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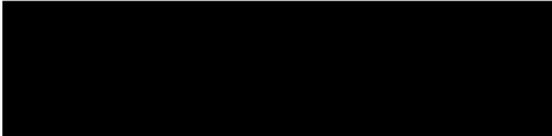
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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DATE:

JAN 23 2012

OFFICE: TEXAS 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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner filed a Motion to Reopen and a Motion to Reconsider the denial with the Texas Service Center. The Director denied the Motion to Reopen and affirmed the petition's denial. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is an IT consulting and solutions provider. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (the DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is March 25, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).³ The Immigrant Petition for Alien Worker (Form I-140) was filed on July 16, 2007.

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

² 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).

³ 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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on March 25, 2005. The proffered wage as stated on the Form ETA 750 is \$75,000 per year. The Form ETA 750 was certified on February 20, 2007, and the petitioner filed the I-140 petition on the beneficiary's behalf on July 16, 2007. The petitioner listed the following information on the I-140 Petition: date established: 2000; gross annual income: "9 million (est.);" net annual income: "\$146,000 (est.);" and current number of employees: 90.

On March 12, 2008, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence that the beneficiary had a four-year baccalaureate degree as required by the certified labor certification as the evaluations that the petitioner submitted relied on a combination of educational programs.

On June 11, 2008, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The director found that the petitioner did not establish that the beneficiary had the required education. The petitioner relied on a combination of the beneficiary's education, two separate degree programs, which were evaluated as the equivalent of a master's degree. However, the director found that the combined education would not meet the requirements that the petitioner listed on the Form ETA 750 of a single four-year bachelor's degree. The petitioner filed a motion to reopen or reconsider the director's decision on July 11, 2008. The director denied the motion to reopen on July 1, 2009. The petitioner then appealed this decision to the AAO on July 28, 2009.

On August 26, 2010, the AAO issued a RFE, which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position to DOL and offered the position to the public in its labor certification advertisements. The petitioner responded with the requested documents.

On November 18, 2010, the AAO issued a Notice of Derogatory Information ("NDI") advising that the petitioner's corporate status, as listed on the Corporate Division website maintained by the State of New Hampshire [REDACTED] listed the petitioner's

corporate status as administratively suspended within the state of New Hampshire. The petitioner responded with confirmation that its corporate status has been restored to "good standing."

The AAO's November 18, 2010 NDI also stated that the petitioner's business was a debarred entity from June 30, 2010 until June 29, 2011.⁴

On appeal, counsel asserts that the beneficiary qualifies for the position as he has two foreign degrees, including a foreign master's degree, which counsel asserts when considered together are the foreign equivalent of a U.S. bachelor's degree. In his brief, counsel points to the AILA Liaison Committee Meeting at NSC notes, as well as several other decisions of the AAO.⁵

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

In a consulting environment meet with client management to gather technical and functional requirements. From requirements develop specifications. From specifications, analyze, code, design, develop, implement, test and troubleshoot software applications using tools and technologies such as .NET, SQL Server, DTS, Visual Basic, COM and COM+.

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

Block 14:

Education (number of years)

Grade school	8
High school	4

⁴ The petitioner in this case was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period: USCIS "shall not approve petitions filed with respect to that employer under sections 204 or 214(c) of the INA (8 U.S.C. 1154 and 1184(c)) for the period of time provided by the Act and described in Sec. 655.810(f)." *See* http://www.uscis.gov/files/nativedocuments/organizations_ineligible_11may09.pdf (accessed March 11, 2010).

⁵ While 8 C.F.R. § 103.3(c) provides that precedent decisions of United States Citizenship and Immigration Services (USCIS), formerly the Service or INS, are binding on all USCIS employees in the administration of the Act, unpublished decisions, and letters 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).

College	4
College Degree Required	Bachelor's
Major Field of Study	Quantitative Discipline (See attached) ⁶

Experience:

Job Offered (or)	2 years (programmer analyst)
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⁶ The attachment provided by the petitioner states as follows:

This requirement is meant to define the minimum education requirement for the position offered. A degree is the normally accepted method of entry into this profession according to the Department of Labor's own Occupational Outlook Handbook and SVP. The employer recognizes that the degree's actual name is not significant as long as it has a significant core of necessary related courses. Thus, a degree in any of the following would be acceptable.

- Accounting
- Automation & Telemetry
- Biology/Biochemistry/Chemistry
- Business/Business Administration/Applications
- Commerce
- Computer Applications
- Computer Information Systems
- Computer Science
- Data Processing
- Datametrics
- Economics/Applied Economics
- Engineering (Aeronautical, Agricultural, Chemical, Civil, Communications, Computer, Electrical, Electronic, Industrial, Manufacturing, Mechanical, Network, Telecommunications)
- Finance
- Industrial Management
- Management Information Systems
- Mathematics
- Physics
- Statistics
- Theoretical Mechanics/Physics

Acceptable degrees are including, but not limited to the above.

Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

The position requires in a Bachelor's degree in a quantitative discipline as set forth above and 2 years of experience, which meets the requirements of the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C). Thus, combined with the DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position will be considered as a professional occupation,⁹ but may also be considered under the skilled worker category.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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

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

⁹ 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."

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 left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. 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).¹⁰ *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).¹¹

¹⁰ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

¹¹ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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.

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *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. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA 750 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as

written.” *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree). In this matter, the Form ETA 750 does not specify an equivalency to the requirement of a Bachelor’s degree in a quantitative discipline.

In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(I)(3)(ii)(C) requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word “degree” in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress’ narrow requirement of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

In support of the beneficiary’s educational qualifications, the petitioner submitted a copy of the beneficiary’s Bachelor of Commerce and Master of Business Administration degrees from Sri

Venkataswara University, Tirupati, India, with the initial petition. The documents indicate that the beneficiary was awarded a Bachelor of Commerce in 1989 and a Master of Business Administration in 1997. Also submitted was a copy of the beneficiary's Certificate issued by Sam Infotech for completion of a computer course from July 1990 through December 1991. The beneficiary did not list this education on Form ETA 750B.¹² The petitioner additionally submitted a credentials evaluation, dated January 30, 2007, from Chicago Evaluations Services, Inc. The evaluation describes the beneficiary's Bachelor of Commerce degree from Sri Venkataswara University as completion of three years of post-secondary education from an accredited university in the United States. The evaluation also considers the beneficiary's Certification of coursework from Sam Infotech as completion of one year of post-secondary education from an accredited university in the United States. The evaluation also considers the beneficiary's Master of Business Administration degree as completion of two years of post-secondary education from an accredited university in the United States. The evaluation concludes that the beneficiary's education based on all three programs of study is equivalent to a Master's degree in Business Administration in the United States.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel provided three additional credential evaluations. The first evaluation is from [REDACTED] of the Trusteforte Corporation. The evaluation is dated May 7, 2008 and concluded that the beneficiary completed the equivalent of a Master of Business Administration with a concentration in Information Systems based upon his educational background. [REDACTED] based his evaluation on the beneficiary's transcripts and the types of courses he took for the beneficiary's Bachelor's and Master's programs. He does not consider or accord any value the program of study at "Sam Infotech." The second evaluation is from [REDACTED] of the Foundation for International Services, Inc. The evaluation is dated July 8, 2008 and concluded that the beneficiary completed the equivalent of a Bachelor's degree in Management and a Master's degree in Management Information Systems based upon his educational background. [REDACTED] does not go into any detail as to how this conclusion was reached. She similarly considers only the beneficiary's Bachelor's and Master's degrees, but not the program of study at [REDACTED]." The third evaluation is from an unnamed party at [REDACTED]. The evaluation is undated and concludes that the beneficiary completed the equivalent of a Bachelor's degree in Business Administration and a Master's degree in Business Administration. This also considers just the Bachelor's and Master's degrees. The evaluation provides no information as to how this conclusion was reached. The AAO notes that each evaluation comes to a slightly different conclusion as to the beneficiary's credentials and field of study.¹³

¹² In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. This similarly applies to the beneficiary's education.

¹³ USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

In review of this appeal, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).¹⁴ According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials. “An Author’s Guide to Creating AACRAO International Publications” 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.¹⁵

EDGE’s credential advice provides that a Bachelor of Commerce degree from India is comparable to “two to three years of university study in the United States. Credit may be awarded on a course-by-course basis.” Here, the beneficiary’s transcripts confirm that this was a three-year program of study.¹⁶ EDGE further advises that a two-year Master of Business Administration from India is comparable to a bachelor’s degree in the United States following a three-year Indian bachelor’s degree.¹⁷

¹⁴ According to its website, “AACRAO is a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.”

¹⁵ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

¹⁶ According to EDGE, a Post-Graduate Diploma is awarded upon completion of one year of study beyond the two- or three-year bachelor’s degree. The Post-Graduate Diploma, following a three-year bachelor’s degree, represents attainment of a level of education comparable to a bachelor’s degree in the United States. Post-Graduate Diplomas should be issued by an accredited university or an institution approved by the All-India Council for Technical Education (AICTE). A search of the National Board of Accreditation (NBA) List of Accredited Programmes shows that Sam Infotech is a not a valid AICTE approved program to qualify as a Post-Graduate Diploma. http://www.nba-aicte.ernet.in/Web-list/pdf/NBA_ACCREDITED_26may.htm (accessed December 19, 2011).

¹⁷ The AAO’s RFE noted that a two-year Master of Arts, Commerce or Science degree from India were comparable to a U.S. bachelor’s degree following a three-year Indian bachelor’s degree.

The Form ETA 750 requires a bachelor's degree in a quantitative discipline. While the beneficiary's field of study for his Master's degree is in Business Administration, a field not stated specifically on Form ETA 750, the petitioner here has specified that it will accept a quantitative discipline. As set forth above, the petitioner attached a list of what it considered to be a "quantitative discipline," which included both Commerce and Business Administration. The petitioner additionally submitted its recruitment in support of the Form ETA 750. While the newspaper advertisements state that the petitioner advertised for candidates with "a Bachelor's degree or equivalent," the Notification of Job Opportunity does state that the petitioner allowed for candidates with a "Bachelor's degree in a quantitative discipline." The notice further states that "a degree in any of the following would be acceptable," and then lists, among other fields, Math, Statistics, Business Administration "or other quantitative discipline." Here the beneficiary's Master's in Business Administration degree and transcripts show substantial quantitative coursework, including quantitative techniques, data analysis methods, economics, financial accounting, data processing and many other courses. Therefore, we will accept that Business Administration is a quantitative discipline, as the petitioner has defined it as such on Form ETA 750 and specifically stated in its notice of posting "Bachelor's degree in a quantitative discipline," including Business Administration.

The regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(l)(2).

8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

In this case, the record demonstrates that the beneficiary holds an Indian Master's degree in the field of Business Administration, determined to be the foreign equivalent of a U.S. Bachelor's degree in Business Administration, a field stated in the petitioner's addendum to the education requirements on the certified Form ETA 750. As the beneficiary has the foreign equivalent of a U.S. bachelor's degree based on his foreign master's degree, the petitioner can establish that the beneficiary meets the educational requirement of the certified labor certification of a bachelor's degree and the AAO finds this degree to meet the requirements of the regulations related to a professional. It is a single degree in a specified quantitative discipline. Thus, the beneficiary does qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

While the petitioner has overcome the director's basis for denial, the petition is not approvable. We will remand the petition for the director's consideration of the following additional issues: whether the beneficiary possesses the required two years of experience in the job offered or as a software engineer or systems analyst as required by the labor certification, and; whether the petitioner can pay the proffered wage.

As stated previously, the AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). Upon review by the AAO, the petitioner has not submitted sufficient evidence to establish that the beneficiary has the required two years of experience in the job offered or related occupation to establish that the beneficiary meets the experience requirements. The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. 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 job requires two years of experience in the proffered position or two years of experience as a software engineer or systems analyst. The record of proceeding does not contain evidence reflecting that the beneficiary has two years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

While the record does include experience letters from [REDACTED] and [REDACTED] documenting more than two years of experience, the letter from [REDACTED] does not provide any detail about the beneficiary's experience or training, but lists only his title as a "Systems Analyst." The letter does not include a specific description of the duties performed by the beneficiary, as required by 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A), and as set forth below, the petitioner must resolve inconsistencies in the beneficiary's stated employment dates and confirmed employment dates.

Additional documentation provided as evidence of the beneficiary's two years of experience as a software engineer or systems analyst also cannot be accepted. The record includes an offer letter and resignation letter from [REDACTED] indicating that the beneficiary was offered employment as a Senior Software Engineer effective October 4, 2006 and that the beneficiary resigned from this position effective May 7, 2007. The priority date is March 25, 2005. This experience was obtained after the priority date and cannot be considered. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, 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).

Additional inconsistencies are noted in the record with respect to the beneficiary's prior work experience. The Form ETA 750 Part B lists the beneficiary's employment history as follows:

<u>Employer</u>	<u>Position</u>	<u>Dates of Employment</u>
██████████	Sr. Software Engineer	12/04 - Present
██████████	Programmer Analyst	10/04 - 3/04 ¹⁸
██████████	Project Engineer	5/04 - 11/04 ¹⁹
██████████	Systems Analyst	6/00 - 9/04 ²⁰

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Therefore, the petitioner must resolve the foregoing inconsistencies before we may determine that the evidence submitted shows that the beneficiary meets the requirement of two years of experience.

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

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

¹⁸ It is unclear whether the beneficiary's period of employment with ██████████ was from March 2004 to October 2004 (reversing the dates) or some other period of time. Other documents in the record list the beneficiary's period of employment with ██████████ as May 2004 to December 2004, May 2004 to November 2004, and May 2004 to October 2004. The only documentation provided from ██████████ is an employment agreement dated December 5, 2003. This agreement does not state the dates of the beneficiary's employment.

¹⁹ It is unclear whether there was an overlap in the beneficiary's employment with ██████████ in November 2004 and the beneficiary's employment with ██████████ in October 2004. The experience letter written by ██████████ lists the beneficiary's dates of employment as October 6, 2003 to March 31, 2004. Other documents in the record list the beneficiary's period of employment with ██████████ as October 2004 to December 2004 and October 2003 to March 2004.

²⁰ The experience letter written by ██████████ lists the beneficiary's dates of employment as June 20, 2000 to September 29, 2003.

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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

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).

As previously mentioned, the Form ETA 750 was accepted on March 25, 2005. The proffered wage as stated on the Form ETA 750 is \$75,000 per year. The petitioner claims to have had 90 employees at the time the Form I-140 was signed.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on March 20, 2005, the beneficiary did claim to have worked for the petitioner from December 2004 to the date of the filing.

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 provided the beneficiary's Form W-2 for the years 2005 (indicating that the petitioner paid the beneficiary total

wages of \$62,045) and 2006 (indicating that the petitioner paid the beneficiary total wages of \$52,461). The petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in March 2005 or subsequently.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the net income figures in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

The record includes the petitioner’s tax returns for the years 2005, 2006, 2008 and 2009. The petitioner’s tax returns demonstrate its net income for each year, as shown in the table below.

- In 2005, the Form 1120S stated net income²¹ of \$72,070.
- In 2006, the Form 1120S stated net income of \$147,999.
- No evidence of the petitioner’s ability to pay the proffered wage was submitted for the year 2007.²²
- In 2008, the Form 1120S stated net income of \$242,568.
- In 2009, the Form 1120S stated net income of \$187,574.

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.²³ 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.

²¹ 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 17e (2004-2005); line 18 (2006-2010) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 18, 2011) (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 expenses shown on its Schedule K for 2005, 2006, 2008 and 2009, the petitioner’s net income is found on Schedule K of its tax returns.

²² If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, USCIS, in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii).

²³ 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner's tax returns demonstrate its net current assets for each year, as shown in the table below.

- In 2005, the Form 1120S stated net current assets of \$135,125.
- In 2006, the Form 1120S stated net current assets of \$290,086.
- No evidence of the petitioner's ability to pay the proffered wage was submitted for the year 2007.
- In 2008, the Form 1120S stated net current assets of \$1,041,417.
- In 2009, the Form 1120S stated net current assets of \$752,558.

Although it is possible that the petitioner had the ability to pay the proffered wage from the priority date in March 2005 and continuing to the present, USCIS records indicate that the petitioner has filed more than 600 petitions since the petitioner's establishment in 2000, including I-129 petitions and I-140 petitions. The petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.²⁴

As the petitioner failed to submit its 2007 tax returns, and based on multiple filings, we cannot conclude that the petitioner has the ability to pay the proffered wage. Accordingly, the petition will be remanded to the director consideration of the issues set forth above related to the beneficiary's experience and the petitioner's ability to pay the proffered wage. The director may request evidence as required and allow the petitioner an opportunity to address these issues.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.

²⁴ The petitioner in this case was the subject of an investigation by the DOL in accordance with the H-1B provisions of the Act. *See generally* 20 C.F.R. § 655 related to Temporary Employment of Aliens in the United States; and 8 C.F.R. § 214.2(h) provisions related to H-1B nonimmigrants. If DOL determines that there has been a violation of 20 C.F.R. § 655, then under 20 C.F.R. § 655.855(c), USCIS shall not approve a petition during the debarment period.