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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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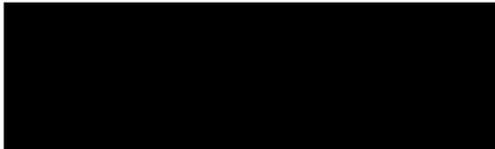
FILE:  Office: TEXAS SERVICE CENTER

Date: **AUG 25 2010**

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 medical practice. It seeks to permanently employ the beneficiary as an accountant. On October 30, 2006, 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).<sup>1</sup>

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is September 12, 2006, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

At issue in this case is whether the beneficiary possesses the education required by the requested visa classification and by the terms of 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.<sup>2</sup>

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.<sup>3</sup>

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<sup>1</sup>Section 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.

<sup>2</sup>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*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> 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).

<sup>3</sup>The 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). The record in the instant case provides no reason to preclude consideration of any of the documents

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

- H.4. Education: Bachelor's degree in Accounting.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months required.
- H.7. Alternate field of study: None permitted.
- H.8. Alternate combination of education and experience: None permitted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None required.

On the ETA Form 9089, the beneficiary represented that the highest level of achieved education related to the requested occupation was a bachelor's degree in accounting from [REDACTED] in India, which was completed in 1996. However, when initially filed, the petition did not contain any evidence of the beneficiary's educational credentials. Accordingly, on January 8, 2007, the director issued a Request for Evidence (RFE), instructing the petitioner to provide a copy of the beneficiary's bachelor's degree diploma and transcripts. On February 23, 2007, the petitioner submitted a response to the RFE containing a copy of the beneficiary's diploma and transcripts for a three-year bachelor of commerce degree from [REDACTED] in India. The petitioner did not submit an evaluation of the beneficiary's foreign educational credentials

The director denied the petition on March 2, 2007. The decision concludes that the beneficiary's three-year bachelor of commerce degree from India does not meet the minimum requirements of the professional classification pursuant to section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), and also does not meet the minimum educational requirements of the offered position as set forth in the labor certification.

On April 2, 2007, the petitioner appealed the director's decision. The appeal contains a credentials evaluation by [REDACTED] dated May 14, 2005. The evaluation references a diploma and transcripts for a *bachelor of laws* degree from [REDACTED] that were not submitted with the petition or on appeal. The evaluation concludes that the beneficiary's bachelor of commerce and bachelor of laws degrees are equivalent to a "Bachelor of Commerce in Accounting and Auditing and Doctor of Laws (JD) from an accredited university in the United States." The appeal brief submitted by the petitioner's prior counsel states that the director erred in concluding that the beneficiary did not have a foreign degree equivalent to a U.S. bachelor's degree because the submitted foreign educational credentials evaluation states that the beneficiary possesses the equivalent of a U.S. bachelor's degree, and also because U.S. Citizenship and Immigration Services (USCIS) had previously granted the beneficiary H-1B status, and had therefore "previously agreed that the beneficiary possesses the foreign equivalent of a bachelor's degree in the United States."

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newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

On April 8, 2009, the AAO issued an RFE. The RFE informed the petitioner that there was no evidence in the record of the beneficiary's bachelor of laws degree, and that degree was also not mentioned on the labor certification. The RFE also informed the petitioner that the AAO had reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),<sup>4</sup> and that, according to EDGE, the beneficiary's three-year bachelor of commerce degree represents attainment of a level of education comparable to three years of university study in the United States.<sup>5</sup> Since EDGE concluded that the beneficiary does not have the foreign equivalent of a U.S. bachelor's degree, the RFE requested evidence establishing that the minimum education required to perform the offered position, as set forth on the labor certification, permitted a combination of lesser education and/or training and/or experience equivalent to a U.S. bachelor's degree. Since the labor certification did not specify that the required bachelor's degree in accounting or foreign equivalent could be met by a combination of lesser degrees, the RFE requested that the petitioner provide evidence establishing its intent concerning the minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process. Accordingly, the AAO requested that the petitioner provide a copy of the recruitment report of its good faith efforts to recruit U.S. workers prior to filing the labor certification as required by the DOL's PERM regulations at 20 C.F.R. § 656 and a copy of all advertisements and notices used to recruit U.S. workers for the position.

On July 13, 2009, the petitioner's current counsel submitted a response to the AAO RFE. Counsel argues that the offered position can be classified as either a professional or skilled worker position, and requests that the beneficiary be classified as a skilled worker. Counsel also argues that the petitioner did not intend the term "foreign equivalent" on the labor certification to exclusively mean a "foreign equivalent degree," and that the documentation prepared during the recruitment process for the labor certification illustrates this intent to accept a broader range of credentials. The RFE response requests that the AAO approve the beneficiary as a skilled worker. Submitted with the RFE response are the following documents:

- Letter of [REDACTED] stating that the requirement of a bachelor's degree in accounting or foreign equivalent was intended to mean that the petitioner would accept persons with a single

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<sup>4</sup>AACRAO, according to its website, [www.aacrao.org](http://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 its registration page, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

<sup>5</sup><http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=128> (accessed July 28, 2010 and incorporated into the record of proceeding).

degree in accounting as well as applicants with "combined education, either U.S. or foreign academic credentials, whose combined education has been judged by a credentialing agency to be equivalent to a Bachelor's Degree in Accounting."

- Diploma and transcripts for a bachelor of laws from [REDACTED] India, conferred on March 18, 2001.
- Foreign academic credentials evaluation by [REDACTED] dated July 2, 2009. The evaluation states that the beneficiary's bachelor of commerce and bachelor of laws is a "six-year program of post-secondary study equivalent to the degrees, Bachelor of Business Administration in Accounting, and *Juris Doctor*, from a regionally accredited university in the United States."
- Prevailing Wage Determination, Job Order, newspaper advertisements, Notice of Filing, resumes and recruitment report. These documents state that the offered position requires a "Bachelor's degree in accounting or foreign equivalent." All of the submitted applicant resumes indicate that the applicant possessed a bachelor's degree in accounting or a single foreign equivalent degree.

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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

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

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

It is left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>6</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14)

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<sup>6</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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).

The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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

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

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

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought.

The first issue is whether the offered position can be classified as a skilled worker and/or professional. 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.<sup>7</sup>

In the instant case, the DOL categorized the offered position under the SOC code 13-2011.01, Accountant. The job offered is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." O\*NET states that 79% of individuals in this occupational classification hold a bachelor's degree or higher. See <http://online.onetcenter.org/link/details/13-2011.01#Education> (accessed July 29, 2010).

O\*NET also states that this occupation falls within Job Zone Four. See <http://online.onetcenter.org/link/summary/13-1041.00#JobZone> (accessed July 29, 2010). According to O\*NET, most Job Zone Four "occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/help/online/zones#zone4> (accessed July 29, 2010).

In addition, the corresponding entry in the Occupational Outlook Handbook (OOH) for this occupation is Accountants and Auditors.<sup>8</sup> The required education for this occupation is summarized as follows:<sup>9</sup>

Most accountant and auditor positions require at least a bachelor's degree in accounting or a related field. Some employers prefer applicants with a master's degree in accounting, or with a master's degree in business administration with a concentration in accounting. Some universities and colleges are now offering programs to prepare students to work in growing specialty professions such as internal auditing. Many professional associations offer continuing professional education courses, conferences, and seminars.

Some graduates of junior colleges or business or correspondence schools, as well as bookkeepers and accounting clerks who meet the education and experience requirements set by their employers, can obtain junior accounting positions and advance to accountant positions by demonstrating their accounting skills on the job.

Most beginning accountants and auditors may work under supervision or closely with an experienced accountant or auditor before gaining more independence and responsibility.

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<sup>7</sup>See <http://www.bls.gov/soc/socguide.htm>.

<sup>8</sup>The OOH, located online at <http://www.bls.gov/OCO>, is a nationally recognized source of career information published by the DOL's Bureau of Labor Statistics.

<sup>9</sup><http://www.bls.gov/oco/ocos001.htm> (accessed July 29, 2010).

Accordingly, O\*NET and the OOH confirm that most accountant positions require at least a bachelor's degree, but some do not.

Therefore, 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.

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 (5<sup>th</sup> 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) of the Act (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.

As is explained above, EDGE states that a three-year bachelor of commerce degree is equivalent to three years of study towards a U.S. bachelor's degree. In response to the AAO RFE, counsel submitted the diploma and transcripts for the beneficiary's bachelor of laws degree from India. EDGE states that a bachelor of laws from India is equivalent to a U.S. law degree. See <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=144> (accessed July 29, 2010). However, a law degree is not related to the field of accounting. For classification as a professional pursuant section 203(b)(3)(A) of the Act, the beneficiary's bachelor's degree must be in a field of study that is related to the profession. See 8 C.F.R. 204.5(l)(3)(ii)(C).

Accordingly, the petitioner relies on a combination of the beneficiary's bachelor of commerce and bachelor of laws degrees for the equivalent of a U.S. bachelor's degree in accounting. The petitioner in this matter relies on the beneficiary's combined education to reach the "equivalent" of a degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification. 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.

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.

Therefore, at issue is whether the beneficiary can be classified as a skilled worker pursuant to Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), which 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. Relevant post-secondary education may be considered as training. 8 C.F.R. § 204.5(l)(2). A skilled worker petition "must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification." 8 C.F.R. § 204.5(l)(3)(ii)(C).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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, Mandany v. Smith*, 696 F.2d 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

As is stated above, the labor certification requires a bachelor's degree in accounting and permits a "foreign educational equivalent." The labor certification does not permit an "alternate combination of education and experience." Therefore the labor certification clearly states that the job offered requires a U.S. bachelor's degree in accounting or foreign equivalent degree, and, does not state that a combination of lesser education would be permissible in the part of the form specifically designed for this purpose. Despite this, counsel argues that the petitioner intended the labor certification to permit a combination of education that is equivalent to a bachelor's degree in accounting.

As is also explained above, in support of this claim, counsel's AAO RFE response contains a letter from the petitioner's owner stating he intended to accept applicants with combined education equivalent to a bachelor's degree in accounting. However such a document, prepared and submitted after the denial of the petition, lacks sufficient credibility to outweigh the plain meaning of the labor certification. Counsel also submits documents generated during the recruitment process for the labor certification. These documents simply state that the offered position requires a "Bachelor's degree in accounting or foreign equivalent" and does not support a claim that a combination of lesser degrees

would be acceptable. The copies of the notices and advertisements submitted in response to the AAO RFE fail to advise any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. It is again noted that all of the applicants' resumes submitted in response to the AAO RFE indicate that the applicant either possessed a U.S. bachelor's degree in accounting or a single foreign equivalent 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." 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.

In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA Form 9089 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 ETA Form 9089 does not specify an equivalency to the requirement of a bachelor's degree in accounting.

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 the 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.

The beneficiary does not have a United States baccalaureate degree in accounting or a foreign equivalent degree, and, thus, does not qualify for professional preference visa classification under section 203(b)(3)(A)(ii) of the Act. Even considering the beneficiary for classification as a skilled worker, the beneficiary does not meet the terms of the labor certification, and the petition is denied on that basis as well. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

Beyond the decision of the director, the petitioner has not established its continuing ability to pay the proffered 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 September 12, 2006 priority date.

The proffered wage stated on the labor certification is \$28.30 per hour (\$58,864.00 per year). On the petition, the petitioner claimed to have been established in 1988 and to employ 30 workers. According to the tax return 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, the beneficiary claimed to have worked for the petitioner since March 28, 2006. The record of proceeding contains a copy of one paycheck stub issued by the petitioner to the beneficiary. There is no evidence that this paycheck was cashed by the beneficiary. The copy of one paycheck stub is not sufficient to establish that the petitioner paid the beneficiary an amount equal to or greater than the proffered wage since the priority date.

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 (1<sup>st</sup> 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. *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); 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 *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).

The priority date of the instant petition is September 12, 2006. The petition was filed on October 30, 2006. Therefore, the 2005 tax return was the most recent tax return available at the time the petition was filed. The petitioner's tax return states that the petitioner had net income of \$148,441.00 in 2005.<sup>10</sup>

Although the petitioner's net income on the tax return exceeds the prevailing wage, the petitioner has filed petitions on behalf of multiple other beneficiaries. According to USCIS records, the petitioner has filed immigrant petitions on behalf of the following additional beneficiaries:

Last Name	Petition Number	Petition Filing Date
[REDACTED]		

<sup>10</sup> For an S corporation, ordinary income (loss) from trade or business activities is reported on Line 21 of Form 1120S, and income/loss reconciliation is reported on Schedule K, Line 17e (2004 and 2005). When the two numbers differ, as is the case here, the number reported on Schedule K is used for net income.

Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offer to each beneficiary is realistic, and therefore, that it has the ability to pay the proffered wage to each beneficiary as of the priority date of each petition and continuing until each beneficiary obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. at 144. The record in the instant case contains no information about the priority dates and proffered wages for the beneficiaries of the other petitions, whether the beneficiaries have withdrawn from the petition process, or whether the petitioner has withdrawn its job offers to the beneficiaries. There is also no information in the record about whether the petitioner has employed the beneficiaries or the wages paid to the beneficiaries, if any. Thus, the petitioner has not established its ability to pay the proffered wage for the beneficiary or the proffered wages to the beneficiaries of the other petitions.

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.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043; *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

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

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.