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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

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 27 2010

IN RE: Petitioner: SOFTEK INFORMATION SERVICES INC.
Beneficiary: UTTAMKUMAR MALHOTRA

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen and reconsider the decision. The director dismissed the motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to be a specialized software development company. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests 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 is September 20, 2002, which is the date the labor certification was accepted for processing by the DOL. *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 educational requirements 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 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

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[1]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.

[2]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 (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).

[3]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).

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 U.S. Citizenship and Immigration Services (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).[4] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
>
> 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 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).

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

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

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

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

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. This analysis begins with the occupational classification of the offered position as determined by the DOL (or applicable State Workforce Agency) during the labor certification process. In the instant case, the DOL assigned the proffered position the occupational classification of 030.162-014, Programmer-Analyst, from the Dictionary of Occupational Titles (DOT). Using the crosswalk at O*NET,[5] the DOT code translates to the occupational classification of 15-1051.00, Computer Systems Analysts.[6]

The occupational classification of the offered position 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." According to O*NET, 68% of individuals in the occupational classification of the offered position hold a bachelor's degree or

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[5]O*NET is the current DOL occupational classification system that replaced the DOT. 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. *See* http://www.bls.gov/soc/socguide.htm

[6]*See* http://online.onetcenter.org/crosswalk (accessed July 16, 2010).

higher.[7] O*NET also states that this occupation falls within Job Zone Four,[8] and that most Job Zone Four occupations require a four-year bachelor's degree, but some do not.[9]

In addition, the corresponding entry in the Occupational Outlook Handbook (OOH) for this occupation is Computer Systems Analysts.[10] The required education for this occupation is summarized as follows:[11]

> When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.
>
> Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation.

Accordingly, O*NET and the OOH confirm that most positions in this occupation 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:

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[7]*See* http://online.onetcenter.org/link/details/15-1051.00#Education (accessed July 29, 2010).

[8]*See* http://online.onetcenter.org/link/summary/15-1051.00#JobZone (accessed July 29, 2010).

[9]*See* http://online.onetcenter.org/help/online/zones#zone4 (accessed July 29, 2010).

[10]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.

[11]http://www.bls.gov/oco/ocos287.htm (accessed July 29, 2010).

> 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. 1289, 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 or certifications earned at an institution other than a college or university.

The petitioner initially asserted that the beneficiary's three-year bachelor of commerce degree from India was equivalent to a U.S. bachelor's degree in computer science. As is explained in detail below, this argument is rejected. The petitioner retained new counsel to respond to the AAO Request for Evidence (RFE), and counsel's response argues that the beneficiary's combined education is the "equivalent" of a U.S. bachelor's degree, but fails to establish that the beneficiary possesses 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).

To be eligible for approval, 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)(l), (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). 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 minimum requirements of the offered position are stated as follows:

EDUCATION
Grade School: 8 years
High School: 4 years
College: 4 years
College Degree Required: "BS"
Major Field of Study: Computer Science, Science or Engineering
TRAINING: None
EXPERIENCE: Two (2) years in the job offered
OTHER SPECIAL REQUIREMENTS: None

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary's prior education is listed as:

- Diploma in Advanced Skills and Concepts from Computer for Advanced Studies, India, from January 1996 to December 1996.
- Diploma in Computer Programming and Concepts from Computer for Advanced Studies, India, from January 1995 to December 1995.
- Diploma in AS/400 from Phoenix (I) Pvt LTD, India, from January 1998 to September 1989.
- Chartered Accountancy certification from the Institute of Chartered Accountants of India, awarded June 1996.
- Three-Year Bachelor of Commerce from Calcutta University, India, from June 1980 to March 1983.

The record of proceeding includes the following documents pertaining to the beneficiary's post-secondary education:

- Diploma in Computer Programming from Computer for Advanced Studies, India, from January 1995 to December 1995.
- Diploma in Programming and Computer Application from Computer for Advanced Studies, India, from January 1989 to June 1989.

- Intermediate Examination results from the Institute of Chartered Accountants of India, issued July 23, 1985.

- Statement of Marks for Part I (1982 examination) of the beneficiary's three-year bachelor of commerce degree from Calcutta University, India.

- Statement of Marks for Part II (1983 examination) of the beneficiary's three-year bachelor of commerce degree from Calcutta University, India.

- Diploma for a three-year bachelor of commerce degree from University of Calcutta, issued 1983.

In support of the beneficiary's educational qualifications, the record also contains the following evaluations of the beneficiary's bachelor of commerce degree:

- Evaluation of , Ph.D., dated October 2001. The evaluation states that the beneficiary's three-year bachelor of commerce degree is equivalent to three years of academic study toward a U.S. bachelor's degree. The evaluation states that the beneficiary has almost 15 years of employment experience in the computer science field. The evaluation concludes that the beneficiary's education combined with his employment experience is equivalent to a bachelor of science degree in management information systems from a regionally accredited U.S. college or university.

- Evaluations of of dated March 22, 2007 and August 4, 2007. The evaluations state that the beneficiary's three-year bachelor of commerce degree from India is equivalent to a bachelor of science degree in computer science from a regionally accredited U.S. college or university.

- Evaluations of , dated March 21, 2007 and August 2007. The evaluations state that the beneficiary's three-year bachelor of commerce degree from India is equivalent to a bachelor of science degree in computer science from a regionally accredited U.S. college or university.

- Evaluation of in the Commonwealth of Dominica, dated August 9, 2007. The evaluation states that the beneficiary's three-year bachelor of commerce degree from India is equivalent to a bachelor of science degree in computer science from a regionally accredited U.S. college or university.

The evaluation makes four 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 evaluation notes that some 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 few U.S. 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.

Second, the evaluation 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.

Third, the evaluation cites an article from World Education News & Reviews (WENR), titled "Evaluating the Bologna Degree in the U.S."[12] WENR is a monthly newsletter published by World Education Services (WES), 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 Indiana University in Bloomington, and a business administration Bologna degree from the Bocconi University in Milan, Italy. 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 evidence for why the beneficiary's bachelor's degree from India is equivalent to a U.S. bachelor's degree.

Fourth, the evaluation notes that the U.S. and India are both UNESCO members, and that UNESCO "clearly recommends that the 3 and 4 year degree should be treated as equivalent to a bachelor's degree by all UNESCO members." However, the evaluation provides no evidentiary support for this claim. In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004), provides:[13]

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[12]www.wes.org/eWENR/04march/Feature.htm (accessed July 24, 2010).

[13]http://unesdoc.unesco.org/images/0013/001388/138853E.pdf (accessed July 24, 2010).

> Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO 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 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 evaluation's reliance on UNESCO for the proposition that a three-year Indian bachelor's degree is equivalent to a four-year U.S. bachelor's degree is misplaced.

The and evaluations use the same phrasing and many of the same supporting materials, and they will therefore be considered together here.

The evaluations note that some 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, similar to the evaluations, the evaluations do not address whether those few U.S. 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.

Second, similar to the evaluations, the evaluations also state 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.

Third, the evaluations cite an article from World Education News & Reviews (WENR), titled "Evaluating the Bologna Degree in the U.S.," which is discussed above.

Fourth, the evaluations also note that the U.S. and India are both UNESCO members, and that UNESCO recommends that the 3- and 4-year bachelor's degrees should be treated as equivalent by all UNESCO members. This issue is also discussed above.

A fundamental argument of the evaluations is that the U.S. institutions of higher education have adopted a variant of the "Carnegie Unit" as a measure of academic credit. According to the evaluations, 15 50-minute classroom hours equals one semester credit hour. Since U.S. bachelor's degree programs require 120 credit hours for graduation, the evaluations claim that a program of study with 1800 classroom hours (or "contact 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 evaluations conclude that it is equivalent to a U.S. bachelor's degree. The evaluations provide 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 evaluations cite to the article "Three Year Undergraduate Degrees: Recommendations for Graduate Admission Consideration," ADSEC News, April 2005. The evaluations claim that the article concludes that, because the U.S. is willing to consider three-year degrees from Israel and the European Union, Indian bachelor's degree holders should be provided the same opportunity to pursue graduate education in the U.S. However, the article does not suggest that Indian three-year degrees are comparable to a U.S. baccalaureate. Instead, the article proposes accepting a *first class honors* three-year degree following a secondary degree from a Central Board of Secondary Education or Council for the Indian School Certificate Examinations program, or a three-year degree *plus a post graduate diploma* from an institution that is accredited or recognized by the National Assessment and Accreditation Council and/or the All India Council for Technical Education. Therefore this non-peer reviewed article from a newsletter directly undermines the argument that three-year degrees from India are, as a whole, equivalent to four-year U.S. bachelors degrees.

The evaluations also cite an Association of International Educators survey and a Council of Graduate Schools survey concerning the acceptance of three-year degrees. The surveys show that a small number of 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 surveys underline that there is not wide acceptance within the academic community of three-year degrees for admission into graduate schools. The Kersey evaluation provides no study or report that conclusively states that all 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 evaluations cite to an article titled "Brief History of the American Academic Credit System: A Recipe for Incoherence in Student Learning," by , September 2002. The article discusses evolution and shortcomings of the U.S. credit hour system, and examines the arbitrariness of the credit hour as a purported unit of learning. It is noted that the article's criticism of the semester credit hour is equally applicable to the classroom contact hour. Accordingly, the article undermines the claims of the evaluations, as they seek to directly equate the semester credit hour with the classroom contact hour when determining equivalency.

In addition to the above, the evaluations of Ms. , Mr. and Mr. conflict with the evaluation of Dr. It is noted that Dr. is the only evaluator authorized to grant credit at an accredited U.S. college or university. It is also noted that Dr. is the only evaluator with expertise in the field of computer science. Further, the evaluations of Ms. Mr. and Mr. lack credibility because they conclude that the beneficiary's three-year bachelor of commerce degree is equivalent to a four-year U.S. bachelor of science in computer science despite the fact that the beneficiary's transcripts do not contain any computer science courses.

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, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[14] AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials."[15]

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[14]In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

[15]http://aacraoedge.accrao.org/register/index/php.

EDGE provides a great deal of information about the educational system in India. According to EDGE, a three-year bachelor of commerce degree from India "represents attainment of a level of education comparable to two to three years of university study in the United States."[16]

On March 8, 2010, the AAO issued a Request for Evidence (RFE) informing the petitioner that the evidence in the record is not sufficient to establish that the beneficiary holds a four-year U.S. bachelor's degree or foreign equivalent. The RFE requested the petitioner to submit such evidence.

In response to the AAO RFE, current counsel argues that the beneficiary's passage of an Intermediate Examination of the Institute of Chartered Accountants in India (ICAI) is, according to EDGE, the equivalent of one year of university study in the United States. *See* http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=129 (accessed August 5, 2010). Therefore, counsel claims that the beneficiary's bachelor of commerce degree together with the passage of the ICAI Intermediate Examination meets the labor certification's "four year requirement."

According to EDGE, the beneficiary's three-year bachelor of commerce degree is equivalent to three years of study towards a U.S. bachelor's degree. In addition, EDGE states that the passage of the ICAI Intermediate Examination represents attainment of a level of education comparable to one year of university study in the United States. However, the petitioner has not established that the beneficiary possesses a bachelor's degree.

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)(l), (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 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coorney,* 661 F.2d 1 (1st Cir. 1981).

As is stated above, the labor certification requires a four-year bachelor of science degree in computer science, science or engineering. The labor certification does not state that a combination of lesser education would be permissible.

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

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[16]http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=128 (accessed August 5, 2010 and incorporated into the record of proceeding).

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.

In the instant case, unlike the labor certification in the aforementioned cases, 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 four-year bachelor of science degree in computer science, science or engineering.

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.

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 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.

In addition to the required education, the petitioner must also establish that the beneficiary possessed the required experience for the offered position prior to the priority date. In the instant case, the labor certification requires two years of experience in the job offered. On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary's employment experience is listed as follows:

- Programmer Analyst with the petitioner since March 1999.
- Programmer Analyst with Apex Information System Pvt Ltd, India, from October 1997 to December 1998.
- Programmer Analyst with Micrographics India, from January 1996 until September 1997.
- Developer with JS Agro Engineering Concern, India, from July 1993 until December 1995.

The record contains the following evidence of the beneficiary's experience:

- Letter by (name illegible) of Annpurna Commodities (P) Ltd, India, dated April 12, 1998, stating that the beneficiary "was associated with" the company since July 1997. The letter states that the beneficiary was "solely responsible for the development & maintenance of the Accounting System. He has assist[ed] in the implementation of the same at various client sites." The letter does not state the beneficiary's title.

- Unsigned letter by , dated June 28, 1997, stating that the beneficiary "was associated with" the company from January 1996 to June 1997. The letter states that the beneficiary worked on a hotel management system project using Visual Basic and SQL database." The letter does not state the beneficiary's title.

- Letter by (name illegible) of dated April 12, 1998, stating that the beneficiary "was associated with" the company since July 1993. The letter states that the beneficiary was "solely responsible for the development & maintenance of the Accounting System. He has assist[ed] in the implementation of the same at various client sites." The letter does not state the beneficiary's title.

- Letter of Project Leader of , dated June 18, 1993. The letter states that the beneficiary "was associated with" the company from "July 1992 to June 1992" on a lottery system project using "Foxpro and clipper language." The letter does not state the beneficiary's title.

- Letter of (name illegible) dated April 12, 1998. The letter states that the beneficiary was "associated with our company since 1987." The letter states that the beneficiary "played a major role in the development, implementation and maintenance of the accounting system."

  Letter of (name illegible) , November 14, 1998. The letter states that the beneficiary was "associated with our company from July, 1986." The letter states that the beneficiary performed audit assignments at client sites.

Any experience requirements for skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien. 8 C.F.R. § 204.5(l)(3)(ii)(B). Evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien. 8 C.F.R. § 204.5(g). If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered. *Id.*

There are several issues with the letters submitted by the petitioner to establish the beneficiary's prior employment experience. None of the letters states whether the companies employed the beneficiary. The letters state that the beneficiary was "associated with" each company. None of the letters state the title of the beneficiary's position. None of the letters provides a specific description of the duties performed by the beneficiary. Only one of the companies who submitted an experience letter, . Concern, is listed as an employer on the beneficiary's labor certification. However, the dates of employment on the letter do not match the dates of employment on the labor certification. In addition, the dates of employment on the letters overlap with each other and do not correlate with the labor certification.

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.

The submitted employment experience letters conflict with each other and the labor certification, and they do not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(B) and 8 C.F.R. § 204.5(g). Therefore, it is concluded that the petitioner has failed to establish that the beneficiary possesses two years of experience in the offered position by the priority date as required by the terms of the labor certification.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage. 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 $60,000.00 per year. On the petition, the petitioner claimed to have been established in 1998, to have a gross annual income of $1.2 million, and to employ 10 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 March 1999.

The record contains the beneficiary's Forms W-2, Wage and Tax Statement, for 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009. These documents state the wages paid to the beneficiary by the petitioner, as shown in the table below.

Year	Wages Paid ($)	Shortfall ($)
2002	45,416.67	14,583.33
2003	45,000.00	15,000.00
2004	46,666.68	13,333.32
2005	58,333.34	1,666.66
2006	60,000.00	N/A
2007	60,000.00	N/A
2008	60,000.00	N/A
2009	68,379.88	N/A

Therefore, for the years 2002 through 2005, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage. The petitioner must establish that it can pay the difference between wages paid to the beneficiary and 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. *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 *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 petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.[17]

Year	Net Income ($)
2002	6,732.00
2003	15,671.00
2004	17,462.00
2005	7,092.00

Therefore, for 2002, the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the

[17]The petitioner filed its tax returns using Form 1120, U.S. Corporation Income Tax Return in 2002, and Form 1120S, U.S. Income Tax Return for an S Corporation in 2003, 2004 and 2005. USCIS considers net income to be the figure shown on Line 28 of Form 1120, and, 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) or Line 23 (1997 to 2003). When the two numbers differ, the number reported on Schedule K is used for net income.

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

The petitioner's 2002 tax return states that it had $22,319.00 in net current assets. Although this appears to be sufficient net current assets to pay the difference between the wage paid and the proffered wage, due to the fat that the petitioner has simultaneously sponsored multiple beneficiaries, the record is not persuasive in establishing that the petitioner had the ability to pay all the proffered wages of all the beneficiaries.

In response to the AAO RFE, counsel claims that the petitioner paid the beneficiary's health insurance premiums, and that this amount should be added to the salary paid to the beneficiary. In support of this claim, the record contains a letter from the petitioner's HR Manager stating the monthly premium paid by the petitioner each year. For 2002, the petitioner claimed to have paid $743.97 per month, or $8,927.64 for the year. Counsel's argument that this amount should be added to the wage paid to the beneficiary is rejected. First, a letter from the petitioner's HR manager, by itself, is not sufficient to establish the additional employment-related expenses paid by the petitioner. Second, the AAO does not count the value of an employee's fringe benefits towards the actual wage paid.

Therefore, 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 when considering the additional beneficiaries.

In addition to the preceding analysis, USCIS may consider the overall magnitude of the petitioner's

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

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

In the instant case, the petitioner claims to have been in business since 1998 and to employ 10 employees. The petitioner's tax returns show gross sales ranging from $1.4 million to $2.7 million. 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.

Further, it is noted that the petitioner has filed petitions on behalf of other beneficiaries.[19] Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must establish that its job offers to each beneficiary are 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. For example, according to the materials submitted in response to the AAO's RFE, at least one of these petitions (LIN 06 177 52747) involved a 2002 priority date, a $60,000 proffered wage, and $50,426.67 in 2002 wages paid to the beneficiary, leaving a shortfall of $9,573.33 which the petitioner must establish it could have paid in addition to the difference between the instant beneficiary's proffered wage and wages actually paid

[19]LIN 07 20151266, LIN 06 17752747, LIN 07 061 53822, and LIN 06 232 53164.

($14,583.33). Although the petitioner's 2002 Schedule L shows net current assets of $22,319, this amount would be insufficient to have paid the combined differences ($24,156.66) between the combined proffered wages for both beneficiaries ($120,000.00) and the wages actually paid to both beneficiaries ($95,843.34). This gap only became compounded in later years as more beneficiaries were sponsored. 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 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).

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.