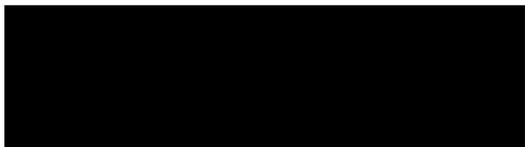


identifying data deleted to  
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**U.S. Department of Homeland Security**  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



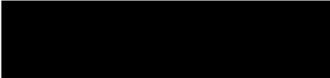
**U.S. Citizenship  
and Immigration  
Services**



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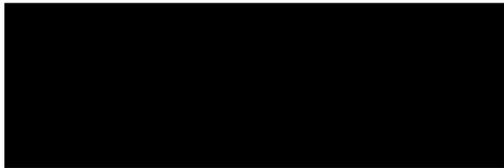
DATE: OFFICE: TEXAS SERVICE CENTER FILE: 

DEC 28 2011

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$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 employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a computer software business. It seeks to employ the beneficiary permanently in the United States as an engineer, or senior software developer,<sup>1</sup> under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, a Form ETA 750,<sup>2</sup> Application for Alien Employment Certification, certified by the Department of Labor (DOL), accompanied the petition.

The Director denied the petition on two grounds: (1) the petitioner failed to establish that the beneficiary had the requisite educational degree as specified on the labor certification, and (2) the petitioner failed to establish its ability to pay the proffered wage in the years 2005-2007.

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), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the application's priority date, which is the date it was accepted for processing by the DOL. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In addition, the petitioner must establish its continuing ability to pay the proffered wage specified on the labor certification as of the priority date. *See* 8 C.F.R. § 204.5(g)(2). In this case, the Form ETA 750 was accepted for processing by the DOL on December 6, 2002.<sup>3</sup> It was certified by the DOL on October 9, 2007. The Immigrant Petition for Alien Worker (Form I-140) was filed on December 27, 2007.

As stated on the Form ETA 750 (Part A, Box 12), the "rate of pay" for the proffered position is \$67,000 per year.

The duties of the proffered position are described on the labor certification in Part A, Block 13:

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<sup>1</sup> The job is identified as an "engineer" on the petition (Form I-140) and as a "senior software developer" on the labor certification (Form ETA 750).

<sup>2</sup> After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089.

<sup>3</sup> 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 is clear.

Responsible for the design and development of application server components of customized solutions using Visual C++, Visual Basic, MDAC, XML, ROMA, IBM MQ Series on a Windows Platform. Responsible for programming in DB2 and MS Access (Client Caching). Responsible for the full software development life cycle processes from requirements gathering, writing requirement specifications (RS), sign off by client, architecting/designing/development to translating the requirements into business functionality and product features, unit/system/integration/performance testing, documentation, build, install/implementation and maintenance (bug fixes, changes, enhancements, etc.).

In Part A, Block 14, of the labor certification the employer set forth the minimum education, training, and experience required for the proffered position:

Education (number of years):

Grade school	--
High school	--
College	4
College Degree Required	Bachelor's or equivalent
Major Field of Study	Engineering or Computer Science

Training: --

Experience:

Job Offered (or) Related Occupation	2 years 2 years – System Analyst and/or Development Engineer and/or Software Engineer and/or Computer Consultant
---	--

Block 15:

Other Special Requirements	Experience in C++, Visual Basic and DB2, Coursework in bachelor's program in Information Systems and Design, Data Processing and File Structure, and Operating Systems
----------------------------	--

As set forth above, the minimum requirements for the proffered position are four years of college culminating in a bachelor's degree "or equivalent" in engineering or computer science, plus two years of experience in the "job offered" or in a related occupation such as systems analysis, development or software engineering, or computer consultant.

The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall

include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Though the job is identified as an "engineer" on the petition (Form I-140), it is identified as a "senior software developer" on the labor certification (Form ETA 750) and the employer's description of the job duties on that document clearly indicate that "software developer" is a more precise job title. The DOL was in accord on the labor certification, assigning the occupational code of 030.062-010 and the title "Software Engineer" to the proffered position.

The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O\*NET is the current occupational classification system used by the DOL. Located online at <http://online.onetcenter.org>, O\*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O\*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.<sup>4</sup>

In the instant case, the DOL categorized the offered position under the DOT (Dictionary of Occupational Titles) occupational code of 030.062-010, which translates in the new SOC occupational code to 15-1132.00 (Software Developers, Applications) or 15-1133.00 (Software Developers, Systems Software). The O\*NET online database states that this occupation falls within Job Zone Four. The DOL assigns a standard vocational preparation (SVP) of 7-8 to Job Zone 4 occupations, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15.1061.00> (accessed December 10, 2011). Additionally, the DOL states the following about 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.* Because of the labor certification requirements of the proffered position and the DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

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

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<sup>4</sup> See <http://www.bls.gov/soc/socguide.htm>. Prior to O\*NET, the DOL used the Dictionary of Occupational Titles (DOT) occupational classification system. The O\*NET website contains a crosswalk that translates DOT codes into SOC codes. See <http://online.onetcenter.org/crosswalk/DOT>.

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

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

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

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

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

As evidence of the beneficiary's educational credentials – all earned in India – the petitioner submitted copies of the following pertinent documentation along with the Form I-140:

- Transcripts and a diploma from the National Institute of Information Technology (NIIT) showing that the beneficiary received an Advanced Diploma in Systems Management from the NIIT on May 19, 1993 after completion of a four-semester program in 1991 and 1992.
- Transcripts and a diploma from Osmania University in Hyderabad showing that the beneficiary was awarded a Bachelor of Science in Computer Science and Engineering on August 3, 1998, based on a three-year course of study that was completed in January 1994.
- Letters from two Indian computer companies in the 1990s – [REDACTED] and [REDACTED] – stating that the beneficiary was employed by them from March to September 1994 and from September 1994 to [REDACTED]

April 1998, respectively.

- An evaluation of the beneficiary's education and experience by [REDACTED] dated August 29, 1998, which claims that the beneficiary's three-year Bachelor of Science degree from Osmania University, his two-year Advanced Diploma from the NIIT, and his progressively responsible experience in hardware engineering, systems analysis, computer program design and development are, in combination, equivalent to a bachelor's degree in computer science from an accredited university in the United States.

The petitioner also submitted page one of its Form 1120, U.S. Corporation Income Tax Return, for each of the years 2003-2006 as evidence of its ability to pay the proffered wage to the beneficiary.

The Director denied the petition on June 12, 2009. The Director determined that the beneficiary's educational credentials did not include a single four-year bachelor's degree, or foreign equivalent degree, and therefore did not meet the specifications of the labor certification. The Director also determined that the evidence of record failed to establish the petitioner's ability to pay the proffered wage in the years 2005-2007.

Counsel filed a timely appeal, asserting that the petitioner's definition of equivalent education includes a combination of education and experience, which the beneficiary fulfilled, and that this combination of education and experience qualifies the beneficiary for the proffered position as a skilled worker under section 203(b)(3)(A)(i) of the Act. As evidence of the petitioner's continuing ability to pay the proffered wage, counsel also submitted copies of the petitioner's complete federal income tax returns for the years 2002-2008; the Forms W-2, Wage and Tax Statements, issued to the beneficiary from 2004 (the year he began working for the petitioner) through 2008; and an affidavit from the petitioner's president.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

In this case the petitioner submitted additional evidence in response to a Request for Evidence (RFE) issued by the AAO on August 4, 2010. In its RFE, the AAO requested a complete copy of the Form ETA 750 as certified by the DOL, with any and all attachments, as well as all supporting materials submitted to the DOL that document the petitioner's recruitment efforts for the proffered position. The petitioner responded on September 20, 2010, with a brief from counsel and the requested documentation.

#### **Is the Beneficiary Eligible for the Classification Sought?**

As previously discussed, the Form ETA 750 in this case is certified by the DOL. The DOL's role is limited to determining (1) whether there are sufficient workers who are able, willing, qualified and available, and (2) whether the employment of the alien will adversely affect the wages and working

conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that neither of the inquiries assigned to the 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. 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 [Immigration and Naturalization Service, predecessor to USCIS]. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>5</sup> *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.

\* \* \*

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.

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

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from the 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 9<sup>th</sup> Cir.1983).

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

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

Therefore, it is the DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of USCIS to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.)

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS (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).

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 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress’ narrow requirement in of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education earned at an institution other than a college or university.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify as a professional under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Thus, 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.

The petitioner in this case relies on the beneficiary’s combined education and work experience to reach the “equivalent” of a U.S. baccalaureate degree, which is not a bachelor’s degree based on a single degree in one of the required fields listed on the certified Form ETA 750. Accordingly, the beneficiary may not be classified as a professional pursuant to section 203(b)(3)(A)(ii) of the Act.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that USCIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

We also note the 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. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at 17, 19. 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 8. 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*, Act. No. 06-2158 (RCL) (D.D.C. March 26, 2008) (upholding an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year 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 the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In the instant case, the employer (petitioner) stated on the labor certification that the requirements for the proffered position of senior software developer were four years of college education with a “bachelor’s degree or equivalent” in the field of engineering or computer science, as well as two years of experience in the “job offered” or a related occupation. Counsel asserts that the employer’s use of the term “bachelor’s degree or equivalent” meant that it was willing to accept something that was “equal in value” to a bachelor’s degree. The employer’s subjective intent, however, may not be dispositive of the meaning of this term. See *Maramjaya* at 14 n. 7. The best evidence of the petitioner’s

intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

Recognizing that the employer's use of the term "or equivalent" following "bachelor's" on the labor certification may be viewed as ambiguous, the AAO sent an RFE to the petitioner requesting the submission of its correspondence with the DOL and all recruitment materials for the proffered position during the labor certification process. Among the documents that were submitted to the AAO are the petitioner's job site posting and three newspaper advertisements for the position, all of which stated that the minimum educational requirement was a "4-year bachelor's degree in Computer Science, Engineering or equivalent." These recruitment materials, like the Form ETA 750, did not further explain what the employer meant by the term "or equivalent." The job advertisements did not state that a combination of lesser degrees and/or work experience would be accepted by the petitioner as equivalent to a bachelor's degree. In fact, all of the recruitment materials specifically stated that in addition to the aforementioned educational requirement "at least 2 years experience as [a] Systems Analyst or Software Engineer" was required. In conformance with the Form ETA 750, therefore, a work experience requirement was a separate element in the recruitment materials for the proffered position. If the employer intended to inject a work element into the educational requirement on the Form ETA 750 – *i.e.* recognizing some combination of the beneficiary's education and experience in India as amounting to the equivalent of a four-year bachelor's degree – that intention should have been explicitly expressed in the labor certification to distinguish the work element within the educational requirement from the separate requirement of two years work experience. In the AAO's view, the most logical interpretation of the language on the labor certification is that the job requirements consist of two distinct components – a four-year bachelor's degree (whether U.S. or a foreign equivalent degree) and two years of work experience.

As previously mentioned, the record includes an evaluation of the beneficiary's education and work experience by [REDACTED] of MEIS. This evaluation does not claim that the beneficiary's three-year bachelor's degree from Osmania University, standing alone, is equivalent to a four-year bachelor's degree in the United States. Rather, it claims that the beneficiary's three-year bachelor's degree and his two-year Advanced Diploma from the NIIT, together with his occupational experience from 1994 to 1998, are in their totality equivalent to a U.S. bachelor's degree. As voluminously discussed in this decision, however, combining the beneficiary's two academic credentials in India – each of which is less than a four-year bachelor's degree – does not produce a foreign equivalent degree to a U.S. bachelor's degree for the purposes of this immigrant visa petition under section 203(b)(3)(A) of the Act. Moreover, the MEIS evaluation incorrectly applied a 3:1 ratio of work experience to education in determining that the beneficiary's work experience in India from 1994 to 1998 was equivalent to one year of university-level credits. The 3:1 equivalence is applied by USCIS in non-immigrant petitions (Form I-129) for H-1B visas, not in Form I-140 immigrant visa petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5).

USCIS uses an evaluation of a person's foreign education by a credentials evaluation service as an advisory opinion only. Where an evaluation is not in accord with previously established equivalencies or is in any way questionable, it may be discounted or given less weight. *See Matter*

*of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). For the reasons discussed above, the MEIS evaluation has no probative value as evidence that the beneficiary has earned a foreign equivalent degree to a U.S. Bachelor's Degree in Engineering or Computer Science.

As another resource to evaluate the beneficiary's educational credentials, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).<sup>6</sup> According to its website, [www.aacrao.org](http://www.aacrao.org), AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions in over 40 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE are not merely expressing their personal opinions. Rather, they 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](http://www.Aacrao.org/publications/guide%20to%20creating%20international%20publications.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.

EDGE's credential advice indicates that a Bachelor of Science degree in India is awarded after two to three years of tertiary study beyond the Higher Secondary Certificate (equivalent to a high school diploma in the United States), and is comparable to two to three years of university study in the United States. This information is consistent with the beneficiary's academic records from Osmania University showing that his Bachelor of Science in Computer Science and Engineering was a three-year degree.

As for the beneficiary's Advanced Diploma in Systems Management from the NIIT, EDGE's credential advice indicates that a "Post Graduate Diploma" (PGD) in India is awarded upon

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<sup>6</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

completion of one year of study beyond the two- or three-year bachelor's degree, and is comparable to one year of university study in the United States. When the PGD follows a three-year bachelor's degree, it is comparable to a bachelor's degree in the United States. However, EDGE also indicates that some PGD programs do not require any university study beforehand. They may be entered with a Higher Secondary Certificate, the equivalent of a high school diploma in the United States. That was the case for the beneficiary in this proceeding. The record shows that he received his Higher Secondary Certificate in 1990, entered the NIIT Systems Management program in early 1991, completed it at the end of 1992, and received his Advanced Diploma in May 1993. This was the same time frame in which he was attending Osmania University in his three-year Bachelor of Science program. Thus, the two-year Advanced Diploma program did not build upon the three-year bachelor's degree. Rather, it was a parallel program that was actually completed before the beneficiary completed his bachelor's degree. Since there was no bachelor's degree requirement for entrance into the NIIT program, those two years of study cannot be added to the beneficiary's three-year bachelor of science degree for the purpose of U.S. equivalency. According to EDGE, therefore, the beneficiary's Bachelor of Science degree and Advanced Diploma in Systems Management are not, in combination, equivalent to a U.S. bachelor's degree.<sup>7</sup>

EDGE also notes that PGDs should be issued by accredited universities or institutions approved by the All-India Council for Technical Education (AICTE).<sup>8</sup> The NIIT's website,

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<sup>7</sup> AACRAO has published the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in an earlier 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual. In the 1997 publication on page 46, it states that the GNIT title, within the National Institute of Information Technology (NIIT) system, is primarily a vocational/technical qualification, and that the entrance requirement is a class/Grade XII certificate.

The AAO accessed NIIT's website to determine what type of educational services it provides. See <http://www.niit.com/services/ITEducationforIndividuals/Pages/ComputerCourses.aspx> (accessed December 11, 2011). NIIT offers a career program (GNIT); an engineering technology program (Edgeineers), which "helps engineering students and engineering graduates get acquainted with high-end technologies and meet requirements across their academic lifecycle;" networking and infrastructure management programs; basic computer programs; and short-term technology programs. *Id.* The website does not indicate that NIIT requires a college degree in order to admit a student to any of these programs. Furthermore, as discussed above, there is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program.

<sup>8</sup> The All India Council for Technical Education (AICTE) was established in November 1945 as a "national level Apex Advisory Body to conduct survey[s] on the facilities on technical education and to promote development in the country in a coordinated and integrated manner." See <http://www.aicte-india.org/aboutus.htm> (accessed December 11, 2011). AICTE has the "statutory authority for planning, formulation and maintenance of norms and standards, quality assurance

<http://www.niit.com/Pages/DefaultUSA.aspx>, does not indicate that it is accredited by AICTE. Nor does it indicate that a bachelor's degree of any sort is required for entrance into its Advanced Diploma program in Systems Management.

Thus, the EDGE credential advice confirms other evidence in the record that the beneficiary's educational credentials in India are not equivalent to a bachelor's degree in the United States.

Counsel references some DOL and USCIS internal documents addressing adjudication practices. These documents are not binding in the instant proceeding. The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).<sup>9</sup>

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through accreditation, funding in priority areas, monitoring and evaluation, maintaining parity of certification and awards and ensuring coordinated and integrated development and management of technical education in the country." *Id.* As AICTE ensures the foundation of norms and standards, the educational value of an unaccredited institution cannot be properly assessed.

<sup>9</sup> USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5<sup>th</sup> Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

Based on the foregoing analysis of the evidence, the AAO concludes that the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree” as prescribed in 8 C.F.R. § 204.5(I)(3)(ii)(C) to qualify for preference visa classification as a professional under section 203(b)(3)(A)(ii) of the Act.

Nor does the beneficiary qualify for preference visa classification as a skilled worker under section 203(b)(3)(A)(i) of the Act, regardless of whether he meets the experience requirement of two years in the “job offered” or a related occupation, because he does not meet all the requirements of the labor certification (one of which is that he have a four-year “bachelor’s degree or equivalent”).

Accordingly, the petition cannot be approved.

### **Does the Beneficiary have the Qualifications for the Job Offered?**

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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 [visa category] 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 at 1008. 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)[(5)] 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 INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found in Form ETA 750, Part A, Box 14. This section of the application for alien labor certification – “MINIMUM education, training, and experience” – describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* 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. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. at 833 (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 alien employment certification application form. *See id.* at 834.

In this Case, Part A, Box 14, of the Form ETA 750 specifies that the minimum level of education required for the position of senior software developer is four years of college and a bachelor’s degree or equivalent in engineering or computer science. Box 14 also specifies that the minimum experience required for the position is two years in the “job offered” or in a related occupation such as systems analysis, development or software engineering, or computer consultant. There is no indication in Box 14 (nor in Box 15 next to it – “Other Special Requirements”) that the educational component of the job requirements can be satisfied with anything less than a four-year bachelor’s degree from a U.S. or foreign university (or college). In particular, Box 14 does not state that a combination of education and experience can substitute for a four-year bachelor’s degree. The labor certification requirements are consistent with the petitioner’s recruitment materials for the proffered position, which were submitted to the AAO in response to the RFE.

As previously discussed, the beneficiary does not have a U.S. bachelor’s degree, or a foreign equivalent degree, in the field of engineering or computer science. Therefore, the beneficiary does not qualify for the proffered position under the terms of the labor certification. For this reason as well, the petition cannot be approved.

### **Has the Petitioner Established its Ability to Pay the Proffered Wage?**

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 in this case was December 6, 2002. *See* 8 C.F.R. § 204.5(d). The labor

certification (Form ETA 750) states in Part A, Box 12, that the “rate of pay” for the proffered position is \$67,000 per year.<sup>10</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the 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).

In his decision denying the petition on June 12, 2009, the Director reviewed the evidence of record – which included page one of the petitioner’s Form 1120, U.S. Corporation Income Tax Return, for each of the years 2003-2006 – and determined, without detailed explanation, that the petitioner had failed to establish its ability to pay the proffered wage for the fiscal years 2005, 2006, and 2007.

On appeal the petitioner submitted complete copies of (a) its federal income tax returns for the years 2002-2008; (b) the Forms W-2, Wage and Tax Statements, it issued to the beneficiary for the years 2004-2008; and (c) an affidavit from its president, [REDACTED] dated July 17, 2009.

In determining the petitioner’s ability to pay the proffered wage between the priority date and the present, USCIS first examines 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 this case, the record indicates that the beneficiary began working for the petitioner in the job offered in February 2004. As shown on the W-2 Forms in the record, the beneficiary received the following amounts of “wages, tips, other compensation” from the petitioner from 2004 through 2008:

2004:	\$ 60,648.65
2005:	\$ 87,334.19
2006:	\$ 95,356.99
2007:	\$ 47,846.42
2008:	\$102,460.75

These figures establish the petitioner’s ability to pay the proffered wage of \$67,000 per year in 2005, 2006, and 2008 – but not in 2004 and 2007 (or 2002 and 2003, before the beneficiary began working for the petitioner). Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (December 6, 2002) up to the present by means of its actual compensation to the beneficiary over the years.

<sup>10</sup> On the immigrant visa petition (Form I-140) the petitioner stated that the “wages per week” were \$1,340, which amounts to \$69,680 per year based on a 52-week pay schedule.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS will examine the net income figures reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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. *See 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 wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages to all of its employees in excess of the proffered wage to the beneficiary is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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 [sic] 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 118. "[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). Consistent with its prior adjudications, and backed by federal court rulings, the AAO will not consider depreciation in examining the petitioner's net income.

The petitioner's federal income tax returns for the years 2002-2004 and 2007<sup>11</sup> show the following figures for net income (Form 1120, Line 28):

2002:	\$-407,098
2003:	\$ 193,610
2004:	\$ 171,088
2007:	\$-207,872

These figures establish the petitioner's ability to pay the proffered wage of \$67,000 per year in 2003 and 2004 – but not in 2002 and 2007. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (December 6, 2002) up to the present based on its net income year by year.

As another alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets as reflected on its federal income tax return. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>12</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. 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.

As indicated on the federal income tax returns in the record, the petitioner's net current assets in the years 2002 and 2007 were as follows:

2002:	\$-371,919
2007:	\$-327,390

These figures do not establish the petitioner's ability to pay the proffered wage of \$67,000 per year in either 2002 or 2007. Thus, the petitioner cannot establish its continuing ability to pay the proffered wage from the priority date (December 6, 2002) up to the present based on its net current assets year by year.

Based on the foregoing analysis, the petitioner has not established its continuing ability to pay the proffered wage in the years 2002 and 2007 on the basis of wages actually paid to the beneficiary, the petitioner's net income, or its net current assets year by year.

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<sup>11</sup> The petitioner's net income figures in other years were -\$158,754 (2005), \$2,331 (2006), and -\$21,503 (2008).

<sup>12</sup> According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

In addition to the foregoing criteria, USCIS may also consider the totality of circumstances, including the overall magnitude of business activities, in determining the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612.<sup>13</sup> USCIS may, at its discretion, consider evidence relevant to the instant petitioner's financial ability that falls outside of its 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 petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the record indicates the petitioner was established in 1992 and had 12 employees when the instant petition was filed in 2007. Business has been erratic with gross receipts surging dramatically from 2002 (\$956,978) to 2003 (\$1,563,834), collapsing even more dramatically from 2004 (\$1,425,951) to 2005 (\$672,373), then trending downward from \$835,630 in 2006, to \$541,498 in 2007, to \$488,586 in 2008. Thus, the petitioner recorded an overall decline in its gross receipts of approximately 50% from 2002 to 2008. Based on its income tax records, therefore, the petitioner does not have a solid record of business growth in recent years.

Counsel asserts that since the labor certification was not filed until December 6, 2002, the petitioner is only required to demonstrate its ability to pay \$5,583 that year (1/12 of the proffered wage of \$67,000 for the month of December 2002). Counsel suggests that \$100,333 spent by the petitioner to pay off a liability that was not owed in 2002 could have been utilized instead to pay the prorated portion of the proffered wage due in December 2002. No such figure of \$100,333 appears in Schedule L, Line 20, of the petitioner's 2002 federal income tax return, as claimed by counsel (or anywhere else in the Form 1120). Even if it did, however, USCIS will only prorate the proffered wage if the record contains evidence of the petitioner's 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. In this case, no monthly income statement has been submitted by the petitioner for December 2002, nor any pay stubs issued in December 2002 since the beneficiary's employment did not begin until 2004.

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<sup>13</sup> 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.

The AAO notes on the petitioner's federal income tax returns that one of the deductions listed each year on the Form 1120 was "compensation of officers" (Page 1, Line 7, and Schedule E). For the years 2002 and 2007, [REDACTED] the petitioner's president, received "officer's compensation" in the amounts of \$70,000 and \$85,000, respectively. In his "Affidavit of Capital Commitment to [REDACTED]" dated July 17, 2009, Mr. [REDACTED] declared that "if at any point in the past additional funds had been required to pay the offered wage of \$67,000 to [the beneficiary], I would have been willing to forego part of my annual officer compensation so as to meet that wage commitment."

In 2002 the "officer's compensation [REDACTED] received (\$70,000) barely exceeded the offered wage (\$67,000). While only a fraction of the calendar year occurred after the priority date – December 6, 2002 – there is no basis in the record (for the reasons discussed above) to prorate the proffered wage in determining the petitioner's ability to pay in December 2002. Accordingly, [REDACTED] declaration is not credible for 2002. As for 2007, the difference between the offered wage (\$67,000) and the amount of compensation the beneficiary received that year (\$47,846.42) was \$19,153.58. This figure is close to one quarter (22.5%) of [REDACTED] own compensation in 2007. In the AAO's view, the documentation of record does not support [REDACTED] claim that he could or would have dedicated such a high percentage of his own compensation to covering the shortfall in the beneficiary's pay that year.

[REDACTED] declared in his affidavit that he had been the sole shareholder of [REDACTED] Inc. since its establishment in 1992<sup>14</sup> and, as such, has made capital investments to the company as needed. Counsel cites this declaration as further evidence of the petitioner's ability to pay the proffered wage. Nothing in the language of the affidavit, however, commits the petitioner's president to make a capital investment for the purpose of paying any portion of the proffered wage to the beneficiary. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003), the court stated that "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Based on the foregoing analysis, the AAO determines that the petitioner has failed to establish that the totality of its circumstances, as in *Sonegawa*, demonstrates its ability to pay the proffered wage to the beneficiary during the years 2002 and 2007.

For all of the reasons discussed in this decision, the petitioner has failed to establish its continuing ability to pay the proffered wage from the priority date (December 6, 2002) up to the present. For this reason as well, the petition cannot be approved.

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<sup>14</sup> This statement is inconsistent with the Forms 1120 for 2002 and 2003, each of which identifies Mr. [REDACTED] as the owner of 25% of the common stock. (The 2003 tax return also identifies [REDACTED] as the owner of 26% of the common stock that year.) It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

**Conclusion**

Since the beneficiary does not have a U.S. bachelor's degree or a foreign equivalent degree, and therefore does not meet the job requirements of the labor certification, he does not qualify for preference visa classification as either a skilled worker or a professional under section 203(b)(3)(A)(i) or (ii) of the Act. In addition, the petitioner has not established its continuing ability to pay the proffered wage from the priority date up to the present, as required under 8 C.F.R. § 204.5(g)(2). For all of these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.