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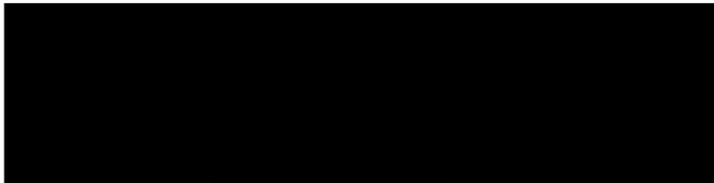
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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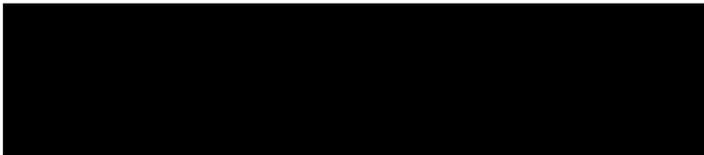
Office: NEBRASKA SERVICE CENTER

Date: **APR 12 2010**

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a software and information technology company. It seeks to employ the beneficiary permanently in the United States as a software engineer - applications. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification application), approved by the Department of Labor (DOL), accompanied the petition.¹ Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).²

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

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on August 17, 2005. The Immigrant Petition for Alien Worker (Form I-140) was filed on February 15, 2007.

¹ 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).

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).

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 a software engineer - applications provides:

Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Migrate applications from Lotus Notes to C# and VB.Net application from the beginning stage. Develop the standards and the framework for the client. Maintain applications developed in ASP-VB-MTS, Microsoft Access. Use C# (WinForms, WebForms, WebService), SQL Server, VB.Net, ASP.Net.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

- H.4. Education: Minimum level required: Bachelor's degree.
- 4-B. Major Field Study: Computer Science or Electrics Engineering or Related Field.
- 6. Is experience in the job offered required for the job?
The petitioner checked "yes" to this question.
- 6-A If Yes, number of months experience required: 12.
- 7. Is there an alternate field of study that is acceptable?
The petitioner checked "yes" to this question.
- 7-A If Yes, specify the major field of study: Computer Information System.
- 8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked “yes” to this question.

8-A: If Yes, specify the alternate level of education required: Associate’s degree.

8-C: If applicable, indicate the number of years experience acceptable in question 8: 3 [years].

9. Is a foreign educational equivalent acceptable?

The petitioner listed “yes” that a foreign educational equivalent would be accepted.

10. Is experience in an alternate occupation acceptable?

The petitioner checked “yes” to this question.

10-A If Yes, number of months experience in alternate occupation required: 48 [months].

10-B Identify the job title of the acceptable alternate occupation: Programmer or Consultant or Software Engineer or Developer.

14. Specific skills or other requirements: One year related exp must include using C# (WinForms, WebForms, WebService), SQL Server, VB. Net, ASP.Net.

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).

As set forth above, the proffered position requires a bachelor’s degree in Computer Science, Electrical Engineering, Computer Information Systems, or a related field plus one year of experience in the job offered, or four years in the alternate occupation of a programmer, consultant, software engineer or developer, or an Associate’s degree plus three years of experience.

On part J of the ETA Form 9089, signed by the beneficiary on December 6, 2006, the beneficiary represented that the highest level of achieved education related to the requested occupation was “Other” and stated that he engaged in university study at the Instituto Tecnológico Autonomo de Mexico but did not graduate.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's transcript from the Instituto Tecnológico Autónomo de México which states that the beneficiary took 28 courses from January 1989 to May 1996. The evidence does not indicate and the beneficiary does not claim that he received any educational degree as a result of his studies.³ The petitioner additionally submitted two evaluations of the beneficiary's education to assert that the beneficiary met the educational requirements of the labor certification.

The director denied the petition on August 7, 2007. He determined that the beneficiary's failure to attain a degree made him ineligible under the terms of the labor certification. Specifically, the director determined that the labor certification does not permit an alien to qualify for the proffered position without holding either an associate's degree or a bachelor's degree plus the specified experience. The petitioner sought to rely on an "equivalent" bachelor's degree based on a combination of education and/or experience, or the equivalence of an Associate's degree, but not an actual completed degree.

On appeal and in response to the AAO's Request for Evidence, the petitioner did not submit any new evaluations with regard to the beneficiary's qualifying academic credentials.

DOL assigned the code of 15-1031.00, computer software engineer, application, to the proffered position. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1031.00> (accessed February 27, 2010) 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.

DOL assigns a standard vocational preparation (SVP) range of 7.0-<8.0 to the occupation, which means that "Most 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 considerable amount 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.

³ The transcripts submitted contain a translation but no valid certification of translation. 8 C.F.R. § 103.2(b)(3) states:

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

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

The regulation at 8 C.F.R. § 204.5(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.

The regulation at 8 C.F.R. 204(5)(1)(3)(ii)(B) states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

On October 5, 2009, the AAO issued a request for evidence ("RFE") to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding that the petitioner used any equivalency to the above stated requirements for the position during its labor market test.

The labor certification, as certified, did not demonstrate that the petitioner would accept anything less than the completion of a degree or that it would accept experience as equivalent to an educational degree. In response to this RFE, the petitioner submitted a letter addressed to DOL during the labor certification process and a copy of the notice it posted in-house about the position.

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

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).⁴ *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

⁴ 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).⁵

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

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

⁵ 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).

in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA 9089 and does not include any equivalency as an alternative to a four-year bachelor's degree.⁶ 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 ETA Form 9089 does not specify an equivalency to the requirement of a Bachelor of Science or Associate's 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,

⁶ The petitioner stated the allowed alternative education only as an Associate's degree. It did not specify that the individual could meet the terms of the labor certification through any combination of education and experience, or qualify without having completed an associate's or bachelor's degree.

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.

The petitioner here relies upon the conclusion of two credential evaluators who state that the beneficiary holds the equivalent to a degree required by the terms of the labor certification. The evaluation from ██████████ concluded that the beneficiary has attained the equivalent of an associate’s degree in computer engineering based solely on the beneficiary’s studies in Mexico. The evaluation from ██████████ of Medgar Evers College of the City University of New York School of Business concluded that the beneficiary possesses the equivalent of a bachelor of science degree in computer information systems by combining the beneficiary’s three years of studies at the Autonomous Technological Institute of Mexico with his “fifteen years and two months of work experience and training in positions of progressively increasing responsibility and sophistication.”⁹ These evaluations reach different conclusions about the beneficiary’s qualifications. “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.” *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Although the discrepancy between the findings of the two evaluations was noted in the AAO’s RFE, the petitioner presented no evidence in response to the RFE to resolve the discrepancy. We also note, as we did in the RFE,

⁷ ██████████ states that he received a Master’s and Ph.D. from Princeton University in an unidentified field.

⁸ ██████████ resume states that he has two Bachelor’s of Science degrees from the City University of New York in engineering and physics and mathematics and a Master of Science in Information Systems from the City College of New York/City University of New York.

⁹ Although the credential evaluations all cite the beneficiary’s fifteen years of experience, the evidence in the record does not demonstrate that the beneficiary has that amount of experience. A September 30, 2006 letter from ██████████ states that the beneficiary worked with ██████████ from September 2004 to September 2006 (part of which is after the August 2005 priority date); an undated letter from ██████████ states that the beneficiary worked with ██████████ ██████████ for twelve months; a February 16, 2004 letter from ██████████ states that the beneficiary worked with ██████████ between July 2002 and February 2004; a June 10, 2000 letter from ██████████ states that the beneficiary worked for ██████████ ██████████. from 1989 to 1993. These letters demonstrate experience of around eight years, not fifteen years as claimed by the evaluators. Additionally, only the beneficiary’s experience before the priority date of August 17, 2005 (around seven years according to the letters in the record) would be considered.

that the use of the beneficiary's experience by the evaluators towards the degree equivalency may not leave any documented experience to be used towards the experience requirement of the ETA Form 9089. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The ETA Form 9089 does not provide that the minimum academic requirements of a Bachelor of Science degree in computer science or electrical engineering or an Associate's degree might be met through anything less than a full degree. The recruitment materials provided in response to the Request for Evidence ("RFE"), issued by this office on October 5, 2009, only included a letter addressed to the DOL dated August 15, 2005 and the in-house advertisement displayed at the petitioner's place of business from July 1, 2005 to July 15, 2005. The petitioner did not send its complete recruitment as outlined on ETA Form 9089 to include: advertisements from *The Detroit News and Free Press* dated March 27, 2005; advertisement from *Computer World* dated April 11, 2005; posting on its employer website dated March 22, 2005 to April 22, 2005; posting from job search website dated March 24, 2005 to April 25, 2005; or employee referral program notice from February 22, 2005 to March 22, 2005.

Additionally, it is unclear whether the petitioner filed the PERM application online or whether it actually submitted the letter sent in response to the AAO's RFE to DOL. If the petitioner filed online, then DOL would not have received the letter unless submitted separately or submitted in response to any audit.¹⁰ The letter to the DOL stated that the petitioner "require[d] at least a BS degree in computer science or electrical engineering or related field with minimum 12-month IT experience in the same or related field. However, [the petitioner] would also accept a suitable combination of 3-year college study or associate degree with minimum 2-year IT experience in lieu of a BS degree." The petitioner also stated in the letter that it received six applications for the position but that none of the applicants were U.S. citizens or legal permanent residents and were thus disqualified from the position as F-1 or H-1B non-immigrant visa holders. The petitioner did not provide copies of the advertisements run in local or specialized media to show the qualifications advertised for, and the resulting resumes received. The petitioner also did not provide a copy of the resumes or other relevant information about the applicants to show that they were not qualified for the position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The job posting from the petitioner's place of employment stated that the petitioner would accept "BS or equivalent in Computer Science or Electric Engineering or Related Field with one-year experience in the job offered or related field. Accept three-yr degree with two-year IT exp as Programmer or Consultant or Software Engineer or Developer." The posting notice conflicts with the terms stated on ETA Form 9089 of a Bachelor's degree and one year of experience in the position offered, or four years in the alternate occupation, or of an Associate's degree and three years of experience. 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.

¹⁰ As the petitioner, beneficiary, and counsel signed the ETA Form 9089 subsequent to certification, it appears that the labor certification was filed online.

1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). This posting notice also does not apprise U.S. applicants of the position's actual certified minimum requirements. The recruitment materials are incomplete and therefore insufficient to demonstrate that the petitioner's intent was to accept anything less than one of the full degrees specified on the labor certification.

Therefore, as set forth above, the beneficiary does not qualify as a professional since the petitioner failed to demonstrate that the beneficiary has a four-year, single-source bachelor's degree.¹¹

Even if we considered the petition under the skilled worker category, 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). Specifically, the labor certification requires either a bachelor of science degree or an associate's degree and does not provide that the individual alternatively can qualify without the receipt of a degree. The beneficiary's college level studies do not meet these specifications. Without a degree as required by the terms of the labor certification, the beneficiary is not eligible for the position described in the labor certification, and this petition may not be approved.

In addition to the number of years of experience specified on the labor certification, the petitioner must also show that the beneficiary possesses the specific skills specified in Part H, Block 14. In this case, the petitioner required experience to include one year of experience with C# (WinForms, WebForms, Webservice), SQL Server, VB.Net, ASP.Net. The letters concerning the beneficiary's experience do not demonstrate that the beneficiary has such experience. The only letter concerning specifics of the beneficiary's experience is from [REDACTED] which states that the beneficiary has "C#/.NET/MS SQL Server Development skills." The letters from [REDACTED] and [REDACTED] for [REDACTED] contain no information about the nature of the beneficiary's work for those companies. The letter from [REDACTED] does not contain the length of experience the beneficiary had with the programs specified and does not include all four of the required programs in her statement of the beneficiary's experience. As a result, the petitioner failed to demonstrate that the beneficiary has the required specific skills for the position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

¹¹ A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

The petitioner failed to establish its ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate 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 U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 9089 was accepted on August 17, 2005. The proffered wage as stated on the Form ETA 9089 is \$28 per hour (\$58,240 per year).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ 36 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the ETA Form 9089, signed by the beneficiary on December 6, 2006, the beneficiary claimed to have worked for the petitioner since February 16, 2004.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an Form ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the Form 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, United States Citizenship and Immigration Services (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. The petitioner submitted paystubs for the period of February 19, 2007 to May 7, 2007 demonstrating that the petitioner paid the beneficiary \$30,680 during this three month time period. This amount is less than the proffered wage for the year. As a result, the petitioner must demonstrate that it had sufficient resources to pay the difference between the actual wage paid and the proffered wage, which for 2007 was \$27,560. The petitioner did not

submit W-2 Forms for 2005 or 2006 and must demonstrate that it can pay the full wage for those years.

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.

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, 558 F.3d 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, 719 F.Supp. at 537 (emphasis added). As a result, we will not take into account the amounts that the petitioner used in valuing its depreciation.

The record closed on October 5, 2009 with the receipt by the AAO of the petitioner's submissions in response to the AAO's request for evidence. As of that date, the petitioner's income tax return for 2008 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2005 through 2008, as shown in the table below.

- In 2005, the Form 1120S stated net income¹² of \$25,515.
- In 2006, the Form 1120S stated net income of \$122,038.
- In 2007, the Form 1120S stated net income of \$137,621.
- In 2008, the Form 1120S stated net income of \$188,088.

Therefore, the petitioner did not demonstrate sufficient net income to pay the proffered wage in 2005. USCIS electronic records show that the petitioner filed 228 other petitions, including 30 other Form I-140 petitions, all of which were pending during the relevant time period. If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2). The record in the instant case contains no information about the proffered wage for the beneficiaries of those petitions, about the current immigration status of the beneficiaries, whether the beneficiaries have withdrawn from the visa petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. Furthermore, no information is provided about the current employment status of the beneficiaries, the date of any hiring, and any

¹² Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) and line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed August 26, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2006 and 2007, the petitioner's net income is found on Schedule K of its tax return for those years.

current wages of the beneficiaries. The record fails to demonstrate that the petitioner can pay the respective wages for all of its sponsored workers from its net income.

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.¹³ 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. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 through 2008, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$19,006.
- In 2006, the Form 1120S stated net current assets of \$61,292
- In 2007, the Form 1120S stated net current assets of \$31,964.
- In 2008, the Form 1120S stated net current assets of \$80,750.

Therefore, in 2005 the petitioner did not have sufficient net current assets to pay the proffered wage. The petitioner must show that it can pay the proffered wage for all of its sponsored workers. From the record, it is unclear that the petitioner would be able to do so from its 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

¹³According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. The evidence does not demonstrate that the petitioner has the ability to pay the wages for all of its sponsored workers. 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.

Therefore, from the date the ETA Form 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.

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

ORDER: The appeal is dismissed.