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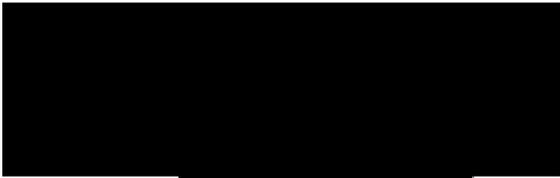
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



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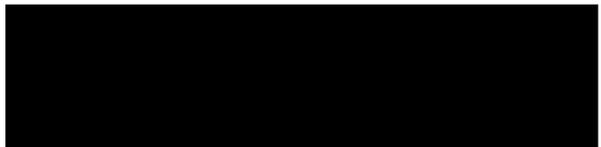
Office: NEBRASKA SERVICE CENTER

Date: APR 29 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

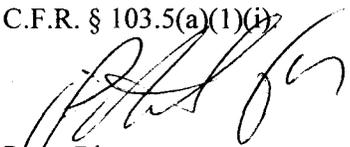
ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software engineering company. It seeks to employ the beneficiary permanently in the United States as a senior engineer. As required by statute, a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the petitioner has demonstrated its ability to pay the proffered wage and that the petition should be approved.

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).

For the reasons discussed below, the AAO concurs with the director's decision to deny the petition based on the petitioner's failure to demonstrate its continuing financial ability to pay the proffered wage. Beyond the decision of the director, the AAO further finds that the record does not demonstrate that the beneficiary possessed the requisite four-year bachelor's degree in engineering as of the priority date. 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 at n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

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

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

The petitioner must demonstrate that it has the continuing financial ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also establish that the beneficiary has the required education and experience as of the priority date. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted for processing on August 6, 2004, which establishes the priority date.¹ The proffered wage is stated as \$76,000 per year. Item 14 of the ETA 750 indicates that the offered position of Senior Engineer requires four years of college culminating in a Bachelor's degree in Engineering. The position also requires three years of experience in the certified job or three years of experience in a related occupation defined as a computer or software engineer. Part B of the Form ETA 750, which was signed by the beneficiary indicates that the petitioner has employed him as a senior engineer since January 2002. Prior to this employment, the beneficiary states that he was employed as a software engineer by the petitioner from July 1999 to January 2002.

The Immigrant Petition for Alien Worker, (Form I-140) was filed on May 1, 2007. Part 5 of the petition indicates that the petitioner was established on April 27, 1998, claims a gross annual income of \$400,000, a net annual income of \$40,000, and currently employs eighteen workers.

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 overall 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 support of the petitioner's ability to pay the proffered wage of \$76,000 per year, the petitioner provided to the underlying record and on appeal, copies of financial statements

¹ 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, including a prospective U.S. employer's ability to pay the proffered wage is clear.

covering its financial information for 2004, 2005 and 2006. All financial statements are compilations as indicated on the accompanying accountant's letter, which also states that the petitioner is structured as an S corporation. The 2006 financial statements were submitted twice with an accountant's letter dated February 26, 2007 and August 21, 2007, respectively. Both financial statements covered the year ending December 31, 2006, although the earlier compilation is identified as one based on "Modified Cash Income Tax Basis" and the one dated August 21, 2007 is specified as one based on "Modified Cash Basis."

The petitioner also provided copies of the beneficiary's Wage and Tax Statements (W-2s) for 2004, 2005 and 2006,² as well as copies of its federal Employer's Quarterly Federal Tax Return (Form 941) for 2006 and the first quarter of 2007. They indicate the following wages were paid to the beneficiary:

Year		Difference from the Proffered Wage of \$76,000
2004	\$37,800	-\$38,200
2005	\$36,575	-\$39,425
2006	\$35,000	-\$41,000

It is noted that the federal employer identification number(s) (FEIN) reflected on these documents conflicts with the tax identification number shown on Part 1 of the I-140. The FEIN shown on the W-2s and on the quarterly federal tax returns is [REDACTED]. The FEIN listed on the I-140 is [REDACTED]. A FEIN is a unique identification number issued to a tax filer. For the purpose of classification as an employer empowered to sponsor a beneficiary on an

² In support of its ability to pay the proffered wage, the petitioner also provided a letter from its vice-president indicating that the company had also provided the compensation to the beneficiary in the form of health insurance, life insurance, lawyer's expenses, educational expenses, etc. The assertion that such items should be considered as part of a petitioner's ability to pay has not been asserted on appeal. It is noted that no legal authority has been cited obliging USCIS to include such expenses paid as part of the beneficiary's wages. USCIS will not consider such expenses as part of the beneficiary's compensation paid by the petitioner. The proposed salary on an approved labor certification is expressed as U.S. currency and not as a formula including the value of other expenses paid on behalf of a beneficiary. It is based on a determination of the prevailing wage pursuant to the regulatory requirements set forth at 20 C.F.R. § 656.40 (2003). Additionally, the regulation at 20 C.F.R. § 656.20(c)(3) clearly provides that the wage offered must not be "based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis." Moreover, as noted above, no record of such monies paid by the petitioner is reported as compensation or as any other kind of income on the beneficiary's W-2s.

application for a labor certification, DOL requires the U.S. employer to possess a valid FEIN.³ The inconsistency between the two FEINs appearing in the record raises doubts as to the identity of the petitioner and the employer of the beneficiary as shown on the W-2s and the quarterly federal tax returns.⁴ This discrepancy has not been addressed by the petitioner. For that reason, the petitioner's alleged payment of wages to the beneficiary will not be considered as part of the petitioner's ability to pay the proffered wage. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Copies of payroll records have also been provided indicating that as of the pay period ending October 12, 2007, the petitioner had paid the beneficiary a gross salary of \$61,488.

The director denied the petition on September 21, 2007, determining that the petitioner had not established its continuing ability to pay the proffered wage.⁵ He noted that the petitioner had

³See generally, 8 C.F.R. § 656.3 for the definition of "employer." It is noted that the regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. New Department of Labor regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. PERM does not specifically apply to this case because this record contains the formerly used labor certification application, Form ETA 750, Application for Alien Employment Certification, which was filed prior to December 20, 2005. It did not require the employer to disclose its FEIN on the application. The ETA Form 9089, Application for Permanent Employment Certification now requires the employer to list its FEIN on Part C of the form.

⁴It is noted that USCIS will not consider the assets of a separate corporate entity. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). As the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

⁵It is noted that the director prorated the proffered wage for the portion of the year that occurred after the priority date, August 6, 2004. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would

provided two different financial statements for 2006 and that none of the financial statements were audited as set forth in the regulation at 8 C.F.R. § 204.5(g)(2).

On appeal, counsel relies upon a copy of a letter from the petitioner's accountant, [REDACTED] in which [REDACTED] explains the difference between the two financial statements' figures for 2006 and states that in his opinion, the compilations could be regarded as annual reports. No legal authority is cited for this proposition and the AAO does not concur. Even if we did consider the unaudited statements, they fail to establish the petitioner's ability to pay the proffered wage. The petitioner did not provide any federal income tax returns.

It is noted that if a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner may have paid the beneficiary less than the proffered wage, those amounts will be considered. If the difference between the amount of wages paid and the proffered wage can be covered by the petitioner's net income or net current assets for a given year, then the petitioner's ability to pay the full proffered wage for that period will also be demonstrated. Here, as set forth above, it is claimed that the petitioner has employed the beneficiary as a senior engineer since January 2002. However, as noted above, the AAO will not consider the W-2s as part of the calculation of the petitioner's ability to pay the proffered wage based on the inconsistent FEINs listed for the I-140 petitioner and the employer identified on the W-2s. Even if considered, it is noted that the beneficiary's W-2s do not reflect that his salary has been paid at the rate of \$76,000 per year.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, audited financial statements or annual reports without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's

consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence for 2004.

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 at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ It represents a

⁶ 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.

measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period.

With respect to the compilations provided to the record, according to the plain language of 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. An audit is an examination of accounting records by an independent certified public accountant who formulates an audit opinion based on conformity with *generally accepted accounting principles* (GAAP). Source documentation is examined to establish legitimacy of transactions and internal control is also evaluated. *See Barron's Accounting Handbook*, 318 (3rd ed. 2000). A compilation is a presentation of financial data of an entity that is not accompanied by an accountant's assurance as to conformity with GAAP. *Id.* at 370-71. As noted by [REDACTED] respective cover letters accompanying the compilations, the compiled financial statements are restricted to information based upon the representations of management. As such, the financial statements submitted in support of the petitioner's ability to pay the proffered wage cannot be considered as determinative of the petitioner's ability to pay the certified salary. We do not consider the compiled financial statements to be annual reports or to be an acceptable substitute for the evidence required by the regulation at 8 C.F.R. § 204.5(g)(2).⁷

Moreover, as noted by the director, even if the figures presented by the financial statements are reviewed, including any allowance made for the classification of the 2006 statements as either "modified cash income tax basis" or "modified cash basis," current liabilities exceeded current assets in each of the 2004, 2005 compilations as well as the 2006 compilation dated February 26, 2007. Additionally, net income is reflected as a loss during each of the same years, including the 2006 compilation dated August 21, 2007. The only figure which is positive based on these compilations is that the petitioner's current assets exceeded its current liabilities by \$10,221.40 based on the 2006 compilation dated August 21, 2007. However, even if the W-2s in the record were considered as part of this calculation, this was insufficient to cover the 2006 difference of \$41,000 resulting from the comparison between the beneficiary's actual wages of \$35,000 claimed to have been paid by the petitioner and the proffered wage of \$76,000. Although, based on the payroll records for 2007 submitted on appeal, it appeared that the petitioner may have compensated the beneficiary based on the rate of the proffered wage as of year-to-date October 12, 2007,⁸ it may not be concluded that the petitioner has demonstrated its ability to pay the proffered wage in 2004, 2005, or 2006.

⁷ Annual reports contain financial statements including footnotes, supplementary schedules, management's discussion and analysis of earnings, president's letter, audit report, and other data helpful in evaluating the entity's financial position. *See Barron's Accounting Handbook*, 310 (3rd ed. 2000).

⁸As the FEIN is not shown on these payroll records, it is unclear if this is the same petitioner identified on the I-140.

On appeal, in support of the petitioner's ability to pay the proffered salary, counsel asserts that two cases considered by the AAO in 2003 should be determinative in this case, including one which held that the normal accounting practices of the company should be considered even if the ability to pay is not shown in the tax returns and the other indicating that wage reports showing the person was actually paid during the year when the labor certification was filed can be a source of proof that the petitioner has the ability to pay the proffered wage. Counsel also submits a copy of the *Memorandum by William R. Yates, Associate Director of Operations, "Determination of Ability to Pay under 8 C.F.R. 204.5(g)(2),"* HQOPRD 90/16.45 (May 4, 2004), in which the adjudicators are advised of three methods by which the ability to pay should be evaluated. With respect to the Yates Memorandum, it is noted that by its own terms, this document is not intended to create any right or benefit or constitute a legally binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), but merely offered as guidance.⁹ Similarly, the 2003 AAO cases cited by counsel are not legally binding precedent. The AAO is bound by the Act, regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from the circuit where the action arose. *See N.L.R.B v. Ashkenazy Property Management Corp.*, 817 F.2d 74,75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Further, it is noted that the Yates Memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates memorandum. However, counsel's interpretation of the language in that memorandum is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which in this case is August 6, 2004, as established by the labor certification. Demonstrating that the petitioner is paying the proffered wage in a specific year or time period may suffice to show the petitioner's ability to pay for that year or period of time, but the petitioner must still demonstrate its ability to pay for the remainder of the pertinent period of time.

⁹See also, *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968).

Relying on *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967) and *Masonry Masters, Inc. v. Thornburgh*, 742 F.Supp. 682 (D.D.C. 1990), remanded in 875 F.2d 898 (D.C. Cir. 1989), counsel asserts that the director erred in failing to give weight to other evidence such as a beneficiary's ability to generate income and the petitioner's expectation of future profit. *Matter of Sonogawa*, is sometimes applicable where other factors such as the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had 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, historical growth and outstanding reputation as a couturiere.

In the instant case, the petitioner submits copies of current contracts and contract amendments and indicates in a letter dated October 22, 2007, that if it wins Phase II of a United States Department of Defense contract it will have an additional value of \$750,000. However, it is noted that the petitioner has failed to submit the regulatorily prescribed evidence of its ability to pay the proffered wage as of the priority date and even if reviewing the unaudited compilations provided to the record, it is noted that the petitioner's net loss increased each year from over \$16,000 to over \$114,000 in 2006. The record does not indicate that the kind of unique or unusual business circumstances discussed in *Sonogawa* are present in this case. Moreover, the beneficiary's employment has been ongoing for several years, therefore any ability for him to generate additional revenue would already be reflected in the figures that the petitioner has elected to provide. In this case, petitioner's assertions that *Sonogawa* justifies approving the petition does not outweigh the evidence in the record. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

Unlike the *Sonogawa* petitioner, the instant petitioner has not submitted sufficient evidence demonstrating that uncharacteristic losses, factors of outstanding reputation or other circumstances that prevailed in *Sonogawa* that are persuasive in this matter. The AAO cannot

conclude that the petitioner has established that it has had the continuing ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) requires that a petitioner establish a *continuing* financial ability to pay the proffered wage beginning at the priority date. (Emphasis added.) Upon review of the evidence contained in the record and submitted on appeal, the AAO concludes that the petitioner failed to establish that it has had the continuing ability to pay the proffered wage.

Beyond the decision of the director, and as noted above, the beneficiary's educational requirements as set forth on item 14 of the ETA 750 for a Senior Engineer, the ETA 750 requires that the beneficiary possess four years of college culminating in a Bachelor's degree in engineering.

DOL assigned the occupational code of 15-1032.00, computer software engineers, systems software to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at 15-1032.00 at <http://online.onetcenter.org/link/summary/15-1032.00>¹⁰ and extensive description of the position and requirements for the job, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

More specific to this position, O*NET provides that 85 percent of responding computer software engineers, applications have a bachelor's degree or higher.¹¹ Further, DOL's Occupation Outlook Handbook, available online at <http://www.bls.gov/oco/ocos267.htm>, provides:

¹⁰ (Accessed 3/19/10).

¹¹ *See* <http://online.onetcenter.org/link/details/15-1032.00>.

Education and Training. Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs. In 2006, about 80 percent of workers had a bachelor's degree or higher.

Based on the position's job title, job duties, experience required, the educational requirements as set forth on the ETA 750, the SVP identified by DOL, and the majority percentage of respondents that have a bachelor's degree or higher, the job in this case is a professional position.

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 regulations use 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.

As noted above, the ETA 750 in this matter is certified by DOL. 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.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

- (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers 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 or not the alien is qualified 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). *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 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).

In this matter, on Part B of the ETA 750, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a Bachelors of Science in Engineering, which he indicates was received from Sambalpur Univeristy, Orissa, India after attendance from May 1981 to September 1984. The beneficiary also claims to have attended

the Indian Institute of Foreign Trade, India from July 1990 to June 1991 and received a diploma in international trade. He additionally states that he has attended the University of Alabama in Huntsville, Alabama from November 2002 to the present (date of signing) and is studying computer science.

In corroboration of the ETA 750, the petitioner provided the following:

1. A copy the beneficiary's diploma from the Regional Engineering College (Sambalpur University) indicating that he received a "B.Sc. (Engineering) Part-II Final (Mining) Degree Examination" on September 21, 2004, including 121 days of practical training. The diploma is not accompanied by a marks transcript that would indicate the duration of the program of study.

2. A copy of a diploma from the University of Alabama in Huntsville indicating that in May 2005, the beneficiary received a Master of Science degree. The accompanying transcript indicates that the field of study was computer science. This degree was obtained after the priority date.

3. A copy of a post-graduate diploma in international trade awarded on June 28, 1991 from the Indian Institute of International Trade following a course he attended from July 1990 to June 1991.

The petitioner also submitted an evaluation report from "The Foundation for International [REDACTED]", dated October 9, 2003, signed by [REDACTED]. She determines that the beneficiary's academic studies and resulting Bachelor of Science in Engineering at the Sambalpur Regional Engineering College is the U.S. equivalent of a bachelor's degree in mining engineering. She further considers the beneficiary studies at the University of Alabama and characterizes them as representing ½ year of university-level credit and 1 ¼ years of graduate credit. [REDACTED] additionally considers the beneficiary's employment experience in mining engineering and computer information systems and concludes that his combined education and employment experience, using a formula of three years of experience as the equivalent of one year of university-level credit, collectively represents the U.S. equivalent of a bachelor's degree in computer information systems from an accredited college or university, as well as the U.S. equivalent of a master's degree in mining engineering.¹²

It is noted that [REDACTED] failed to enumerate her credentials as an academic evaluator. It must also be noted that the beneficiary did not gain his U.S. Master's degree until after May 2005, approximately nine months after the priority date of August 6, 2004. Further, the petitioner failed to indicate on the ETA 750 that any alternate combination of education and experience or an alternate combination of degrees or diplomas would be acceptable in lieu of four years of

¹²The evaluation does not consider or assess any equivalency for the beneficiary's program of study in international trade, which is unrelated to the required field.

college culminating in a Bachelor's degree in Engineering. Additionally, the beneficiary claims on Part B of the ETA 750 that his bachelor's degree represents a three-year course of study. No marks transcripts were submitted with the Indian bachelor's degree in order to determine whether the program of study was based on a three or four years of study.¹³ Moreover, with respect to the King evaluation, it is noted that the evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5).¹⁴

¹³ We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) and further consulted directly with EDGE personnel. 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.

According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at [www.Aacrao.org/publications/guide to creating international publications.pdf](http://www.Aacrao.org/publications/guide%20to%20creating%20international%20publications.pdf). If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

On direct consultation with EDGE, EDGE advised that Sambalpur University does not list any engineering degrees as the "Original Regional College of Engineering (RCE)" conducted all engineering programs and then several affiliated engineering colleges started to offer course work. Since the affiliated colleges offer the course work, the University itself will not list any Engineering degrees unless they offer and award Master's and PhD's.

EDGE further advised that RCE in the past offered a B.Sc degree in Engineering, which was a program of four year duration and the degree was awarded by the Sambalpur University, however, this cannot be definitively ascertained without a review of the marks statements to exhibit that it was a four-year program.

¹⁴ The evaluation determines that the beneficiary has the equivalent of a bachelor's degree

The beneficiary was required to have a four-year single source bachelor's degree on the Form ETA 750. The AAO does not find this evaluation to be probative of the beneficiary's possession of a bachelor's degree in engineering as the Form ETA 750 required. USCIS may, in its discretion, use advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). USCIS, however, is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a combination of certificates, experience and diplomas, will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). 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. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Even if considering at most, the beneficiary's attainment of three years of undergraduate university studies represented by the bachelor of science degree, this would not qualify as full four-year bachelor's degree in engineering as indicated on the ETA 750. Moreover, if a defined alternate combination was acceptable, then the petitioner could have described this alternative in Item 15, which permits other special requirements.

Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B). For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B).¹⁵

based on his degree from the Sambalpur Regional Engineering College or alternatively, that he has the equivalent of a bachelor's degree in computer information systems based on a combination of education and work experience.

¹⁵ *Skilled Workers*. 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 AAO is not persuaded that the beneficiary is eligible for a skilled worker classification in this case. As mentioned above, the record supports a finding that the certified position was appropriately classified as a professional, based on the job title, job duties, the educational requirements as set forth on the ETA 750 by the petitioner, the SVP identified by DOL, and the majority percentage of software engineering respondents that have a bachelor's degree or higher as indicated in O'Net.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d, 1174 (D. Or. 2005) which found that [USCIS] “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a). In reaching this decision, the court also concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary’s credentials in evaluating the job requirements listed on the labor certification.¹⁶

¹⁶ Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to “clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons.” BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court’s suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers “B.A. or equivalent” to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor’s degree. We are satisfied that DOL’s interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a “B.S. or equivalent.” The Certifying Officer questioned this

Additionally, we also note the subsequent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. November 30, 2006) that was rendered in the same district. In that case, the ETA 750 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 as a “specific level of educational background.”. *Snapnames.com, Inc.* at *6. 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. *Snapnames.com, Inc.* 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. *Snapnames.com, Inc.* at *17, 19.

In *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the ETA 750

requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer’s attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that “a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers.” BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer’s stated minimum requirement was a “B.S. or equivalent” degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

described the educational requirement as Bachelor's or equivalent" and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien's other credentials with his three-year diploma to meet the requirements of the ETA 750. *Id* at *13-14. In this case, the beneficiary must possess a bachelor's degree in engineering. The petitioner failed to specify any defined equivalency on the ETA 750. The beneficiary's formal education acquired as of the priority date does not equate to a bachelor's degree in engineering. Rather it appears to be a three-year bachelor's degree in mining engineering based on the dates of study that the beneficiary lists on Form ETA 750B. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).¹⁷ Further, in this matter, the ETA 750 requires four years of college culminating in a bachelor's degree in engineering. Therefore, the evidence does not establish that the beneficiary's degree from Sambalpur University can be considered a foreign equivalent degree for the purpose of meeting the bachelor's degree requirement as of the priority date of August 6, 2004 without evidence that it was a four-year program of study. The record fails to indicate that the position should be considered in a skilled worker category. Moreover, even if additionally considered as a skilled worker, the beneficiary's qualifications do not satisfy the requirements of the labor certification in either a professional or skilled worker category.

It is noted that that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984), USCIS is obliged to "examine the certified job offer *exactly* as it is completed by the prospective employer." (Emphasis added) USCIS' 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).

The evidence in the record does not establish that the beneficiary has a four-year bachelor's degree or foreign equivalent degree in engineering and that he would meet the terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional or as a skilled worker under 203(b)(3)(i) of the Act.¹⁸

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, at 1002 n. 9.

¹⁷ In any further filings, the petitioner must submit the beneficiary's mark statements to establish that the beneficiary had the required four years of education and that the beneficiary's degree was based on a four-year program of study as required by the labor certification.

¹⁸ A skilled worker category requires that a petitioner must show that a beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification."

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.

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.