



U.S. Citizenship  
and Immigration  
Services



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DATE: NOV 28 2012 OFFICE: TEXAS SERVICE CENTER

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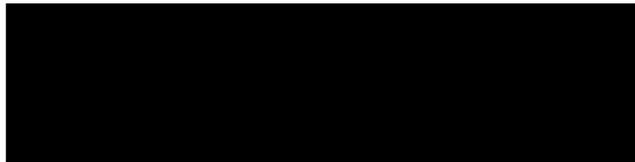


IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software solutions and services firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750,<sup>1</sup> Application for Alien Employment Certification approved by the Department of Labor (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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

The AAO concurs with counsel and the evidence submitted on appeal that the beneficiary has the relevant employment experience and required special skills to meet the petitioner's offer of employment. For the reasons set forth below, however, the AAO concludes that the petitioner has not established that the beneficiary's educational credentials meet the terms of the labor certification and that the petitioner has not demonstrated its continuing ability to pay the proffered wage as the record currently stands.

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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (noting that the AAO reviews appeals on a *de novo* basis).

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.

The job qualifications for the certified position of programmer analyst are found on Form ETA-750 Part A. Item 13 describes the job duties as including analyzing, designing and developing

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

<sup>2</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).

various Cross platform applications, deploying and maintaining such applications on Weblogic Application Server and Websphere, as well as analyzing new projects and complete involvement in projects including technical and user documentation.

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 petitioner must also demonstrate its continuing financial ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on July 16, 2004, which establishes the priority date.<sup>3</sup>

The Immigrant Petition for Alien Worker (Form I-140) was filed on July 11, 2007,<sup>4</sup> accompanied by a request to substitute the instant beneficiary for the original beneficiary sponsored on the Form ETA 750.

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
College	4
College Degree Required	Bachelor's degree or foreign degree equivalent
Major Field of Study	Engineering

Experience:

Job Offered	3*
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<sup>3</sup> 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.

<sup>4</sup> As of July 16, 2007, substitution requests are no longer permitted according to 20 C.F.R. §§ 656.11 and 656.30(c). As the instant petition was filed prior to this date, the substitution was allowed.

(or)  
Related Occupation

Block 15:

Other Special Requirements \* 3 years of experience in Object Oriented Technologies on Java, EJB, JSP and CRM applications using Java (J2EE). Excellent knowledge and expertise in Oracle 9i, Teradata V2R5 and SQL.

- See #13 and #15.

As set forth above, the proffered position requires 4 years of college culminating in a Bachelor's degree in Engineering and 3 years of experience in the job offered of programmer analyst.

On Part B of the labor certification, signed by the beneficiary, the beneficiary listed his prior education as a Bachelor of Science in Computer Science and a Master's in Computer Applications.

In support of the beneficiary's educational qualifications, the record contains a copy of the beneficiary's 1998 diploma from Madurai Kamaraj University (India) indicating that he received a Bachelor of Science in Computer Science. A copy of another diploma from Madurai Kamaraj University also indicates that the beneficiary received a Master of Computer Applications degree in 1999. The statement of marks for the Bachelor's degree did not specifically describe the courses completed.

The director denied the petition on May 11, 2009. The director determined that the beneficiary's educational credentials could not be accepted as a foreign equivalent degree to a U.S. Bachelor's degree in engineering because the designated fields of study on the beneficiary's bachelor's degree is Computer Science and the Master's degree is in Computer Applications.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel asserts that computer science is an engineering related discipline and further asserts that the beneficiary possessed the requirements set forth on the Form ETA 750. Counsel submits materials discussing how software engineering is *related* to computer science, project management and systems engineering.

The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 15-1031 to the proffered position. This code is specified as computer software engineers, applications. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O\*NET is the current occupational classification system used by the DOL. Located online at <http://www/online.onetcenter.org>, O\*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O\*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.

The O\*NET online database states that this occupation falls within Job Zone Four.<sup>5</sup>

According to the DOL, two to four years of work-related skill, knowledge, or experience are needed for Job Zone 4 occupations. The DOL assigns a standard vocational preparation (SVP) of 7 to Job Zone 4 occupations, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not."<sup>6</sup> Additionally, the DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

*See id.* Because of the requirements of the proffered position and the DOL's standard occupational requirements, the proffered position is for a professional, but might 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

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<sup>5</sup>According to O\*NET, most of the occupations in Job Zone Four require a four-year bachelor's degree. <http://online.onetcenter.org/link/summary/15-1031.00> (accessed November 15, 2012).

<sup>6</sup> *Id.*

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.

The regulation at 8 C.F.R. 204(5)(1)(3)(ii)(B) states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

As noted above, the Form ETA 750 in this matter is certified by the DOL. Thus, at the outset, it is useful to discuss the DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

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 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 remaining 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).<sup>7</sup> *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.

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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.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> 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

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<sup>7</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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 (9<sup>th</sup> Cir. 1984).

Therefore, it is the DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of United States Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation 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.)

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (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).

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 1289m 1295 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress’ narrow requirement in 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 a member of the professions 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 degree, we would not consider education earned at an institution other than a college or university.

Counsel relies on the beneficiary’s bachelor’s and master’s degrees in computer science and computer applications, respectively, to reach the “equivalent” of a bachelor’s degree in engineering, neither of which is a degree in the field of engineering as required by the terms of the certified labor certification. As set forth below, it is noted that the credentials evaluation submitted to the record does not support an educational equivalence to any degree in engineering or related field of study but determines that the beneficiary has the U.S. equivalent of three years of undergraduate study toward a degree in Computer Science and has the U.S. equivalent of a Master of Science degree in Computer Science.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” from a college or university in the required field of study, Engineering, listed on the certified labor certification, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required by the Form ETA 750. As noted above, the Form ETA 750 does not state that a different or related field of study is acceptable.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (USCIS) “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *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 and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 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. *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. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at \*17, 19.

In the instant case, the petitioner’s intent regarding any educational equivalence is clearly stated on the Form ETA 750 and does not include alternatives to the designated field of study of engineering. 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 engineering, or that it would accept any other fields of study, or a related field of study.

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 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 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 the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The beneficiary is also not eligible for qualification as a skilled worker under section 203(b)(3)(A)(i) of the Act. For this qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides that:

*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.

In this case, even considering the petition under the skilled worker category, the beneficiary's educational credentials would not meet the requirements set forth on the Form ETA 750. The petitioner specified that four years of college culminating in a bachelor's degree or foreign degree equivalent in engineering was required. An alternate field of study or a related field of study is not specified on the Form ETA 750. As discussed above, the beneficiary's diplomas in computer science and computer applications are not in the specified field of study designated by the petitioner, engineering only.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. The employer's recruitment procedures and communications with DOL as to the job opportunity's minimum requirements are also relevant.

Thus, the AAO issued a Notice of Derogatory Information (NDI) and Notice of Intent to Deny (NOID) observing that the petitioner had not established its ability to pay the proffered wage of \$50,000 per year and had not established that the beneficiary's degrees in computer science and computer applications met the educational requirement of the labor certification that designated the education as a bachelor's degree and the field of study as engineering only with no stated alternative or related field of study.

In response, the petitioner submitted a copy of a letter to the state employment security office, dated July 15, 2004 in which the petitioner requests a reduction in recruitment relevant to the original beneficiary. The petitioner additionally submitted copies of three print advertisements. In the letter to the state employment security office, the petitioner described the position as one "that requires a Bachelor's degree or foreign degree equivalent in Engineering (including Computer Engineering)<sup>8</sup> with three (3) years of experience in Object Oriented Technologies on Java, EJB, JSP and CRM applications using Java (J2EE) and excellent knowledge and expertise in Oracle 9I, Teradata V2R5 and SQL. The copies of the three January 19, 2004, print ads in

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<sup>8</sup> The original beneficiary on Form ETA 750 stated his education as a Bachelor of Engineering degree.

*Infoworld*, *Computerworld*, and *NetworkWorld*, respectively, are almost illegible but appear to contain the same language pertinent to the educational and experience requirements necessary for the position of programmer analyst; "Education & Experience: Bachelors/Masters in Engineering with 3-5 years of Industrial Experience. . ." The ads also reference "Good financial industry knowledge especially protocols FIX, SWIFT, and knowledge of Mutual funds, Commingled funds, Fixed Investment Instruments desired." The ads also state "experience in CRM applications/financial industry experience" using various tools and applications is "strongly desired," and that "experience financial industry is preferred." Form ETA 750 as certified does not reference any financial knowledge or related job duties in the position description or requirements. A copy of the petitioner's internal posting for the position was also provided. It contains the same language as is reflected on the Form ETA 750; "Bachelor's degree or foreign degree equivalent in Engineering with 3 years of experience in Object Oriented Technologies on Java, EJB, JSP and CRM applications using Java (J2EE). Excellent knowledge and expertise in Oracle 9i, Teradata V2R5 and SQL." Upon review, although the petitioner mentioned computer engineering to the state employment security office, none of its advertisements contained any language suggesting that an alternate, different, or related field of study was acceptable. Three of the ads reference higher education and experience for the position (Master's degree and three to five years of experience) than the labor certification requires and skills and preferred experience not referenced in the job duties of the certified labor certification.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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).

As noted in the AAO's notice, the petitioner submitted a credentials evaluation from The Trustforte Corporation signed by [REDACTED]. The evaluation determines that the beneficiary's Bachelor of Science degree in Computer Science represents the U.S. equivalent of three years of undergraduate studies toward a degree in Computer Science. The evaluation further concludes that the beneficiary's Master of Computer Applications degree represents the U.S. equivalent of a Master of Science degree in Computer Science. It is noted that the evaluation does not determine that the beneficiary has any kind of degree in engineering. The evaluation references the beneficiary's general studies in social sciences, math and the sciences and outlines specific coursework in computer science, computer programming, computer architecture, among other courses and only references one engineering course in software engineering. As noted above, the labor certification requires the field of study to be in

engineering. No alternatives or related fields are specified. The labor certification does not state that the petitioner will accept a degree in any alternate field.

As advised in the notice issued to the petitioner by this office, we have also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).<sup>9</sup> According to its website, [www.aacrao.org](http://www.aacrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." 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](http://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.

In the "credential advice," section relevant to a baccalaureate degree from India, EDGE indicates that a "Bachelor of Arts/ Bachelor of Commerce/Bachelor of Science represents attainment of a level of education comparable to two to three years of university study in the United States. Credit may be awarded on a course by course basis."

EDGE further states that the Master of Computer Applications is awarded based on a three-year program following a three-year bachelor's degree for entry and it represents a level of education comparable to a master's degree in the United States. The "Advice to Author Notes" states that it is "[c]omparable to a degree in computer application, not computer science."

The Form ETA 750 does not provide that the minimum academic requirements of a Bachelor's degree in Engineering might be met through a degree in computer science or computer applications or some other major other than that explicitly stated on the Form ETA 750. The copies of the notice(s) of newspaper advertisements and recruitment, provided with the

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<sup>9</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision. In *Tisco Group v. Napolitano*, 2010 WL 3464314, No. 09-10072 (E.D. Mich. Aug. 30, 2010), the court determined that the petitioner had not explained how five years of study in India was the equivalent to the six years of study typically required for a U.S. Master's degree and that the AAO's reliance upon EDGE was appropriate.

petitioner's response to the notice issued by this office, also fail to consistently advise otherwise qualified U.S. workers that the educational requirements for the job may be met through a bachelor's degree in a major other than engineering. Thus, the alien does not qualify as either a professional or as a skilled worker as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of the petitioner's intent about those requirements during the labor certification process.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree in engineering and fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

For the reasons stated below, the AAO also finds that the petitioner has failed to demonstrate its continuing ability to pay the proffered wage. The petitioner must demonstrate the ability to pay the proffered wage beginning on the priority date of July 16, 2004. The proffered wage as stated on the Form ETA 750 is \$50,000.

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

In this case, on Part 5 of the Form I-140, Immigrant Petition for Alien Worker, filed on July 11, 2007, the petitioner claims to have been established in 1999 and to currently employ sixty-two (62) workers. On appeal, the petitioner submitted copies of its second, third and fourth quarter

2010 Employer's Quarterly Federal Tax Returns. The fourth quarter 2010 return shows that the petitioner declared nineteen (19) employees who received wages, tips or other compensation. The petitioner also provided copies of its 2004 Form 1120S, U.S. Income Tax Return for an S Corporation, as well as copies of its 2004, 2005, 2006, 2007, 2008 and 2009 Form 1120 U.S. Corporation Income Tax return(s). These documents reflect that the petitioner's fiscal year is based on a calendar year. The tax returns indicate the following:<sup>10</sup>

	2004	2005	2006	2007
Net Income	\$ 73,454	\$62,845	\$125,690	\$130,658
Current Assets	\$405,975	\$800,734	\$800,734	(none shown)
Current Liabilities	\$218,695	\$451,597	\$451,597	(none shown)
Net Current Assets	\$187,280	\$349,137	\$349,137	n/a
	2008	2009		
Net Income	\$ 8,201.24	\$ 6,201.54		
Current Assets	\$862,397	\$651,910		
Current Liabilities	\$571,597	\$517,365		

<sup>10</sup>Pertinent to the petitioner's 2004 Form 1120S, where an S Corporation's income is exclusively from a trade or business, U.S. Citizenship and Immigration Services (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. 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 of the 2004 return. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Here, the petitioner's net income for 2004 is reflected on line 17e of Schedule K.

The remaining tax returns indicate that for the years from 2005 to 2009, the petitioner has filed its taxes as a C corporation. For a C corporation, the petitioner's net income is found on line 28 (taxable income before net operating loss deduction and special deductions). USCIS uses a corporate petitioner's taxable income before the net operating loss deduction as a basis to evaluate its ability to pay the proffered wage in the year of filing the tax return because it represents the net total after consideration of both the petitioner's total income (including gross profit and gross receipts or sales), as well as the expenses and other deductions taken on line(s) 12 through 27 of page 1 of the corporate tax return. Because corporate petitioners may claim a loss in a year other than the year in which it was incurred as a net operating loss, USCIS examines a petitioner's taxable income before the net operating loss deduction in order to determine whether the petitioner had sufficient taxable income in the year of filing the tax return to pay the proffered wage.

Net Current Assets      \$290,800      \$134,545

Besides net income and as an alternative method of reviewing a petitioner's ability to pay a proposed wage, USCIS will examine a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>11</sup> It represents a measure of liquidity during a given period and a possible resource out of which the proffered wage may be paid for that period. In this case, the corporate petitioner's year-end current assets and current liabilities are shown on Schedule L of its federal tax returns. Here, current assets are shown on line(s) 1 through 6 and current liabilities are shown on line(s) 16 through 18. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the corporate petitioner is expected to be able to pay the proffered wage out of those net current assets.<sup>12</sup>

It is noted that with the exception of the 2004 and 2005, the petitioner's federal corporate income tax returns raise questions relating to the accuracy and methodology used, particularly in reference to Schedules L, M-1 and M-2. First, it is noted that the 2006 Schedule L uses the identical figures as contained on the 2005 Schedule L, which is too coincidental to be accepted. Schedule M-2 also uses the same figures as was presented in 2005. Further the 2006 figures used on Schedule M-1, Reconciliation of Income (Loss) per Books With Income per Return, are identical to those used on the 2005 Schedule M-1 except for the number presented on Line 10 Income (page 1, line 28)-line 6 less line 9, which, if accurate, would also result in the 2005 figure of \$62,845, instead of \$125,690 that appears on the 2006 Schedule M-2. It is additionally noted that the figures given for assets and liabilities on the petitioner's 2008 Schedule L do not add up to either of the totals given for total assets or total liabilities and additionally do not balance with each other. Further, it is unclear how the figures given in Schedule M-1 or M-2 have been calculated as line 10 of Schedule M-1 does not represent either page 1, line 28 or line 6 less line 9 of Schedule M-1 as is illustrated. It is also unclear where the Schedule M-2 figure for unappropriated retained earnings comes from since it does not match the same category in line 25 of Schedule L. Similar questions are raised in the 2009 tax return; each of the assets and liabilities totals do not add up to the totals represented in line 15 or line 28 or balance with each other; the figure represented for line 10 of Schedule M-1 is not an accurate reflection of the income shown on page 1, line 28, and it is unclear from where the figure used for unappropriated retained earnings in Schedule M-2 is derived since it does not match the figure used on line 25, Schedule L. It is incumbent on the petitioner to resolve any inconsistencies in the record by

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<sup>11</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>12</sup> A petitioner's total assets and total liabilities are not considered in this calculation because they include assets and liabilities that, (in most cases) have a life of more than one year and would also include assets that would not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage.

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

However, the anomalies present in the tax returns as noted above are relevant to the petitioner's specific ability to pay the proffered wage in 2006, since the record reflects that the petitioner paid wages exceeding the proffered wage in 2008 and 2009. 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. If the petitioner paid wages less than the proffered wage, its ability to pay for a given period may be established if either its net income or net current assets can cover any shortfall between the actual wages paid and the proffered wage. Here, the petitioner submitted copies of Wage and Tax Statements (W-2s) that it issued to the beneficiary for 2007, 2008, 2009, and 2010. They indicate that the petitioner paid to the beneficiary wages of \$13,502.16 in 2007; \$62,914.32 in 2008; \$66,031.54 in 2009; and \$70,178.20 in 2010. Because the actual wages paid to the beneficiary exceeded the proffered wage in 2008, 2009, and 2010, the petitioner's ability to pay has been established for those years. For 2004, 2005, 2006, and 2007, the petitioner's net income or net current assets must establish the petitioner's ability to pay the full proffered wage or any difference between the proffered wage and the actual wages paid to the beneficiary.

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). 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). 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.

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 116. “[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).

Here, the petitioner’s ability to pay the instant beneficiary must be considered within the context of the petitioner’s sponsorship of other beneficiaries. As noted in the AAO’s notice to the petitioner, current USCIS electronic records, reflected that the petitioner had filed at least 228 petitions, including at least 42 Form I-140 petitions, with the remaining being Form I-129s. Where a petitioner files I-140 petitions for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its Form ETA 750 job offer to a beneficiary is a realistic one for each beneficiary that it has sponsored and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The reason for requesting information relevant to the employment and payment of wages to other beneficiaries, as well a petitioner’s income tax returns and/or audited financial statements is to evaluate whether and to what extent they support the sponsorship of additional beneficiaries. In this case, the record indicates that the petitioner employed the original beneficiary specified on the Form ETA 750

from May 2002 to 2009. The instant beneficiary was requested to be substituted for the original beneficiary on the Form ETA 750 for an immigrant visa when he began employment with the petitioner in 2007.

Counsel asserts that the current beneficiary was intended to replace the original beneficiary and therefore the original beneficiary's W-2 wages should be imputed to the current beneficiary as evidence of the petitioner's ability to pay the proffered wage. With the appeal, copies of the original beneficiary's 2004 through 2009 W-2s have been provided. Also submitted are copies of a 2001 agreement between the petitioner and [REDACTED], a California firm, accompanied by two work orders referencing services to be performed by the original beneficiary at [REDACTED] premises on June 1, 2002 and on January 5, 2004.

The petitioner additionally provided copies of two 2007 agreements between the petitioner and [REDACTED] a New Jersey firm, and [REDACTED] a New York company.<sup>13</sup> The [REDACTED] agreement is accompanied by a purchase order, dated September 1, 2007, referring to the provision of the current beneficiary's services at [REDACTED] for twelve months with extension. The Oracle agreement is accompanied by four purchase orders covering a period from April 1, 2009 to December 31, 2010 for the provision of the beneficiary's services to [REDACTED]. A copy of a third contract between the petitioner and [REDACTED] a Delaware firm, dated August 17, 2010 has been submitted. It is accompanied by a service agreement for the provision of the beneficiary's services to a [REDACTED] client located in Princeton, New Jersey.

Although it is noted that the petitioner requested the Form ETA 750 be used to support its sponsorship of the current beneficiary as a substitute for the original beneficiary, the evidence is not persuasive in establishing that the current beneficiary was intended as an actual replacement for the original beneficiary. The record indicates that the original beneficiary worked and resided in California until 2008 and did not leave the petitioner's employment until 2009. His employment overlapped the current beneficiary's employment by several years and therefore raises a question how the current beneficiary was intended to be his actual replacement at the time this petition was filed in July 2007 and that his wages could be attributed to paying the beneficiary's proffered wage.

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<sup>13</sup> In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3. *See also* *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1). (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

In this case, as set forth above, despite sufficient net income in 2004, 2005, and 2006, respectively, to cover the payment of a \$50,000 proffered wage and relatively large net current assets reported in 2004, 2005, and 2006<sup>14</sup> (with no assets or liabilities declared in 2007), the petitioner's ability to pay this beneficiary has not been established, because insufficient information has been provided relevant to the proffered wages of all sponsored beneficiaries of the multiple petitions that it has filed during the relevant period, beginning as of the beneficiaries' respective priority dates.

The insufficiency of the evidence related to the petitioner's continuing ability to pay all beneficiaries' their combined respective proffered wages precludes a favorable finding with regard to its ability to pay the instant beneficiary, as of the July 16, 2004 priority date.

In some circumstances, the principles set forth in *Matter of Sonogawa*, 12 I&N Dec. 612 (BIA 1967) are applicable. That case related to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. 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.

In the present matter, as set forth above, the petitioner has not established that the petition merits approval under *Sonogawa*. As noted above, the petitioner must demonstrate that it can pay the proffered wage of all sponsored workers, as well as the instant beneficiary's proffered salary. Little information relevant to its other sponsored beneficiaries' wages has been provided despite

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<sup>14</sup> For the reasons explained above, the petitioner's 2006 Schedule L report of assets and liabilities are not considered probative of its net current assets without resolution of the issues set forth. 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. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

the AAO's specific request related to this issue in the NDI sent to the petitioner.<sup>15</sup> Additionally, the decrease in the current number of workers as compared to the number claimed by the petitioner when it filed the petition in 2007 as well as the omissions and discrepancies reflected in Schedule L of the petitioner's tax returns for 2006 through 2007 do not support a *Sonegawa* finding. Further, no unusual business circumstances or reputational factors have been shown to exist in this case that parallel those in *Sonegawa*, nor has it been established that the filing year was an uncharacteristically unprofitable year for the petitioner within a framework of profitable years. Considering the overall circumstances as suggested by the record in this case, it is not concluded that the petitioner has established its continuing ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

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<sup>15</sup> 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).