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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

B6

[Redacted]

FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **MAR 04 2011**

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

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

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

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, 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 a Montessori school for children sixteen months to six years. It seeks to employ the beneficiary permanently in the United States as a Spanish Montessori teacher. As required by statute, a Form ETA 750,1 Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor (the DOL), accompanied the petition.² 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. The director also determined that the petitioner did not establish its ability to pay the proffered wage as of the 2005 priority date and onward.

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

The Beneficiary's Qualifications

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). The priority date of the petition is February 1, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

² The AAO notes that the petitioner filed a subsequent I-140 petition [REDACTED] for the beneficiary with a certified ETA Form 9089 under the EB3 skilled worker classification. This petition was approved on June 7, 2010.

³ 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).

C.F.R. § 204.5(d).⁴ The Immigrant Petition for Alien Worker (Form I-140) was filed on November 9, 2006.

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

Provide Montessori instruction in Spanish language arts and in reading and writing to preschool Montessori students. Develop and implement teaching strategies and techniques for Spanish language instruction. Develop foreign language curriculum, analyzing, designing and preparing various course objectives and outlines.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	Blank
High school	Blank
College	4
College Degree Required	Bachelors or equivalent
Major Field of Study	Elementary Education or related field

Training: AMI Montessori

Experience:

Job Offered	2 years ⁵
Or in the related occupation Of Spanish language instruction	

Block 15:

Other Special Requirements Spanish language instruction, must be in a preschool setting. AMI Montessori training or foreign equivalent, and Spanish proficiency required.

As set forth above, the proffered position requires four years of college culminating in a bachelor's degree in elementary education or in a related field.

⁴ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

⁵ The petitioner also indicates a related occupation of Spanish language instruction but does not indicate any specific number of years or months of experience.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of a document from the Veracruz Training School for Teachers in Jalisco, Mexico dated June 23, 1987. This document states that the beneficiary received the title of "Teacher of Kindergarten Education" from the school. Another document from the Escuela Normal Veracruz states that the beneficiary finished her studies in the career of professor of preschool education. On the Form ETA 750B, the alien represents that she has a bachelor's degree after completing four years of education at the Veracruz Normal School in Guadalajara. She does not identify her specific secondary education credentials.

With the I-140 petition, the petitioner submitted a Work Experience Evaluation report dated December 20, 2000 and written by [REDACTED] stated that the beneficiary's years of work in the elementary education field since 1983 was the equivalent of a U.S. bachelor of science in education awarded by a regionally accredited U.S. institution. [REDACTED] utilized the three years of work experience for one year of college level studies ratio utilized by United States Citizenship and Immigration Services (USCIS) in its H-1B non-immigrant petition in her evaluation. The petitioner additionally submitted a credentials evaluation, dated May 24, 2001 and written by [REDACTED] that stated the beneficiary had completed seventeen years of progressively responsible qualifying work experience and attended professional-level training/academic studies. The evaluator states that the beneficiary completed two years of bachelor's level academic studies from the Veracruz Center from 1984 to 1986. The evaluator equated the beneficiary's work experience to academic work utilizing the ratio of three years of work experience to one year of college.

In response to the director's request for evidence (RFE) dated October 10, 2007, the petitioner submitted a third educational evaluation from the Trustforte Corporation that states the beneficiary completed the equivalent of three years of academic studies toward a Bachelor of Arts degree in education, with a specialization in early childhood education, at an accredited U.S. college or university, based on three years of studies at the Escuela Normal Veracruz and her Association Montessori Internationale (AMI) diploma.

The director denied the petition on February 28, 2008. He determined that the beneficiary's combination of college level studies and work experience could not be accepted as a foreign equivalent degree to a four-year U.S. bachelor's degree in elementary education or a related field.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel states that the director concluded that the proffered position could only be classified as an EB3 professional because it assumed that the training certification from the AMI could only be obtained following baccalaureate studies.

Counsel provides a letter dated May 5, 2008 and written by [REDACTED] [REDACTED] states that the educational equivalent of a bachelor degree, while preferred, is not the requirement for obtaining AMI certification.

Counsel also submits a letter from [REDACTED] the petitioner's director, dated May 5, 2008 that states that while the AMI diploma is a prerequisite for the petitioner's teachers, a bachelor's degree or foreign equivalent education is not. [REDACTED] includes the text of Part 5403.0032, of the state of Minnesota rules on teacher qualifications for child care centers. The breakdown describes both the education and work experience required for various types and levels of licensure. [REDACTED] states that the state of Minnesota rules make clear that a combination of education and experience may be used for licensure.

Counsel also states that since the petitioner has also requested that the petition be processed under the skilled worker category, the beneficiary's educational qualifications may be the functional equivalent of a four year U.S. bachelor's degree rather than the foreign equivalent degree required for professional positions. Counsel refers to an unpublished AAO decision dated June 14, 2007 and states that in this decision the AAO approved the case in the skilled worker category because the beneficiary had four years of college-level education from three different schools.⁶

The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Part A of the Form ETA 750 indicates that the DOL assigned the occupational code of 25-2011 with accompanying job title, Preschool Teachers, except Special Education, to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at <http://online.onetcenter.org>, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.⁷

In the instant case, the DOL categorized the offered position under the SOC code 25-2011.00. The O*NET online database states that this occupation falls within Job Zone Three.

⁶ The AAO notes that while 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Further, neither the petitioner nor counsel in the instant matter asserts that the beneficiary has four years of college level education.

⁷ See <http://www.bls.gov/soc/socguide.htm>.

According to the DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. The DOL assigns a standard vocational preparation (SVP) of 6 to Job Zone 3 occupations, which means “[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree.” See <http://online.onetcenter.org/link/summary/25-2011> (accessed January 11, 2011). Additionally, the DOL states the following concerning the training and overall experience required for Job Zone 3 occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

See id. Because of the requirements of the proffered position and the DOL’s standard occupational requirements, the proffered position is for a skilled worker, but might also be considered under the professional 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.

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

Initially, however, 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 the DOL. Thus, at the outset, it is useful to discuss the 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 the 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 [Immigration and Naturalization Service] (INS). The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁸ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) 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

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

determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of “matching” them with those of corresponding United States workers so that it will then be “in a position to meet the requirement of the law,” namely the section 212(a)(14) determinations.

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

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

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

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from 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 (9th Cir. 1984).

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

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

The petitioner in this matter relies on the beneficiary's combined education and work experience to reach the "equivalent" of a degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, several years of studies at less than a baccalaureate level combined with years of work experience will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the

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

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 she does not have the minimum level of education required for the 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 USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

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.

In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the Form ETA 750 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.*

at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the Form ETA 750 does not specify an equivalency to the requirement of a four year bachelor's degree in elementary education or a related field.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

On August 16, 2010, the AAO issued a request for evidence to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond her studies at the Veracruz Normal school. The AAO also noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's degree in elementary education might be met through a combination of lesser degrees and/or a quantifiable amount of work experience. The AAO further advised that that the labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a four-year U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience when the labor market test was conducted.

In response to the request for evidence, counsel submits a copy of the Reduction in Recruitment Application for Alien Employment Certification that was submitted to the Minnesota Department of Employment and Economic Development. Counsel states that the petitioner's recruitment results makes clear that it considered candidates who had a combination of education

and experience. Counsel references the letters from [REDACTED] and from [REDACTED], that were previously submitted in the petitioner's appeal materials.

Counsel states that the instant petition is not a case in which the employer excluded qualified U.S. candidates who had the experience and education required for the position, but rather the petitioner would have considered any qualified candidate based on any combination of education and experience advertised in its recruitment campaign.

The AAO notes that in the petitioner's correspondence to the Minnesota Department of Employment and Economic Development, it states that at a minimum, the position requires a bachelor's degree or equivalent in elementary education or a closely related field plus two years of work experience in Spanish language instruction in preschool setting. The petitioner further noted in its recruitment report that two U.S. candidates applied for the position, but that neither had the minimum education or experiential requirements. The newspaper advertisements submitted to the record indicates that a BA/BS or equivalent in elementary education or a related field plus two years of experience in Spanish language instruction in preschool setting are required, along with AMI Montessori training and Spanish proficiency. The petitioner's posting notice also indicates that a bachelor's degree or equivalent in elementary education is required.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *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).

The petitioner submitted three evaluations of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification. Both the Bank Street evaluation and the Trustforte evaluation examined the beneficiary's educational studies to determine that the beneficiary had the equivalent of a four year U.S. bachelor's degree based on her education and work experience, while the Global Education Group examined only the beneficiary's extensive work experience to reach its equivalency determination. Thus, the Global Education Group evaluation is in conflict with the other two evaluations. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice."

As noted by the director, all three evaluations used an equivalence to determine that three years of experience equaled one year of college to conclude that the beneficiary had achieved the equivalent of a U.S. four-year bachelor's degree in elementary education, but that regulatory-

prescribed equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Additionally, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate. Thus, the AAO gives no weight to any of the three evaluations found in the record.

Moreover, as advised in the RFE issued to the petitioner by this office, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is “a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page listed on their website, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

EDGE provides a great deal of information about the educational system in Mexico. The EDGE overview of Mexican education states the following:

Since 1984, training of early childhood and elementary school teachers takes place at an *escuela normal* (teacher training college); secondary school teachers are trained at an *escuela normal superior* (higher teacher training college). *Facultades de Pedagogía* (Faculties of Pedagogy) also offer such teaching degrees as the *Licenciatura en Pedagogía* (Licentiate in Pedagogy) at universities. Admission to *Licenciatura* programs in education requires *bachillerato* (upper-secondary), *preparatoria* (academic upper-secondary), or comparable upper-secondary credentials such as the former *Título de Profesor de Educación Primaria* (Title of Teacher of Elementary Education) or *Título de Profesor de Educación Preescolar* (Title of Teacher of Early Childhood Education). Full-time programs last from 3 to 4 years; *cursos intensivos* (intensive programs for working teachers) require 6 summers. Upon completion of the programs, students are awarded a *Título de Licenciado en Educación Preescolar* (Title of Licentiate in Early Childhood Education), *Título de Licenciado en Educación Primaria* (Title of Licentiate in Elementary Education), or *Título de Licenciado en Educación Media en la especialidad de...* [Title of Licentiate in Secondary Education in the specialization of...(major)]. Other nomenclature exists.

While the EDGE documentation confirms that elementary school teacher training is done at *escuelas normales*, it does not suggest that a two or three year course of studies at an *escuela normal* may be deemed a foreign equivalent degree to a U.S. baccalaureate. It rather describes credentials such as “titles de professor/professor de Educación Primaria as awarded upon

completion of three years of upper secondary and comparable to completion of a vocational or other specialized high school curriculum in the United States.”

There is no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond her studies at the Veracruz Normal School between 1984 and 1986 and her Montessori training in Minnesota, which is not considered university-level education.⁹ Further, although the Trustforte evaluation describes a third year of studies at the Veracruz Normal School, the AAO does not find any specific document that addresses any coursework undertaken by the beneficiary between 1986 and 1987 that would constitute a third year of post secondary level studies.

The Form ETA 750 does not provide that the minimum academic requirements of four years of bachelor level studies might be met through a combination of work and educational studies or some other formula other than that explicitly stated on the Form ETA 750. The copies of the notice(s) of Internet and newspaper advertisements and recruitment, provided with the petitioner’s response to the RFE issued by this office, also fail to advise the DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. Thus, the alien does not qualify as a skilled worker as she does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

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 with regard to the beneficiary’s qualifications.

The Petitioner’s Ability to Pay the Proffered Wage

The AAO will now examine whether the petitioner established its ability to pay the proffered wage.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at

⁹ Although the beneficiary represents on Part B, of the ETA Form 750 that she received a bachelor’s degree following her studies at the Veracruz Normal School from 1982 to 1986, the AAO finds no evidence in the record of the beneficiary’s studies prior to 1984.

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. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As discussed previously, the Form ETA 750 was accepted on February 1, 2005. The proffered wage as stated on the Form ETA 750 is \$27,000 per year.

With the initial I-140 petition, the petitioner submitted a budget for the 2006-2007 school year. The petitioner also submitted its Form 990, Return of Organization Exempt Form Income Tax (Form 990), for tax year 2004.

In response to the director's RFE dated October 10, 2007, the petitioner submitted its Forms 990 for tax years 2005 and 2006. The petitioner also submitted an Independent Auditor's Report dated October 9, 2007 that examined the petitioner's statement of financial position as of June 30, 2007. The record also contains the beneficiary's W-2 Forms for tax years 2005 and 2006 that indicate the beneficiary received wages of \$28,492.31 in 2005 and \$27,640.75 in 2006. The petitioner also submitted an ADP Earnings Statement for the beneficiary for December 7, 2007 indicating that the beneficiary was paid a weekly salary of \$812.50 for fifty hours of work at the rate of \$16.50 an hour and the year to date salary is indicated as \$28,325.77.

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, 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.

In the instant case, the AAO notes that both the beneficiary's W-2 Forms and the ADP Earnings Statement identify the employer's name as [REDACTED] as a non-profit management resources company for the petitioner. The director did not accept these documents as evidence of the petitioner's ability to pay the proffered wage. On appeal, the petitioner submits additional information with regard to [REDACTED] and the petitioner. Thus the question before the AAO is whether the petitioner has established that it is the beneficiary's employer, or whether by utilizing Pillsbury United Communities management services, the petitioner has forfeited its role as employer.

In determining an actual employer, the regulation at 20 C.F.R. § 656.3 provides:

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.

The role of a non-profit management service providing payroll and benefits services to other non-profit organizations has not been directly addressed in any precedent AAO decisions. A number of precedent decisions have examined the issue of staffing offices versus actual employers. In *Matter of Smith*, 12 I&N Dec. 772 (1968), the petitioner, a staffing service, provided a continuous supply of secretaries to third-party clients. The district director determined that the staffing service, rather than its clients, was the beneficiary's actual employer. To reach this conclusion, the director looked to the fact that the staffing service would make contributions to the beneficiary's social security, worker's compensation, and unemployment insurance programs; would withhold federal and state income taxes; and would provide other benefits such as group insurance. *Id.* At 773.

In *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992), a firm sought to utilize the H-1B nonimmigrant visa program and temporarily outsource its aeronautical engineers to third-party clients on a continuing basis with one-year contracts. In *Ord*, the Regional Commission determined that the petitioning firm was the beneficiary's actual employer, not its clients, in part because it was between an employer and a job seeker, but had the authority to retain its employees for multiple outsourcing projects. In *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982), the petitioner sought to utilize the H-2B program to employ machinists who were to be outsourced to third-party clients. The commissioner again determined that were a staffing service does more than refer potential employees to other employers for a fee, where it retains its employees on its payroll, etc. The staffing service rather than the end-user is the actual employer. *Id.*

In the instant case, [REDACTED] had an address and Federal Employer Identification Number (FEIN) distinct from the petitioner's address and FEIN on the beneficiary's W-2 forms. [REDACTED] states in his letter that his organization and the petitioner have a management agreement under which [REDACTED] hires all [REDACTED] (the petitioner) employees and assigns them back to the petitioner for employment. [REDACTED] states that [REDACTED]

provides all human resource services including the issuance of paychecks and W-2 Forms to the petitioner's employees and the petitioner reimburses [REDACTED] for the cost of all employee-related expenses including wages, taxes, and benefits, in addition to paying an additional three per cent service fee for the provision of these services. The Management Service Agreement between [REDACTED] and the petitioner states that [REDACTED] will provide payroll and benefit administration, staff support for an independent audit, manage government filings such as W-2 Forms, and provide leased office space. The agreement further states that [REDACTED] will hire a number of staff who will be assigned to perform duties for [REDACTED] Montessori School provided that the petitioner provides sufficient funds to PUC to cover all direct costs for the employees, including wages, salaries, employee benefits, payroll taxes and mileage reimbursements.

Within the context of actual employer versus management services that provide payroll and benefits infrastructure, the evidence in the record indicates that [REDACTED] plays the role of an employer rather than as a management resource. Furthermore, the AAO notes that the 2004 management agreement between the petitioner and [REDACTED] was entered on February 5, 2004, valid for one year from January 20, 2004 to December 31, 2004. While the agreement provided the petitioner the option of renewing the agreement for one additional one-year from January 1, 2005 to December 31, 2005 under renegotiated terms, the record does not contain any renewed agreement for 2005, the year of the priority date, or any subsequent years. The AAO also notes that the petitioner submitted the beneficiary's W-2 form for 2009 that was issued in the petitioner's name with another petition for the instant beneficiary. Thus, the AAO cannot accept the beneficiary's W-2 forms produced by [REDACTED] as evidence of wages paid by the petitioner to the beneficiary for any relevant years. Therefore, the petitioner must demonstrate that it paid the beneficiary the proffered wage for all relevant years with the W-2 forms issued by the petitioner or establish that [REDACTED] is in fact a management company that only manages the petitioner's payroll obligations. The petitioner failed to establish its ability to pay the proffered wage for all relevant years except for 2009 through an examination of wages actually paid to the beneficiary.

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 (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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as

stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *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 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The evidence in the record of proceeding shows that the petitioner is a non-profit organization. On the petition, the petitioner claimed to have been established in 2003, to have a budget of \$449,000 and to currently employ eleven workers. The petitioner submitted its Forms 990 for tax years 2004 through 2006.¹⁰ The petitioner's Form 990 indicates that its fiscal year runs from July 1 of one year and ends June 30 of the next year.¹¹ The petitioner also submitted audited

¹⁰ Although the director did not note this in his decision, the petitioner's 2004 Form 990 is material to these proceedings. The petitioner's tax year runs from July 1, 2004 to June 30, 2005, and, thus, the priority date for the instant petition, February 1, 2005, is covered by the petitioner's 2004 tax year.

¹¹ Thus, the petitioner submitted its 2004 Form 990 to establish its ability to pay the proffered wage as of the February 1, 2005 priority date.

financial statements as of June 30, 2007. The tax returns and audited financial statements demonstrate the petitioner's net income for the relevant years as following.

- In the fiscal year of 2004 (7/1/04-6/30/05), the Form 990 stated net income¹² of (\$143,602).
- In the fiscal year of 2005 (7/1/05-6/30/06), the Form 990 stated net income of (\$39,992).
- In the fiscal year of 2006 (7/1/06-6/30/07), the Form 990 stated net income of (\$52,127).

Therefore, for the fiscal years of 2004 through 2006, the petitioner did not have sufficient net income to pay the beneficiary the proffered wage.

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

Net current assets are the difference between the petitioner's current assets and current liabilities.¹³ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

It is noted that the Form 990 does not permit a filer to identify its net current assets. In order to establish its net current assets in this case, the petitioner would have needed to have submitted audited balance sheets. The record contains the petitioner's audited financial statements as of June 30, 2007. The audited financial statements demonstrate that the petitioner had total current assets of \$44,474 and total current liabilities of \$26,495, and therefore, had net current assets of \$17,979 at the end of the fiscal year 2006. Therefore, the petitioner failed to establish its ability to pay the proffered wage for its fiscal year of 2006 with net current assets. The record is devoid of such evidence for the fiscal years 2004 and 2005. Going on record without supporting

¹² For a non-profit corporation, USCIS considers net income to be the figure shown on Line 18, Excess or (deficit) for the year (Line 18-IRS Form 990 for years prior to 2008).

¹³ 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.

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)). Accordingly, for the fiscal years 2004 and 2005, the petitioner did not have sufficient net current assets to pay the proffered wage to the beneficiary. The record does not contain any regulatory-prescribed evidence for the petitioner's fiscal years 2007 and 2008. The petitioner failed to establish its ability for these two years because it failed to submit regulatory-prescribed evidence for these years.

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.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the Form 990s and the petitioner's audited financial statements as of June 30, 2007 document as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner submitted its I-140 petition in 2006, three years after the school was established. The petitioner is a non profit entity with modest compensation of officers and directors as indicated in Part II of the Form 990. The record has extensive documentation on the recruitment process for Montessori teachers, with less documentation on the petitioner's

financial assets, reputation within the [REDACTED] or other issues. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.