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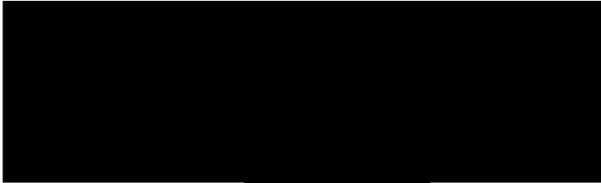
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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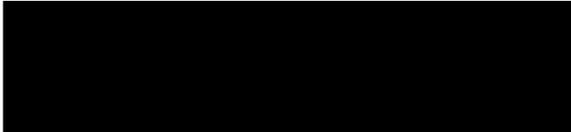
APR 23 2010

Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed this decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a computer consulting business. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition.

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

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

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on February 27, 2003.² The Immigrant Petition for Alien Worker (Form I-140) was filed on November 29, 2006.

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

Participate in full life cycle development and implementation. Enhance existing software and hardware packages or in-house applications to achieve performance

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

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

requirements. Debugging, e-commerce or internet web development through ASP. Satisfy system growth projections and maintenance as defined by client.

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	[complete]
High school	[complete]
College	[blank]
College Degree Required	Bachelor of Science
Major Field of Study	Computer Science

Experience:

Job Offered	6 years
(or)	
Related Occupation	[none specified]

Block 15:

Other Special Requirements: Experience in AS/400 utilities [sic] utilities such as SEU, PDM, RLU, SDA and DFU. Must be able to perform AQ functions such as systems and acceptance testing.

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 and six years of experience in the job offered.

On the Form ETA 750B, signed by the beneficiary on February 28, 2003, the beneficiary represented that the highest level of achieved education related to the requested occupation was an associate's

degree in computer programming and received a Certificate of Achievement from Informatics in the Philippines in Microsoft Visual Basic 5.0 based on studies in August 1998.³ He listed the institution of study he completed the associate's degree as Systems Technology Institute, Philippines and the year completed as 1995.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's certificate from Systems Technology Institute, indicating that the beneficiary received a Certificate in Programming in Business Systems on November 6, 1995 and a Certificate of Achievement from Informatics stating that he completed a course in Microsoft Visual Basic 5.0 Module 1 on August 22, 1998. 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 July 16, 2007. Specifically, the director determined that the labor certification does not permit an alien to qualify for the proffered position through combining more than one degree and/or experience, which is less than a U.S. bachelor's degree.

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

DOL assigned the code of 15-1021, computer software engineer, to the proffered position. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1021.00> (accessed February 25, 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.

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

³ The beneficiary also indicated that he received a bachelor's degree from PMI (Philippine Maritime Institute) College in the Philippines in the field of Marine Transportation. The document in the record shows that he was issued a "diploma in Associate in Maritime Transportation."

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

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

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

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

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

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

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

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

On October 8, 2009, the AAO issued a request for evidence to the petitioner. In this request, the AAO noted that the beneficiary received an associate's degree in marine transportation from PMI College, received a certificate in programming in business systems from the Systems Technology Institute (STI), and took computer training classes with RADIX Systems Services Corporation and the Informatics Computer Institute of the Philippines. The AAO also noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements a Bachelor of Science degree in Computer Science might be met through a combination of lesser degrees and/or a

quantifiable amount of work experience. The AAO further advised that according to the American Association of Collegiate Registrars and Admissions Officer's (AACRAO) EDGE database, an associate's degree from the Philippines "represents attainment of a level of education comparable to 1 to 2 years of university study in the United States." The labor certification, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a single-source, four-year U.S. bachelor's degree or its foreign equivalent. Further, the evidence does not demonstrate that the petitioner advertised with terms consistent on the labor certification to demonstrate that it would accept a lesser degree and a quantifiable amount of work experience.

In response to the AAO's RFE, the petitioner states that the Form ETA 750 was incorrectly filled out by its office staff to indicate that six years of experience were required instead of two years. The petitioner further asserts that the labor certification should have otherwise indicated that the minimum education requirements might be met through something other than a single source four-year degree. Despite the petitioner's assertions, the Form before us states that a Bachelor's degree in Computer Science and six years of experience is required for the position.

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

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

As noted above, the Form ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position

and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).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 the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed

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

United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.)

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree: “[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*” 56 Fed. Reg. 60897, 60900 (November 29, 1991) (Emphasis added).

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word “degree” in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States*

Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289m 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement in of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education earned at an institution other than a college or university.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position and how it expressed those requirements to DOL during the labor certification process, and on Form ETA 750, and not afterwards to USCIS is important.

The petitioner relies upon two credential evaluations: one from [REDACTED]⁵ of the Washington Evaluation Service and one from [REDACTED]. The evaluation submitted from [REDACTED] states that the beneficiary's combined education would be the equivalent to a bachelor's degree with dual focus in marine transportation and computer business systems. He notes that entrance to the beneficiary's program in marine transportation required the equivalent of a high school education. Although his evaluation specifically refers to the beneficiary's degree as a "3-year degree,"⁷ he concludes that the beneficiary holds the equivalent of a U.S. bachelor's degree. [REDACTED] explains that the second computer business systems major would have been awarded due to "USCIS guidelines [that] state that it takes one to two years of additional collegiate study to attain a bachelor's degree in another major" and that the beneficiary's one-year programming in business systems studies would thus qualify for that additional major. We note that [REDACTED] classifies the second major as "Computer Business Systems," and not Computer Science, the field of study required on the labor certification. The labor certification does not allow for any alternate or related fields of study. Also, [REDACTED] states that STI has the ability to grant bachelor's and master's degrees even though the beneficiary does not hold any such degree from STI.

The evaluation from [REDACTED] states that the beneficiary attended a three-year program of study that is "equivalent to an associate's degree" in maritime transportation. She notes that the

⁵ The evaluation states that [REDACTED] received a master's and Ph.D degree in education from Loyola University, Chicago, Illinois.

⁶ [REDACTED] states that she has a Master of Arts, but does not specify the field of study or the awarding institution.

⁷ A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

beneficiary took one computer class in pursuit of this degree. [REDACTED] states that the certificate from Systems Technology Institute is equivalent to one year of study in computer science at a U.S. institution and that the certificate from RADIX shows that the beneficiary received three months worth of college level computer science instruction. In combining the two certificates and the equivalent of an associate's degree, [REDACTED] concludes that the beneficiary has the equivalent of a bachelor's degree in computer information systems. She provides no reasoning for her determination that the work done towards the associate's degree in maritime transportation studies would count towards a degree in computer science and instead bases her conclusion upon the amount of time that the beneficiary spent in school regardless of the course of study. Computer information systems is a different field of study than computer science. Form ETA 750 was not certified to allow for alternate or related fields of study.

Additionally, 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 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 an associate's degree from the Philippines⁹ "represents attainment of a level of education comparable to 1 to 2 years of university study in the United States."

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.

⁹ This would reflect the beneficiary's studies at PMI in maritime transportation. Nothing demonstrates that the beneficiary's "certificate" from STI or courses at Radix would be independently equivalent to a four-year single-source bachelor's degree.

The petitioner was advised in the AAO's RFE that the credential evaluations were deficient and was given an opportunity to explain the discrepancies. The petitioner submitted no new evidence in response to the AAO's RFE to resolve the discrepancies in the beneficiary's education and evaluations. Instead, the petitioner stated in its response that each of the evaluations were independent and credible and should be viewed in the same light as the information found in EDGE. 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)). 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 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). The evaluations fail to demonstrate that the beneficiary has a four-year single-source bachelor's degree in the required field of study. Additionally, the evaluators both determined that the stated "equivalent" was in a different field than the required field of computer science.

The Form ETA 750 does not provide that the minimum academic requirements of a Bachelor of Science degree in Computer Science might be met through some other formula other than that explicitly stated on the Form ETA 750. The petitioner submitted advertisements in response to the AAO's RFE placed in *The Morning News*, which indicate that the petitioner required a "Bachelor's Degree in Computer Science / Computer Engineering, etc., or equivalent work experience with appropriate certificates, ex MSSE, MCSD, CSE, etc." These advertisements did not include the certified labor certification requirement that the applicant have six years of experience, but stated instead that "at least 2 years experience with AS400 utilities such as SEU, PDM, RLU, SDA, and DFU" was required. The internal job posting at the petitioner's place of employment contained the same requirements. These job requirements are not the same as those included and certified on the Form ETA 750.

The petitioner also submitted a job posting which it identified as being posted at the University of Arkansas Computer Science/Engineering Building study room which stated the same education and experience requirements, but stated that the position was "as temporary consultants with average assignment length usually about 6 months."¹⁰ The job posting also requires "appropriate certificates, ex; MSSE MCSD, CSE, etc." These additional factors were not part of the job description or requirements of the position on the Form ETA 750. The evidence submitted presents conflicting requirements and discrepancies between the certified labor certification and job advertisements and we are thus unable to conclude that the petitioner clearly expressed the certified requirements or adequately defined alternatives to potential qualified U.S. applicants.

¹⁰ The petitioner's tax returns identify the company's business as one engaged in providing "temporary employee[s]." The position offered by the petitioner must be for permanent and full-time employment. See 20 C.F.R. § 656.3.

In response to the AAO's RFE, the petitioner stated that "crucial mistakes" were made by "the administrative secretary that was responsible for filing the [labor certification]." The mistakes identified by the petitioner included the requirement of a Bachelor of Science degree with no equivalency on Form ETA 750 and by requiring six years of experience for the position on the Form ETA 750. 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, *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). We note that in response to the director's RFE, the petitioner did not mention that any mistakes were made and, instead, the petitioner stated that the beneficiary had six years of experience and that it only omitted the degree equivalency information because of a lack of room on the labor certification. As stated above, 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 suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at, 591-92. Whether an administrative error was made or not, USCIS must read the terms of the labor certification as certified. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

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

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). Specifically, the labor certification requires a Bachelor of Science degree in computer science and six years of experience. The beneficiary's education combined does not meet this specification of one four-year single-source bachelor's degree. Additionally, the evaluations conclude that the beneficiary's "equivalent" education is in a different field of study, either Computer Information Systems or Computer Business Systems, than that stated on the labor certification, i.e. Computer Science. Form ETA 750 did not allow the candidate to meet the terms of the labor certification through any equivalency or based on any alternate or related field of study.

Additionally, the letters in the record do not indicate that the beneficiary possesses the requisite amount of experience. The petitioner submitted a letter from [REDACTED] for Global Employment Solutions which states that the beneficiary was employed in a full-time capacity from May 1999 through October 2002; a letter from [REDACTED] for Radix Systems Services Corporation stating that the beneficiary was employed in a full-time capacity from June 1996 to April 1998; and a letter from [REDACTED] with EDS which states that the beneficiary was employed from May 2000 to October 2000.

The AAO notes that the beneficiary did not indicate on the Form ETA 750 that he worked for EDS or Global Employment Solutions. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). In addition, the letter from [REDACTED] does not specify whether the beneficiary was employed in a part-time or full-time capacity. As a result, we are unable to conclude that the beneficiary had the requisite six years of experience in the job offered at the time that the labor certification was filed. Even assuming that the letters were from employers identified by the beneficiary on the Form ETA 750B, the time period demonstrated was less than the required six years. As a result, the petitioner failed to demonstrate that the beneficiary met the specific terms of the labor certification related to both his education and his experience and would not qualify as a skilled worker.

Further, although not raised by the director, the petitioner failed to establish its ability to pay the proffered wage to the beneficiary.¹¹ Here, the Form ETA 750 was accepted on February 27, 2003. The proffered wage as stated on the Form ETA 750 is \$45,000 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 1998 and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the Form ETA 750B, signed by the beneficiary on February 28, 2003, the beneficiary claimed to begin working for the petitioner in November 2002.

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, 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

¹¹ 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).

petitioner's ability to pay the proffered wage. The petitioner submitted the following Form W-2s for the beneficiary:

- The 2003 Form W-2 states that the petitioner paid the beneficiary \$35,916.09.
- The 2004 Form W-2 states that the petitioner paid the beneficiary \$25,995.73.
- The 2005 Form W-2 states that the petitioner paid the beneficiary \$36,112.29.
- The 2006 Form W-2 states that the petitioner paid the beneficiary \$45,903.47.

The petitioner also submitted payroll records covering 2003 to 2006 and also for January 1, 2007 to April 30, 2007 showed that the petitioner paid the beneficiary \$23,601.58 in those four months. The petitioner demonstrated its ability to pay the proffered wage in 2006, where it paid slightly more than the proffered wage, but did not pay an amount equal to or exceeding the proffered wage in 2003, 2004, or 2005. The petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage for those years, which in 2003 is \$9,083.91; in 2004 is \$19,004.27; and in 2005 is \$8,887.71.

As noted in the AAO's RFE, USCIS records indicate that the petitioner has filed 115 petitions since the petitioner's establishment in 1998, including 96 I-129 petitions and 19 I-140 petitions. 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). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 8 C.F.R. § 655.715. The petitioner was requested to submit evidence in compliance with 8 C.F.R. § 204.5(g)(2) that it can pay the respective proffered wage for each sponsored beneficiary from each respective priority date.

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) (*quoting 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).

The record before the director closed on July 3, 2007 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. At that time, the petitioner's tax returns for 2006 were the most recent available.

- In 2003, the Form 1120S stated net income¹² of \$101,521.

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

- In 2004, the Form 1120S stated net income of \$21,390.
- In 2005, the Form 1120S stated net income of -\$54,608.

While the petitioner's net income would be sufficient to pay the difference between the actual wage paid and the proffered wage in 2003 and 2004, the petitioner has filed for a number of other beneficiaries and must establish its ability to pay for all sponsored workers. In response to the AAO's RFE, the petitioner asserts, "it is our contention that all other pending, approved or abandoned petitions are irrelevant to this particular case. We have proven or will prove our ability to pay on the aforementioned petitions separately, if or when an issue arises on case by case basis." The petitioner's net income for 2005 was insufficient to demonstrate its ability to pay the difference in the actual wage paid and the proffered wage for that year.

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.

- In 2003, the Form 1120S stated net current assets of \$97,980.
- In 2004, the Form 1120S stated net current assets of \$26,981.
- In 2005, the Form 1120S stated net current assets of \$11,847.

The petitioner must demonstrate that it can pay for all workers. The petitioner failed to respond to the request for evidence regarding its ability to pay the proffered wage for all of its sponsored workers. 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).

on line 17e (2004-2005), or line 18 (2006) of Schedule K. *See* Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 3, 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 all of the years at issue, the petitioner's net income is found on Schedule K of its tax returns for all years.

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

The petitioner's statement indicates that it believes the same finite amount of net income and net current assets should be used over and over for each petition, not considering that the finite amounts could thus be exhausted if considering the financial obligations in the petitions in the aggregate instead of separately. If the petitioner's net income and net current assets were sufficient to cover the difference between all of the petition's proffered wages and any actual wages paid to those individual beneficiaries, the petitioner would prove its ability to pay the proffered wage. The petitioner, however, declined to submit information concerning any other wage obligations, so that we are unable to determine whether it has sufficient net assets or net income to satisfy all of its obligations. As such, the petitioner has not demonstrated its ability to pay the proffered wage in this case.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner must show that it has the ability to pay all immigrant sponsored workers. In response to the AAO's RFE, the petitioner indicated that some of the petitions had been abandoned, but did not submit any evidence as to which were abandoned and which were pending or approved or the proffered wage any actual wages paid to any of these additional beneficiaries. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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