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

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U.S. Citizenship  
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Services



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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **SEP 16 2009**  
LIN 07 059 52261

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, 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 cleaning services company. It seeks to employ the beneficiary permanently in the United States as an administrative manager. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.<sup>1</sup> 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 director also stated that the record did not establish that the beneficiary had the specific skills identified in Item H-14, of the ETA Form 9089, namely, "knowledge and strategies in the franchise business." The director further noted that the petitioner had not submitted sufficient documentation to establish its ability to pay the proffered wage as of the 2006 priority date.

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)(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

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<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

<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).

158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on April 22, 2006.<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on December 21, 2006.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for an administrative manager provides, in pertinent part, the following job duties: Dictate financial policies, responsible for financial planning, P&L, BS, and CF reporting, monitoring market trends and proposing strategies in the franchise business, interpret and analyze translation of legally binding documents, and acts as liaison between the board of directors and management.

The minimum level of education and experience required for the proffered position stated in Part H of the labor certification reflects the following:

H.4. Education:	Minimum level required:	Bachelor's.
4-A. States "if Other indicated in question 4 [in relation to the minimum education], specify the education required."		(Blank)
4-B. Major Field Study:		Business Administration
H-7. Is there an alternate field of study that is acceptable?		No
H-8. Is there an alternate combination of education and experience that is acceptable?		No
H-9. Is a foreign educational equivalent acceptable?		Yes

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<sup>3</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.

H-6. Experience: Number of months experience required: 36  
H-10. Is experience in an alternate occupation acceptable? no

H-14. Specific skills or other requirements: Knowledge and Strategies in the franchise business.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (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).

On the ETA Form 9089, signed by the beneficiary, the beneficiary represents that the highest level of achieved education related to the requested occupation was a bachelor's degree in business administration completed in 1998 at Universidad Fermin Toro, Barquisimeto, Lara, Venezuela.<sup>4</sup>

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma from Colegio Universitario Fermin Toro. The translation of the beneficiary's diploma indicates that the beneficiary was awarded an Associate's degree in Administration, "specialty in trading" on June 10, 1998. The petitioner also submitted a transcript of the beneficiary's coursework at Colegio Universitario Fermin Toro. The translation of this document identified the beneficiary's major as administration, with a minor in marketing. The transcript lists courses taken by the beneficiary during five semesters of studies from 1992 to 1997, with a sixth semester for one course entitled Introduction to internships, and a professional internship.

The petitioner additionally submitted a credentials evaluation, dated October 4, 2002 from Foundation for International Services, Inc.(FIS). The evaluation describes the beneficiary's diploma from Colegio Universitario Fermin Toro as a Title of Higher Technician in administration with a specialization in agricultural marketing. The evaluator states that the beneficiary's studies were the equivalent to two and one half years of university-level credit in business administration with a specialization in agricultural marketing from an accredited U.S. college or university. The evaluator then examined the beneficiary's work experience as a logistic assistant and a general administration in business administration from March 1996 to January 2002, and notes that the beneficiary had five and three quarters years of prior work experience. The evaluator combines the beneficiary's educational credentials with her work experience utilizing a ratio of three years of work experience to equally one year of university-level credit to conclude that the beneficiary has the equivalent of a

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<sup>4</sup> The AAO notes that the beneficiary's resume identified her educational degree from Colegio Universitario Fermin Toro as "A.S., Business Administration."

bachelor's degree in business administration with a specialization in agricultural marketing from an accredited U.S. college or university.

The director denied the petition on December 28, 2006. He determined that the beneficiary's associate's degree in administration with a specialty in agricultural marketing could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in business administration because the ETA Form 9089 required a bachelor's degree, and did not indicate that a combination of lesser degrees, or a combination of work and education would be acceptable to meet the stipulated requirement of a bachelor's degree in business administration.

On appeal, the petitioner submits a brief, the beneficiary's diploma, FIS evaluation report, and copies of the beneficiary's training certificates and letters of work verification. The petitioner asserts that USCIS contradicted itself by stating that the beneficiary did not have the required bachelor's degree while affirming the findings of the FIS evaluation. Counsel also notes that USCIS incorrectly states that the Form ETA 9089 did not indicate that the combination of lesser degrees or a combination of work and education would be acceptable as meeting the educational requirement of a bachelor's degree. The petitioner points out that the ETA 9089 at question H-9 did not state what the director stated in his decision, but rather states that a foreign equivalent degree is acceptable. The petitioner also states that a reading of Section 203(b)(3)(A)(ii) does not state or imply that a combination of education and work experience is not acceptable for a bachelor's degree, and that this is a subjunctive interpretation not substantiated in law. Finally the petitioner cites *Grace Korean United Methodist Church v. Michael Chertoff*, equating the circumstances of the beneficiary in *Grace Korean* with the beneficiary in the instant petition. The petitioner states that in the instant case, the beneficiary should have been considered for skilled worker classification.

DOL assigned the code of 11-3011.00 to the proffered position of Administrative Manager. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/11-3011.00> (accessed August 18, 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 Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." 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.*

Although the proffered position may be analyzed as a skilled worker, because not all workers are required to have a bachelor's degree, DOL's classification and assignment of educational and experiential requirements for the occupation suggest it is a professional position.

The position requires a bachelor's degree in business administration, and three years 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 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 March 9, 2009, the AAO issued a request for evidence to the petitioner, noting that the petitioner had requested the petition be considered under the professional and skilled worker classification, and that the director had considered the petition under both classifications. The AAO stated that the record did not contain any evidence that the beneficiary held a four-year bachelor's degree in business administration, or that any of the certificates submitted was a postgraduate diploma issued by an accredited university or institution. The AAO also noted that the petitioner did not draft Form ETA 9089 to allow for an "equivalent" based on any alternate combination of education and experience, and did not specify on the ETA Form 9089 that the minimum academic requirements of a bachelor's degree in business administration might be met through a combination of lesser degrees and/or a quantifiable amount of work experience.

The AAO further advised that according to the American Association of Collegiate Registrars and Admissions Officer's (AACRAO) EDGE database, the title of Higher Technician in Administration with a Specialization in Agricultural Marketing (a Technico Superior or Tecnologo) is awarded upon completion of two or three years of tertiary study beyond the secondary education (or equivalent) and represents attainment of a level of education comparable to two to three years of university study

in the United States. The AAO then stated that this information did not suggest that a two to three year degree from Venezuela may be deemed a foreign equivalent degree to a four-year U.S. baccalaureate degree. The AAO then requested a complete copy of the petitioner's recruitment efforts, including notice of the filing, job order, advertisement in newspaper or professional journals to establish that the petitioner intended to delineate an equivalency to the bachelor degree required stipulated in Part H, items 1-13 of the ETA Form 9089.

The AAO also noted that although the petitioner requested that the petition should be considered under the skilled worker classification, the evidence submitted was insufficient to demonstrate that the beneficiary has two years of experience in the proffered job. The AAO notes that the letters of work verification did not detail the beneficiary's job responsibilities in accordance with the regulation at 8 C.F.R. § 204.5(1)(3)(ii) or document the job skills required in the ETA Form 9089. The AAO requested that the petitioner submit letters from the beneficiary's past employers and accurately translated certificates with sufficient detail to demonstrate that the beneficiary has two years of experience in the proffered job. Finally, the AAO noted that the petitioner's unaudited financial statements were not sufficient to prove the petitioner's ability to pay and that the petitioner failed to establish its ability to pay the proffered wage although documentation in the record indicated that the beneficiary worked for the petitioner since 2003. The AAO requested that the petitioner establish its ability to pay the proffered wage with the most recent available W-2 Forms for the beneficiary, annual reports, federal tax returns or audited financial statements.

In response to the AAO request for evidence, the petitioner submitted the following evidence:

1. Copies of the advertisements placed by the petitioner in the *Sun Sentinel* newspaper during January 2006. These advertisement outline the job duties for the proffered position but describe no educational or work experience criteria;
2. A letter from Placement Services, USA, dated March 6, 2006, written by [REDACTED].  
The letter to the petitioner's counsel states that although the position of Administrative Manager, located in Tamarac, Florida was recruited for, no applicants were found and no resumes were received that met the minimum qualifications stipulated by the petitioner;
3. A document entitled Position Available-Employee Referral Program that states the minimum requirements for the position is a bachelor's degree in business administration;<sup>5</sup>
4. A document entitled "Job Notice" that states the DOL certifying officer addresses, the proffered salary but does not state any educational or work experience, or the place where the notice was filed; and

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<sup>5</sup> The AAO notes that this posting notice contains several deficiencies, including no information on the location of the position, or address for the DOL certifying officer to register any comments on the posting, and further describes the place of posting as a conspicuous place at the office of Next Trade, Inc. The record provides no clarification on the relationship between the petitioner and Next Trade, Inc. See the regulation at 20 C.F.R. § 656.10(d) for further information on the proper posting of a filing notice.

5. A copy of the petitioner's Recruitment Reply Log, that identifies seven applicants and the reasons for their disqualifications. Applicant Five states the reason for being disqualified is that the applicant does not have a bachelor's, although she plans to attend a four year college in the future. Applicant Four is disqualified although he or she has a bachelor's in business administration, and is described a "financial specialist." Applicant Two is disqualified because she expected graduation in August 2007 and has no experience.

### **Beneficiary's Qualifications**

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

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for

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

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>7</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 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, an associate’s degree or the beneficiary’s diploma for a three year program in administration in agricultural marketing 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.

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<sup>7</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).

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Id.* at 11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Id.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated on the ETA 9089 and does not include alternatives to a four-year bachelor’s degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner’s asserted intent, USCIS “does not err in applying the requirements as written.” *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree). In this matter, contrary to the petitioner’s assertion on appeal, the ETA Form 9089 does not specify an equivalency to the requirement of a Bachelor’s degree in Business Administration.

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(1)(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.

Moreover, as advised in the request for evidence 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).<sup>8</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 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’s credential advice provides that the title of Superior Technician (Tecnico Superior) is comparable to “2 to 3 years of university study in the United States, and that credit may be awarded on a course-by-course basis.”

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<sup>8</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.

As noted by the director, the FIS evaluation used an equivalence to determine that three years of experience equaled one year of college to conclude that the beneficiary had achieved the equivalent of a U.S. four-year bachelor's degree in business administration, 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(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate. The AAO gives no evidentiary weight to the FIS evaluation.

The ETA Form 9089 does not provide that the minimum academic requirements of four years of college and a Bachelor's degree in business administration might be met through three years of college or some other formula other than that explicitly stated on the ETA Form 9089. The copies of the notice(s) of Internet and newspaper advertisements, provided with the petitioner's response to the request for evidence issued by this office, also fail to advise any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. The petitioner's Internet and newspaper advertisement list no educational or work experience criteria, while the petitioner's posting notice lists educational requirements of a bachelor's degree in business administration. Further, the petitioner's recruit reply log, submitted in response to the AAO RFE, indicates that several applicants were disqualified because they did not possess bachelor's degree at all or not in the right field. Thus, the record establishes that the petitioner did appear to require a four year baccalaureate degree as the minimum educational requirement. 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.

The AAO notes the petitioner filed the I-140 petition under both the professional and skilled worker classification. Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification, and 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).

With the petition, the petitioner submitted three letters of work experience: an undated letter from the petitioner stating that the beneficiary worked from July 2003 to the present working as an Administrative Manager; a letter dated June 27, 2002 from [REDACTED], the general manager, Mercantil Celltronic, C.A., Barquisimetro, Venezuela that stated the beneficiary worked as a logistical assistant from April 12, 2000 to January 8, 2002; and a letter dated June 30, 2002 from [REDACTED] General Manager, of Incora, C.A., Venezuela, stating the beneficiary had worked for the company from March 4, 1996 to February 15, 2000 in a general administration position. None of these letters refer to any prior franchise experience by the beneficiary.

The director in his decision noted that the record did not establish that the beneficiary had the specific skill of “knowledge and strategies in the franchise business,” as required in Item H-14, of the ETA Form 9089. The AAO determined in its RFE that the employment reference letters were insufficient to establish that the beneficiary had the requisite two years of experience, stipulated on the ETA Form 9089, and also noted the lack of knowledge and strategy of franchises stipulated in the other skills section at H-14. The petitioner also submitted the beneficiary’s resume that lists the job duties of the above-mentioned jobs. In her resume, the beneficiary described her job duties with Celltronic as follows: operations planning, cash flow management, inventory control, margin analysis, cost and pricing analysis, profit maximization analysis, new equipment quality certification, royalty report and supervising five people in the administrative department.

In response to the AAO’s RFE, the petitioner submitted a second letter dated June 8, 2002 from [REDACTED]. This letter shows both the Motorola Service Authorized logo but also Celltronic, C.A. on its letterhead. [REDACTED] states that the company is a franchise of Motorola and stated that the beneficiary worked for the company from April 12, 2000 to January 20, 2002 as Logistic and Administrative Manager, and that she was in charge of the franchise department. [REDACTED] describes the beneficiary’s work responsibilities as follows: “Operations planning, cash flow management, inventory control, margin analysis, cost and pricing analysis, profit maximization analysis, new equipment quality certification, royalty report. Supervised five people in the administrative department.” With regard to franchise job duties, Ms. [REDACTED] describes these job duties: “Responsible for operations of franchise planning, monitor franchise market and proposes strategies in the franchise business, acts as liaison between the Board of Director and management, dictates financial policies for the organization.” An additional letter is also submitted, written by [REDACTED], with more detailed explanation of the beneficiary’s job duties with this company.

The duties listed by [REDACTED] in her second letter of work verification that now includes the beneficiary’s job duties in the franchise operations are not an explanation of the beneficiary’s duties in the previous letter of work verification but an entirely new description of previously unmentioned job duties. The AAO notes that the beneficiary’s resume does not note any franchise job duties while the beneficiary worked at Celltronic, but rather itemizes the beneficiary’s specific duties at Celltronic as described by [REDACTED] in her second letter, namely, operations planning, cash flow management, inventory control, margin analysis, cost and pricing analysis, profit maximization analysis, new equipment quality certification, royalty report and supervising five people in the administrative department.

The AAO finds the second letter from [REDACTED] problematic, as it appears to be written earlier than the initial letter of employment verification. The AAO notes that the duties described by Ms. [REDACTED] in the most recent letter submitted to the record conflict with the job duties described by the beneficiary in her resume. *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 petitioner has not

sufficiently clarified whether the beneficiary has knowledge of strategies of franchises, thus is qualified to perform the duties of the proffered position. The director's decision will be affirmed.

The director also indicated that the petitioner had not established its continuing ability to pay the proffered wage as of the 2006 priority date. 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 9089 was accepted on April 22, 2006. The proffered wage as stated on the Form ETA 9089 is \$56,805 per year.

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>9</sup> On appeal, counsel submits the petitioner's previously submitted Profit and Balance Sheet as of September 30, 2006. Relevant evidence in the record includes the petitioner's Form 1120, U.S. Corporation Income Tax Return for tax year 2005. In response to the AAO's RFE, the petitioner submits its corporate tax returns for 2007 and 2008. The petitioner also submits the beneficiary's W-2 Form for tax year 2008 that indicates the petitioner paid the beneficiary \$20,254.83 in wages. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established on January 28, 2002, and to currently employ four employees. According to the 2005 tax return in the record, the petitioner's fiscal year is

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<sup>9</sup> The submission of additional evidence on appeal is allowed by the instructions to the 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).

the calendar year. On the Form ETA 9089, the beneficiary claimed to have worked for the petitioner since May 14, 2003.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, 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).

The petitioner submitted its unaudited profit sheet and balance sheet for 2006 for the period of time up to September 2006. Counsel's reliance on unaudited financial records is misplaced. 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. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore the AAO will only examine the petitioner's tax returns for tax years 2005, 2007, and 2008 in these proceedings.

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 established that it employed and paid the beneficiary \$25,254.83 in 2008. The petitioner has not established that it paid the beneficiary the full proffered wage from the 2006. Therefore it has to establish its ability to pay the entire proffered wage in 2006, and 2007, and the difference of \$36,550.17 between the beneficiary's actual wages and the proffered wage in tax year 2008.

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 CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

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).

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 record before the director closed on December 28, 2006 with the director's decision. As of that date, the petitioner's 2006 federal income tax return would not have been yet due. The petitioner's income tax return for 2005, which is prior to the 2006 priority date, is the most recent return available. The AAO in its RFE correctly indicated that the petitioner's 2005 tax return is not probative of the petitioner's ability to pay the proffered wage, because it is prior to the 2006 priority date. However, it was the only tax return available as of the

date the record closed; therefore it can be considered as evidence of the petitioner's ability to pay the proffered wage. The petitioner then submits two additional tax returns in response to the AAO RFE. It does not submit its tax return for 2006 or provide any explanation for this omission. Thus, the AAO will consider the petitioner's tax returns for 2005, 2007 and 2008 below:

- In 2005, the Form 1120 stated net income of \$2,430.
- In 2007, the Form 1120 stated net income of -\$3,432
- In 2008, the Form 1120 stated net income of \$699.

Therefore, for the years 2005 through 2008, the petitioner did not have sufficient net income to pay either the entire proffered wage, or the difference between the beneficiary's actual wages and the proffered wage.<sup>10</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>11</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 corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for tax years 2005, 2007 and 2008, as shown in the table below.

- In 2005, the Form 1120 stated net current assets of \$5,569.
- In 2007, the Form 1120 stated net current assets of \$1,478.
- In 2008, the Form 1120 stated net current assets of \$1,158.

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<sup>10</sup> As stated previously, the petitioner did not submit its 2006 tax return to the record, and thus, the AAO cannot determine whether the petitioner had sufficient net income to pay the proffered wage in this year.

<sup>11</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.

Therefore, for the years 2005 to 2008, the petitioner did not have sufficient net current assets to pay the proffered wage, or the difference between the beneficiary's actual wages and the proffered wage.

Therefore, from the date the Form ETA 9089 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.

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 reflects that the petitioner has been incorporated since 2002, and that it has four employees. Based on its tax returns, it has paid salaries of \$24,203 and \$947 in additional cost of labor<sup>12</sup> in tax year 2005; salaries and wages of \$24,998 and cost of labor of \$620 in tax year 2007; and salaries and wages of \$20,255 and cost of labor of \$1,520<sup>13</sup> in tax year 2008. The petitioner's organizational chart submitted with the petition indicates that besides the administrative manager, there are three maintenance technicians, along with a president and vice president. Thus, any salaries would be paid to at the minimum four persons, excluding the petitioner's officers. The petitioner's combined wage and salary figures for all three years reviewed are considerably less than the proffered wage of \$56,805. Thus, the petitioner's business operations at the time of the 2006

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<sup>12</sup> As identified on the petitioner's Schedule A, item 2, cost of labor for tax years 2005 and 2007.

<sup>13</sup> As identified on the petitioner's Schedule A, item 5, other costs.

priority date and continuing do not appear sufficient to support the payment of the entire proffered wage to the beneficiary and paying any other wages. The petitioner refers to knowledge and strategy of franchise as a required skill in the Form ETA 9089; however, the record does not indicate that the petitioner is a franchise, or provides any further clarification of any projected franchise business operations to further bolster the petitioner's business viability. 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 petitioner had the continuing ability to pay the proffered wage beginning on the priority date. 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.