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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
and Immigration
Services**



B6

FILE: [REDACTED]
SRC 07 127 51543

Office: TEXAS SERVICE CENTER

Date:

AUG 03 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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner claims to be a networking business. It seeks to permanently employ the beneficiary as an "Assistant to Marketing Manager." On March 16, 2007, the petitioner requested classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the labor certification was accepted for processing by the DOL, is September 25, 2002. See 8 C.F.R. § 204.5(d).

As set forth in the director's denial, the primary issue in this case is whether the beneficiary meets the minimum requirements of the requested preference classification and of the offered position as set forth in the labor certification. The AAO will also consider whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.²

The record shows that the appeal is properly filed, 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.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d at 145. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

¹Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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 grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

²An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

³The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

In order for the petition to be approved, the petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The minimum education, training, experience and skills required to perform the duties of the offered position is set forth at Part A of the labor certification. In the instant case, the labor certification states that the position of has the following minimum requirements:

EDUCATION

Grade School: 6 years

High School: 6 years

College: 4 years

College Degree Required: Bachelors

Major Field of Study: Business Administration or Marketing

TRAINING: None

EXPERIENCE: None

OTHER SPECIAL REQUIREMENTS: None

The labor certification does not state that the petitioner would accept a combination of degrees that are individually less than a four-year U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience. Instead, the plain language of the labor certification states that the offered position requires a four-year bachelor's degree in business administration or marketing.

According to the DOL field guidance, when a labor certification requires a bachelor's degree and the beneficiary has a foreign four-year bachelor's degree, the employer need not include "or equivalent" on the labor certification or in its advertisement and recruitment efforts. *See Memorandum from [REDACTED] Acting Regl. Adminstr., U.S. Dept. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dept. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994)(Hall Memorandum).* Further, if the labor certification states that the offered position requires a U.S. bachelor's degree "or equivalent," and "equivalent" is not defined in the labor certification or in the employer's recruitment efforts, then the term is interpreted to mean that the employer is willing to accept an equivalent foreign degree. *See Ltr. From [REDACTED] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] INS (October 27, 1992).* *If the offered position requires a bachelor's degree, but the employer will accept work experience or a combination of lesser degrees for the bachelor's degree, then the employer must specifically state on the labor certification and throughout all phases of the recruitment process exactly what will be considered an acceptable equivalent or alternative to the bachelor's degree. See Hall Memorandum.*

The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The labor certification, signed by the beneficiary on September 9, 2002 under penalty of perjury, states that the beneficiary obtained a bachelor of science from University of Madras, India. The labor certification states that he attended the school from June 1971 until April 1975. The labor certification does not state that the beneficiary completed any other education.

The record of proceeding contains the following documents pertaining to the beneficiary's education:

- Diploma and transcripts for a bachelor of science degree from University of Madras, India. The diploma states that the beneficiary's primary field of study was physics with ancillary studies in chemistry and mathematics. The diploma and transcript also state that the beneficiary took his bachelor of science degree examinations in March 1972, April 1973, April 1974, and April 1975.
- Transcripts for a post graduate diploma in business management (marketing) from Rizvi Academy of Management, India. The transcripts are for Semesters I, II, and III, with examinations on December 2000, September 2000, and September 2001. There is a letter accompanying the transcripts from [REDACTED], Director, dated June 25, 2000. The letter states that the beneficiary has been admitted to a two-year full-time post graduate diploma program commencing July 1, 2000. Therefore, the evidence in the record does not reflect that the beneficiary completed the diploma program.

The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification application form. O*NET is the current occupational classification system used by the DOL. O*NET, located online at <http://online.onetcenter.org>, is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.⁴

In the instant case, the DOL categorized the offered position under the SOC code 11-2021.00 – Marketing Manager. The O*NET online database states that this occupation falls within Job Zone Four,⁵ and that 69% of individuals in this occupation hold a baccalaureate degree or higher.⁶

⁴See <http://www.bls.gov/soc/socguide.htm>. For older labor certifications that were assigned a Dictionary of Occupational Titles (DOT) code instead of an O*NET-SOC code, the O*NET website contains a crosswalk that translates DOT codes into the current O*NET-SOC codes. See <http://online.onetcenter.org/crosswalk/DOT>.

⁵According to O*NET, most of the occupations in Job Zone Four require a four-year bachelor's degree. <http://online.onetcenter.org/help/online/zones> (accessed July 20, 2010).

⁶Details Report for 11-2021.00 at <http://online.onetcenter.org/link/details/11-2021.00> (accessed July

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

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

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

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

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

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

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

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

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

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

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

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

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

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁷ *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

⁷ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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

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

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

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

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

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

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. 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). 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.

For the reasons explained below, because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," from a college or university in the required field of study listed on the certified labor certification, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds 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*, 437 F. Supp. 2d at 1179 (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).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* 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. *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 USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* 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 Form 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 U.S. bachelor's degree.

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 about the beneficiary's

qualifications. *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.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The record contains four evaluations of the beneficiary's foreign academic credentials.

The evaluation by [REDACTED] Directing Evaluator, American Evaluation Institute, dated November 15, 2007 (Clark Evaluation) states that the beneficiary's bachelor of science degree is equivalent to a U.S. bachelor of science in mathematics from an accredited U.S. institution of higher education.

The evaluation by [REDACTED] of The Trustforte Corporation, dated October 15, 2007 [REDACTED] states that the beneficiary's bachelor of science degree together with his post-graduate studies in business management and marketing from Rizvi Academy of Management is equivalent to a U.S. bachelor's degree with a dual major in physics and business administration with a further specialization in marketing from an accredited college or university. The [REDACTED]

Evaluation states that the beneficiary's bachelor of science degree, by itself, is only equivalent to three years of study towards a U.S. bachelor's degree in physics.

The record includes two additional evaluations of the beneficiary's academic credentials. The first evaluation, dated February 6, 2007, was prepared by [REDACTED] for Career Consulting International [REDACTED]. The [REDACTED] states that the beneficiary's bachelor of science degree is a three-year degree, and that it is equivalent to a four-year bachelor of science degree in mathematics from an accredited U.S. institution of higher education.

[REDACTED] makes five basic arguments in support of its assertion that Indian three-year bachelor's degrees are equivalent to U.S. four-year bachelor's degrees.

First, the [REDACTED] notes that the U.S. and India are both [REDACTED] members, and that [REDACTED] "clearly recommends that the 3 and 4 year degree should be treated as equivalent to a bachelor's degree by all [REDACTED] members." However, the [REDACTED] Evaluation provides no evidentiary support for this claim. In fact, [REDACTED] publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004), provides:⁹

Most of the universities and the institutions recognized by the [REDACTED] or by other authorized public agencies in India, are members of the Association of [REDACTED]. Besides, India is party to a few [REDACTED] conventions and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the

[REDACTED] indicates that she has a master's degree from the Institute of Transpersonal Psychology and a doctorate from [REDACTED] but does not indicate the field in which she obtained her doctorate. According to its website, [REDACTED] awards degrees based on past experience. [REDACTED] is also states that she is a professor at [REDACTED] where she oversees standards for granting college credit based on past experience. [REDACTED] states that she is a member of the [REDACTED] and the [REDACTED]

[REDACTED] The record does not indicate what these organizations require for membership, and their websites do not indicate that anything other than the payment of dues for membership is required. For example, the bylaws for the [REDACTED] at <http://www.eval.org/aboutus/bylaws.asp> (accessed on July 20, 2010), states: "Any individual interested in the purposes of the Association shall be eligible for membership. Members are defined as those who have completed an application form, received acknowledgment of membership from the Association, and paid the currently stipulated membership dues." Membership in organizations that only require the payment of dues does not confer any expertise.

[REDACTED] (accessed on July 20, 2010).

Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. The [University Grants Commission], [All India Council for Technical Education] and [Association of Indian Universities] are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.). Accordingly, the [redacted] reliance on [redacted] for the proposition that a three-year Indian bachelor's degree is equivalent to a four-year U.S. bachelor's degree is misplaced.

Second, the [redacted] notes that some U.K. and U.S. institutions of higher education will consider holders of three-year bachelor's degrees from India for entry into their master's degree programs. However, the evaluation does not address whether those institutions that accept three-year degrees from India do so subject to additional conditions, such as requiring the degree holder to complete extra credits prior to admission. Further, the fact that some U.S. graduate programs accept three-year degrees has little relevance to whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate.

Third, the [redacted] cites an article from [redacted] titled "Evaluating the Bologna Degree in the U.S."¹⁰ [redacted] is a monthly newsletter published by [redacted] a credentials evaluation organization. The newsletter article includes a brief assessment of three-year Bologna degrees from Europe. The article states that U.S. bachelor's degrees are based on the completion of 120 semester credits, and are generally completed over a four-year period. According to the article, approximately half of a U.S. bachelor's degree is devoted to general studies, and the remaining credits are devoted to the student's major and related subjects. In contrast, the Bologna degrees "are more heavily concentrated in the major – or specialization – and that the general education component which is so crucial to U.S. undergraduate education is absent." The article compared a bachelor's degree in business administration from [redacted], and a business administration Bologna degree from the [redacted]. The article concludes, after assessing the requirements for admission to a Bologna degree program, its contents and structure, and the function that the credential is designed to serve in the home system, that the Bologna degree is "functionally equivalent to a U.S. bachelor's degree." However, this non-peer reviewed article from a newsletter is irrelevant as it provides no

¹⁰ Accessed at [redacted] on July 20, 2010.

evidence for why the beneficiary's bachelor's degree from India is equivalent to a U.S. bachelor's degree.

Fourth, the [REDACTED] states that some U.S. institutions offer three-year bachelor's degree programs. It is noted that there exists accelerated degree programs in the United States. However, this fact provides no useful information about the degree obtained by the beneficiary in India. At issue is the actual equivalence of the specific degree the beneficiary obtained, not whether it is possible to obtain a baccalaureate in less than four years in an accelerated program in the United States. The beneficiary did not compress his studies to obtain a degree in less than four years from an institution that grants four-year degrees, and, even if this were the case, the petitioner would need to establish that the beneficiary's accelerated degree is equivalent to a four-year, 120 credit hour U.S. bachelor's degree.

Fifth, the [REDACTED] also cites a Council of Graduate Schools survey concerning the acceptance of three-year degrees from within and outside Europe. The survey allegedly shows that some U.S. graduate programs accept three-year degrees from India. The surveys do not reflect how many of the limited number of institutions that accept three-year degrees from outside of Europe do so provisionally. If the three-year Indian baccalaureate were truly a foreign equivalent degree to a U.S. baccalaureate, the vast majority of U.S. institutions would accept these degrees for graduate admission without provision. The cited survey underlines that there is not wide acceptance within the academic community of three-year degrees for admission into graduate schools. The Danzig Evaluation provides no study or report that conclusively states that Indian three-year degrees are equivalent to a U.S. bachelor's degree, or even that Indian three-year degrees are generally accepted for admission into U.S. graduate degree programs.

The final sentence of the [REDACTED] states: "It is the opinion of this evaluation agency that any failure to treat the [Indian three-year] bachelor's degree . . . as equivalent to [a U.S. four-year] bachelor's degree would be against the [REDACTED] recommendations and could indicate evidence of racial discrimination." This unfounded statement further undermines the credibility of the evaluation.

The second evaluation, prepared on the same date as the [REDACTED] was prepared by John [REDACTED] also states that the beneficiary's bachelor of science degree is a three-year degree that is equivalent to a four-year U.S. bachelor of science degree in mathematics.

The fundamental argument of the [REDACTED] is that a three-year bachelor's degree from India is equivalent to a 120 credit hour U.S. bachelor's degree, because an Indian three-year degree requires the same number of classroom hours (or "contact hours") as a U.S. bachelor's degree. The evaluations claim that a student must attend at least 15 50-minute classroom hours to earn one semester credit hour under the U.S. system. Since U.S. bachelor's degree programs require 120 credit hours for graduation, the [REDACTED] concludes that a program of study with 1800 classroom hours is equivalent to a U.S. bachelor's degree. Since a three-year bachelor's degree from

India allegedly requires over 1800 classroom hours, the evaluation concludes that it is equivalent to a U.S. bachelor's degree.

The evaluation bases this equivalency formula on the claim that the U.S. semester credit hour is a variant of the [REDACTED] [REDACTED] was adopted by the [REDACTED] for the Advancement of Teaching in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject.¹¹ For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.¹² This unit system was adopted at a time when high schools lacked uniformity in the courses they taught and the number of hours students spent in class.¹³ According to the foundation's website, the "Carnegie Unit" relates to the number of classroom hours a high school student should have with a teacher, and "does not apply to higher education."¹⁴

In support of its conclusion that a three-year bachelor's degree from India is equivalent to a U.S. baccalaureate, the [REDACTED] refers to three letters. The first letter is from [REDACTED] [REDACTED] addressed to [REDACTED]. The letter states that a three-year degree from India is equivalent to a U.S. bachelor's degree. This letter states that this opinion is based on the number of contact hours in each program, the [REDACTED] treaty, and the fact that Bologna degrees from Israel, Canada, and Europe are accepted by U.S. colleges and universities. The second letter is from [REDACTED] [REDACTED] addressed to [REDACTED]. The letter states that a three-year degree from India is equivalent to a U.S. bachelor's degree. The letter states that this conclusion is based on the author's opinion that Indian degrees require over 1800 contact hours. The third letter is from [REDACTED] former professor at [REDACTED] also addressed to Ms. [REDACTED], states that a three-year degree from India is equivalent to a U.S. bachelor's degree based on the author's opinion that Indian degrees require over 1800 contact hours. There is no evidence in the record demonstrating that these individuals are qualified to determine whether a foreign academic credential is equivalent to a U.S. baccalaureate.

[REDACTED] for the Advancement of Teaching was founded in 1905 as an independent policy and research center whose charge is "to do and perform all things necessary to encourage, uphold, and dignify the profession of the teacher." [REDACTED] (accessed on July 20, 2010).

[REDACTED] accessed on July 20, 2010).

¹³ *Id.*

¹⁴ *Id.*

provides no peer-reviewed material confirming that assigning credits solely based on hours spent in the classroom is applicable to the Indian tertiary education system. The makes no attempt to assign credits for the beneficiary's individual courses, and merely concludes that the beneficiary's three-year bachelor of science degree is equivalent to a U.S. degree.

There is no support in the record for the argument that a three-year bachelor's degree from India is equivalent to a U.S. bachelor's degree because both degrees allegedly require an equivalent amount of classroom time. The evaluations fail to provide any peer-reviewed material (or other reliable evidence) confirming that assigning credits based on hours spent in the classroom is applicable to evaluating three-year bachelor of science degrees from India. For example, if the ratio of hours spent studying outside the classroom is different in the Indian and U.S. systems, comparing hours spent in the classroom would be misleading.¹⁵

also references the Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. has six regional conventions on the recognition of qualifications, and one interregional convention. A convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between members. See <http://www.unesco.org> (accessed December 3, 2008).

The Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993 contains the language relating to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

"Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of

¹⁵See e.g., "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," at (accessed July 28, 2010)(stating that the Indian system is exam-based instead of credit-based, thus transfer credits from India are derived from the number of exams passed; and that, in India, six exams equates to 30 credit hours).

higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The recommendation does not address this issue.

As is explained above in the analysis of the publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004) states that no agreements exist that bind India and other governments or universities to recognize all degrees of all the universities either on a mutual basis or on a multilateral basis.

As with the the states that some U.S. institutions offer three-year bachelor's degree programs. As is discussed above, the existence of accelerated programs in the United States is not useful in evaluating the equivalence of the beneficiary's degree from India. The also notes that some U.S. colleges and universities will consider holders of three-year bachelor's degrees from India for entry into their master's degree programs. Again, this information has little to do with whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate.

also cites the World Education News & Reviews article titled "Evaluating the Bologna Degree in the U.S." This article is also addressed above in the discussion of the

Finally, it is unclear how the evaluations could conclude that the beneficiary has the equivalent of a U.S. bachelor's degree in mathematics when his primary field of study was physics.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may 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)).

Given the inconsistencies between the statements in the evaluations and the evidence in the record, we have reviewed the [REDACTED] created by the American [REDACTED]. [REDACTED] 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."¹⁶ 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." *Id.*

[REDACTED] is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of [REDACTED].¹⁷ Authors for [REDACTED] are not merely expressing their personal opinions. Rather, authors for [REDACTED] must work with a publication consultant and a Council Liaison with [REDACTED] on the Evaluation of Foreign Educational Credentials.¹⁸ 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.

[REDACTED] provides that a three-year bachelor of science degree from India represents the attainment of a level of education comparable to three years of university study in the United States. This information contradicts the evaluations submitted.

The job offer portion of the labor certification clearly requires an individual with a bachelor's degree in business administration or marketing. The labor certification does not permit an individual to qualify for the offered position with a combination of degrees and/or experience. The beneficiary possesses a bachelor of science degree from [REDACTED] and completed coursework towards a post graduate diploma in business management (marketing) from [REDACTED]. The beneficiary did not complete the diploma program. The record contains four evaluations of the beneficiary's education. None of the evaluations conclude that the beneficiary possesses a single foreign degree that is equivalent to a U.S. bachelor's degree *in business administration or marketing*. The submitted academic credentials evaluations contradict each other and lack sufficient credibility to establish that the beneficiary has a foreign degree that is equivalent

¹⁶ <http://www.aacrao.org/about> (accessed July 20, 2010).

[REDACTED] Login," <http://aacraoedge.aacrao.org/index.php> (accessed July 20, 2010).

¹⁸ "An Author's Guide to Creating [REDACTED] 5-6 (First ed. 2005), available at [REDACTED] (accessed July 20, 2010).

to a U.S. bachelor's degree. Therefore, without a single foreign degree that is the equivalent to a U.S. bachelor's degree, the beneficiary cannot be classified as a professional.

In response to the AAO's notice of derogatory information, counsel states that "the petitioner conducted the entire recruitment for the position with the understanding that any US applicant who is able to provide the equivalency of a US Bachelor's Degree in the field specified is qualified for the position." Counsel provides no evidence to support this claim. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner's claim that the petitioner intended for the labor certification to state that the offered position requires a combination of lesser education that is equivalent to a U.S. bachelor's degree is not supported by the terms of the labor certification or by any evidence in the record.

The petitioner has also not established that the beneficiary possesses the educational qualifications required to perform the proffered position as set forth on the Form ETA 750. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

The Form ETA 750 does not provide that the minimum academic requirements of a bachelor's degree in business administration or marketing might be met through a combination of lesser education or some other formula other than that explicitly stated on the Form ETA 750. The record contains no evidence that the petitioner advised the DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. Thus, the alien does not qualify as a skilled worker as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process.

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

Beyond the decision of the director, the petitioner has also not established that it possessed the ability to pay the prevailing wage from the priority date. In order for the petition to be approved, the petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

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.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage stated on the labor certification is \$45,230.64 year. On the petition, the petitioner claimed to have been established in 1992,¹⁹ to have a gross annual income of \$3 million and to employ 15 workers. According to the tax returns in the record, the petitioner is structured as an S corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary claimed to have worked for the petitioner since August 2001. The record of proceeding contains no evidence that the petitioner has employed the beneficiary. Accordingly, the petitioner has not established that it paid the beneficiary an amount equal to or greater than the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. 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.

¹⁹The petitioner's tax returns state that the company was established in 2001. This is corroborated by the California Secretary of State Business Search website. See <http://kepler.sos.ca.gov/cbs.aspx> (accessed July 20, 2010). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). 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. *Id.* at 591.

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. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total payroll exceeded the proffered wage is insufficient.

In *K.C.P. Food*, 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 the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in [REDACTED] 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.

[REDACTED] "[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." [REDACTED] at 537 (emphasis added).

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.²⁰

²⁰The petitioner filed its tax returns using Form 1120S, U.S. Income Tax Return for an S Corporation. For an S corporation, ordinary income (loss) from trade or business activities is

Year	Net Income (\$)
2002	63,268.00
2003	3,871.00
2004	103,491.00
2005	115,511.00
2006	Not Provided ²¹

Therefore, for 2003 and 2006, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets are not considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.²²

reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 17e (2004 and 2005) or Line 23 (1997 to 2003). When the two numbers differ, the number reported on Schedule K is used for net income.

²¹The instant petition was filed on March 16, 2007. By that date, the petitioner's 2006 federal tax return would have been due. See 2006 Instructions to Form 1120S. The regulation 8 C.F.R. § 204.5(g)(2) states that the petitioner must demonstrate its ability to pay the proffered wage "at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence," and that the evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." (Emphasis added.). The petitioner's failure to provide this evidence is, by itself, sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

²²According 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

If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's 2003 tax return states that its net current assets were \$12,982.00.²³ For the years 2003 and 2006, the petitioner did not have sufficient net current assets to pay the difference between the wage paid and the proffered wage.

Therefore, except for 2002, 2004 and 2005, the petitioner has not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The record contains copies of the petitioner's bank statements. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income or the cash specified on the petitioner's tax return used in determining the petitioner's net current assets. Fourth, bank statements, without more, are unreliable indicators of ability to pay because they do not identify funds that are already obligated for other purposes.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows

salaries). *Id.* at 118.

²³On Form 1120S, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

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, the petitioner appears to have been established in 2001 and claims to employ 15 employees. The petitioner's tax returns show gross sales of \$1,886,927.00 in 2002, \$2,309,903.00 in 2003, \$2,028,194.00 in 2004, and \$3,058,347.00 in 2005. This, by itself, is not sufficient to demonstrate the petitioner's ability to pay the proffered wage. The petitioner has not established the existence of any unusual circumstances to parallel those in *Sonegawa*. There is no evidence in the record of the historical growth of the petitioner's business or the occurrence of any uncharacteristic business expenditures or losses. There is no evidence of the petitioner's reputation within its industry. There is no evidence of whether the beneficiary will be replacing a former employee or an outsourced service.

Thus, assessing the totality of the circumstances in this case, it is concluded that the evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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

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 *id.*; see also *Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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.