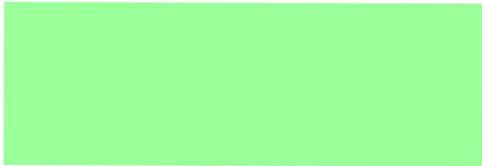




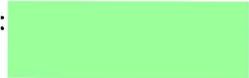
U.S. Citizenship  
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(b)(6)

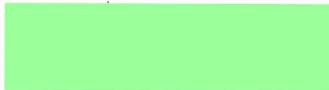


Date: JUN 07 2012

Office: NEBRASKA SERVICE CENTER

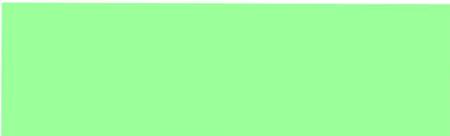
FILE: 

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 with the field office or service center that originally decided your case by filing a 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 an import/export medical supplies business. It seeks to employ the beneficiary permanently in the United States as a financial 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 March 20, 2009 denial, the single 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 Form ETA 750, Application for Alien 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 Form ETA 750, Application for Alien 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 Form ETA 750 was accepted on March 8, 2005. The proffered wage as stated on the Form ETA 750 is \$62,130.00 per year. The Form ETA 750 states that the position requires seven years of college with a degree in "public accountant" and a major field of study in "independent auditor" as well as two years of experience in the position offered or the related occupations of accountant or auditor.

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

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2002, to have a gross annual income of \$64,523.00, and to currently employ two workers. According to the tax returns in the record, the petitioner's fiscal year begins on June 1<sup>st</sup> and ends on May 31<sup>st</sup>. On the Form ETA 750B, signed by the beneficiary on March 2, 2005, the beneficiary does not claim to have worked for the petitioner.

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'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 Sonogawa*, 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 has not established that it employed and paid the beneficiary the full proffered wage from the priority date. Forms W-2 were submitted indicating that the petitioner paid the beneficiary wages according to the table below.

- In 2005, the Form W-2 stated wages paid to the beneficiary of \$18,000.00
- In 2006, the Form W-2 stated wages paid to the beneficiary of \$18,500.00

<sup>1</sup> 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).

(b)(6)

- In 2007, the Form W-2 stated wages paid to the beneficiary of \$40,120.00<sup>2</sup>
- In 2008, the Form W-2 stated wages paid to the beneficiary of \$47,000.00

In addition, the petitioner submitted copies of paystubs and payroll checks for a period of 44 days in 2009 showing \$8,424.99 paid. The AAO notes that as the petitioner's fiscal year is from June 1<sup>st</sup> through May 31<sup>st</sup>, the priority date of March 8, 2005, falls within the period covered by the 2004 tax return which was not submitted.

As the proffered wage was \$62,130.00 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 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	\$62,130.00	\$0	\$62,130.00
2005	\$62,130.00	\$18,000.00	\$44,130.00
2006	\$62,130.00	\$18,500.00	\$43,630.00
2007	\$62,130.00	\$40,120.00	\$22,010.00
2008	\$62,130.00	\$47,000.00	\$15,130.00
2009	\$62,130.00	\$8,424.99	\$53,705.01

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 (1<sup>st</sup> 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 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.

<sup>2</sup> A Form W-2 for \$40,120.00 in wages paid by the petitioner to the beneficiary was submitted which prior counsel referred to as being from 2007, but the year was not included on the copy. Thus alone, the Form W-2 would not serve as evidence of wages paid in 2007; however, the Form W-2 was accompanied by a Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return for 2007 which listed the payment, and is therefore corroborative evidence of the wage paid to the beneficiary for 2007.

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).

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. The record before the director closed on February 26, 2009, with the receipt by the director of the petitioner's submissions in response to the director's notice of intent to deny (ITD). 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 would have been the most recent return available. However, the petitioner submitted a copy of the 2008 tax return subsequent to filing the appeal. No tax return for 2004 which covered the period including the priority date was submitted. The petitioner's tax returns demonstrate its net income for 2005, 2006, 2007, and 2008, as shown in the table below.

- In 2005, the Form 1120 stated net income of \$4,321.00
- In 2006, the Form 1120 stated net income of \$4,231.00
- In 2007, the Form 1120 stated net income of \$18,806.00

- In 2008, the Form 1120 stated net income of \$16,885.00

Therefore, for the years 2005, 2006, and 2007, the petitioner did not have sufficient net income to pay the proffered wage. The petitioner demonstrated sufficient net income to pay the proffered wage only in 2008. The petitioner failed to submit regulatory-prescribed evidence for 2004.

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 net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>3</sup> 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. A Schedule L was not completed for 2005, 2006, 2007, or 2008.<sup>4</sup>

Therefore, for the years 2005, 2006, 2007, and 2008, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage. The petitioner failed to submit regulatory-prescribed evidence for 2004.

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.

On appeal, counsel asserts that the director failed to consider the totality of factors in assessing the petitioner's ability to pay the proffered wage. Counsel further states in his brief<sup>5</sup> that the petitioner is able to pay the proffered wage if the corporation's cash available in its checking account is considered. However, the AAO notes that no evidence of the petitioner's bank accounts was submitted into the record. In addition, counsel's reliance on the balances in the petitioner's bank accounts is misplaced. 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

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

<sup>4</sup>Corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L. See <http://www.irs.gov/instructions/i1120/> (accessed May 11, 2012).

<sup>5</sup>The AAO notes that counsel mistakenly refers to the petitioner as [REDACTED] and lists an incorrect receipt number in his brief.

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, 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 funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions).

Counsel also states in his brief that many corporations use the accrual basis accounting system which allows a company to declare "next-year expenses" as "Other current liabilities" in the current year. He then refers to specific amounts he claims are listed as other current liabilities on Schedule L and which are liquid assets immediately available to the corporation, thus asserting that the petitioner's balance sheet is not an accurate representation of its ability to pay the proffered wage. The AAO notes that: 1) the evidence in the record never addresses whether the petitioner uses the cash or accrual method of accounting; 2) there is no evidence in the record indicating that the petitioner switched from one method to another; 3) whether the petitioner's returns were prepared using either method, it does not make them poor indices of the funds available to the petitioner with which to pay wages; and 4) current liabilities are not assets, liquid or otherwise. Further, and most significantly, as none of the Schedule L attachments to any of the petitioner's tax returns were completed, it is not clear which figures or assets counsel is referring to as representing additional funds available to pay the proffered wage. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also states that USCIS must consider the normal accounting practices of a company and that reporting losses is a normal accounting practice of the petitioner and provides the following unpublished citation: *Matter of X*, [REDACTED] (AAO Jan. 31, 2003) Vermont Service Center, reported in 8 No. 18 *Bender's Immigr. Bull.* 1528-29 (Sept. 15, 2003). 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). The AAO also notes that if we were to accept that the goal of a corporation is to reduce its tax liability as a normal accounting practice, then the question would be can the petitioner demonstrate that it has funds available to pay the proffered wage. In the instant case, the petitioner has not submitted probative evidence that such funds are available.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that fail to demonstrate that the petitioner could pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

The record of proceeding also contains a letter from the owner of the petitioner dated February 22, 2009, in which she states that as owner and CEO of [REDACTED] she is committed to supplying the petitioner with any additional funds necessary for its success, including use of her personal assets to pay the beneficiary. 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.

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

In the instant case, the petitioner's gross receipts varied, but were never substantial. The amount of wages paid was also not substantial. The Form I-140 indicated that the petitioner employed only two workers, and prior counsel's response to the director's ITD states that the beneficiary has been the only employee since 2006. No officer compensation was paid. The petitioner has been in business almost ten years, but it does not pay substantial compensation to its owner. 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.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. 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 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires seven years of college including a public accountant degree with a major in the field of independent auditor as well as two years of experience in the job offered or in the related occupations of accountant or auditor. On the labor certification, the beneficiary claims to qualify for the offered position based on: 1) a claimed bachelor degree in the field of "Accountant" from [REDACTED] in Lima, Peru begun in 1976 and completed in 1980; 2) a public accountant certification from [REDACTED], Peru begun in 1980 and completed in 1985; 3) a certificate in "Managerial/Tech" from [REDACTED] in Lima, Peru earned in 1996; 4) a certificate in "Financial, Economic" from [REDACTED] in Lima, Peru earned in 1996; and 5) a certificate in "Admin, Reduce & Contai" from [REDACTED] in Lima, Peru earned in 1994. In addition, the beneficiary claims to qualify for the position based on 40 hours work experience per week as: an accountant for [REDACTED] in Lima, Peru from May 12, 1993 to 2002; an accountant general/internal auditor for [REDACTED] in Lima Peru from 1991 to 1993; and a general accountant for [REDACTED] in Lima, Peru from 1987 to 1991.

The beneficiary's claimed qualifying experience of at least two years was sufficiently supported by a letter from [REDACTED] giving the name, address, and title of the employer, and a description of the beneficiary's experience.

The record contains a copy of the beneficiary's public accountant diploma from [REDACTED] in Lima, Peru issued in 1980 and a copy of his public accountant certificate from [REDACTED] in Lima, Peru issued in 1985. However, the record did not contain any transcripts or other probative evidence sufficient to demonstrate that the beneficiary completed the seven years of college specifically required by the labor certification. The record contains an education

evaluation from [REDACTED] for [REDACTED] dated June 21, 2002, which concluded that the beneficiary through a combination of twenty-four years of work experience and professional training in accounting has attained the equivalent of a bachelor's degree in business administration with a concentration in accounting from an accredited institution of higher education in the United States.

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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

First, the AAO notes that the evaluation in the record does not specifically state that the beneficiary has completed seven years of college as required by the Form ETA 750. Second, the attainment of a bachelor's degree is not usually associated with completion of seven years of college. Third, the evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). Further, the record does not contain the transcripts relied on by the evaluator.

The beneficiary was required to have seven years of college education on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The evidence in the record does not establish that the beneficiary possessed the required education set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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.