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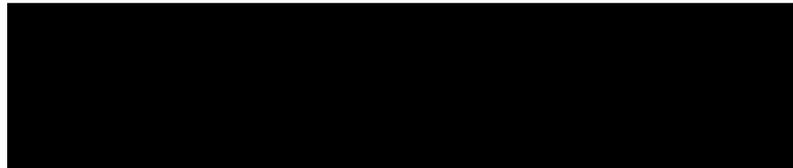
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

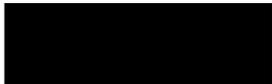
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B6



Date: **NOV 16 2011**

Office: MIAMI FIELD OFFICE

FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a 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 preference visa petition was denied by the Field Office Director, Miami, Florida, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology company. It seeks to employ the beneficiary permanently in the United States as a computer network analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

As set forth in the director's May 4, 2011 denial, the primary issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). 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).

Here, the Form ETA 750 was accepted on April 26, 2001. The proffered wage as stated on the Form ETA 750 is \$59,000.00 per year. The Form ETA 750 states that the position requires eight years of grade school education, four years of high school education, and four years of experience in the offered job of computer network analyst.

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

The evidence in the record of proceeding reveals that the petitioner is a C corporation. The petitioner indicated on the Form I-140 petition at part 5, section 2 that it was established in 1990, and employs 7 workers, but failed to list either its gross annual income or its net annual income. According to the tax returns in the record, the petitioner's fiscal year corresponds to the calendar year. On the Form ETA 750B, signed by the beneficiary on April 16, 2001, the beneficiary claimed to have worked for the petitioner since April 1999.

On appeal, counsel asserts that the petitioner has submitted sufficient evidence to demonstrate its continuing ability to pay the proffered wage to the beneficiary since the priority date. Counsel states that during the period from 2001 to 2005, the petitioner paid wages well in excess of the proffered annual wage of \$59,000.00 to two part-time subcontractors and that such wages would have otherwise been available to pay the beneficiary had he been employed by the petitioner. Counsel notes that a consideration of the petitioner's net assets and actual wages paid to the beneficiary from 2006 to 2009 revealed the petitioner's ability to pay the proffered wage in this period. Counsel contends that funds in the petitioner's bank accounts were and are available to pay the beneficiary the proffered salary since the priority date of April 26, 2001.

Relevant evidence in the record also includes the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008, bank statements from [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2008, and a portion of 2009, and copies of payment slips, cancelled checks, and payroll summaries purportedly reflecting employee compensation paid by the petitioner to the beneficiary in 2006, 2007, and 2008.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the

petitioner's ability to pay the proffered wage. While the beneficiary claimed that he had been employed by the petitioner the Form ETA 750B and the record contains no evidence that the beneficiary has worked for any other employer other than the petitioner, the petitioner failed to provide any evidence reflecting the payment of employee compensation to the beneficiary in the period from 2001 to 2005.

Nevertheless, the record contains payroll summaries reflecting employee compensation paid to the beneficiary by the petitioner as follows:

- 2006 – \$48,473.00 (\$10,527.00 less than the proffered wage of \$59,000.00).
- 2007 – \$57,088.71 (\$1,911.29 less than the proffered wage of \$59,000.00).
- 2008 – \$52,079.02 (\$6,920.98 less than the proffered wage of \$59,000.00)

The record contains photocopies of cancelled checks for the period from January 2009 through October 2009 purportedly reflecting employee compensation in the amount of \$21,170.67 paid to the beneficiary by the petitioner.

Although the petitioner also provided photocopies of payment slips and cancelled checks made payable to the beneficiary in 2006, as well as cancelled checks made payable to the beneficiary in 2007 and 2008, the petitioner failed to include all of the corresponding cancelled checks listed as employee compensation to the beneficiary on the payroll summaries noted above for 2006, 2007, and 2008. In addition, only one of the cancelled checks made payable to the beneficiary in 2006 is listed as employee compensation paid on the payroll summary for 2006, with the remaining three payment slips and seven cancelled checks made payable to the beneficiary in 2006 being unlisted on the payroll summary for that year. Furthermore, a review of these payment slips, cancelled checks, and payroll summaries reveals that the petitioner paid the beneficiary amounts ranging from \$19.00 to \$1069.59 for a variety of items and activities including but not limited to; expense reimbursements, bonuses, [REDACTED] tickets, expenses for conferences, legal expense reimbursement, and travel expenses in the period from 2006 to through October 2009. Neither the payment slips, nor the cancelled checks, nor the payroll summaries can be considered as persuasive evidence of any wages having been paid to the beneficiary because there is no indication that payments made by the petitioner to the beneficiary were subject to Social Security withholding taxes and had been reported to the Internal Revenue Service (IRS) or [REDACTED] a state tax authorities. Further, the payments are not reflective of a commercially viable employer-employee relationship because the payments range from \$19.00 to \$1069.59 for a variety of items and activities other than the payment of a regular salary. The record is absent any explanation from the petitioner as to why the beneficiary, purportedly a full-time employee working forty hours per week and being paid an annual wage of \$59,000.00, would receive such disparate payments in such a fashion. 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 payment slips, cancelled checks, and payroll summaries as persuasive evidence of wages paid to the beneficiary.

Clearly, the petitioner has not credibly established that it paid the beneficiary any wages from the priority date of April 26, 2001 through 2009.

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

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure 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 petitioner’s Form 1120 tax returns list its net income as shown in the table below.

- In 2001, the Form 1120 stated net income¹ of \$7,348.00.
- In 2002, the Form 1120 stated net income of <\$8,126.00.>²
- In 2003, the Form 1120 stated net income of <\$7,087.00.>
- In 2004, the Form 1120 stated net income of \$16,309.00.
- In 2005, the Form 1120 stated net income of \$2,662.00.
- In 2006, the Form 1120 stated net income of \$6,402.00.
- In 2007, the Form 1120 stated net income of <\$1,705.00.>
- In 2008, the Form 1120 stated net income of <\$5,039.00.>

Clearly, the petitioner did not have sufficient net income to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, 2007, and 2008.

As an alternate means of determining the ability of the petitioner to pay the proffered wage, USCIS may review its net current assets. Net current assets are the difference between a corporate entity’s current assets and current liabilities.³ A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the corporation is expected to be able to pay the proffered wage using those net current assets. The tax returns of the petitioner demonstrate its end-of-year net current assets as shown in the table below.

- In 2001, the Form 1120 stated net current assets of \$9,476.00.
- In 2002, the Form 1120 stated net current assets of <\$4,220.00.>
- In 2003, the Form 1120 stated net current assets of <\$3,290.00.>
- In 2004, the Form 1120 stated net current assets of <\$1,665.00.>
- In 2005, the Form 1120 stated net current assets of \$12,872.00.

¹ For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

² The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss.

³ 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.

- In 2006, the Form 1120 stated net current assets of \$13,167.00.
- In 2007, the Form 1120 stated net current assets of \$79,049.00.
- In 2008, the Form 1120 stated net current assets of \$17,148.00.

While the petitioner did possess sufficient net current assets to pay the proffered wage in 2007, it did not have sufficient net current assets to pay the proffered wage in 2001, 2002, 2003, 2004, 2005, 2006, and 2008.

The record contains the petitioner's monthly statements for three separate business banking accounts held at [REDACTED] for 2001, 2002, 2003, 2004, 2005, 2008, and that portion of 2009 from January through October. Regardless, the petitioner's business checking accounts represent cash needed to conduct the financial transactions involved in the petitioner's regular day-to-day operations rather than a readily available asset that could be used to continually pay the proffered wage to the beneficiary since the priority date. In addition, the balances in these accounts are variable with combined monthly balances generally well below the proffered wage. Finally, the bank records are incomplete as many of the statements are missing pages, 2002 was the only year for which the petitioner provided monthly statements for all three accounts, and the petitioner failed to submit any statements for 2006 and 2007. Overall, these records do not establish that the petitioner more likely than not had the continuous and sustainable ability to pay the proffered wage since the priority date. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, as explained above, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered when determining the petitioner's net current assets. Therefore, the AAO will not consider the petitioner's bank statements persuasive when evaluating the petitioner's continuing ability to pay the proffered wage to the beneficiary.

On appeal, counsel asserts that during the period from 2001 to 2005, the petitioner paid wages well in excess of the proffered annual wage of \$59,000.00 to two part-time subcontractors and that such wages would have otherwise been available to pay the beneficiary had he been employed by the petitioner. While the Schedule A and corresponding attachments of the petitioner's Form 1120 tax returns reflect payments to subcontractors for 2001 as \$155,804.00, for 2002 as \$127,515.00, for 2003 as \$154,415.00, for 2004 as \$161,922.00, and for 2005 as \$96,395.00, the record is absent any evidence regarding the number of subcontractors employed by the petitioner in each respective year and the terms of employment for such subcontractors. Moreover, the record is absent any evidence to establish that any of these subcontractors was performing the same duties as those of the offered position of computer network analyst as certified in the Form ETA 750. As the record does not contain independent evidence demonstrating that the petitioner is replacing former employees or outsourced services, counsel's assertions on appeal must be considered without merit. 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)). 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).

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL on April 26, 2001, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income, or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612. 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, no evidence has been presented to show that the petitioner has a sound and outstanding business reputation as in *Sonogawa*. Nor has the petitioner included any evidence or detailed explanation of the corporation's milestone achievements or accomplishments. In addition, the petitioner has neither claimed nor provided any evidence demonstrating that it suffered any uncharacteristic business losses that prevented its continuing ability to pay the beneficiary the proffered wage as of the priority date. Further, no evidence has been presented to show that the petitioner's owners are willing and able to sacrifice or forego past, present, or future compensation to pay the beneficiary's proffered wage. The AAO cannot conclude that the petitioner has established that it had the continuing ability to pay the proffered wage of the beneficiary since the

priority date. 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.

Beyond the director's decision, the petition cannot be approved because the listing of education and experience requirements on the Form ETA 750 do not correspond to the education requirements of the category for which the Form I-140 petition was submitted. Consequently, the AAO issued a Notice of Intent to Deny (NOID), to the petitioner and counsel on October 19, 2011, informing both counsel and the petitioner that the AAO intended to dismiss the appeal on this basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. 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.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides:

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.

Federal circuit courts have upheld our authority to inquire as to whether the alien is qualified for the classification sought.

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).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). See also *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

The Form ETA 750 states that the certified job of computer network analyst requires eight years of grade school education, four years of high school education, no training, and four years of experience in the offered job. However on Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional, a category requiring the minimum of a baccalaureate degree for entry into the occupation.

There is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted establishes that the petition requires a United States baccalaureate degree or a foreign equivalent degree but that the Form ETA 750 requires only four years of experience in the offered job without any degree requirement. For this additional reason, the appeal must be dismissed.

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.