or a related field and one year of experience, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C). Thus, combined with its statutory definition and DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position must be considered as a professional occupation.

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.

On November 17, 2008, the AAO issued a request for evidence to the petitioner, noting that there was insufficient evidence in the record of proceeding that the beneficiary possesses a foreign equivalent degree equivalent to a four-year U.S. bachelor of Science degree in the major field of study of information technology, education or a related field of study. The AAO asked for an explanation and description of the courses at St. Thomas Aquinas University and Gregorian University that would qualify the beneficiary to perform the job duties described on the Form ETA 750. The AAO also noted that the Form ETA 750 as certified does not demonstrate that the petitioner would accept a college or university degree that is a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience. The AAO requested that the petitioner submit a complete copy of the Form ETA 750 labor certification including any documentation that both reflects and summarizes the petitioner's recruitment efforts. In response to the request for evidence, counsel does not submit any further documentation.

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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 left to U.S. Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so 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).<sup>5</sup>

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the

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<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

<sup>5</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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

regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a 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.

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 (5<sup>th</sup> 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. Thus, the beneficiary's studies at

Moreover, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).<sup>6</sup> According to its website, [www.aacrao.org](http://www.aacrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." 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](http://www.aacrao.org/publications/guide) to creating international publications.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's credential advice on the Holy See states that education is limited to post-secondary studies focusing on theology (especially Catholicism), psychology, religion, philosophy, Canon law, and social science. With regard to the beneficiary's baccalaureate degree from the Pontifical University of St. Thomas Aquinas in theology, EDGE provides that a 3 year Bachelor's degree is comparable to "3 years of university study in the United States. Credit may be awarded on a course-by-course basis." With regard to the combined four years of studies in philosophy at the Gregorian University, EDGE states that usually a three-year Baccalaureate degree is necessary for entry into the Licentiate program and that a licentiate is awarded after completion of two years (120 ECTS credits) of post

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<sup>6</sup> 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 information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

secondary study, and that the Licenza (licentiate) represents attainment of a level of education comparable to a master's degree in the United States. It also notes that completion of a First Cycle university program such as Baccalaureate or Baccellierato (baccalaureate) is required for entry into the Licentiate program.

While the beneficiary's three year program of studies in Theology at the Pontifical University of St. Thomas Aquinas would not be the equivalent of a U.S. baccalaureate degree in a similar field; the beneficiary, based on his combined degrees from the Gregorian University, may have a master's degree in Philosophy that is comparable to a U.S. master's degree. The AAO notes that in the instant case, the beneficiary studied for two years to receive a baccalaureate, and an additional two years to receive a Licentiate in Philosophy with a specialization in theoretical philosophy at Gregorian University, so his credentials are somewhat at variance with the EDGE information.

In their evaluations, [REDACTED] and [REDACTED] only refer to the beneficiary's four years of studies at the Pontifical University of St. Thomas Aquinas. The documentation submitted to the record does not reflect four years of studies at this institution. Furthermore, both educational equivalency reports in the record combined the beneficiary's work experience with his academic studies to determine that beneficiary had achieved the equivalent of a U.S. four-year bachelor's degree in information technology and interactive media, but that regulatory-prescribed equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). 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). Additionally, the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate. The AAO gives no weight to either educational equivalency report submitted to the record.

With regard to the beneficiary's Master's in Theology from the Gregorian University, the AAO notes that the total credit hours for the two diplomas from the Gregorian University total 101 credit hours, and thus may not be the equivalent of a U.S. baccalaureate degree in the same field. The AAO also notes that the director's determination that the beneficiary's studies in Philosophy are not viewed as a field related to Information Technology or Education is well-taken. While counsel provides additional documentation on appeal that many philosophy majors are employed in a wide range of professions, this fact in itself does not support that the beneficiary's studies in philosophy are sufficient to establish his academic credentials in the field of Information Technology or to perform the described job duties of the proffered position. Evidence that philosophers enter certain fields is not the same as proving that the courses of study for either field are related. The petitioner provided no evidence of similar course requirements or evidence of cross-department courses, namely that the study of philosophy usually requires certain courses from the education department curriculum. Finally the petitioner provides no evidence that the coursework of a philosophy major or a education major is significantly similar to the coursework of an information technology major. The AAO thus affirms the director's decision with regard to the beneficiary's qualifications.

The Form ETA 750 does not provide that the minimum academic requirements of four years of

college and a Bachelor of Science degree in Information Technology, Education or a related field might be met through three years of college or some other formula other than that explicitly stated on the Form ETA 750. The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.<sup>7</sup>

Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification because the subject matter of his master's degree is not related to the required bachelor's degree in information technology, education or a related subject. The petition would be denied on that basis as well. See 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

Beyond the decision of the director, the AAO finds that the petitioner has not fully established its status as a successor in interest and has not established the ability of the original petitioner to pay the proffered wage of \$54,000 in the 2003 priority year. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The AAO notes that in his RFE dated September 27, 2006, the director requested further evidence of the I-140 petitioner's status as a successor on interest.<sup>8</sup> The petitioner submitted numerous documents to establish that Chartlogic, Inc. had assumed all the rights, duties and obligations of the predecessor company, DynoMed.com, Inc. that filed the ETA Form 750. Among the evidence submitted is the following:

1. A document entitled "Report of Independent Auditors," dated October 3, 2005, written by PriceWaterhouseCoopers, L.L.P., Salt Lake City. In this document, the auditors refer to accompanying consolidated balance sheets and statements of operations, of changes in shareholders' deficit and of cash flows that reflect the financial position of ChartLogic, Inc., and its subsidiaries as of December 31, 2004, 2003, and 2002. Page ten of the report states that on December 3, 2004, Chartlogic acquired all outstanding common stock of DynoMed, and assumed its liabilities. The document states acquisition with assumed

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<sup>7</sup> The beneficiary's possession of a master's degree in philosophy is a possibility, but this has not been proven by the petitioner nor has the petitioner provided any response to the AAO's RFE to further clarify this issue.

<sup>8</sup> This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest.

- liabilities; assumed assets; other current assets; and net property and equipment as of December 31, 2002, 2003, and 2004;
2. An undated document "Articles of Merger of Dynomed, Inc., with and into CLI Merger Co., Inc." that states the merger shall be effective on the date the Plan of Merger is filed as part of the required Articles of Merger with the Secretary of State of Indiana. The document also has a Agreement and Plan of Reorganization;
  3. A folder from [REDACTED], Indianapolis, Indiana. The folder contains copies of the predecessor petitioner's Form 1120 for tax year 2004 that indicates DynMed.com, Inc. had net current assets of \$763,650. This folder does not contain the predecessor's petitioner's tax return for the priority year 2003;
  4. A letter dated March 30, 2006 from [REDACTED] and [REDACTED] Salt Lake City. [REDACTED] states that the firm represents Chartlogic, Inc, in connection with the acquisition of DynoMed.com, Inc, and states that in the transaction DynoMed merged with a subsidiary of Chartlogic, and under the terms of the merger Chartlogic issued shares of its capital stock to all stockholders of DynoMed, and DynoMed became a wholly-owned subsidiary of Chartlogic and all employees of DynoMed became employees of Chartlogic;
  5. Copies of the beneficiary's paychecks for the months June to December 2002, that indicates the beneficiary earned \$47,250 in 2002;<sup>9</sup>
  6. Copies of four of the beneficiary's biweekly pay stubs for tax year 2005. The pay stub for the two week period ending December 31, 2005 indicates a biweekly salary of \$2,395.84 and that the beneficiary earned \$57,500 as of December 31, 2005:
  7. Copies of fourteen of the beneficiary's biweekly pay stubs for tax year 2006 from January to September 2006. All pay stubs indicate a biweekly salary of \$2395.84, or an annual salary of \$62,291.84. The paycheck for September 16 through September 30, 2006 indicates the that as of this pay period, the beneficiary earned \$43,125;
  8. Copies of the beneficiary's W-2 Forms for tax years 2002, 2003, 2004,<sup>10</sup> and 2005. These documents indicated DynoMed paid the beneficiary the following wages: \$47,200 in 2002; \$47,250 in 2003; and \$51,310.88 in 2004. The documents also indicate that Chartlogic paid the beneficiary \$4,072 in 2004; \$55,630.16 in 2005,<sup>11</sup> and \$57,500 in 2006.

Although the petitioner submitted documentation as to the proposed acquisition, the documents submitted are unsigned and undated as to the actual date of the acquisition. According to the Indiana

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<sup>9</sup> Since the priority year for the instant petition is 2003, the beneficiary's wages in 2002 are not probative of the predecessor petitioner's ability to pay the proffered wage during the relevant period of time. The AAO will not address the beneficiary's 2002 wages further in these proceedings.

<sup>10</sup> For tax year 2004, the petitioner provided W-2 Forms from both Chartlogic and from DynoMed. The beneficiary's combined wages for 2004 were \$55,382.88.

<sup>11</sup> The petitioner provides no clarification of the beneficiary's actual wages in 2005. For purposes of these proceedings, the AAO will utilize the \$55,630.16 sum on the beneficiary's W-2 Form.

Secretary of State Corporate database<sup>12</sup> the predecessor was created in April 26, 2000, merged with another company and was inactive as of December 3, 2004. The PriceWaterHouseCoopers report also corroborates this date as the date of merger with Chartlogic, Inc. The state database also indicates that the predecessor company also operated under the name Dynomed.com, Inc.

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). Here, the Form ETA 750 was accepted for processing on January 23, 2003.<sup>13</sup> The proffered wage as stated on the Form ETA 750 is \$57,500 per year.<sup>14</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on September 13, 2006.

The AAO notes that in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the certified wage as of the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Therefore the instant

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<sup>12</sup> See [https://secure.in.gov/sos/bus\\_service/online\\_corps/name\\_search.aspx](https://secure.in.gov/sos/bus_service/online_corps/name_search.aspx). (Available as of August 24, 3009.)

<sup>13</sup> 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.

<sup>14</sup> Although [REDACTED] in her cover letter dated September 1, 2006 indicates the beneficiary's annual salary as certified on the labor Certification is \$54,500, the ETA Form 750 indicated a corrected proffered wage of \$57,500, as of July 14, 2006, with an original proffered wage of \$47,250. The AAO notes that in the Foreign Labor Certification database, the level two prevailing wage for a Audio Visual Collections Specialist in Indianapolis, Indiana, Marion County as of 2003 is \$54,725 (As found on the All-Industries Database for 2003 at <https://www.flcdatacenter.com>, available as of August 24, 2009.) While the record is not clear how the \$57,500 proffered wage was determined, 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). Thus the proffered wage to be considered in these proceedings is \$57,500.

petitioner has to establish the predecessor petitioner's ability to pay the proffered wage in the 2003 priority year and during the part of 2004 in which the predecessor was the petitioner.

In the petitioner's cover letter, [REDACTED], the current petitioner's vice president, indicates that the predecessor company, DynoMed, was established in 1999; had a gross annual income of \$500,000; and employed five individuals until its purchase by Chartlogic, Inc. in 2004. On the petition, the current petitioner claimed to have been established in 1999, to have a gross annual income of \$4,749,455, and to currently employ 85 workers. On the Form ETA 750B, signed by the beneficiary on January 8, 2003, the beneficiary claimed that he had worked for Dynomed.com, Inc., since December 2000.

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 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 reference to the director's RFE, counsel refers to the PriceWaterhouseCoopers report for evidence as to the predecessor petitioner's ability to pay the proffered wage. However, the report refers to Chartlogic and its subsidiaries and then lists Chartlogic and subsidiaries' financial information as of December 31, 2002, 2003, and 2004. The AAO notes that as of December 31, 2003, DynoMed, the original ETA Form 750 petitioner, was not a subsidiary of Chartlogic and therefore the information as to the predecessor petitioner's ability to pay the proffered wage in the priority year is not contained in the PriceWaterhouseCoopers report. With regard to tax year 2004, the predecessor petitioner was only a subsidiary of Chartlogic from December 3, 2004 to December 31, 2004, and would have to establish its ability to pay the proffered wage for the remainder of 2004.

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 established that the predecessor petitioner employed and paid the beneficiary \$47,250 in 2003; and \$51,310.88 in 2004.<sup>15</sup> It also established that it paid the beneficiary \$4,072 in 2004; \$55,630.16 in 2005, and \$57,500 in 2006. Therefore the petitioner established that in tax year 2006, it paid the beneficiary the entire proffered wage of \$57,500, while it did not establish that the full proffered wage was paid to

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<sup>15</sup> Thus, the beneficiary earned \$55,382.88 in 2004.

the beneficiary by itself or the predecessor petitioner in tax years 2003, 2004, or 2005. Therefore it has to establish the ability of the predecessor petitioner to pay the difference between the beneficiary's actual wages and the proffered wage of \$57,500 in tax year 2003, and the difference between the beneficiary's actual wages and the proffered wage from January 2004 to December 3, 2004. The petitioner also has to establish its ability to pay the difference between the beneficiary's wages and the proffered wage in the relevant part of 2004, and in tax year 2005.<sup>16</sup>

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 (1<sup>st</sup> 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.

The record does not contain the predecessor's federal tax return for the 2003 priority year, or any other documentation described at 8 C.F.R. § 204.5(g)(2) for tax year 2003. Therefore the AAO cannot determine whether the predecessor had sufficient net income or net current assets to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2003.

With regard to tax year 2004, the instant petitioner submitted the predecessor's tax return for 2004, and an audited consolidated balance sheet that includes the current petitioner's 2004 financial information. The predecessor's tax return for 2004 reflects net income of -\$115,813. Thus the current petitioner cannot establish that the predecessor petitioner had sufficient net income to pay the difference between the beneficiary's wages and the proffered wage from January 1 to December 3, 2004.

With regard to the current petitioner's ability to pay the difference between the beneficiary's wages and the proffered wage of \$57,500 from December 3, 2004 to December 31, 2004, the only evidence

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<sup>16</sup> The respective differences between the beneficiary's actual wages and the proffered wage are \$10,300 in tax year 2003, \$2,117.12 in the merger year of 2004, and \$1,869.84 in 2005.

submitted to the record by the current petitioner is the PriceWaterhouseCoopers' Report of Independent Auditors. This document states the following: "The Company incurred net losses of \$3,469,372 . . . and negative cash flow from operating activities of \$2,637,917 . . . in 2004. The company also had negative working capital of \$2,633,578 and an accumulated deficit of \$14,049,027 as of December 31, 2004."

With regard to tax years 2004 and 2005, the document states:

Management funded its operation during 2004 primarily through available cash and proceeds from the issuance of preferred stock, and that during 2005, the company plans to use cash received from operations to fund ongoing operations. In the event sales are not sufficient to fund ongoing operations, the Company intends to seek additional financing from external sources and related parties. In anticipation of these financing needs, the majority shareholder of the Company has committed to fund, through long-term advances or equity contributions, all capital investment, working capital or other operational cash requirements of the Company through October 3, 2006.

On page 11, the document also indicates "Other current assets" as of December 31, 2003 of \$99,923. The AAO does not find these statements sufficient to establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage during December 2004. The report's comments on tax year 2005 are prospective and not sufficient to establish the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2005.<sup>17</sup>

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

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>18</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a

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<sup>17</sup> The petitioner's tax returns for tax years 2004 and 2005 would be much more probative evidence.

<sup>18</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. As stated previously, the instant petitioner did not submit the tax return for the predecessor petitioner for tax year 2003. Thus, the AAO cannot determine if the petitioner had sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage of \$57,500 in tax year 2003. With regard to tax year 2004, the predecessor petitioner had net current assets of \$763,650 and the current petitioner has established the predecessor petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage of \$57,500 for the relevant part of tax year 2004.

With regard to the current petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage in 2004 and 2005 based on its net current assets, the AAO notes that the PriceWaterhouseCoopers financial report includes tax year 2004 but not tax year 2005. Therefore the record is devoid of any evidence with regard to the current petitioner's ability to pay the difference between the beneficiary's actual wages in 2005 and the proffered wage. As stated previously the financial information on the auditor's report is also found insufficient to establish the instant petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2004.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for January through November 2004, and tax year 2006.

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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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 record does not contain sufficient evidence to establish either the predecessor or current petitioner's totality of circumstances. Based on documents in the file, the predecessor petitioner had five employees while the instant petitioner has 85 employees. While the petitioner's vice president states in her cover letter that the current petitioner was founded in 1994, the I-140 petition indicates the current petitioner was established in 1999. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." Thus the evidence in the record as to the petitioner's longevity is not established. Further, there is no evidence in the record as to the petitioner's business profile within the medical audiovisual production field, or any other extraordinary circumstances beyond a merger of two companies, that would have affected either petitioner's ability to pay the proffered wage. 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 evidence submitted does not establish that the predecessor petitioner and the instant petitioner had the continuing ability to pay the proffered wage beginning on the 2003 priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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