



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE JUN 29 2012 OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

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 Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as an electric contractor. It seeks to permanently employ the beneficiary in the United States as an electrician. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is December 4, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the evidence does not establish that the beneficiary possessed the minimum educational requirements for the position of electrician as stated on the labor certification.

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

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

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time

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 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).

of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).² *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

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

² Based on revisions to the Act, the current citation is section 212(a)(5)(A).

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

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) states:

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 [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education:	Associate’s.
H.4-B. Major Field of Study:	Electricity.
H.5. Training:	None required.
H.6. Experience in the job offered:	24 months.
H.7. Alternate field of study:	None accepted.
H.8. Alternate combination of education and experience:	None accepted.
H.9. Foreign educational equivalent:	Accepted.

- H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

In Part J of the ETA Form 9089, the petitioner indicated that the highest level of education achieved by the beneficiary relevant to the requested occupation is an associate's degree in electricity from [REDACTED] Brazil, in 1982.

A translation of a document from "[REDACTED] (illegible) [sic]" certifying that beneficiary completed the course "technical electricity" was submitted, however copies of the beneficiary's diploma or transcripts from [REDACTED] were not in the record before the director.

Other documents related to the beneficiary's education in the record before the director included

- Certificates from [REDACTED] in Stamford, Connecticut. The certificates indicate the beneficiary satisfactorily completed instruction in Electrical Code I, II, III and IV.
- Certificates for completion of training related to specific products or brands such as [REDACTED], [REDACTED], as well as continuing education training in electrical code.

The director's decision denying the petition stated that the labor certification requires, at a minimum, an associate's degree and 24 months of experience, and the beneficiary's certificates from [REDACTED], along with his other certificates, do not meet those minimum requirements.

On appeal, the petitioner asserts that the beneficiary meets all the requirements for the position of electrician and notes that the petition is for a skilled worker under section 203(b)(3)(A)(i) of the Act. The petitioner lists the following accomplishments of the beneficiary in support of its assertion:

- Worked for [REDACTED] as an electrician from 11/28/1983 to 7/31/1984.
- Worked for the [REDACTED] as an electrician from 8/03/1981 to 10/20/1982.
- Worked for [REDACTED] from 10/01/1974 to 8/05/1975.
- Completed training at the [REDACTED]
- Completed training at the [REDACTED]
- Completed [REDACTED] Training.
- Completed training in 2002 for [REDACTED]
- Certified [REDACTED] training.
- Completion of the fourth series of the second grade at [REDACTED]

On April 2, 2012 the AAO sent the petitioner a Request for Evidence (RFE) which stated in part:

If you claim that your organization intended the terms of the labor certification to require an alternative to an U.S. associate's degree or a single foreign equivalent degree, then please submit evidence of your claimed intent. Such evidence would be of your organization's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers. Part H of the labor certification states that the offered position requires a U.S. associate's degree in electricity or a foreign equivalent degree.

Specifically, the AAO requests that your organization provide a copy of the signed recruitment report required by 20 C.F.R. § 656.17(g)(1), together with copies of the prevailing wage determination, all online, print and additional recruitment conducted for the position, the job order, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. Please also include any other communications with the DOL that may be probative of your intent, such as correspondences or documents generated in response to an audit.

Your submission of this evidence may help establish your intent regarding the minimum requirements of the offered position and show that U.S. workers without associate's degrees were in fact put on notice that they were eligible to apply for the position.

The AAO received the petitioner's response to the RFE on May 14, 2012. In the petitioner's response, counsel for the petitioner claims that the labor certification was not intended to require an associate's degree in electricity or any other field of study. Counsel states that his responses to questions H.4. and H.4-B of the ETA Form 9089 are "scriber's errors." He states, "This is born out by the fact that the answer to H-8-A is *none*. The only requirement for the job opportunity was two years of experience as stated in the answer to H-6 of the ETA 9089." (Emphasis original.)

Question H.8-A of the ETA Form 9089 asks the petitioner to indicate the alternate level of education required for the position *if* it is indicated in question H.8 that an alternate combination of education and experience is acceptable. In this case, in response to question H.8, the petitioner indicated that no alternate combination of education and experience was acceptable. Despite the petitioner's negative response to H.8 which rendered a response to question 8-A unnecessary, the petitioner marked the box to indicate the alternate level of education required for the position is "None." It is not clear how this is proof of a "scriber's error" in answering questions H.4. and H.4-B.

Counsel also states:

The beneficiary does not claim to possess an Associates degree from the equivalent of an institution of higher education or college as we understand those terms to mean. The degree which the beneficiary claims to have obtained in Section J. of the ETA, Alien Information, refers to a certificate from an [REDACTED], a vocational school usually requiring less time than high school to complete.

Counsel does not explain, however, why the ETA Form 9089 signed by the beneficiary, the petitioner and counsel under penalty of perjury, states that the beneficiary possesses an associate's degree. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The plain language of the labor certification does not permit a lesser degree, a combination of lesser degrees and certificates, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.³ Nonetheless, the AAO's RFE permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. associate's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.⁴ Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with

³ The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." See Memo. from [REDACTED], U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." See Ltr. From [REDACTED], U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From [REDACTED] U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

⁴ In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. See *Id.* at 14.

copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

In response, to the AAO's RFE, counsel stated that the recruitment efforts for the job opportunity occurred in 2007 and the petitioner does not have full records of the recruitment.⁵ The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Counsel did not submit the signed recruitment report. Counsel did provide resumes from four U.S. applicants for the position, copies of two newspaper advertisements, a job order placement confirmation from the State of New York's Department of Labor and the prevailing wage request.

The newspaper ads submitted by counsel state the requirements for the position of electrician are "2 yrs exp & proof of legal authority to work in US." The prevailing wage request states two years of experience is required and that no college degree or training is required. The job order placement summary from the State of New York Department of Labor states that two years of experience and less than a high school level of education are required. These items support counsel's assertion that the position does not require an associate's degree. Significantly, however, this is not a situation where the employer intended the minimum level of education indicated on the ETA Form 9089 (i.e., an associate's degree in Electricity) to encompass a combination of formal education, certifications and training, such as that possessed by the beneficiary. As stated above, USCIS cannot ignore a term of the labor certification. USCIS can only consider the employer's intent when the terms of the labor certification are ambiguous. That is not the situation at hand. In the instant case, the petitioner has indicated for the first time in response to the AAO's RFE that the labor certification does not reflect the actual minimum requirements for the position.

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14.⁶ In

⁵ The instructions to ETA Form 9089 state: "All application information (a copy of certified Form ETA 9089, recruitment information, re-filing information (if applicable), etc...) must be retained by the employer or their attorney/agent for five years from the date of filing the *Application for Permanent Employment Certification*." See <http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf>.

⁶ In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal

addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the required education is clearly and unambiguously stated on the labor certification and does not include the language "or equivalent" or any other alternatives to an associate's degree.

Moreover, the resumes of the four U.S. applicants submitted by counsel in response to the AAO's RFE indicate that the petitioner set additional requirements for the position which were not stated in the newspaper advertisements, job order, or on the labor certification application submitted to the DOL. The four resumes are annotated with the petitioner's reasons for rejecting the applicants. Those reasons are summarized below.

- 1) No [redacted] lighting experience.
- 2) Not [redacted] software approved or familiar.
- 3) No [redacted] software or hardware experience.
- 4) Not [redacted] software or hardware approved. No low [illegible] experience.

Based on the reasons for rejecting the U.S. applicants listed above, it appears that knowledge of [redacted] and [redacted] products was required by the petitioner, but not stated on the ETA Form 9089.

Therefore, it is concluded that the terms of the labor certification explicitly require a U.S. associate's degree in electricity or a foreign equivalent degree. The beneficiary does not possess such a degree despite representations to the contrary on the labor certification. Because the petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). The ETA Form 9089 states a proffered wage of \$25.57 per

circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

hour. This equals \$53,185.60 per year based on 40 hours per week. Evidence of the petitioner's ability to pay the proffered wage must be either in the form of copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.⁷ If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record before the director contained the petitioner's 2007 Form 1120S, Tax Return for an S Corporation, and the beneficiary's 2007 Form W-2 issued by the petitioner. The AAO's RFE requested that the petitioner submit annual reports, federal tax returns or audited financial statements for 2008, 2009, 2010, and, if available, 2011. Additionally, the AAO requested the beneficiary's Forms W-2 or 1099 issued by the petitioner for the years 2008 through 2011.

In response to the AAO's RFE, counsel submitted

- 2008 Form W-2 issued by the petitioner to the beneficiary.
- 2008 Form W-2 issued by [REDACTED] to the beneficiary.
- 2009, 2010, 2011 Forms W-2 issued by [REDACTED] to the beneficiary.
- 2008, 2009, 2010 Forms 1120S for [REDACTED].

The Forms 1120S for [REDACTED] show that the corporation has two shareholders, one of whom is also a shareholder of 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."

⁷ *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

Accordingly, since the record lacks the required evidence of the petitioner's ability to pay the proffered wage for the years 2008, 2009, 2010, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

Finally, the AAO's RFE noted that in Part K of the ETA Form 9089 regarding the beneficiary's work experience, two jobs are listed. The first job is as an electrician with [REDACTED] from November 28, 1983 to December 31, 1984 (1 year, 1 month, 3 days). The second job is as an electrician for the [REDACTED] from August 3, 1981 to October 20, 1982 (1 year, 2 months, 2 days). The record contains letters detailing the beneficiary's experience with these employers working in various positions. However, the letter from [REDACTED] states the beneficiary worked as an electrician from November 28, 1983 to July 31, 1984, rather than December 31, 1984 as stated on the labor certification. The RFE also noted that the record includes a letter from an additional employer not listed on the ETA Form 9089. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976)(a claim to possess experience that is not listed on the labor certification is less credible).

Counsel stated that he realized there was a discrepancy in the dates of employment listed on the labor certification at the time he was preparing the petition and that he submitted the letter from [REDACTED] because he realized that the information in Part K of the labor certification regarding the beneficiary's employment as an electrician was "four months short." Counsel also indicated that he was attempting to obtain corroborating evidence of the beneficiary's employment with [REDACTED] but was unable to do so within the period allowed for response to the RFE.

Because of the conflicting dates of employment and because counsel failed to corroborate the claimed employment from an employer not listed on the Form ETA Form 9089, the petitioner has failed to establish that the beneficiary possesses the 24 months of experience as an electrician as required by the labor certification.

In summary, the petitioner failed to establish that the beneficiary met the minimum educational and experience requirements of the offered position as set forth on the labor certification, and also failed to establish its ability to pay the proffered wage from the priority date.

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

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, the petitioner has not met that burden.

(b)(6)

ORDER: The appeal is dismissed.