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

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U.S. Citizenship
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Services

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FILE:

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EAC 06 120 51549

Office: Texas SERVICE CENTER

Date:

SEP 24 2009

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, 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 software consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary does not have a U.S. bachelor's degree or foreign degree equivalent required by the terms of the labor certification application.

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).²

Beyond the decision of the director, an issue in this case is whether or not the petitioner has the ability to pay the proffered wages to each of the beneficiaries that it sponsored from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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

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

² 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 Form ETA 750 was accepted for processing on January 30, 2002.³ The Immigrant Petition for Alien Worker (Form I-140) was filed on March 21, 2006.

The job qualifications for the certified position of software engineer are found on Form ETA 750 Part A. Item 13 of Part A describes the job duties to be performed as follows:

“Designing, coding, testing, and implementing computer programs.”

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:

Block 14:

Education (number of years)

Grade school	7
High school	5
College	4
College Degree Required	BS
Major Field of Study	Information Tech

Training

No. Mos.	3
Type of Training	IBM

Experience:

Job Offered (years)	3
(or)	
Related Occupation of (years)	Programmer/Systems Engineer/Analyst 3

Block 15:

Other Special Requirements None stated

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

As set forth above, the proffered position requires four years of college culminating in a Bachelor of Science degree in Information Technology and three years of experience in the job offered of software engineer.

In support of the beneficiary's educational qualifications, the petitioner submitted the beneficiary's diploma from Manonmaniam Sundaranar University, India. According to the diploma, the beneficiary was awarded a Bachelor of Science degree in physics in April 1996.

The petitioner submitted a credentials evaluation, dated February 11, 1999, from Multinational Education & Information Services, Inc. (MEIS) of Atlanta, Georgia. The evaluation describes the beneficiary's diploma from Manonmaniam Sundaranar University as a Bachelor of Science degree in physics and concludes that it is equivalent to three years of academic studies in physics in the United States.

The evaluator next reviewed the Post Graduate Diploma (PSD) in Advanced Computer Software from the Rajiv Gandhi Education Foundation, India,⁴ received by the beneficiary in 1998. According to the evaluator, the PSD was awarded to the beneficiary after an one-year program of training and studies in computer science. Additionally the evaluator stated that the beneficiary was awarded a certificate in "Mainframe Application Developer" from Integral Microtek, India, (a former employer). Then the evaluator stated that because the beneficiary had over three years of progressively responsible experience in hardware and software engineering, and that this is "equivalent or exceeding to over [a] one year diploma of academic studies in Software Applications" based upon the "rule" of "3 years of experience = 1 year of university-level credit.

The director issued a notice of intent to deny (NOID) dated July 28, 2006, and stated that, as is the case here, USCIS must ascertain whether the beneficiary is qualified for the job by looking to the terms of the labor certification. The director stated that where the labor certification "plainly and expressly requires a candidate with a specific degree," and found that the petitioner has the burden to demonstrate that the beneficiary does have a U.S. bachelor's degree or foreign degree equivalent.

In response to the NOID, the petitioner on August 8, 2006, submitted an explanatory letter, along with an "Academic Equivalency Evaluation" from the Trusteforte Corporation of New York, New York, dated August 7, 2006; the beneficiary's diploma from Manonmaniam Sundaranar University, India; the beneficiary's university "Statement of Marks;" a certificate in "Mainframe Application Developer" from the Integral Microtek, India, which was awarded to the beneficiary; and four employment references from the petitioner, Integral Microtek, Data Tech, and Ace Computers.

The credentials evaluation from the Trusteforte Corporation, New York, New York, was dated

⁴ The Foundation is not listed as a technical institution eligible to provide accredited programs according to the National Board of Accreditation, All-India Council for Technical Education (AICTE) organization website (www.nba-aicte.ernet.in) accessed September 9, 2009.

August 7, 2000. According to the evaluator, the beneficiary undertook advanced studies in physics and that the nature of the course taken and the credit hours involved are together the equivalent of three years of academic studies toward a Bachelor of Science degree in physics at an accredited U.S. college or university.

According to the Trustforte evaluation, the PSD in Advanced Computer Software received in 1998 by the beneficiary from Rajiv Gandhi Education Foundation, with the Bachelor's of Science degree in physics satisfies the academic requirements for a bachelor's-level concentration in computer science, and is the equivalent of a Bachelor of Science degree with a dual major in computer science and physics at an accredited U.S. college or university. The Trustforte Corporation evaluation did not mention or consider the beneficiary's work experience in its evaluation.

The director denied the petition on February 20, 2007. The director determined that the beneficiary's Bachelor of Science degree could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in information technology. The director explained a three-year bachelor's degree will not be considered to be the foreign equivalent degree to a United States baccalaureate degree since a U.S. baccalaureate degree is generally found to require four years of education. Further, as elucidated in the above mentioned Trustforte credential's review, where the analysis of the beneficiary's credentials relies on a combination of multiple lesser degrees, the result is not a "foreign degree equivalent," and the education requirement in the labor certification cannot be met for the professional preference visa classification through a combination of education and experience.

As evidence on appeal, counsel submitted a letter dated March 12, 2007; employment reference letters from Keane, Inc. and the petitioner; and the Trustforte Corporation and MEIS evaluations mentioned above.

Part A of the Form ETA 750 indicates that DOL assigned the occupational code of 15-1032.00⁵ with accompanying job title computer software engineers, system software, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1032.00> (accessed September 8, 2009) and its description of the position and requirements for the position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation. type identified as the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 7.0-<8.0 and above to the occupation, which means that "Most of these occupations [meaning analogous occupations including software engineer] 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:

⁵ The DOL "Occupational Information Network" website "O*NET Online" connects the code 15-1032.00 by an on-line search to that DOL occupational code stated on the labor certification which is 030.062.010.

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.

According to the labor certification, the position requires four years of college culminating in a Bachelor of Science degree in Information Technology 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(1)(3)(ii)(C). Thus, combined with DOL's classification and the 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(1)(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 May 21, 2009, the AAO issued a request for evidence to the petitioner seeking additional evidence of the petitioner's intent during the labor certification recruitment process. The petitioner did not respond to the request for evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In the request, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond academic studies at Manonmaniam Sundaranar University, India. The AAO also noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of four years of college and a Bachelor's of Science degree

might be met through a combination of lesser degrees and/or a quantifiable amount of work experience.

The AAO further advised the petitioner that according to the website <http://aacraoedge.aacrao.org> accessed on May 7, 2009, concerning the equivalency of tertiary education attainments in India, a Bachelor of Science degree is awarded upon completion of two to three years of tertiary study beyond the higher secondary certificate, and that the labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a four-year U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience when the labor market test was conducted.

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

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did

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

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).⁷

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, 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.

⁷ 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 (9th Cir. 1984).

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Id.* at *11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Id.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated on the ETA 750 and does not include alternatives to a four-year bachelor’s degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner’s asserted intent, USCIS “does not err in applying the requirements as written.” *Id.* 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, the Form ETA 750 does not specify an equivalency to the requirement of a Bachelor of Science 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 (5th Cir. 1987). It can be presumed that Congress’ narrow requirement of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

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).⁸ According to its website, www.aacrao.org, is “a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://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 a Bachelor of Science degree is “comparable to two to three years of university study in the United States. Credit may be awarded on a course-by-course basis.”

In the instant case, the petitioner submitted two educational equivalency reports. In the MEIS credentials report dated February 11, 1999, the evaluation stated that the beneficiary’s education and professional experience are equivalent to a four-year bachelor degree in computer science and

⁸ 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.

physics from an accredited university in the United States. As noted by the director, the evaluation used an equivalence of three years of work experience for one year of university-level studies to determine that the beneficiary had attained the equivalent of a U.S. four-year Bachelor of Science degree in computer science and physics. However, as already noted, the regulatory equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

This is an erroneous application of nonimmigrant regulation by the evaluator in an immigrant petition matter. The rule to equate three years of experience for one year of education applies in regulation to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). There is no similar regulation for immigrant petitions providing an equivalent of employment experience, as in this case, a four-year bachelor's degree is required by the labor certification.

In the Trustforte credentials report, the evaluator did not mention or consider the beneficiary's work experience in the evaluation. The evaluator stated the beneficiary's Bachelor of Science degree in physics is equivalent to a three year Bachelor of Science degree from an accredited university in the United States. According to the Trustforte evaluation, it is the combination of the beneficiary's university diploma and PSD in Advanced Computer Software that satisfies the academic requirements for a bachelor's-level concentration in computer science, and is the equivalent of a Bachelor of Science degree with a dual major in computer science and physics at an accredited U.S. college or university.

With reference to the beneficiary's beneficiary's Statement of Marks from Manonmaniam Sundaranar University, it noted that the course content undertaken were coded on the statement and not disclosed, and no plain language course descriptions were provided by the petitioner. The Trustforte evaluator based his report the courses taken but there is no evidence in the record of the content of the courses offered by Manonmaniam Sundaranar University to the beneficiary.

In this case, both credential evaluations, and EDGE agree that the beneficiary's tertiary education at Manonmaniam Sundaranar University is only equivalent to three years of university study in the United States. The AAO rejects any contention that combined education experiences are an acceptable equivalence or that professional employment may be substituted for academic university or college level education when seeking classification as a professional in an immigrant petition.

Further, 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 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 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. 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).

The AAO affirms the director's decision that the preponderance of the evidence demonstrates that the beneficiary does not satisfy the minimum level of education stated on the labor certification. Specifically, the beneficiary did not possess a bachelor's degree (or foreign equivalent) when the request for certification was accepted, and that the beneficiary cannot be found to have met the minimum requirements stated on the Form ETA 750 as of that date. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Ability to Pay the Proffered Wage

As already stated, beyond the decision of the director, an issue in this case is whether or not the petitioner has the ability to pay the proffered wages to each of the beneficiaries that it sponsored from the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence.

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 30, 2002. The Immigrant Petition for Alien Worker (Form I-140) was filed on March 21, 2006. The proffered wage as stated on the Form ETA 750 is \$41,000.00 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the petition, the petitioner claimed to have been established in 1997 and to currently employ five workers. The net annual income and gross annual income stated on the petition were \$50,000.00 and \$100,000.00 respectively. On the Form ETA 750B, signed by the beneficiary on July 22, 2003, the beneficiary claims to have worked for the petitioner since 1999.

The record does not contain any evidence relevant to the petitioner's ability to pay the wage. Submission of such evidence is regulatory required for employment based visa preference petitions according to the regulation at 8 C.F.R. § 204.5(g)(2). This is an independent basis of denial.

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 determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2002 or subsequently. Although the beneficiary stated that it currently employed five employees as noted on the petition, and is or has sponsored approximately 38 non-immigrant and immigrant workers according to the records of USCIS, and the beneficiary stated in the labor certification that he had been employed by the petitioner since 1999, no payroll information, wage, salary or compensation for services evidence was submitted.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill.

1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts 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 USCIS should have considered income before expenses were paid rather than net income. No net income information was submitted by the petitioner other than a statement in the I-140 petition that its net annual income at the time of its filing was \$50,000.00.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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. No evidence of the petitioner's current assets or current liabilities with which to calculate net current assets was submitted. 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.

Since the petitioner has submitted insufficient evidence of its finances, the AAO is unable to ascertain its net income or net current assets, or whether the petitioner paid the beneficiary the proffered wage at any time since the priority date. The burden of proof in these proceedings rests solely with the petitioner.

As noted the petition stated that the petitioner employed five workers. However, the petitioner has filed other Immigrant Petitions for Alien Worker (Form I-140) for six workers and Non-immigrant Petitions for Alien Worker (Form I-129) for 32 workers according to the electronic records of USCIS. Therefore, the petitioner must establish that it can pay the respective proffered wage for each sponsored worker. As noted the petitioner has failed to submit financial evidence according to the regulation at 8 C.F.R. § 204.5(g)(2). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not

⁹According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. Also, the preponderance of the evidence does not demonstrate that the beneficiary possessed a four-year bachelor's degree (or foreign equivalent) when the request for certification was accepted, and that the beneficiary cannot be found to have met the minimum requirements stated on the Form ETA 750 as of that date. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.