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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: TEXAS SERVICE CENTER Date: DEC 0 1 2010

IN RE: Petitioner: [redacted]
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:

[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 $630. 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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer consulting business. It seeks to employ the beneficiary[1] permanently in the United States as a programmer/analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).[2] Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. The director also concluded that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the beneficiary's educational credentials satisfied the terms of the labor certification and also maintains that the petitioner established its continuing ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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.

For the reasons discussed below, the AAO finds that the petitioner failed to establish that the beneficiary possessed the required Bachelor of Science in Computer Science. It is also determined that the petitioner failed to establish its continuing ability to pay the proffered wage of $45,000 per year.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8

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[1] The beneficiary is sponsored as a substitution for the original beneficiary identified in the labor certification. The regulation at 20 C.F.R. § 656.11 states the following:

> Substitution or change to the identity of an alien beneficiary on any application for permanent labor certification, whether filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, and on any resulting certification, is prohibited for any request to substitute submitted after July 16, 2007.

Because the preference petition was filed on May 7, 2007, the substitution is permitted.

[2] After March 28, 2005, the correct form to apply for a labor certification is the Form ETA 9089, Application for Permanent Employment Certification. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

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

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date which is the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. The petitioner must also demonstrate that it has had the continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on October 15, 2001, which establishes the priority date.[3] The Immigrant Petition for Alien Worker (Form I-140) was filed on May 7, 2007.

The job duties are set forth on Part 13 of the ETA 750 and are described as follows:

> Perform full life cycle development or enhancements, testing, up-grading, debugging, e-commerce or internet web development through ASP for diverse clients to their satisfaction.

Item(s) 14 and 15 of the ETA 750 set forth the following requirements:

Item 14

	College	**College Degree Required** (specify)
Education (Enter number of years)	5	Bachelor of Science
		Major Field of Study Computer Science

[3] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

Training

Experience

Item 15 **Other Special Requirements**
None

As set forth above, the petitioner requires that the beneficiary have five years of college and a Bachelor of Science in Computer Science.

In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (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).

DOL assigned the occupational code of 15-1051, analogous to computer systems analyst, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at 15-1051.00 at *http://online.onetcenter.org/link/summary/15-1051.00*[4] and the extensive description of the position and requirements for the job, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

See id.

[4] (Accessed September 7, 2010).

Further, DOL's Occupation Outlook Handbook, available online at http://www.bls.gov/oco/ocos287.htm,[5] provides:

> **Education and Training.** 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 . . . .

Based on the position's job title, job duties, the educational requirements as set forth on the Form ETA 750, in this case would be classified as a professional position.

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

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

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

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

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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[5](Accessed September 7, 2010).

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

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

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would

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

> adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

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

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

Therefore, it is 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. 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).[7]

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[7] A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

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

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

> We have held in *Francis Kellogg,* et als., 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006) the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* at 11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.,* the petitioner's educational requirements appear on the ETA 750 as simply a Bachelor of Science degree with Computer Science as the major field of study. There are no equivalencies expressed as "B.S. or equivalent" as in *Snapnames.* There are no alternatives or equivalencies to the required major field of study of Computer Science. 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.*

Moreover, in *Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008), the court upheld an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the ETA 750 described the educational requirement as "Bachelor's or equivalent" and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien's other credentials with his three-year diploma to meet the requirements of the ETA 750. *Id.* at 13-14. Again in this case, the beneficiary must have five years

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> chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).
>
> In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

of college and possess a Bachelor of Science degree in Computer Science. The petitioner failed to specify any defined equivalency on the Form ETA 750 in either the degree or the field of study. Additionally, the petitioner did not state that it would accept any related field of study or field other than Computer Science.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning."[9]

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[9] Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

The petitioner, has submitted copies of the beneficiary's educational credentials and accompanying grade transcripts in support of the ETA 750 as follows:

1. A diploma from The Birla Institute of Technology & Science, (India) that indicates on September 21, 1998, the beneficiary received a Bachelor of Engineering (Honours) in The Chemical Branch (with Practice School). His marks transcript similarly reflects a "B.E. (Hons.)(Chemical) (With Practice School).
2. A diploma from West Virginia University, College of Engineering and Mineral Resources (Morgantown, West Virginia) that indicates on May 14, 2000, the beneficiary received a Master of Science in Engineering.[10] His grade transcript also reflects the "Degree Awarded" as an M.S. in Engineering 14-May-2000, with "Major" stated to be Engineering.

In support of the contention that the beneficiary has the required Bachelor of Science degree in Computer Science, the petitioner has submitted an academic equivalency evaluation from The Trustforte Corporation, dated January 9, 2008. This evaluation indicates that as to the beneficiary's studies at The Birla Institute of Technology & Science, "he attained the equivalent of a Bachelor of Science Degree in Chemical Engineering, with coursework in Computer Science, from an accredited institution of higher education in the United States." The evaluation also states that the beneficiary was awarded a Master of Science Degree in Electrical Engineering by West Virginia University. The evaluation concludes that because the beneficiary completed coursework in computer science at both institutions, he also has the U.S. equivalent of a "Bachelor of Science Degree in Computer Science, a Bachelor of Science Degree in Chemical Engineering, and a Master of Science Degree in Electrical Engineering."

Another evaluation, dated April 16, 2008, was submitted by the petitioner from [redacted] determines that because of the preponderance of computer science courses completed by the beneficiary in his M.S. degree in engineering, he has also earned the equivalent of a Master of Science degree in Computer Science, and thus in doing so, has also attained the equivalent of a Bachelor of Science degree in Computer Science. He breaks the beneficiary's courses taken into Computer Science, Computer Engineering and Electrical Engineering.

The petitioner also submitted a letter, dated March 12, 2008, from [redacted] the [redacted] He states that the beneficiary received his MSE [redacted] Department of Computer Science and Electrical Engineering at [redacted] also stated the beneficiary "took required and elective courses for emphasis in Computer

[10]In its request for evidence, the AAO incorrectly referred to the beneficiary's degree as a Master of Science in Electrical Engineering. Although his grade transcript refers to the beneficiary's current program major as electrical engineering, the actual degree awarded was an M.S. in Engineering.

Engineering." He added that "[A]ll engineering degrees are awarded by the College of Engineering and Mineral Resources and conferred by West Virginia University."

On appeal and in response to the AAO's request for evidence, counsel asserts that the petitioner is not attempting to show that the beneficiary has the *equivalent* of a Bachelor of Science in Computer Science, but that he actually possesses a computer science degree as required.[11]

We do not agree. The Trustforte evaluation states that the beneficiary's degree from Birla Institute is the *equivalent* of a Bachelor of Science Degree in Chemical Engineering, with coursework in Computer Science. It does not state that it is a B.S. in Computer Science. Further, it combines the computer science coursework taken by the beneficiary at both institutions and determines that he has the U.S. *equivalent* of a "Bachelor of Science Degree in Computer Science, a Bachelor of Science Degree in Chemical Engineering, and a Master of Science Degree in Electrical Engineering." The evaluation from also explicitly uses equivalency language to determine what credential the beneficiary received from West Virginia University. While we may consider an evaluation that attempts to evaluate *foreign* education submitted as a foreign equivalent degree, there is no provision in employment-based immigrant regulations that compels consideration of evaluations of U.S. baccalaureate or graduate studies that attempt to convert one or more U.S. degrees into the *equivalent* of another U.S. degree, where there is no indication that the alien has actually received the required degree in the required major field of study and where the ETA 750 fails to state that the petitioner will accept an equivalent degree.

Finally, although statement that the beneficiary took required and elective courses for emphasis in computer engineering is acknowledged, it remains that the specific degree awarded to him from the College of Engineering and Mineral Resources was a degree with a major field of study in engineering, as stated on both his diploma and his transcript and not a degree in computer science. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id. 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)).

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[11] Elsewhere, counsel asserts that Associate 'statement that the beneficiary has a degree in Computer Engineering would also meet the terms of Computer Science. She states that "Computer Science is inclusive" and Computer Engineering should satisfy the terms of the certification. We do not agree. USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS must read the terms as stated 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 at 406. The petitioner did not state on the labor certification that it would accept any related fields of study, only that it would accept five years of college and a Bachelor's degree in Computer Science.

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 degree that is a Bachelor of Science in Computer Science. No combinations of other degrees conferred in alternative major fields of study are defined on the ETA 750. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," in the field of study of Computer Science as specified on the ETA 750 as of the priority date, the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required by the terms of the ETA 750.

Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act, which it does not qualify, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B). Additionally, in such a case, USCIS will also examine whether the petitioner's intent to accept some other form of an academic equivalency was stated on Form ETA 750, communicated to DOL and to U.S. workers in the labor market test.[12]

The petitioner was also requested to provide evidence of its recruitment efforts in order to demonstrate whether it communicated to otherwise available qualified U.S. workers that some other kind of combination of certificates, diplomas or degrees in an alternative field of study were acceptable to qualify for the offered position.

Although not required for this decision, the beneficiary would not be eligible for a skilled worker classification. As mentioned above, the record supports a finding that the certified position was appropriately classified as a professional by the petitioner's intent expressed in the record, the job title, job duties, and the educational requirements as set forth on the Form ETA 750. It is noted that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, at 833, USCIS is obliged to "examine the certified job offer *exactly* as it is completed by the prospective employer." (Emphasis added) USCIS' interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). In this case, that requirement was simply a Bachelor of Science in Computer Science. As stated above, this office finds that neither of the educational institutions discussed above awarded a Bachelor of Science (or Master of Science) in Computer Science to the beneficiary.

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[12] For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides that:

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

Additionally, it is not possible to discern the petitioner's intent to accept an equivalency in other degrees and/or majors because all of the documentation showing petitioner's recruitment efforts, which were submitted by former counsel with the initial petition, appear to relate to different jobs other than the one described on the ETA 750. Counsel maintains on appeal that no further evidence of the petitioner's recruitment efforts would be provided because it is irrelevant and unobtainable, and, the petitioner asserts, that the beneficiary has the required degree anyway. Nonetheless, it is noted that copies of three newspaper ads and a copy of an advertisement that was posted at the University of Arkansas state that the petitioner was seeking workers with:

> Bachelors degree in Computer Science/Computer Engineering etc., or equivalent work experience with appropriate certificates, ex: MSSE MCSD, CSE, etc. Used as temporary consultants with average assignment length usually about 6 months. You will be placed into different businesses to perform any one of Full Life Cycle Development or Enhancements, Testing, Upgrading, Debugging, e-Commerce, or Internet Web Development through ASP.

The record also contains a copy of an additional advertisement that appears to be a copy of a job order. This also contains language referring to placement in different businesses, which is not stated in the ETA 750. The additional ad omits language of equivalent work experience. Another copy of an internal job posting refers to a different and higher proposed salary than in the current ETA 750, a different job title, requires a B.A. or B.S. in computer science or math, and job duties that include documentable ability in COBOL II, and two years of experience. None of these terms are the same as in the ETA 750. Based on the information provided on appeal by that the beneficiary was to work at the petitioner's office site, as well as the ETA 750's omission of "equivalent work experience with appropriate certificates," and temporary placements of 6 month assignments in different businesses,[13] we do not find the newspaper ads or the University of Arkansas advertisement to be reliable examples of actual recruitment efforts pertinent to the job described on the ETA 750 in the record. Nothing on Form ETA 750 references acceptance of appropriate certificates in lieu of a bachelor's degree. The differences in the job order advertisement and the internal posting also do not appear to accurately represent the certified job described on the ETA 750 herein.

Therefore, the beneficiary's educational credentials do not meet the terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional or as a skilled worker under 203(b)(3)(i) of the Act.[14]

With regard to the petitioner's ability to pay the proffered wage of $45,000 per year, it is noted that at the time of filing the I-140, Part 5 indicates that the petitioner was established in 1998, currently employed twenty-four workers, claimed a gross annual income of approximately $1,100,000 and an annual income of approximately $100,000.

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[13]The job offer must be for full-time permanent employment.

[14] As noted above, a skilled worker category requires that a petitioner must show that a beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification."

Here, as stated earlier, the Form ETA 750 was accepted on October 15, 2001. The proffered wage as stated on the Form ETA 750 is $45,000 per year. On the Form ETA 750B, signed by the beneficiary on April 13, 2007, the beneficiary does not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

As evidence of its ability to pay the proffered wage of $45,000 per year, the petitioner provided copies of its federal Form 1120S, U.S. Income Tax Return for an S Corporation for 2001, 2002, 2003, 2004, 2005 and 2006. In response to the AAO's request for evidence, issued on June 29, 2010, the petitioner provided copies of its 2007 and 2008 tax returns. The petitioner's tax returns identify the company's business as one engaged in providing "temporary employee[s]." It is noted that the position offered by the petitioner must be for permanent and full-time employment. *See* 8 C.F.R. § 656.3.[15] The record does not indicate that the petitioner has actually employed and paid wages to the beneficiary as would be shown by copies of Wage and Tax Statements (W-2s).

It is additionally noted that where an S Corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. Where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001, 2002, 2003), line 17e (2004, 2005), and line 18 (2006-2008) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf

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[15] The petitioner states that "there is no contract between the beneficiary and our company, as his employment is contingent upon the I-140 approval. The original ETA beneficiary was to work at an address which was the stated of Arkansas Division of Child Services. However, [the beneficiary] was to work at our office site." Form ETA 750 and Form I-140 lists the employer's address as: It is unclear if this would change the wage obligation. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and for the area of intended employment stated on the Form ETA 750. 20 C.F.R. § 656.30(C)(2). The petitioner may not employ the beneficiary outside the terms of the Form ETA 750. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (change of area of intended employment).

(indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income is reflected on line 23 of Schedule K in 2001, 2002 and 2003, line 17e in 2004 and 2005, and on line 18 in 2006, 2007 and 2008.

The AAO also specifically requested a copy of the petitioner's 2009 financial information, consisting of a copy of a federal tax return, *audited* financial statement or annual report. The petitioner has failed to provide any of those documents for 2009, asserting that the federal tax return for 2009 has not been filed. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). In this respect, as the regulation at 204.5(g)(2) requires that a petitioner establish its continuing ability to pay the proffered wage beginning at the priority date and maintaining this ability until the beneficiary obtains lawful permanent residence, an omission of an entire year of financial information through the required evidence cannot support the *continuing* ability to pay the proffered wage. If the federal tax return has not been filed, the regulation permits a petitioner to submit an audited financial statement or annual report. As this has not been received, the petitioner has not established its ability to pay the proffered wage.

The returns that were submitted reflect that the petitioner's fiscal year is a standard calendar year. The returns additionally contain the following information:

Year	2001	2002	2003	2004	2005
Net Income	$89,399	$48,932	$ 101,521	$ 21,390	-$ 54,608
Current Assets	$97,046	$89,068	$ 104,358	$ 79,641	$ 77,270
Current Liabilities	$33,367	$40,795	$ 5,978	$ 52,160	$ 65,423
Net Current Assets	$63,679	$48,273	$ 98,380	$ 27,481	$ 11,847

	2006	2007	2008
Net Income	$ 12,513	$104,558	$104,558
Current Assets	$ 178,721	$ 187,280	$256,637
Current Liabilities	$ 70,821	$ 70,821	$ 67,946
Net Current Assets	$ 36,088	$ 116,459	$188,691

As indicated in the table above, besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. A petitioner's net current assets represent a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. 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. Barron's Dictionary of Accounting Terms 117 (3rd ed. 2000). 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. A corporate petitioner's year-end current

assets and current liabilities are shown on Schedule L of its federal tax return. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets. A petitioner's total assets and total liabilities as set forth on Schedule L of a corporate tax return are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and would not, therefore, become funds available to pay the proffered wage. The director denied the petition on February 27, 2008, determining that the evidence did not sufficiently establish the beneficiary's requisite educational credentials or the petitioner's ability to pay the proffered wage.

On appeal, the petitioner submits a letter, dated April 23, 2008, signed by as the petitioner's executive vice-president and chief financial officer. He states that certain discretionary expenditures were made by the petitioner including, for example, overseas investment, travel, and employee bonuses that could have been re-directed toward the proffered wage. Copies of unaudited income statements, along with the corresponding copies of tax schedules are submitted to illustrate this assertion. also affirms a credit line available to be used for the proffered wage, and further states that the tax returns' depreciation expenses taken could have been used as available cash to pay the proffered wage. He additionally points out resignations of five employees and suggests that as they occupied "areas of employment virtually identical" to the beneficiary's proposed position, their salaries would be available to pay the proffered wage.

A letter, dated February 27, 2008, from the petitioner's accountant, , is also submitted to the record. confirms the petitioner's ability to pay the proffered wage and joins in maintaining certain discretionary expenses were taken in the past and reflected as ordinary business expenses or "other deductions" on the petitioner's federal tax returns' schedules in 2004, 2005, and 2006.

It is noted that in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998).

With respect to the unaudited income statements accompanying certain portions of the petitioner's attached schedules of the tax returns, they will be considered only as cumulative documentation as to where such expenses were taken on the respective tax schedules. It is noted that the regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the unsupported representations of management and are not reliable evidence and are insufficient to demonstrate the ability to pay 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 during that 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); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation expenses as claimed by [redacted] in the instant case, 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).

Similarly, the petitioner has asserted in the instant matter that various expenses claimed, to include employee bonuses, consulting fees, and travel expenses, on the 2004, 2005 and 2006 tax returns described as discretionary should somehow be added back to net income or net current assets as an additional resource because they should be somehow classified outside of ordinary operations and reflect investment for future profitability. The AAO is not persuaded that the tax returns for these years should be reconfigured by adding back these real expenses already paid out any more than depreciation should be added back.

Further, and as noted on the AAO's request for evidence, an additional factor which affects the whether the job offer is realistic is that USCIS electronic records reflect that the petitioner has filed at least 143 petitions since 2000, including 23 I-140 petitions and 120 I-129 petitions. These petitions are reflected as being filed under ' and ' Where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must demonstrate that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977)(petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089; *see also* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations and the labor condition application certified with each H-1B petition. *See* 8 C.F.R. § 655.715.

The AAO had requested for each of the petitioner's sponsored workers: 1) receipt number; 2) proffered or prevailing wage; 3) date of hire and date of termination if applicable; 4) job title and nature of job duties; and 5) proof of payment during all times of employment. An additional letter, dated August 6, 2010, from was provided in the petitioner's response to this issue raised in the request for evidence. He asserts that the petitioner's response to this question has been that "we respectfully request that consideration be made on a case-by-case basis as the current economy may affect our decision to proceed with certain cases." asserts that this response has been accepted in three out of five cases and the petitions were approved. He adds that he feels that the AAO's request has been excessively demanding in this respect.

In this case, the petitioner has asserted the resignations of five employees at various times from April 2004 to March 2008, would have permitted their salaries to have been applied to the payment of the proffered wage. This assertion is not persuasive in view of the lack of information provided about the I-140 petitions and other 120 employees who have been sponsored and the lack of documentation as to their: 1) wages and proof of payment of proffered or prevailing wage; 2) job title and nature of job duties; and 3) dates of employment. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure*

Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972)). It is noted that even without considering other workers, neither the petitioner's net income of $21,390 in 2004; -$54,608 in 2005; or $12,513 in 2006 was sufficient to cover the proffered wage of $45,000. Further, the net current assets of $27,481 in 2004; $11,847 in 2005; and $36,088 in 2006 were also insufficient to cover the proffered wage for the instant beneficiary alone. The petitioner has not established its continuing ability to pay the proffered wage in any of the relevant years for either the instant beneficiary or the multiple beneficiaries that it has sponsored.

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

In the context of the multiple petitions that the petitioner has filed, it has failed to submit sufficient information relevant to all of its wage obligations, so the AAO is hindered in determining whether it has sufficient net income or net assets sufficient to satisfy all of its obligations during the pertinent period. Assessing the totality of the circumstances, it may not be concluded that the petitioner has established its continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.