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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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[REDACTED]

FILE:

[REDACTED]

Office: TEXAS SERVICE CENTER Date: **APR 26 2010**

LIN 07 098 52472
SRC 08 008 59538

IN RE:

Petitioner:

[REDACTED]

Beneficiary:

[REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition,¹ which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a financial services company. It seeks to employ the beneficiary permanently in the United States as a financial planner/marketing representative. As required by statute, a Form ETA 750,² Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).³

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 7, 2007 denial, an issue in this case is whether or not the petitioner established that the beneficiary is qualified to perform the duties of the proffered position. The AAO will also examine whether the petitioner has established its continuing ability to pay the

¹ The petitioner has filed three I-140 petitions for the beneficiary. An initial I-140 petition was filed on June 10, 2004, and denied by the California Service Center on March 31, 2005. The AAO subsequently dismissed the appeal of this petition on November 16, 2006. The instant I-140 petition (LIN 07 098 52472) was filed on February 15, 2007. It was subsequently transferred to the Texas Service Center. The petition was denied on September 7, 2007. When counsel on appeal stated that the petitioner or counsel had not received the decision, the Texas Service Center director reopened the matter as SRC 08 008 59538 and subsequently reaffirmed the initial decision on October 19, 2007. The AAO in its RFE dated January 11, 2010 erroneously identified the petition as WAC 06 030 52685, an earlier I-140 petition that was filed on November 7, 2005 and denied on October 2, 2007. The record does not reflect that the petitioner appealed the petition WAC 06 030 52685. The AAO will address counsel's assertions in the appeal as well as the materials submitted in response to the AAO RFE in these proceedings.

² After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

³ 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).

proffered wage to the beneficiary as of the 2001 priority date. The AAO will first examine the beneficiary's qualifications to perform the duties of the proffered position and then will examine the petitioner's ability to pay the proffered wage.

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 April 30, 2001.⁴ The Immigrant Petition for Alien Worker (Form I-140) was filed on February 15, 2007.

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

Develops & implements financial plans for clients, using knowledge of business administration, finance, tax & investment strategies, securities, insurance, pension plans, interview clients to determine their assets, liabilities, cash flow, insurance coverage, tax status, & financial objectives. Analyzes clients' financial status, develops financial plan based on analysis of data, & discusses financial options with them. prepares and submits documents to implement plan selected by clients . Monitor plans and maintains regular contact with clients to revise plan based on modified needs of clients or changes in investment market. Sells insurance and investment products to clients.

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)

⁴ 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.

Grade school	yes
High school	yes
College	yes
College Degree Required	Bachelor's Degree
Major Field of Study	Business Administration or equivalent

Experience:

Job Offered (or)	Two years
Related Occupation	Two years of management, finance, insurance or sales agent experience

Block 15:

Other Special Requirements (Blank)

The Labor Certification indicates that the beneficiary will be supervised by the Associate general Agent/Sales Manager and that the beneficiary will supervise three employees.

As noted above, the ETA 750 specifies that an applicant for a financial planner position must have attended college culminating in a U.S. bachelor's or an equivalent foreign degree in business administration or equivalent.

As proof of the beneficiary's formal education, the petitioner submitted a copy of the beneficiary's resume, a copy of an "unofficial grade report," dated September 25, 2000, from the American College of Insurance and Financial Planning, and a copy of a February 27, 1995, diploma from the Singapore Institute of Management and an accompanying grade transcript reflecting that the beneficiary completed a two-year part-time course of study with 36 lecture hours attended culminating in the receipt of a diploma in management studies.

The petitioner also provided a copy of a September 27, 2000 grade report from an examination in insurance and financial planning sponsored by the American College in Bryn Mawr, Pennsylvania reflecting that it considered its "Huebner School courses" to be the equivalent of 3 semester undergraduate credits. Other documents provided are copies of two professional training grading information reports relevant to a personal estate and retirement planning course and employee benefits course sponsored by the Life Underwriter Training Council. The examinations related to these courses were successfully passed on January 31, 1997 and May 29, 1997, respectively. Also submitted are copies of examination records from the North American Securities Administrators Association (NASD) reflecting that the beneficiary completed these courses in order to sell investment products, as well as a copy of the beneficiary's licensing certificate to sell insurance received in 1995 from the State of Hawaii Insurance Division.

The petitioner submitted an evaluation report from [REDACTED]

██████████ dated August 17, 1995. The report states that the beneficiary's secondary school studies and examinations are the equivalent to graduation from high school plus ten semester credits of university-level work from an accredited college or university in the United States. However, these ten semesters of claimed university-level studies do not constitute the foreign equivalent degree to the requisite bachelor's degree in business administration. ██████████ utilized the beneficiary's military experience combined with the ten semesters of university level work to determine that the beneficiary had the equivalent educational background of a bachelor's degree in business administration.

The petitioner also provided another credentials evaluation report dated February 28, 2005 from ██████████ Dr. ██████████ determined that the beneficiary's "progressively responsible professional work experience/training is equivalent to a U.S. degree of Bachelor of Business Administration awarded by a regionally accredited college or university in the United States." The stated documentation reviewed by ██████████ included work experience letters issued by the beneficiary's current and previous employers (submitted into the record with the petitioner's response), a detailed curriculum vitae, and the beneficiary's February 27, 1995 diploma from the Singapore Institute of Management. ██████████ also stated that using a three for one formula, he concludes that the beneficiary has combined experience and training that would be the equivalent of 200 semester credit hours.

The record indicates the beneficiary studied at the Singapore Institute of Management, studying management studies, from January 1991 to December 1992, receiving a diploma for a two-year part time program in management; at The Life Underwriter Training Council, Honolulu, Hawaii, studying Personal Estate and Retirement planning, from October 1996 to January 1997, receiving a certificate; The Life Underwriter Training Council, Honolulu, Hawaii, studying employing employee benefits, from February 1997 to May 1997, receiving a certificate; at the American College, Bryn Mawr, Pennsylvania, studying HS 318 Insurance and Planning from July 2000 to September 2000, receiving a certificate, and that as of the date of filing the Form ETA 750, the beneficiary was studying at the American College, Bryn Mawr, Pennsylvania studying certification financial planning, from February 2001 to April 30, 2001 (the date the beneficiary signed the ETA Form 750). None of these studies appear to be university-level studies.

The director denied the petition on September 7, 2007, finding that pursuant to 8 C.F.R. 204.5(k)(2) the combination of work experience and a bachelor's degree as the equivalent of an advanced degree is allowed; however, there was no comparable provision to substitute a combination of lesser degrees, work experience or certificates under the employment based professional or skilled worker classification. The director further noted that since the beneficiary fell outside the scope of the job requirements as stipulated on the ETA 750, as they were advertised, he does not meet the formal education requirement of the labor certification, and that the petition cannot be approved.

On appeal, counsel states that USCIS found the beneficiary qualified as a professional for entry into

a specialty occupation⁵ in approving the H-1B petition filed on his behalf. Counsel states that USCIS is ambiguous as to the beneficiary's qualifications, and the ambiguity should be resolved in favor of the petitioner.

Counsel further notes that the Department of Labor training guidance encompassed in its Judges Benchbook used in Board of Alien Labor Certification Appeals (BALCA) adjudications, determines that USCIS equivalency regulations "are not binding." Therefore an alien found to qualify for an H-1B visa, which requires a bachelor's degree or equivalent, supports a finding that the beneficiary is qualified for the proffered job in the instant matter. Counsel notes the acceptance of the FIS evaluation report with regard to the beneficiary's degree equivalent that supported the beneficiary's six years in H-1B status and the DOL approval of the instant labor certification. Counsel asserts that the USCIS past decision on the beneficiary's degree equivalent should stand.⁶

Counsel's assertions are not persuasive. At the outset, it is noted that USCIS has authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). 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, even where a classification may not require a bachelor's degree. In this case, the ETA 750 states that the proffered position requires a bachelor's degree, not a combination of experience, certificates or degrees, which could be considered the equivalent of a bachelor's degree. Further, the approval of a prior non-immigrant petition does not in any manner establish the approval of a subsequent employment-based immigrant petition.

Even if viewed as a petition for a skilled worker, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the evidence must show that the alien has the education, training or experience, and any other requirements of the individual labor certification. This labor certification does not specifically define an equivalency less than a bachelor's degree whether it is a U.S. awarded or foreign equivalent. 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 Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

Part A of the Form ETA 750 indicates that DOL assigned the occupational code of 250.257.014 with accompanying job title, Financial Planner, to the proffered position. DOL's occupational codes are

⁵ Counsel refers to the approval of the beneficiary's H-1B non-immigrant petitions.

⁶ The AAO notes that counsel's assertions on appeal are similar to those stated in the petitioner's response to the director's NOID dated April 28, 2007.

assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/> (accessed March 25, 2010 under 41-3031.01, Sales Agents, Securities and Commodities, DOL's updated correlative occupation) 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 to 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:

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.

See id.

The position requires a bachelor's degree in business administration and two years of experience, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C). The certified ETA Form 750 also indicates that the position is a supervisory one, and not an entry level position. Combined with DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position can be considered a professional occupation. While the DOL classification indicates that the occupation does not always require a bachelor's degree, the petitioner's requirements as stipulated on the certified ETA 750, require a bachelor's degree. Thus, the proffered position would not be considered under the skilled worker classification.⁷

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.

⁷ Counsel in a prior response to a director's Request for Evidence for a prior petition stated that the proffered position could be considered under either the professional or skilled worker classification.

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

On January 10, 2010, the AAO issued a request for evidence to the petitioner, noting that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond his diploma for a two-year non-university course of studies in business management in Singapore, and other subsequent certificates in insurance and other financial related fields. The AAO requested the petitioner to submit its DOL recruitment report to determine the petitioner's intentions with regard to the required minimum educational requirements and any equivalency to these requirements as described to DOL and utilized during the recruitment period.

Counsel submitted the following evidence to the record:

A four page Request for Reduction in Recruitment Efforts dated April 30, 2001 signed by [REDACTED] Hallman General Agency, [REDACTED]. Mr. [REDACTED] describes the beneficiary as holding the U.S. equivalent of a bachelor's degree in Business Administration and a diploma in Management Studies from Singapore Institute of management. [REDACTED] also notes that the minimum qualifications for the position of financial planner/marketing representatives requires the minimum of a bachelor's degree in business administration (or the equivalent) and two years of financial planning, management, finance, insurance, or sales agent experience;

Two documents entitled "Financial Services Career Opportunity," dated August 20, 2003 that state the education requirements for the proffered position of financial advisor/planners, insurance agents, sales representatives and systems analyst is a bachelor's degree or equivalent.;

An advertisement placed on Monster.com website with no date for a US-HI-Honolulu-Sales Representative, that states no education or work experience requirements;

An Internet job advertisement dated November 15, 2000 that describes the Honolulu Hallman General Agency Fast Start Program. The position is described as sales/marketing program focusing on long term care insurance. The education requirements listed as "college graduate or commensurate experience, with no prior sales experience required, and the appropriate fields of study are described as "any major that has an interest in sales."

Two documents entitled "Career Opportunity" that [REDACTED] describes as job postings placed with university/colleges in Hawaii. These two documents describe the education requirements for a Financial Advisor/Planner Development Program as a college graduate, with no prior sales experience required.

Correspondence between [REDACTED] and the University of Hawaii for a job recruitment program, dated August 26, 2002, and

Copies of undated job advertisements in unidentified newspapers for a range of positions with [REDACTED] in Hawaii. The advertisements do not list any specific education or work experience requirements.

Counsel states that the petitioner's advertisements reflected that it accepted applicants regardless of whether or not they had a formal bachelor's degree issued by a U.S. university, and that it considered a variety of education, experience and combination of education and experience for the position officered.

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).⁸ *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

⁸ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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).⁹

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

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More

⁹ 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).

specifically, a two year course of studies in a non-university program will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a single-source “foreign equivalent degree.” In order to have experience and education equating to a bachelor’s degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree.

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Id.* at 11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Id.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated on the ETA 750 and does not include alternatives to a four-year bachelor’s degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner’s asserted intent, USCIS “does not err in applying the requirements as written.” *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree). In this matter, the Form ETA 750 does not specify an equivalency to the requirement of a bachelor’s degree in business administration or an equivalent field of study.

In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s

requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word “degree” in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress’ narrow requirement of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

With regard to the academic equivalency reports submitted to the record, the earlier FIS evaluation report submitted apparently with the beneficiary’s I-129 application for H-1B status, utilizes the beneficiary’s military experience combined with the ten semesters of university level work to determine that the beneficiary had the equivalent educational background of an individual with a bachelor’s degree in business administration.

As noted by the director, [REDACTED] additional evaluation determined that the beneficiary’s more than twenty years of professional work experience was equivalent to a U.S. bachelor’s degree in business administration awarded by a regionally accredited U.S. college or university. [REDACTED] referenced the USCIS equivalent formula of three years of work experience for one year of college level education in determining that the beneficiary had the equivalent of 200 semester credit hours. The AAO notes that the referenced regulatorily prescribed equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Thus, the AAO gives no weight to either evaluation report found in the record.

The Form ETA 750 does not provide that the minimum academic requirements of a bachelor's degree in business administration or an equivalent field of study might be met through three years of college or some other formula other than that explicitly stated on the Form ETA 750. The copies of the notice(s) of Internet and newspaper advertisements, provided with the petitioner's response to the request for evidence issued by this office, either are not specific to the proffered position; contain no information with regard to the actual academic and work requirements for the proffered position; or provide insufficient information as to what a bachelor's degree or equivalent actually means. The AAO notes that the petitioner did not submit its recruitment report for the proffered position which would include the numbers of workers interviewed for the position, their academic credentials, and why they were not hired for the position. The majority of the evidence submitted in response to the AAO RFE fails to advise any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. The record does not indicate that the only document that lists "college degree or commensurate experience" as the requisite educational experience was utilized in the recruitment phase of the instant petition.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification, and the petition would be denied on that basis as well. See 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification). The certified ETA Form 750 stipulates that the beneficiary possess a bachelor's degree, with no specific number of years of study identified. However, the beneficiary does not possess a bachelor's degree from an accredited university or college of any determined length of study. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, the AAO would question whether the petitioner has established its ability to pay the proffered wage to the beneficiary.

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.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$72,000 per year. The Form ETA 750 states that the position requires a bachelor's degree in business administration or an equivalent field of study, and two years of experience in the proffered job or in the related occupations of management, finance, insurance or sales agent experience.

The director did not address the issue of the petitioner's ability to pay the proffered wage in his decision. The AAO in its RFE noted that the petitioner provided general information on the financial strength of [REDACTED] however, the record contained no documentation specific to the petitioner. The AAO requested that the petitioner submit its federal tax returns as of tax year 2001 and onward, or any other documentation identified at 8 C.F.R. § 204.5(g)(2).

In response, the petitioner submitted Forms 1040, for [REDACTED] for tax years 2001 to 2007. The Schedule C for these tax returns indicates that [REDACTED] conducts his insurance sales business as [REDACTED], located at the same address as the petitioner, namely, [REDACTED]. In her response to the AAO RFE, counsel does not address the documentation submitted to establish the petitioner's ability to pay the proffered wage. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding does not clearly establish the relationship between the I-140 petitioner, identified as [REDACTED] doing business as [REDACTED] and [REDACTED], the sole proprietor business identified on the Schedules C submitted by counsel. The record contains the beneficiary's W-2 forms and Forms 1099 for tax years 2003, 2004, and 2005 that indicate he was paid by both [REDACTED] and by [REDACTED]. Boston. For example, in tax year 2004, [REDACTED] paid the beneficiary \$50,466.78, as evidenced by his W-2 form, while [REDACTED] Boston, paid him \$44,237.85, as evidenced by the beneficiary's Form 1099-MISC, nonemployee compensation. The submission of the tax returns for

the sole proprietor¹⁰ operating as [REDACTED] suggest that the petitioner is not Signator Financial Network, doing business as [REDACTED], but rather [REDACTED] through his sole proprietorship business working with [REDACTED]. The record indicates that the I-140 petition identifies the petitioner's Employer Identification Number (EIN) as [REDACTED] while [REDACTED] has an EIN of [REDACTED]. Thus, the I-140 petitioner and [REDACTED] are two distinct businesses. A petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. 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). Further the petitioner may not be changed during the course of the adjudication proceedings.

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

¹⁰ The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income. The AAO notes that in the instant matter, [REDACTED] tax return for 2001, the priority date year, indicates that he had three dependents and an adjusted gross income of \$23,156. It is not probable that [REDACTED] could have paid both his household yearly expenses for three individuals and the \$72,000 proffered wage in 2001.

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 Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). In the instant matter, the petitioner that originally submitted the I-140 petition does not appear to be the same petitioner that submits its financial records. Thus, the record neither establishes clearly the identity of the petitioner, and in turn, does not support the realistic nature of the job offer. For this reason alone, the petition may be denied.

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 Sonegawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, 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, while the I-140 petition states that the petitioner was established in 1862, it also states that the petitioner has over 40 employees. Thus, the record reflects that [REDACTED] if it is the petitioner has a lengthy business presence, while it only has over 40 employees. The actual relationship between the worldwide [REDACTED] and the specific Hawaii office of Signator Financial Network doing business as [REDACTED] is not reflected in the record. The record does not establish who is the actual petitioner, and does not clarify the relationship between the I-140 petitioner, and the sole proprietorship that submitted its tax returns to the record. The AAO further notes that the RFE correspondence sent to the petitioner's address at [REDACTED] was returned as "No longer at address" and "unable to forward." This also raises questions with regard to whether the instant petition is still sponsored by a [REDACTED] affiliate or representative. 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 burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.