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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: DEC 28 2011 Office: NEBRASKA SERVICE CENTER File:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information systems consulting firm. It seeks to employ the beneficiary permanently in the United States as a consultant – systems engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification and that the petitioner failed to demonstrate its continuing ability to pay the proffered wage.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on December 23, 2002. The Immigrant Petition for Alien Worker (Form I-140) was filed on December 1, 2006.

The job qualifications for the certified position of systems engineer are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

Analyzing user requirements for needs assessment to automate or improve existing systems; Designing, developing, implementing, improving, monitoring, & maintaining computer systems; Providing technical documentation & guidelines; Studying existing information processing systems to evaluate effectiveness & developing new systems to improve production or workflow as required.

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).

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	8
High school	4
College	4
College Degree Required	B.S. or equivalent
Major Field of Study	Computer Science

Experience:

Job Offered	3 years
(or)	
Related Occupation	3 years: Systems Analyst, Software Engineer, System Architect

Block 15:

Other Special Requirements: [none]

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires four years of college culminating in a Bachelor of Science degree in Computer Science or the "equivalent" (undefined) to that degree plus three years of experience in the job offered as a systems engineer or three years experience in the related fields of systems analyst, software engineer, or system architect.

On the Form ETA 750B, signed by the beneficiary on December 11, 2002, the beneficiary represented that the highest level of achieved education related to the requested occupation was a Bachelor of

Science degree in Computer Science, completed at Moscow State University, Moscow, Russia, based on studies from October 1986 to June 1991.

In support of the beneficiary's educational qualifications, the petitioner submitted an academic record from Moscow State University indicating that the beneficiary "completed a coursework of the faculty of Numerical Mathematics and Cybernetics" from September 1, 1986 to January 15, 1991. The petitioner also submitted transcripts of grades, the last of which, as noted by the director, indicates that the beneficiary withdrew "due to poor academic performance." The petitioner did not, however, submit any evidence of a completed bachelor's degree. The petitioner additionally submitted two evaluations of the beneficiary's education combined with work experience in an attempt to show that the beneficiary met the educational requirements of the labor certification.

The director denied the petition on April 21, 2008. He determined that the beneficiary left his studies based on poor performance prior to obtaining a degree so that he did not meet the terms of the labor certification which required a completed four-year Bachelor of Science degree in Computer Science. Additionally, the director determined that the petitioner failed to specify that a combination of education and experience would be considered as an equivalent to the stated educational requirement on the labor certification and thus could not be accepted. The petitioner appealed and the AAO issued a Request for Evidence (RFE) on October 13, 2010. In this request, the AAO noted that although the petitioner stated the educational requirements as Bachelor's "or equivalent" that the terms of the labor certification were ambiguous as to what would be an accepted equivalency. In response to the AAO's RFE, the petitioner submitted information concerning the petitioner's recruitment conducted in connection with the labor certification.

DOL assigned the code of 030.062-010, software engineer, to the proffered position. According to DOL's public online database at <http://www.onetonline.org/link/summary/15-1133.00?redir=15-1032.00> (accessed November 3, 2011) 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 Four requiring "considerable preparation" for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 7.0-<8.0 to the occupation, which means that "Most of these occupations require a four-year bachelor's degree, but some do not." Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A considerable amount 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 requirements of the proffered position and 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:

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.

Initially, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

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

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

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

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

² Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

§ 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

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

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

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

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

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (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.)³

³ A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289m 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement in of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education 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 under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone, a combination of multiple lesser degrees, or a combination of education and experience, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have the 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 here relies upon the conclusion of two credential evaluators, [REDACTED] and [REDACTED] of the Trustforte Corporation, who, although employed for the same evaluation service and issued their evaluations on the same day, come to different conclusions concerning the beneficiary's credentials. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Both evaluations rely on a combination of education and experience. Neither concludes that the beneficiary has the foreign equivalent or the equivalent of a U.S. bachelor's degree based on education alone.

█ states that the combination of the beneficiary's coursework at Moscow State University and experience are equivalent to a Bachelor of Science degree in Computer Science. He considers courses taken over a period of five years and work experience and training in the amount of six years and five months (although only four years and ten months is specified as related to Computer Science). He states that the beneficiary's "substantial coursework in Computer Science" and other "specialized studies" were equivalent to two years at a U.S. institution in the field of Computer Science. The evaluation states that "most" of the beneficiary's general courses "would qualify" for credit, but the evaluation does not specify how much of the educational equivalency is based on accepted coursework compared to experience or how he ultimately concludes that the combination of education and experience would be equivalent to a bachelor's degree.⁴ █ does not outline the beneficiary's experience or dates relied on, but states that he has work experience of six years and five months as of the evaluation date, November 19, 1997. The evaluation, however, states that only four years and ten months of work in the field of Computer Science was documented. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Further, █ does not explain how the beneficiary's experience is equivalent to study at a U.S. institution.

In the second evaluation submitted, █ concluded that the beneficiary has attained the equivalent of a Master's degree in Computer Science based on the beneficiary's coursework at Moscow State University over a five year time period in combination with six years and five months of employment experience from July 1991 through February 1997. He similarly qualifies that only four years and ten months of the experience related to Computer Science. █ states that "the nature of the coursework, the grades attained in the courses, and the hours of academic coursework" equates the beneficiary's studies at Moscow State University to those at an accredited U.S. institution including both entry-level courses required for a bachelor's degree as well as specialized studies in Computer and Information Science. He states that the beneficiary's specialized courses in Computer and Information Science "indicate that he satisfied substantially similar requirements to the completion of two years of academic studies leading to a Bachelor of Science degree in Computer Science from an accredited institution of higher education in the United States."⁵ He then considers the beneficiary's six years and five months of experience.⁶ This

⁴ Although the beneficiary engaged in coursework over a five year period, the evaluator does not assess that the coursework is equivalent to either four or five years of study, and the amount of education attributed to the overall bachelor's equivalency evaluation is unclear as set forth above. However, as the evaluator considers the beneficiary's experience as well, the total amount attributed to course work would only appear to be three years or less.

⁵ As noted by the director, nothing in the record shows that Moscow State University issued a degree to the beneficiary, but rather that the beneficiary withdrew based on academic performance.

⁶ The record contains two separate evaluations from █ both with the same dates. One of the evaluations refers to the beneficiary as █ which is not the beneficiary's name. Additionally, some of the stated experience conflicts with that listed on Form ETA 750. █

evaluation did not explain how the beneficiary's experience is equivalent to collegiate level courses or attempt to equate certain experience to individual courses that would be required for a bachelor's or master's degree in computer science. [REDACTED] then added the beneficiary's experience using the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Despite the six years, [REDACTED] states that this would equate to "at least one additional year of college level training."⁷ 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); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). As he assesses specific courses as equivalent to two years of college, fails to assign a specific equivalency to generalized courses, and assesses the work as experience as one additional year, it is unclear how [REDACTED] reaches the equivalency of a Master's degree.⁸ This deficiency was noted in the AAO's Request for Evidence, however, the petitioner did not submit any additional evaluations or clarification nor did counsel explain the deficiency in his response. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," from a college or university in the required field of study listed on the certified labor certification, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional as he does not have the minimum level of education required for the foreign equivalent of a bachelor's degree.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (USCIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court except in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean*

refers to employment with [REDACTED] from February 1997 onward. This is not the stated employment on Form ETA 750B. "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." *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

⁷ This assessment appears to be based on the statement that only four years and ten months of that experience related to Computer Science.

⁸ The evaluator also relies on experience from 1991 to 1997. The petitioner submitted a letter to document the beneficiary's experience from 1991 to 1996. The petitioner may not rely on the beneficiary's experience to meet both the experience and educational requirements. The record does not contain any other letters to document any other experience for the beneficiary.

makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* 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 *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree).

The Form ETA 750 states the educational requirement as four years of college, "B.S. or equivalent"⁹ in Computer Science.¹⁰ The petitioner submitted evidence to support its labor certification recruiting efforts in response to the AAO's RFE. The advertisement sent to Adnet Advertising Agency, the ad on America's Job Bank, the advertisement that appeared in *The Sunday Star-Ledger* (the copy of

⁹ The petitioner filed a subsequent labor certification on the beneficiary's behalf as a computer systems analyst. However, that ETA Form 9089 listed the position's minimum requirements as only a high school education and three years of experience. This discrepancy calls into question the true minimum requirements of the position offered. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (stating that doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition).

¹⁰ As noted above, *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008), upholds an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree.

which is very difficult to read), and the in-house job posting all stated that “B.S. in Comp. Science or equivalent” was the education required for the position. Nothing in the advertisements or posting notice references that the petitioner was willing to accept an equivalent of a bachelor’s degree based on a combination of education and experience. A letter from the petitioner to the New Jersey Department of Labor states that “No qualified applicants applied for the position.” The petitioner did not submit a report concerning how many applications were received so that we cannot determine if any applicants relied on a combination of education and experience, or why any applicants, if any, were deemed unqualified. The petitioner did not submit any information concerning any applicant’s level of education or experience. In response to the AAO’s RFE, counsel states that “The Respondent previously conceded that the phrase ‘Bachelor’s Degree or equivalent’ on the ETA was ambiguous.” He further stated that there “was no Assessment Notice or Notice of Findings. . . . The documentation is typical and complete but really is not determinative in substantiating or deciphering the employer’s intent.” Counsel asserts that the proof that the beneficiary possessed a degree equivalent is the petitioner’s employment of the beneficiary: “it would be unusual if not inexplicable given the fact that [the beneficiary] was presently employed, for the employer to set the minimum requirements beyond what [the beneficiary] possessed.” Counsel also asserts that “it would seem likely” that the beneficiary’s education documents were submitted to DOL^{11,12} We note, however, that Form ETA 750B stated that the beneficiary had a Bachelor’s degree in the required field and not the “equivalent of a degree.”¹³ Therefore, it is unclear that DOL was aware that the beneficiary did not have a completed Bachelor’s degree. From the record, it is

¹¹ As noted above, 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.

Therefore, it is DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought.

¹² Another lawyer prepared and submitted Form ETA 750. Therefore, this is only an assumption on counsel’s part. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

¹³ The later filed ETA Form 9089 states the beneficiary’s “highest education achieved relevant to the requested occupation” in J.11. as “high school” completed in 1986 in Moscow, Russia. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

also not clear that the petitioner defined an "equivalent" in any documents submitted to DOL and, as noted above, by counsel's own admission, "equivalent" is "ambiguous."¹⁴ Absent specific evidence, rather than an assumption of counsel, we cannot conclude that DOL was aware of or examined the beneficiary's education. *See Madany*, 696 F.2d at 1008, and footnote 11 above.

Based on a review of the record, we find an equivalent based on a combination of education and experience was not clearly stated on Form ETA 750, clearly defined, or clearly advertised in any of the recruitment materials. Although the petitioner may have viewed the beneficiary's education and experience as equivalent to a Bachelor of Science degree in Computer Science issued by a U.S. institution, it must have conveyed any accepted equivalency to potential job seekers to inform them that they would be eligible for the position even if they did not have a Bachelor of Science in Computer Science. As the wording of the job advertisements do not convey what the petitioner deemed an equivalent to a Bachelor of Science, they were incapable of apprising potentially qualified U.S. workers of the position's true minimum requirements. As the term "equivalent" is ambiguous, which counsel admits, neither USCIS nor prospective applicants for the position could realistically be expected to guess what methodology the petitioner intended to use to evaluate

¹⁴ As noted in the AAO's RFE, the DOL has provided the following field guidance for interpreting labor certification requirements: when the labor certification states that a "bachelor's degree in computer science" is required, and the beneficiary has a four-year bachelor's degree in computer science from the University of Florence, "there is no requirement that the employer include 'or equivalent' after the degree requirement" on the Form ETA 750 or in its advertisement and recruitment efforts. *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). Further, where the Form ETA 750 indicates that a "U.S. bachelor's degree or the equivalent" may qualify an applicant for a position, where no specific terms are set out on the Form ETA 750 or in the employer's recruitment efforts to define the term "equivalent," "we understand ['equivalent'] to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). Where the Form ETA 750 states that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor's degree, "the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative [to the degree] in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). State Workforce Agencies should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] Finally, the DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *Id.* To our knowledge, the field guidance memoranda referred to here have not been rescinded.

candidates claiming to have earned the "equivalent" to a U.S. bachelor's degree. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As the evaluations are deficient, which was addressed in the AAO's RFE and above, we cannot definitively conclude that the beneficiary has the equivalent of a bachelor's in the required field of study or that the petitioner clearly expressed a defined equivalent to potential U.S. workers in its recruitment.

The beneficiary does not meet the terms of the labor certification, therefore, the petition cannot be approved. *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). Specifically, the labor certification requires four years of university study culminating in a Bachelor of Science in Computer Science or the "equivalent." The beneficiary's coursework is not a completed degree and does not meet the requirement of a four-year bachelor's degree and, therefore, the beneficiary does not qualify as a professional.

Even if we considered the petition under the skilled worker category, the beneficiary does not meet the terms of the labor certification, and the petition would be denied on that basis as well. *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). Specifically, the labor certification requires a four-year bachelor's degree or "equivalent" in computer science. The labor certification does not define what type of equivalency that the petitioner will accept. The beneficiary's coursework did not result in a four-year, single-source bachelor's degree in Computer Science or any completed degree. As set forth above, the labor certification does not adequately define any equivalency, the advertisements do not adequately convey an equivalency, and the evaluations fail to adequately establish how the beneficiary's education is the equivalent of a bachelor's degree. Therefore, the petitioner has failed to demonstrate that the beneficiary has the education required for the position offered or that the petition would qualify for approval as a skilled worker.

Additionally, as noted above and in the AAO's RFE, the evaluations partially rely on the beneficiary's experience. The petitioner must demonstrate that the beneficiary has the required three years of experience in the position offered or three years as a systems analyst, software engineer, or system architect. The record contains only one letter¹⁵ regarding the beneficiary's prior experience. The [REDACTED] evaluation also relied on this experience in an attempt to demonstrate that the beneficiary had the equivalent of a bachelor's degree. The petitioner may not rely on the same experience to show that the beneficiary has both the education and experience required for the position offered. In the absence of other letters in compliance with 8 C.F.R. § 204.5(l)(3)(ii)(A), we cannot conclude that the beneficiary has the required three years of experience.

¹⁵ Experience letters must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

With regard to the petitioner's 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 is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on December 23, 2002. The proffered wage as stated on the Form ETA 750 is \$75,000 per year.

The evidence in the record shows that the petitioner is an S corporation. On the petition, the petitioner states that it was established in 1997 and currently employs three workers. On the Form ETA 750B, signed by the beneficiary on December 11, 2002, the beneficiary stated that he began working for the petitioner in July 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).

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. The petitioner submitted the following Forms W-2:

- The 2002 Form W-2 states that the petitioner paid the beneficiary \$24,000.
- The 2003 Form W-2 states that the petitioner paid the beneficiary \$39,805.48.

- The 2004 Form W-2 states that the petitioner paid the beneficiary \$79,324.00.
- The 2005 Form W-2 states that the petitioner paid the beneficiary \$55,000.00 and a Form 1099 states that the petitioner paid the beneficiary an additional \$20,000.
- The 2006 Form W-2 states that the petitioner paid the beneficiary \$92,500.00.
- The 2007 Form W-2 states that the petitioner paid the beneficiary \$69,000.00.
- The 2008 Form W-2 states that the petitioner paid the beneficiary \$97,000.00.
- The 2009 Form W-2 states that the petitioner paid the beneficiary \$67,555.00.

The amounts are sufficient to establish the petitioner's ability to pay the proffered wage in 2004, 2005, 2006, and 2008.¹⁶ The amounts for the other years are less than the proffered wage. Therefore, the petitioner must establish its ability to pay the difference between the actual wage paid and the proffered wage, which in 2002 was \$51,000; in 2003 was \$35,195; in 2007 was \$6,000; and in 2009 was \$7,445.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d. 873, 881 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. See *Taco Especial v. Napolitano*, 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

¹⁶ The record, however, lacks required regulatory proscribed evidence for 2008 in the form of a tax return, annual report, or audited financial statement. See 8 C.F.R. § 204.5(g)(2).

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, 558 F.3d 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*, 719 F.Supp. at 537 (emphasis added).

The petitioner’s tax returns reflect the following net income:

- In 2002, the Form 1120S stated net income¹⁷ of -\$16,640.
- In 2003, the Form 1120S stated net income of \$28,226.
- In 2004, the Form 1120S stated net income of \$13,432.
- In 2005, the Form 1120S stated net income of \$104,711.
- In 2006, the Form 1120S stated net income of \$73,807.
- In 2007, the petitioner failed to submit a complete federal tax return.
- In 2008, the petitioner failed to submit a complete federal tax return.
- In 2009, the petitioner failed to submit a complete federal tax return.

The net income in 2002 and 2003 is insufficient to demonstrate the ability to pay the difference between the actual wage paid and the proffered wage. Despite being specifically requested for tax

¹⁷ Where an S corporation’s income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner’s IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2008, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 3, 2009) (indicating that Schedule K is a summary schedule of all shareholder’s shares of the corporation’s income, deductions, credits, etc.). Because the petitioner had additional adjustments shown on its Schedule K for 2003 and 2005 the petitioner’s net income is found on Schedule K for those years.

returns or other regulatory proscribed¹⁸ evidence in the AAO's RFE, the petitioner submitted no regulatory evidence for 2007, 2008, or 2009.¹⁹ The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). Therefore, we are unable to determine that the petitioner has the ability to pay the proffered wage for the entire time period from the priority date onwards.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.²⁰ 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.

- The 2002 Form 1120S stated net current assets of -\$63,715.
- The 2003 Form 1120S stated net current assets of -\$46,040.
- The 2004 Form 1120S failed to include a Schedule L.
- The 2005 Form 1120S stated net current assets of -\$7,816.
- The 2006 Form 1120S stated net current assets of -\$4,727.
- In 2007, the petitioner failed to submit a complete federal tax return.
- In 2008, the petitioner failed to submit a complete federal tax return.
- In 2009, the petitioner failed to submit a complete federal tax return.

The petitioner's tax returns reflect negative net current assets, which are insufficient to demonstrate the petitioner's ability to pay the difference between the actual wage paid and the proffered wage in 2002, 2003, 2007, or 2009. 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 proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

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

¹⁸ The regulation requires that the petitioner submit its tax return, annual report, or audited financial statement to establish its continuing ability to pay the proffered wage.

¹⁹ The petitioner submitted the beneficiary's W-2 forms for 2008 and 2009. However, as set forth above, those alone would not allow us to conclude that the petitioner has the continued ability to pay the proffered wage.

²⁰ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

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

In the instant case, the petitioner submitted no regulatory proscribed evidence in the form of a tax return, annual report, or audited financial statement regarding its financial situation in 2007, 2008, or 2009 despite being specifically requested to do so in the AAO's RFE. The petitioner's 2002 Form 1120S reflects negative net income and negative net current assets and the 2003 Form 1120S reflects minimal net income and negative net current assets. The petitioner's gross receipts have varied and declined substantially from 2001 to 2006: in 2002, they were \$538,836; in 2003, they were \$437,819; in 2004, they were \$929,847; in 2005, they were \$843,981; and in 2006, they were \$360,881. The wages paid in each year represent only the salary earned by the beneficiary, and would not evidence that the petitioner has three employees as asserted on the Form I-140. On appeal, counsel states that the beneficiary was compensated directly by the petitioner's client for a six month period in 2003 so that the beneficiary received a greater salary than that reflected on the Form W-2 issued by the petitioner.²¹ No evidence was submitted to support counsel's assertions.

²¹ It is unclear that the petitioner will be the beneficiary's employer and was authorized to file the instant petition. The regulation at 8 C.F.R. § 204.5(c) provides that "[a]ny United States employer desiring and intending to employ an alien may file a petition for classification of the alien under...section 203(b)(3) of the Act." In addition, the Department of Labor (DOL) regulation at 20 C.F.R. § 656.3²¹ states:

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

Based on counsel's statement regarding pay from another entity, it is unclear what company will actually employ the beneficiary. Counsel states in a letter dated June 17, 2008 that the petitioner is a software consulting company that "contracts out its employees to clients." Specific to the beneficiary, counsel states that the petitioner's client required him "to be a direct rather than contract employee" in 2003 for a period of approximately six months. This letter from counsel makes clear that the beneficiary may not always be an employee of the petitioner due to the nature of its business. We note that the certified job offer in this matter is valid only for the petitioner's New Jersey address. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979) (change of area of intended employment).

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

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

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

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

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

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

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

The *Clackamas* court considered the common law definition of the master-servant relationship, which focuses on the master’s control over the servant. The court cites to definition of “servant” in the Restatement (Second) of Agency § 2(2) (1958): “a servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other’s control or right to control.”²¹ *Id.* at 448. The Restatement additionally lists factors for consideration when distinguishing between servants and independent contractors, “the first of which is ‘the extent of control’ that one may exercise over the details of the work of the other.” *Id.* (*citing* § 220(2)(a)). The court also looked to the EEOC’s focus on control in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) and that the EEOC considered an employer can hire and fire employees, assign tasks to employees and supervise their performance, can decide how

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, the petitioner submitted no evidence as to its reputation or any evidence showing that one year was off or otherwise not representative of the petitioner's overall financial picture. The AAO specifically requested evidence of the petitioner's "financial circumstance or overall reputation . . . to liken its situation to the one in *Sonegawa*." The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Additionally, without the petitioner's specifically requested tax returns in 2007, 2008, and 2009, we cannot fully assess the petitioner's totality of the circumstances. However, assessing the totality of the circumstances in this individual case from the record before us, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

the business' profits and losses are distributed. *Id.* at 449-450. In any further filings, the petitioner would need to address this issue.