(b)(6)

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

DATE: DEC 0 8 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a residential facility for the elderly. It seeks to employ the beneficiary permanently in the United States as a billing and posting clerk. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent 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 and that the minimum requirements reflected on the labor certification do not meet the requirements of the classification sought. 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 April 9, 2009 denial, an 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)(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.

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 ETA Form 9089, Application for Permanent Employment Certification, 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 ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on May 7, 2004. The proffered wage as stated on the ETA Form 9089 is $10.50 per hour ($21,840.00 per year based on 40 hours per week). The ETA Form 9089 states that the position requires "some post High School" education in any business-related field or the alternate field of office management, or an alternate combination of education and experience consisting of High School plus one year of experience in the job offered or the alternate field of administrative assistant.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ ten workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on November 7, 2006, the beneficiary claims to have worked for the petitioner as an accountant from October 1, 2004, to April 27, 2009.[2]

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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'l Comm'r 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 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 petitioner demonstrated that it paid the beneficiary according to the table below.

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

[2] The AAO notes that the ending date of employment listed as after the date the petitioner and beneficiary signed and submitted the labor certification.

- In 2004, the Form W-2 stated wages paid to the beneficiary of $12,672.03.
- In 2005, the Form W-2 stated wages paid to the beneficiary of $4,318.00.
- In 2006, the Form W-2 stated wages paid to the beneficiary of $6,815.98.
- In 2007, the Form W-2 stated wages paid to the beneficiary of $1,865.00.
- In 2008, the Form W-2 stated wages paid to the beneficiary of $1,865.00.
- In 2009, a paystub dated March 5, 2009, stated year-to date wages of $932.50.

The AAO notes that Forms W-2 issued to the beneficiary by a different corporation, were submitted but not included above. The record of proceeding contains copies of the articles of incorporation for differentiating it as a separate corporation from the petitioner.

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Therefore, USCIS will not consider the wages paid to the beneficiary from in determining the petitioner's ability to pay the proffered wage.

Therefore, as the proffered wage was $21,840.00 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 or the paystub, but would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2004	$21,840.00	$12,672.03	$9,167.97
2005	$21,840.00	$4,318.00	$17,522.00
2006	$21,840.00	$6,815.98	$15,024.02
2007	$21,840.00	$1,865.00	$19,975.00
2008	$21,840.00	$1,865.00	$19,975.00
2009	$21,840.00	$932.50	$20,907.50

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), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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 record before the director closed on March 20, 2009, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2008 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2007 was the most recent return due. The petitioner did not submit a federal income tax

return or other regulatory-prescribed evidence from 2007. The petitioner's tax returns demonstrate its net income for 2004, 2005, and 2006, as shown in the table below.

- In 2004, the Form 1120S stated net income[3] of -$41,660.00.
- In 2005, the Form 1120S stated net income of -$16,568.00.
- In 2006, the Form 1120S stated net income of -$10,724.00.

Therefore, for the years 2004, 2005, 2006, and 2007, the petitioner did not demonstrate sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax return for 2005 did not include a completed Schedule L.[5] The petitioner's tax returns demonstrate its end-of-year net current assets for 2004 and 2006, as shown in the table below.

- In 2004, the Form 1120S stated net current assets of -$15,894.00.

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[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (1997-2003), line 17e (2004-2005), or line 18 (2006-2011) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed August 28, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional deductions and other adjustments shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its 2006 tax return.

[4] 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.

[5] For 2005, corporations with total receipts (line 1a plus lines 2 through 6 on page 1) and total assets at the end of the tax year less than $250,000 are not required to complete Schedule L if the "Yes" box on Schedule B, question 9, is checked. *See* http://www.irs.gov/pub/irs-prior/i1120s--2005.pdf (accessed August 28, 2012). Schedule B, question 9, is not checked "Yes" on the petitioner's 2005 Form 1120S, but the total receipts and total assets are less than $250,000.

- In 2006, the Form 1120S stated net current assets of $42,648.00.

Therefore, for the year 2006, the petitioner did have sufficient net current assets to pay the proffered wage. The petitioner did not demonstrate sufficient net current assets to pay the proffered wage in 2004, 2005, and 2007.

Therefore, from the date the ETA Form 9089 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 in 2004, 2005, and 2007.

Counsel asserts on appeal that the petitioner has the ability to pay the proffered wage and submits additional evidence of the personal assets of the petitioner's owner, including several residential real estate properties, bank accounts, and investment accounts in her name. USCIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. See Matter of M, 8 I&N Dec. 24 (BIA 1958), Matter of Aphrodite Investments, Ltd., 17 I&N Dec. 530 (Comm'r 1980), and Matter of Tessel, 17 I&N Dec. 631 (Acting Assoc. Comm'r 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Counsel also cited a memorandum dated May 4, 2004, from William R. Yates, Associate Director of Operations, USCIS, regarding the determination of ability to pay (Yates Memorandum). *See* Interoffice Memo. from William R. Yates, Associate Director of Operations, USCIS, to Service Center Directors and other USCIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

The Yates' Memorandum relied upon by counsel provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage."

The AAO consistently adjudicates appeals in accordance with the Yates Memorandum. However, counsel's partial excerpt indicating that this memo urges USCIS adjudicators to make a positive ability to pay determination in cases where the beneficiary is employed by the petitioner does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2) set forth in the memorandum as authority for the policy guidance therein. The regulation requires that a petitioning entity demonstrate its *continuing* ability to pay the proffered wage beginning on the priority date. If USCIS and the AAO were to interpret and apply the Yates Memorandum as counsel urges, then in this particular factual context, the clear language in the regulation would be usurped by an interoffice guidance memorandum without binding legal effect. The petitioner must demonstrate its continuing

ability to pay the proffered wage beginning on the priority date, which in this case is May 7, 2004. The petitioner's payment of a portion of the proffered wage in each year from 2004 to 2009 does not demonstrate the ability to pay the full proffered wage in those years.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 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 Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner demonstrated sufficient net current assets in 2006 to pay the proffered wage. The petitioner failed to demonstrate sufficient net income or net current assets to pay the proffered wage in 2004, 2005, and 2007. The petitioner failed to include a copy of the Schedule L for 2005 which would reflect net current assets for that year. The petitioner's gross receipts during the relevant years varied as did its wages paid. The petitioner indicated on the Form I-140 that it employs ten workers. The petitioner has been in business approximately ten years and it does not pay substantial compensation to its owner. No officer compensation was reported on the tax returns submitted. The petitioner did not submit evidence sufficient to demonstrate that the owner was willing and able to forego compensation in order to pay the beneficiary the proffered wage. In addition, there is no evidence in the record of the historical growth of the petitioner's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. 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.

As set forth in the director's April 9, 2009 denial, another issue in this case is whether or not the petitioner has established that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

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 (Acting Reg'l Comm'r 1977). As previously stated, the priority date of the petition is May 7, 2004, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).[6] The Immigrant Petition for Alien Worker (Form I-140) was filed on July 9, 2007.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

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[6] 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.

On the ETA Form 9089, the "job offer" position description for a billing and posting clerk provides for job duties which include assisting in compiling and recording a variety of financial and accounting data and related work.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Other.

4-A. States "if Other indicated in question 4 [in relation to the minimum education], specify the education required."

Some post High School.

4-B. Major Field Study: Any business-related field.

7. Is there an alternate field of study that is acceptable?

The petitioner checked "yes" to this question.

7-A. If Yes, specify the major field of study:

Office Managment.

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "yes" to this question.

8-A. If yes, specify the alternate level of education required:

High School.

8-C. If applicable, indicate the number of years experience acceptable in question 8:

1

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: The petitioner checked "no" to this question.

10. Is experience in an alternate occupation acceptable?

The petitioner checked "yes" that an alternate occupation was acceptable.

10-A. If Yes, number of months experience in alternate occupation required:

12

10-B. Identify the job title of the acceptable alternate occupation:

Administrative Assistant

14. Specific skills or other requirements: Ability and proper attitude to undergo on-the-job training.

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 F of the ETA Form 9089 indicates that the DOL assigned the occupational code of 43-3021.02 and title Billing, Cost, and Rate Clerks, 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.

In the instant case, the DOL categorized the offered position under the SOC code 43-3021.02. The O*NET online database states that this occupation falls within Job Zone three. 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://www.onetonline.org/link/summary/43-3021.02 (accessed August 29, 2012).

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 director noted that the minimum requirement for this classification is at least two years of training or experience; however, the labor certification submitted indicates that the beneficiary can qualify for the offered position with education consisting of "Some post High School." In the alternate, a beneficiary could qualify for the offered position with a combination of High School and 12 months of experience as an Administrative Assistant.

On appeal, counsel notes that the offered position falls within Job Zone 3 and asserts that the petitioner's Form I-140 petition is in compliance with relevant and regulatory standards. Counsel also asserts that the beneficiary qualifies for the position since she possesses a foreign bachelor's degree and several years of experience.

Counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case.

Counsel also cites *Matter of Kellogg*, 1994-INA-465 (BALCA Feb. 2, 1998)(*en banc*) asserting that the petitioner's contention is based on the use of the phrase "any suitable combination of education, training, or experience is acceptable."

The AAO notes that the phrase "any suitable combination of education, training, or experience is acceptable" is not contained in the labor certification or other supporting documents. The only combination of education, training, or experience which the petitioner noted is contained in the labor certification as a combination of High School and 12 months of experience as an Administrative Assistant. The AAO notes that this combination of education and experience equates to one year rather than two, and thus fails to meet the requirement of two years of training or experience.

Counsel also cites *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005). In *Grace Korean*, a federal district court held that United States Citizenship and Immigration Services (USCIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." *Id.* at 1179. Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). A judge in the same district, however, subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *5 (D. Or. Nov. 30, 2006).

Counsel also cites *Snapnames.com, Inc. v. Chertoff*, noting that the court held that "equivalency" was not "sameness." The AAO notes that counsel has failed to articulate how equivalency is relevant to the current proceeding as the issues under consideration do not include the equivalency of

foreign degrees or combinations of work experience to a degree. The issue at hand is whether or not the labor certification contained a minimum requirement of at least two years of training or experience, which it clearly did not.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The alien had a three-year degree and membership in the Institute of Chartered Accountants of India (ICAI). USCIS had concluded that the alien did not qualify for EB-2 or EB-3 (due to the specific job requirements on the labor certification). The court upheld the USCIS determinations on EB-2 and EB-3 as a professional but reversed USCIS in the EB-3 skilled worker classification.

In reaching its conclusions, the federal district court in *Snapnames.com, Inc.* determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at *14. In professional and advanced degree professional cases, however, where the alien is statutorily required to hold a bachelor's degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *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.*

Counsel also cites *Federal Insurance Co., BALCA Case No.: 2008-Per00037*, ETA Case No.: C-06006-72025, Issue Date: 20 February 2009. Counsel asserts that it would offend fundamental due process to deny an application for failure to write the attestation on the Form 9089 that "any suitable combination of education, training or experience would be acceptable." The AAO notes that if this phrase was included on the labor certification and the beneficiary was found to meet the minimum qualifications of the labor certification, the case would still be denied because the labor certification fails to require at least two years of training or experience as required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B). The director did not take issue with the beneficiary's qualifications, but the minimum requirements of the labor certification. Further, the petitioner's reliance on the cited BALCA decision is misplaced. Counsel does not state how the DOL precedent is binding in these proceedings. 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, BALCA 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).

Counsel also cites another BALCA decision, *Matter of Kpit Infosystems Inc.*, 2009-Per-00075 (2/25/09) in asserting that certification cannot be denied for lack of *Kellogg* Language. The AAO again notes that the petitioner's reliance on the cited BALCA decision is misplaced as counsel does

not state how the DOL precedent is binding in these proceedings. In addition, the director's decision does not deny or grant certification of a labor certification; rather it makes a determination regarding the qualifications of the petitioner and beneficiary in regards to the approved labor certification and then grants or denies an immigration benefit.

Counsel also cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and asserts that a court should accord an agency deference unless it appears from the statute or its legislative history that the agency's construction is contrary to clear Congressional intent. The AAO notes that counsel has failed to demonstrate that USCIS' construction regarding the minimum requirements for this classification being at least two years of training or experience are contrary to Congressional intent.

Counsel also cites *Occidental Engineering Co. v. INS*, 753 F.2d 766, 769-70 (9th Cir. 1985) and asserts that an abuse of discretion may be found where the agency decision is based on an improper understanding of the law. The AAO notes that counsel has failed to demonstrate that USCIS has an improper understanding of the law in the instant case and has submitted no evidence to establish how the director erred in asserting that the minimum requirements for the classification of a skilled worker are at least two years of training or experience.

Counsel also cites *Evangelical Lutheran Church in Am. v. INS*, 288 F. Supp. 2d 32, 43 (D.D.C. 2003) but fails to state its relevance to the instant matter as it dealt with an extension of stay on a nonimmigrant case rather than a determination regarding a labor certification.

Counsel also cites *Hootkins v. Chertoff*, CV 07- 5696 CAS (C.D. Cal. August 30, 2007), but fails to state its relevance to the instant matter as it dealt with surviving spouses in adjustment of status cases rather than a determination regarding a labor certification.

Counsel also cites *Edwards, Governor of Louisiana, et. al. v. Aguillard et. al.*, 482 U.S. 578 (1987) in support of the assertion that the cardinal principle of statutory construction is to save and not destroy. Again, counsel fails to articulate the relevance of the cited case in the instant matter. The cited case involves the teaching of creationism in schools, whereas the instant matter deals with an immigration benefit.

The regulation at 8 C.F.R. § 204.5(l) provides in pertinent part:

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that it requires less than two years of education, training or experience requirements for the proffered position. However, the petitioner requested the professional or skilled worker classification on the Form I-140.

The evidence submitted does not establish that the petition requires at least two years of training or experience such that the beneficiary may be found qualified for classification as a skilled worker.

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.