

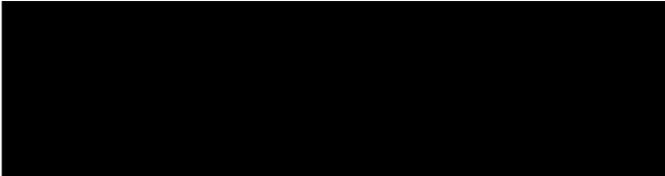


U.S. Citizenship
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Services

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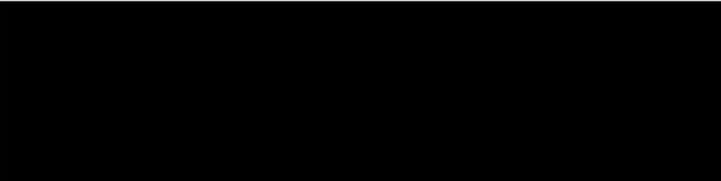
Office: NEBRASKA SERVICE CENTER

Date: FEB 23 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is an architecture firm. It seeks to employ the beneficiary permanently in the United States as an intern architect. 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). The director determined 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.

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.

As set forth in the director's May 25, 2007 denial, the issue on appeal is whether or not the petitioner has the ability to pay the proffered wage as of the 2002 priority date and continuing until the beneficiary obtains lawful permanent residence. The AAO will also examine whether the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position.

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 the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on November 15, 2002. The proffered wage as stated on the Form ETA 750 is \$17.50 per hour (\$36,400 per year). The Form ETA 750 states that the position requires a bachelor's degree in architecture and one year of work experience in the proffered position.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2002, and to currently have two employees. According to the tax returns in the record, the petitioner's fiscal year runs from April 1, of a calendar year to March 31 of the following year. On the Form ETA 750B, signed by the beneficiary on November 12, 2002, the beneficiary claimed to have worked for the petitioner since June 6, 2001.

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

On appeal, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the November 15, 2002 priority date. The AAO will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

With the initial petition, the petitioner submitted unaudited income statements for tax years 2001 to 2005. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner established it paid the beneficiary the following wages, based on his W-2 Wage and Tax Statements: \$34,093 in 2002; \$31,040 in 2003; \$33,630.71 in 2004;² and \$12,558.59 in 2005.³ Thus, the petitioner has to establish its ability to pay the difference between the beneficiary's wages and the proffered wage during the 2002 priority year and through tax years 2003 to 2005.⁴

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, contrary to counsel's assertion, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). 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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits 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

² This figure differs from the wages of \$24,286 stated by the director in his decision. On appeal, the petitioner submitted an additional W-2 Form that indicated the petitioner directly paid the beneficiary \$9,344 in 2004. The petitioner had already submitted a 2004 W-2 Form prepared by [REDACTED] the petitioner's payroll company. Thus, the beneficiary's actual wages for 2004 were actually \$33,630.71.

³ Based on additional W-2 Wage and Tax Statements submitted to the record, the petitioner also established that the beneficiary worked for two other businesses during 2005: [REDACTED] and [REDACTED]. Neither company appears to be related to the petitioner's business.

⁴ The difference between the beneficiary's actual wages and the proffered wage in these years is as follows: \$2,407 in 2002; \$5,360 in 2003; \$2,769.29 in 2004; and \$23,841.41 in 2005.

Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 116. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on March 23, 2007 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2006 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2005 is the most recent return available. The petitioner’s tax returns demonstrate its net income for tax years 2002 to 2005, as shown in the table below.

- In 2002, the Form 1120 stated net income of -\$1,276.
- In 2003, the Form 1120 stated net income of -\$32,393.
- In 2004, the Form 1120 stated net income of \$60,614.
- In 2005, the Form 1120 stated net income of \$34,687.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage. In tax years 2004 and 2005, the petitioner had sufficient net income to pay the difference between the beneficiary's actual wages and the proffered wage.

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

Net current assets are the difference between the petitioner's current assets and current liabilities.⁵ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2002 and 2003, as shown in the table below.

- In 2002, the Form 1120 stated net current assets of -\$70,987.
- In 2003, the Form 1120 stated net current assets of -\$105,504.

Therefore, for the years 2002 and 2003, the petitioner did not have sufficient net current assets to pay the difference between the beneficiary's actual wages and the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the difference between the actual wages and the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets, except for tax years 2004 and 2005.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

⁵According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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

The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

On appeal, [REDACTED], identified as the petitioner's 100 per cent majority shareholder in its 2004 tax return, submits a letter dated June 18, 2007 that describes the petitioner's involvement in numerous school architectural projects in the years 2004 to 2007. She also describes the historic growth of the petitioner in the greater Houston area. [REDACTED] states that presently about 80 percent of the petitioner's work is with educational entities, financed through bonds, although it has also worked with The Boeing Company, the United States Postal Service, the City of Houston, and Houston Airport System, among others.

[REDACTED] also submits the petitioner's profile that refers to its former business identity as [REDACTED] a business incorporated in 1974, with a change of name in early 1997 to [REDACTED]. A description of the petitioner's principal employees and their professional experience and management of the petitioner's projects for periods of thirty and twenty-eight years is also submitted to the record.⁶ With regard to gross receipts, the petitioner's tax returns indicate

⁶ The AAO notes that the petitioner in the I-140 petition stated its date of establishment as 2002, while the petitioner's 2004 tax return indicates an incorporation date of March 6, 1997, and the petitioner's 2005 tax return indicates an incorporation date of January 1, 1985. All tax returns reflect the same Employer Identification Number, namely, [REDACTED]. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies,

gross receipts of over \$1 million dollars every tax year with the exception of tax year 2004, in which the petitioner shows \$984,184 in gross receipts.

With regard to officer compensation, the petitioner's tax returns indicate four officers and shareholders in tax years 2002 and 2003, with one shareholder/officer in 2004. The officer compensation varies widely from tax years 2002 to 2005, with the following compensation noted: officer compensation of \$188,120 and other compensation listed on Schedule A of \$322,802 in tax year 2002; officer compensation of \$147,440 and consulting fees of \$332,936 in 2003; officer compensation of sole officer of \$92,900 and additional cost of labors including consulting fees of \$511,351 in tax year 2004; and officer compensation of \$69,238 with consulting fees of \$209,886 in 2005. The tax returns also indicate additional wages and salaries for all relevant tax years.⁷ Based on the company's profile, and level of salaries and officer compensation, it is concluded that the petitioner is a viable business and has established that it had the continuing ability to pay the proffered wage. USCIS computer records reflect only one other I-140 petition filed by the petitioner in 2000 and subsequently approved prior to the submission of the instant petition. The AAO withdraws the director's decision with regard to the petitioner's ability to pay the proffered wage.

Beyond the decision of the director, the AAO finds that the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position because the petitioner provided no evidence that the beneficiary has the equivalent of a four-year bachelor degree in architecture as required by the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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

absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The petitioner has either been incorporated since 1997 for twelve years; since 1985 for 22 years, or since 2002 for five years at the time the petitioner filed the I-140 petition. The petitioner's profile submitted on appeal does not corroborate which incorporation date is the actual incorporation date for the instant petitioner. The AAO cannot comment further on the petitioner's longevity.

⁷ For example, the petitioner's tax return for 2005 indicates wages and salaries of \$191,703.

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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the labor certification application was accepted on November 12, 2002.

With the instant petition, the petitioner stated that it was submitting the instant petition under the skilled worker classification. The petitioner did not acknowledge that the position of architect is statutorily considered a professional position, and did not explain the difference in the proffered position of architect intern and the professional classification of architect or why a bachelor's degree was required on the certified ETA 750. Thus the record is confused. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on 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."

The job qualifications for the certified position of intern architect are found on Form ETA-750 Part A. Item 13 describes the job duties to be performed as follows: "Supervised under architects to research, plan, design, and administer building projects for clients, applying knowledge of design, construction procedures, and building codes and materials."

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education (number of years)

Grade school	(Blank)
High school	(Blank)
College	X
College Degree Required	Bachelor Degree
Major Field of Study	Architecture

Experience:

Job Offered	1 year
(or)	
Related Occupation	0 (zero)

Block 15:

Other Special Requirements (Blank)

For purposes of these proceedings, the use of “X” in the number of years section is interpreted as four years of college. As set forth above, the proffered position requires a four-year bachelor’s degree in architecture, and one year of experience in the proffered position.

The proffered position is for an intern architect. Part A of the Form ETA 750 indicates that DOL assigned the occupational code of 001-061.010 with accompanying job title, Architect, to the proffered position. The DOL O’Net database identifies this occupational title as 17-1011.00. DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database at <http://online.onetcenter.org/crosswalk/17-1011.00> (accessed January 12, 2010) and its description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Five requiring “extensive preparation” for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means that “[A] bachelor’s degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master’s degree, and some require a Ph.D., M.D., or J.D. (law degree).” Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience.

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

See id.

The position requires four years of college culminating in a Bachelor of Science degree in architecture, which is the minimum educational level required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(1)(3)(ii)(C). The DOL classification states that much more extensive work experience for the profession of architect is required than the one year of experience stipulated on the Form ETA 750. Thus, combined with its statutory definition and DOL’s classification and assignment of educational and experiential requirements for the occupation, the profession of architect is considered a professional occupation.

The AAO notes that the fact that the ETA Form 750 states the intern architect is under “supervision” by an architect is likely a significant factor for why the petitioner filed the petition as a skilled worker; however, this does not resolve the equivalent degree issue.

While the profession of architect is statutorily prescribed as a professional occupation, the position of intern architect is not. The O’Net database also lists the classification of 17-3011.01, architectural drafters, with one of the related job titles for this job classification being intern architect. This

occupation for the architectural drafter/intern architect is Job Zone Three with “medium preparation” needed, and an SVP of 6.0 to 7.0. The O’Net database further states that “most occupations in this zone require training in vocational schools, related on the job experience or an associate’s degree.” See O’Net data base at <http://online.onetcenter.org/crosswalk/17-3011.01> available as of January 12, 2010. As such, the position of architectural drafter and the related job title of intern architect could be considered under the skilled worker classification.

In the instant matter, however, the DOL occupational title and code assigned on the certified ETA Form supports the conclusion that the proffered position is a professional classification. Moreover, even if evaluation as a skilled worker, the petition could not be approved if the beneficiary has less than the minimum requirements on the labor certification, a four-year bachelor’s degree in architecture.

In support of the beneficiary’s educational qualifications, the petitioner submitted a credential evaluation dated January 15, 2001 written by [REDACTED] address not identified. The petitioner also submitted Spanish language documents to the record to which [REDACTED] apparently refers. The AAO notes that these materials do not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator’s certification that he or she is competent to translate from the foreign language into English.

The record does not contain any translations of the Spanish language documents submitted to the record. Further, one Spanish language document apparently from an archive at the Universidad Anahuac is illegible. [REDACTED] refers to these documents inaccurately in at least one instance. She also refers to another document described as a certificate of completion, issued March 2000, for the beneficiary’s academic program in steel structures undertaken at Anahuac University that may be the illegible and untranslated document included in the record of proceedings.

In her evaluation, [REDACTED] refers to the beneficiary’s two years of bachillerato studies that he finished in 1992. The Spanish language document submitted to the record for these studies indicates that the beneficiary covered “los ultimos tres anos” (three last years) of his bachillerato in the area of physics and mathematics apparently through the Universidad Nacional Autonoma de Mexico (UNAM). [REDACTED] also states that the beneficiary’s transcripts apparently from the Technological University of Mexico were issued on September 25, 1992. This statement appears to be based on an inaccurate translation. As utilized by the evaluator, the beneficiary was issued his university transcripts prior to his university level studies. She also states that the architecture degree from the Technological College of Mexico requires “nine ten” semesters of study. [REDACTED] in her evaluation provides a recommendation that the beneficiary is eligible to seek further study as accorded the holder of a U.S. Bachelor of Architecture. However, the lack of translations for the documents submitted and the inconsistencies in this evaluation raise serious questions with regard to the credibility of its conclusions.

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

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

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

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

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

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

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁸ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14)

⁸ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).⁹

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).

⁹ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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

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

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

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 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.

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). Based on the evaluator's confused analysis and reliance on the beneficiary's untranslated Spanish language academic documents, the AAO gives no weight to the Span Tran evaluation. Thus, there is no evidence in the record that the beneficiary's studies are the equivalent of a U.S. four-year bachelor's degree in architecture.

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. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification because the petitioner has not established that the beneficiary possesses a four-year bachelor's degree in architecture. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

While the AAO withdraws the director's decision with regard to the petitioner's ability to pay the proffered wage, the petition cannot be approved based on the lack of credible documentation and translation of the beneficiary's qualifications. 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.