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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 07 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 Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The director's decision will be withdrawn in part and affirmed in part.

The petitioner, states that it is a research and publishing firm. It seeks to employ the beneficiary permanently in the United States as a publication manager. An ETA 750, Application for Alien Employment Certification[1] approved by the Department of Labor (DOL), accompanied the petition. 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 additionally concluded that the petitioner had not established its continuing financial ability to pay the proffered wage because the two entities submitting financial documentation could not be collectively regarded as the beneficiary's actual employer.

On appeal, the petitioner contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petitioner established its continuing financial ability to pay the proffered wage because the petitioner represented two related entities.

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).[2]

For the reasons discussed below, the AAO finds that the beneficiary's credentials satisfied the minimum level of education stated on the labor certification. It is noted that various decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered. The AAO finds, however, that the petitioner has not established that it is the actual intended employer of the beneficiary or has demonstrated its ability to pay the proffered wage to the beneficiary.

The regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation.

Only a U.S. employer that desires and intends to employ an alien may file a petition to classify the alien under section 203(b)(3)(A)(i) or (ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i)or (ii). *See* 8 C.F.R. § 204.5(c).

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

[2]The procedural history of this case is documented in the record and is incorporated herein. Further references to the procedural history will only be made as necessary.

Section 203(b)(3)(A)(i) of the Act, 8 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. 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.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.[3]

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

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the Form ETA 750 was accepted for processing by any office within DOL's employment system. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d); Here, the ETA 750 was accepted for processing on November 17, 2003, which establishes the priority date. Although the director used an offered wage of $1,101 as stated on Part 6 of the Immigrant Petition for Alien Worker (Form I-140), we would note, however, that the DOL certified salary of $31,450

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[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. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

per year is the proffered wage as stated on the ETA 750. On Part B of the ETA 750, which the beneficiary signed on October 9, 2003, he states that he has worked for the petitioner since June 19, 2001.

On Part 5 of the Form 1-140, it is stated that the petitioner was established in 1995, employs eleven workers, and claims a gross annual income of $3,456,985 (Unaudited) and an annual net income of $183,019 (Unaudited).

The Beneficiary's Educational Credentials

The certified job's requirements for education and experience are found on item 14 and 15 of Part A of the Form ETA 750. In this case, the only requirement for the position of publication manager is a "BS" with the major field of study designated as "Communication." The position's job duties are described in Part 13 of the Form ETA 750 as:

> Soliciting Manuscripts in English and Arabic; negotiating and concluding contracts with authors, printers and publishers; assessing marketing potentials for each title and develop business plans, format, quantity and scheduling: and manage production and distribution.

In determining 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, but must recognize that the DOL sets the contents of the labor certification. *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, 1016; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

DOL assigned the occupational code of 27-3041.00-Editors, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database[4] and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, 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

[4]*See* http://online.onetcenter.org/link/summary/27-3041.00 (accessed November 4, 2010).

some do not."[5] 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.

Further, based on a Bureau of Labor Statistics survey of employees aged 25-44, DOL states that 81% of the respondents in this category hold a Bachelor's degree or higher level of education.[6] On this basis, as well as the title of the certified job, its responsibilities as set forth in Part A of the approved labor certification and its minimum educational requirements of a B.S. in Communication, the job will be considered 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.[7]

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[5] *See* Id.

[6] *See* http://online.onetcenter.org/link/details/27-3041.00 (accessed November 4, 2010).

[7] The position may also be analyzed as a skilled worker. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 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(l)(3)(ii) states in pertinent part:

As noted above, the Form ETA 750 in this matter is certified by DOL. Section 212(a)(5)(A)(i) of the Act provides:

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

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

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

> (B) *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.

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

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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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 adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the*

> *certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

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

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

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

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or 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).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree."

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 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. *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. In professional and advanced degree professional cases, however, 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 intent regarding educational equivalence is clearly stated on the 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 B.S. in Communication 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). 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." 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 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.

In support of the beneficiary's possession of a B.S. in Communication, the petitioner submitted a copy of the beneficiary's diploma from the [redacted] awarded to the beneficiary on November 28, 1998 and stating that he received a degree of Bachelor of Human Sciences (Communication) Second Class (Upper)(Honours). The corresponding grade transcript reflects that he earned 128 credits and received credits from a previous program.

The record also contains a copy of a transcript from an unidentified U.S. school indicating that the beneficiary completed some courses in the fall of 2002 and the spring of 2003. No award of credit is indicated. Additionally, the record contains a copy of an M.B.A. from [redacted] awarded on June 13, 2005, and an M.A. from [redacted] awarded on January 10, 2009. These credentials may not be considered as they were obtained after the priority date of November 17, 2003.

The petitioner also provided a copy of a credential evaluations from [redacted] of the [redacted] dated June 17, 2009. He states that the beneficiary's 1998 Bachelor of Human Sciences (Communication) degree is the U.S. equivalent of a Bachelor of Arts in Communication. Additionally, on appeal, the petitioner submitted a letter, dated October 7, 2009, from the dean of admissions, [redacted] of the [redacted]. [redacted] states that the beneficiary successfully completed a four-year baccalaureate degree in Human Science (Communication) at that institution, with the 35 credits from a previous program as reflected on his transcript representing the completion of two full academic years at the school of Economics and Management Sciences. Although more credit hours were taken, only 35 were permitted to be transferred. [redacted] adds that the Department of Communication does not offer a three-year baccalaureate degree.

With reference to the beneficiary's 1998 Bachelor of Human Sciences (Communication) degree from the [redacted] office has also reviewed the credentials information in the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). 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, and administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE authors must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.[8]

In this matter, EDGE indicates that the baccalaureate degree (first university degree) represents attainment of a level of education comparable to a bachelor's degree in the United States. As this supports the evidence that the beneficiary possessed the equivalent of a four-year U.S. bachelor's degree, the beneficiary's Bachelor of Human Sciences (Communication) represents a single degree which satisfies the requirements of the ETA 750 and the regulation under section 8 C.F.R. § 204.5(l)(3)(ii)(C). The part of the director's decision to deny the petition based on the beneficiary's education is withdrawn.

Whether the I-140 Petitioner is the Actual Employer of the Beneficiary

This issue was raised in the director's decision relating to the petitioner's submission of federal tax returns bearing a different federal identification number (FEIN) than the one claimed on the Form I-140 as belonging to the petitioner. The petitioner styles itself on Part 1 of the Form I-140 as " The federal employer identification number (FEIN) stated on Part 1 of the I-140 is However, as is revealed in the supporting documentation submitted to demonstrate the petitioner's ability to pay the proffered wage, there is no business or legal entity by the name of that is singularly associated with the FEIN as claimed on the Form I-140. Rather, there is a corporation identified as Inc. that individually holds a FEIN of and there is a separate non-profit entity called the that is singularly associated with the FEIN of as revealed by the Form 990(s), Return of Organization Exempt from Income Tax for 2003, 2004, 2005, and 2006.

It is unclear who will be the beneficiary's employer and which entity was authorized to file the instant petition.

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[8] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3 states:

> *Employer* means a person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation. An employer must possess a valid Federal Employer Identification Number (FEIN).

In determining whether there is an "employee-employer relationship," the Supreme Court of the United States has determined that where a federal statute fails to clearly define the term "employee," courts should conclude "that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, ... all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In considering whether or not one is an "employee," U.S. Citizenship and Immigration Services (USCIS) must focus on the common-law touchstone of control. *Clackamas*, 538 U.S. at 450. Factors indicating that a worker is an "employee" of an "employer" are clearly delineated in both the *Darden* and *Clackamas* decisions. 503 U.S. at 323-324; *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the

provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

It is important to note that the factors listed in *Darden* and *Clackamas* are not exhaustive and must be evaluated on a case-by-case basis. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based on all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. *See Clackamas*, 538 U.S. at 448-449; New Compliance Manual at § 2-III(A)(1).

In *Clackamas*, the specific inquiry was whether four physicians, actively engaged in a medical practice as shareholders, could be considered employees to determine whether the petitioner could qualify as an employer under the American with Disabilities Act of 1990 (ADA), which necessitates an employer with fifteen employees. The court cites to *Darden* that "We have often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Clackamas,* 538 U.S. at 444, (*citing Darden*, 503 U.S. at 318, 322). The court found the regulatory definition to be circular in that the ADA defined an "employee" as "individual employed by the "employer." *Id. (citing* 42 U.S.C. § 12111(4)). Similarly, in *Darden,* where the court considered whether an insurance salesman was an independent contractor or an "employee" covered by the Employee Retirement Income Security Act of 1974 (ERISA), the court found the ERISA definition to be circular and adopted a common-law test to determine who would qualify as an "employee" under ERISA. *Id.* (*citing Darden*, 503 U.S. at 323). In looking to *Darden,* the court stated, "as *Darden* reminds us, congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning in common law. Congress has overridden judicial decisions that went beyond the common law." *Id.* at 447 *(citing Darden*, 503 U.S. at 324-325).

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master's control over the servant. The court cites to definition of "servant" in the Restatement (Second) of Agency § 2(2) (1958): "a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control."[9] *Id.* at 448. The Restatement

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[9] Section 220, Definition of a Servant, in full states:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

additionally lists factors for consideration when distinguishing between servants and independent contractors, "the first of which is 'the extent of control' that one may exercise over the details of the work of the other." *Id. (citing* § 220(2)(a)). The court also looked to the EEOC's focus on control[10] in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered that an employer can hire and fire employees, assign tasks to employees and supervise their performance, and decide how the business' profits and losses are distributed. *Id.* at 449-450.

On appeal, counsel argues that both entities have been identified on the Form I-140 and related documents as the petitioner and should be considered as the employer. She maintains that this consideration would also support their collective ability to pay the offered salary. Counsel submits a copy of a letter in order to clarify the relationship. The letter, dated August 18, 2000, is from " relevant to an H-1B petition to USCIS, in which sought the temporary employment of the beneficiary. In this letter, signed by ., it states that . is a Virginia investment and management corporation and that included in its management services, it is the employer and management agent for the . Counsel reiterates this position on appeal. The letter describes the activities of but no further clarification explains why two different entities, one a for-profit corporation and the other, a non-profit organization, with two different individual FEINs should be regarded as one employer. No contracts or agreements between these two entities or between the organization and the beneficiary have been provided that would clearly

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a. The extent of control which, by the agreement, the master may exercise over the details of the work;
b. Whether or not the one employed is engaged in a distinct occupation or business;
c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the director of the employer or by a specialist without supervision;
d. The skill required in the occupation;
e. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. The length of time for which the person is employed;
g. The method of payment, whether by the time or by the job;
h. Whether or not the work is a part of the regular business of the employer;
i. Whether or not the parties believe they are creating the relation of master and servant; and
j. Whether the principal is or is not in business.

[10] Additionally, as set forth in the recent Memorandum from , Associate Director, Service Center Operations, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements, HQ 70/6.2.8, January 8, 2010, USCIS should look to whether the employer has the "right to control" where, when and how the beneficiary performs the job. The memo's guidance considers many of the factors set forth in *Darden, Clackamas,* and the Restatement, including who provides the tools necessary to perform the job duties, control to the extent of who hires, pays and fires, if necessary, the beneficiary, and who controls the manner and means by which the beneficiary's work product is completed.

establish which entity should have been stated as the employer on the Form ETA 750 and on the Form I-140. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is noted that the letter from a was dated August 18, 2000, and was written in support of an H-1B petition sponsoring the beneficiary as a temporary worker. In fact, the petitioner ' has filed seven Immigrant Petitions for Nonimmigrant Workers (Form 1-129), on the beneficiary's behalf using one or the other of the two different FEINs with each petition.[11]

We note that neither the statutory nor the regulatory provisions relevant to employment-based immigrant petitions in this visa classification provide for multiple or co-employers. In this case, the returns indicate that FEIN is , not the FEIN stated on the I-140. In fact, there is nothing that supports the representation on the Form I-140 that an employer with the name of with a FEIN of even exists as an individual entity or should be regarded as the beneficiary's actual employer. The record indicates that the only holder of the FEIN is not stated to be the Form I-140 employer or the employer named on the Form ETA 750, which states the combined , and the holder of FEIN who is also not the stated petitioner on the Form I-140 or the employer on the Form ETA 750.

To further confuse the issue, it is additionally noted that location, according to its Form 990s submitted to the record, as well as its current website available at [2] is The address for as shown on the beneficiary's W-2s submitted to the record is Part 6 of the Form I-140 indicates that the beneficiary will be working at address at a salary considerably larger ( ) than the proffered wage of $31,450 as stated on the Form ETA 750. This also makes it unclear why and were not stated to be the petitioner on the Form I-140. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Based on the foregoing, it has not been established that the designated Form I-140 petitioner has a singularly associated FEIN or will be the beneficiary's actual intended employer.

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[11] Four of the Form I-129s represented that FEIN individually. The others used the FEIN for

[12](Accessed November 4, 2010).

Although the director determined that are separate legal entities[13] and that the financial information of could not be used to demonstrate the petitioner's ability to pay the proffered wage, we would note that as neither entity has clearly been established as the beneficiary's actual employer and petitioner, then none of the financial documentation can be attributed to the ability to pay the proffered wage to the beneficiary, and a positive determination relevant to the petitioner's ability to pay the certified wage cannot be established.[14] Thus, this part of the director's decision is affirmed.

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[13] There is nothing in the governing regulation at 8 C.F.R. § 204.5 related to the ability to pay, that permits [USCIS] to consider the financial resources of individuals or entities that have no legal obligation to pay the wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003). It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

[14] Inc. issued W-2 forms to the beneficiary, indicating compensation paid ranging from $41,017.81 in 2003 to $60,069.27 in 2008. In determining a petitioner's ability to pay a given wage, and before examining a petitioner's net income or net current assets during a given period, USCIS will first review whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner's ability to pay the proffered wage. If any shortfall between the actual wages paid by a petitioner to a beneficiary and the proffered wage can be covered by either a petitioner's net income or net current assets during the given period, the petitioner is deemed to have demonstrated its ability to pay the proffered salary for that period.

If a petitioner does not establish that it has employed and paid the beneficiary an amount at least equal to the proffered wage during the pertinent period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (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.

However, the substantial increase in salary from the wage stated on the Form ETA 750 ($31,450 per year) to the one stated as being offered to the beneficiary at the rate of $1,101 per week or $57,252 per year on the Form I-140 raises the question of whether the Form ETA 750 certified position of Publication Manager, with the DOL occupational title of Editor, 27-3041, and communications as the field of study, continues to represent a realistic job offer in the claimed position and duties.[15] It is further noted that several Form I-129 petitions have been filed for the beneficiary with the same/similar job title but with business or business administration as the designated field of study and wages well above $50,000 have been offered.[16]

Although the petitioner has established that the beneficiary possesses the requisite educational credentials for the certified position, the petitioner failed to demonstrate that it is the actual employer of the beneficiary and therefore, has not established its continuing financial ability to pay the beneficiary's proposed wage offer beginning at the priority date.

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. Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will also examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. A corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Current assets are shown on line(s) 1 through 6 of Schedule L 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

Matter of Sonegawa, 12 I&N Dec. 612 (Reg. Comm. 1967), may sometimes be applicable where other circumstances are present. In *Sonegawa,* the appeal was sustained where the facts supported a petitioner's reasonable expectation of increasing business and increasing profit and based in part, on unusual circumstances, despite evidence of past small profit. As there is no clearly identifiable petitioner or actual employer established in this case, the applicability of *Sonegawa* cannot be determined.

[15] 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). *See Matter of Ho,* 19 I&N Dec. 582, 591-592 (BIA 1988): "It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

[16] *See*

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.