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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

**PUBLIC COPY**

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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

JAN 11 2011

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. The petitioner filed a motion to reopen and reconsider the decision. The director granted the motion to reconsider and affirmed the initial decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a public accounting business. It seeks to permanently employ the beneficiary in the United States as an information technology manager. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).<sup>1</sup>

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is April 16, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's denial of the petition and the motion to reconsider, the primary issues in this case are whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; and whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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.<sup>2</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. 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). The regulation 8 C.F.R. § 204.5(g)(2) states:

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

*Ability 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.

Therefore, the petitioner must establish that it has possessed the continuing ability to pay the proffered wage beginning on the priority date.

The proffered wage stated on the labor certification is \$58,323.00 per year. On the petition, the petitioner claimed to have been established in 1990, to have a gross annual income of \$1,164,626.00, and to employ 12 workers. According to the tax returns in the record, the petitioner is structured as a C corporation with a fiscal year based on a calendar year.

In determining the petitioner's ability to pay the proffered wage, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner employed the beneficiary during the required period. If the petitioner establishes by documentary evidence that it paid the beneficiary 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. If the petitioner has not paid the beneficiary wages that are at least equal to the proffered wage for the required period, the petitioner must establish that it could pay the difference between the wages actually paid to the beneficiary, if any, and the proffered wage.

On the labor certification, signed by the beneficiary under penalty of perjury, the beneficiary claimed to have worked for the petitioner 20 hours per week since July 1996.

The record contains the beneficiary's Forms W-2, Wage and Tax Statement, purportedly representing wages paid to the beneficiary in 2001, 2002, 2003, 2004, 2005 and 2006. However, information contained in these Forms W-2 are inconsistent with claims made by the petitioner in the Form I-140 under penalty of perjury and, therefore, the Forms W-2 are not persuasive evidence of wages having been paid to the beneficiary. The Forms W-2 state that the wages were paid to a person having social security number 017-72-0410 and, in 2006, to the person having social security number 579-43-5359, both attributable to the beneficiary. The petitioner responded "none" to the query in the Form I-140 asking for the beneficiary's social security number, even though this information was clearly available to it if, in fact, one of these two social security numbers belongs to the beneficiary. 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). Absent clarification of these inconsistencies in the record, the AAO will not accept the Forms W-2 as persuasive evidence of wages paid to the beneficiary. Although this is not the basis for the AAO's decision in the instant case, it is noted that certain unlawful uses of social security numbers are criminal offenses involving moral turpitude and can

lead in certain circumstances to removal from the United States. *See Lateef v. Dept. of Homeland Security*, 592 F.3d 926 (8<sup>th</sup> Cir. 2010).

However, assuming, *arguendo*, that the Forms W-2 are persuasive evidence, these documents state the wages paid to the beneficiary by the petitioner, as shown in the table below.

Year	Wages Paid (\$)	Shortfall (\$)
2001	20,000.00	38,323.00
2002	40,000.00	18,323.00
2003	36,000.00	22,323.00
2004	40,000.00	18,323.00
2005	40,000.00	18,323.00
2006	56,000.00	2,323.00

For the years 2001 through 2006, the petitioner did not pay the beneficiary an amount equal to or greater than the proffered wage. The petitioner must therefore establish that it can pay the difference between wages paid to the beneficiary and the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage each year during the required 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 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). The petitioner must establish that it had sufficient net income to pay the difference between the wage paid, if any, and the proffered wage. 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. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubedu v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and wage expense is misplaced. Showing that the petitioner's gross sales exceeded the proffered wage is insufficient. Similarly, showing that the petitioner's total payroll exceeded 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 during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

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

*River Street Donuts* at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added). Accordingly, counsel's argument that the director should have added back depreciation to the petitioner's net income when determining its ability to pay the proffered wage is rejected.

The petitioner's tax returns demonstrate its net income for the required period, as shown in the table below.<sup>3</sup>

<b>Year</b>	<b>Net Income (\$)</b>
2001	7,513.00
2002	29,752.00
2003	20,624.00
2004	28,251.00
2005	137,484.00
2006	0.00

For the years 2001, 2003 and 2006 the petitioner did not have sufficient net income to pay the difference between the wage paid and the proffered wage.<sup>4</sup>

<sup>3</sup> The petitioner filed its tax returns using Form 1120, U.S. Corporation Income Tax Return. For a C corporation, USCIS considers net income to be the figure shown on Line 28 of Form 1120.

<sup>4</sup> The record contains two different Forms 1120 for 2001. The 2001 Form 1120 submitted on appeal, which is dated October 30, 2007 and is unsigned, contains a net income figure of \$13,838.00. This is a higher net income figure than the 2001 Form 1120 originally submitted with the petition, which

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

Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>5</sup> If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its net current assets for the required period, as shown in the table below.<sup>6</sup>

Year	Net Current Assets (\$)
2001	15,940.00
2003	79,392.00
2006	7,802.00

The petitioner had sufficient net current assets to pay the difference between the wage paid and the proffered wage in 2003 and 2006, but not 2001.

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is dated August 1, 2007 and is signed. It is noted that an amended Form 1120 is ordinarily filed on Form 1120X. Although the higher net income figure is still not sufficient to establish the petitioner's ability to pay the proffered wage, this unexplained inconsistency undermines the credibility of the figures reported on the 2001 tax returns. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

<sup>5</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.

<sup>6</sup> On Form 1120, USCIS considers current assets to be the sum of Lines 1 through 6 on Schedule L, and current liabilities to be the sum of Lines 16 through 18.

Therefore, the petitioner has established that it had the ability to pay the beneficiary the proffered wage in 2002, 2003, 2004, 2005 and 2006 through an examination of wages paid to the beneficiary, or its net income or net current assets. However, it did not establish its ability to pay the proffered wage in 2001. The difference between the proffered wage, the wages paid to the beneficiary in 2001 and the petitioner's 2001 net current assets is \$22,383.00

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

In the instant case, the petitioner has been in business since 1990 and claims to employ 12 employees. The petitioner's tax returns show gross sales that have increased every year from \$648,174.00 in 2001 to \$1,301,809.00 in 2006. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. *See Matter of Sonogawa*, 12 I&N Dec. 612. The AAO notes the length of time the petitioner has been in business, its claimed gross revenues, its claimed number of employees and its claimed payroll. However, the unresolved inconsistencies pertaining to the beneficiary's Forms W-2 and 2001 tax returns undermines the credibility of these documents, and, consequently, the AAO's willingness to rely on them as evidence of the petitioner's ability to pay the proffered wage. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not established that it has the ability to pay the proffered wage.

The petitioner must also establish that the beneficiary possessed all the education, training, and

experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

At this stage, it is important to discuss the role of USCIS and the DOL in the employment-based permanent residence process. Section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>7</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

<sup>7</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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 at 1012-1013.

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

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

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1008. 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 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 (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.

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). 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]." *Id.* at 834.

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. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, 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.* at \*7.

The minimum education, training, experience and skills required to perform the duties of the offered position is set forth at Part A of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION: Two-year associate's degree in computer science

TRAINING: None

EXPERIENCE: Three (3) years in the job offered

The record contains a copy of the beneficiary's *diploma de tecnologo programador* from *Esuela Politecnica del Ejercito*. The translation of the diploma in the record states that it is a diploma in computer science from the "Military Polytechnic School." It is noted that the translation contains multiple errors that undermine its reliability. For example, the translation states that *diploma de* translates to "diploma the:" instead of "diploma of:." Further there is no evaluation of the beneficiary's academic credentials in the record establishing that the beneficiary's *diploma de tecnologo programador* is equivalent to an associate's degree in computer science from an accredited institution of higher education in the United States.

The record contains transcripts from the University of the District of Columbia (UDC) for the beneficiary's studies towards a Bachelor of Business Administration in computer information and systems science. The transcripts indicate that the beneficiary was awarded 58 transfer credits from *Esuela Politecnica del Ejercito* and that he completed a total of 127 credit hours at UDC, including the transfer credits. The transcripts do not state that the beneficiary was awarded a degree by UDC. There is no diploma from UDC in the record. Although the transcripts indicate that UDC accepted 58 transfer credits from *Esuela Politecnica del Ejercito*, this does not establish that the beneficiary's

diploma is equivalent to an associate's degree in computer science. Therefore, the evidence in the record established that the beneficiary has obtained a *diploma de tecnologo programador* from *Esuela Politecnica del Ejercito*, and that he has accumulated additional post-secondary credits at UDC. However, the evidence does not establish that the beneficiary possesses an associate's degree in computer science or foreign equivalent as required by the terms of the labor certification.

The labor certification does not permit a combination of lesser education. There is no evidence in the record, nor does counsel argue, that the petitioner expressed its intent to the DOL during the labor certification process that it would accept lesser education.

This case does not involve the interpretation of the petitioner's intent regarding the meaning of the phrase "or equivalent." See *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) and *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding the required education is clearly stated on the labor certification and does not include alternatives to a two-year associate's degree in computer science. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at \*7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.*

The labor certification also requires three years of experience in the job offered. The labor certification, signed by the beneficiary under penalty of perjury, describes the beneficiary's prior employment experience as follows:

- IT Manager with the petitioner, working 20 hours per week, from July 1996 to the "present." The labor certification indicates that it was signed by the beneficiary on April 11, 2001.
- IT Manager with [REDACTED], working 20 hours per week, from August 1996 to the "present."
- [REDACTED], working 1.5 hours per week, from August 1996 until the "present."
- [REDACTED], working 1.5 hours per week, from June 1995 to December 1998.
- [REDACTED] working 1.5 hours per week, from August 1996 to August 1999.

Any experience requirements for skilled workers must be supported by letters from employers giving the name, address, and title of the trainer or employer, and a description of the experience of the alien. 8 C.F.R. § 204.5(l)(3)(ii)(B). The record contains the following evidence of the beneficiary's employment experience:

- Letter of [REDACTED] president of the petitioner, dated August 8, 2006. The letter states

that the beneficiary was hired by the petitioner as a full-time employee as [REDACTED] on May 18, 1999.

- Letter of [REDACTED] dated August 27, 2007. The author claims that he was previously employed as the General Manager of Support Systems, Inc., when the beneficiary worked there as IT Manager of the computer department. The letter states that the beneficiary worked full-time for Support Systems, Inc. from August 1996 until July 2001, and that the owner of the company has since retired.
- Letter of [REDACTED] dated November 8, 2007. The letter states that the beneficiary worked on a full-time basis for the company as an Administration Manager in Systems from January 15, 1989 to June 30, 1993.

There are several issues with the beneficiary's claimed experience:

- The labor certification and the employment letter of [REDACTED] state different dates of employment with the petitioner. The labor certification also states that the beneficiary was employed 20 hours per week, while the employment letter states that the beneficiary worked full-time. In the brief in support of the motion to reopen and reconsider, counsel claims that the conflict between the employment letter of [REDACTED] and the labor certification regarding the hours worked by the beneficiary was because the letter specifically referred to when the beneficiary initiated full-time employment with the petitioner in 1999, whereas the labor certification describes when the beneficiary's part-time employment started. However, assuming the Forms W-2 in the record pertain to the beneficiary (*see* discussion of the beneficiary's purported Social Security Number *supra*), they indicate that the petitioner paid the beneficiary \$20,000.00 in 2001, \$40,000.00 in 2002, \$36,000.00 in 2003, \$40,000.00 in 2004, \$40,000.00 in 2005, and \$56,000.00 in 2006. Therefore, contrary to counsel's claim, it appears that the beneficiary initiated full-time employment with the petitioner in 2002, after his employment with [REDACTED] had ended.
- The labor certification states that the beneficiary was employed 20 hours per week with [REDACTED], but the employment letter of [REDACTED] states that the beneficiary worked full-time for the company. Counsel does not explain the conflict between the employment letter of [REDACTED] and the labor certification regarding the hours worked by the beneficiary.
- Taken together, the letters of [REDACTED] state that the beneficiary worked full-time for both the petitioner and [REDACTED] at the same time from May 1999 through July 2001. In addition, the labor certification states that the beneficiary was working 1.5 hours per week for two other employers during this period (for [REDACTED] and Associates until August 1999, and for [REDACTED]). The transcripts in the record also indicate that the beneficiary was attending UDC in the spring and fall semesters of 1996. In the brief in support of the motion to reopen and reconsider, counsel claims that the beneficiary did work full-time for both the petitioner and [REDACTED] at the same time. The petitioner claimed that the beneficiary worked for the petitioner from 8:00am to 5:00pm and then worked for [REDACTED] at night and on the weekends. Counsel did

not explain how the beneficiary was also able to attend UDC and work for up to two additional employers at 1.5 hours per week during this time.

- The labor certification does not mention the beneficiary's claimed experience with [REDACTED]. The letter pertaining to the beneficiary's employment experience with [REDACTED] was not submitted until the filing of the motion to reopen and reconsider. The beneficiary's claim of prior employment experience is less credible if the experience is not stated on the labor certification. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976). Counsel claims that "prior counsel failed to explain" that the beneficiary could use his employment experience gained outside the U.S. Counsel does not explain why the beneficiary would understand that education gained outside the U.S. could be used, but experience could not. Further, as noted by the director, the letter attesting to the beneficiary's experience with [REDACTED] was not written by his employer. The letter attesting to the beneficiary's experience with [REDACTED] was written by an individual employed at a different company. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B). The record does not contain any other evidence of the beneficiary's employment with that company, such as Forms W-2. In the brief in support of the motion to reopen and reconsider, counsel cites to *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988), for the proposition that the submission of affidavits or statements are the only documents necessary to prove an alien meets the experience requirements for an offered position. It is noted that this cited case is from the United States District Court, District of Columbia. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters 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.

Further, the facts of *Lu-Ann Bakery Shop* are easily distinguishable from the instance case. *Lu-Ann Bakery Shop* involved the revocation of the approval of a petition. The Service revoked the petition because the petitioner did not provide contemporaneous evidence of the beneficiary's claimed employment. The court stated that the Service could have revoked the petition based on a finding that that submitted experience letter was not credible, but it could not revoke simply for the failure to provide contemporaneous evidence. In its holding, the court states:

[USCIS] is of course free to determine, upon sufficient evidence, that [an employment experience letter] is not accurate or not credible, [however, USCIS] erred by refusing to make such a conclusive determination in [REDACTED] and by again shifting the burden on him to prove by contemporaneous evidence that he actually had the experience to which the employer had attested.

\* \* \*

The Court's ruling does not, of course, mean that [USCIS] must accept as true or accurate the affidavits presented by the petitioner, nor does it mean that [USCIS] may not consider as evidence the lack of contemporaneous evidence in its determination whether the petitioner has the requisite experience. What [USCIS] cannot do, however, is deny or revoke a petition because of the fact that contemporaneous evidence has not been presented without making a conclusive determination that the affidavits presented are not accurate or credible or otherwise concluding that the petitioner does not have the requisite experience.

*Id.* at 11-12. In the instant case, the director denied the petition after concluding that the employment experience letters were not credible, and noting that there exists no other evidence in the file to establish the beneficiary's experience. This is consistent with holding of *Lu-Ann Bakery Shop*.

Counsel's explanations of the multiple issues with the experience letters described above are not credible. Further, counsel provides no documentary support for her claims. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Given the issues described above, the AAO concurs with the director's decision that the submitted experience letters are not sufficient to establish that the beneficiary possesses three years of experience in the job offered prior to the priority date.

Therefore, the petitioner has not established that the beneficiary possesses the educational and experience qualifications required to perform the proffered position. 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)).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)

(noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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.