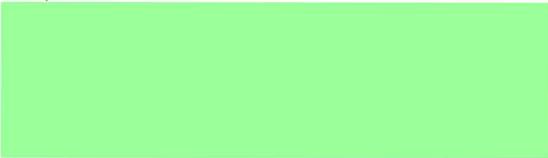


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U.S. Citizenship  
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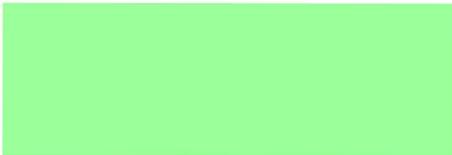


DATE: **APR 04 2013** OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner<sup>1</sup> is a self-described software consulting company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established: (1) that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition; (2) that the beneficiary possessed the minimum education required on the labor certification; and (3) that the beneficiary possessed the minimum experience required by the labor certification. The director denied the petition accordingly.

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

As set forth in the director's February 26, 2009, denial, the issues in this case are: (1) whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence; (2) whether or not the beneficiary possessed the minimum education required by the labor certification for the position offered; and (3) whether or not the beneficiary possessed the minimum amount of experience required by the labor certification for the position offered.

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>

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<sup>1</sup> The labor certification was filed by "[REDACTED]". The petitioner's letterhead indicates that it maintains a website at [REDACTED] however, that address now directs to a website for [REDACTED]. That website indicates that [REDACTED] was "formerly [REDACTED]". *See* [REDACTED] (accessed March 28, 2013). It is unclear from the record whether [REDACTED] is the same entity, a different entity, or a successor-in-interest to the petitioner. In any future filings, the petitioner must address this issue and provide independent, objective evidence of its corporate status and continued operation. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits independent, objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

<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).

*Ability to Pay the Proffered Wage*

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

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on October 1, 2003. The proffered wage as stated on the Form ETA 750 is \$70,000 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2000, to have a gross annual income of \$65,000, and to currently employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year follows the calendar year. On the Form ETA 750B, signed by the beneficiary on September 25, 2003, the beneficiary claimed to have worked for the petitioner from November 2002 onward.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the labor certification application establishes a priority date for any immigrant petition later based on the labor certification, 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 documented the following wages paid to the beneficiary by the petitioner from 2003 to 2008:

- \$22,720 in 2003, which was \$47,280 less than the proffered wage;
- \$19,190 in 2004, which was \$50,810 less than the proffered wage;
- \$43,624 in 2005, which was \$26,376 less than the proffered wage;
- \$42,200 in 2006, which was \$27,800 less than the proffered wage;
- \$35,632 in 2007, which was \$34,368 less than the proffered wage;
- \$71,973 in 2008, an amount more than the proffered wage.

Therefore, the petitioner established that it paid the beneficiary the proffered wage in 2008 only. For the years 2003, 2004, 2005, 2006, and 2007, there was a difference between the proffered wage and the wage paid for each year as indicated above.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubedu v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before

expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

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

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

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

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

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on January 26, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2003 to 2007, as shown in the table below.

- In 2003, the Form 1120 stated net income of \$12,845.
- In 2004, the Form 1120 stated net income of -\$8,605.
- In 2005, the Form 1120 stated net income of \$22,336.
- In 2006, the Form 1120 stated net income of \$65,258.
- In 2007, the Form 1120 stated net income of \$103,821.

For the years 2006 and 2007, it would appear that the petitioner may have had sufficient net income to pay the difference between the wages paid to the beneficiary and the proffered wage. However,

according to USCIS records, the petitioner has filed 33 I-140 petitions on behalf of other beneficiaries.<sup>3</sup> Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N at 144-145.

The evidence in the record does not document the priority date, proffered wage, or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the AAO cannot determine that the petitioner has the ability to pay the instant beneficiary's proffered wage, as the petitioner has not established its continuing ability to pay the difference between the wages paid to the beneficiary and the proffered wage, and the proffered wages to the beneficiaries of its other petitions.

Therefore, for the years 2003, 2004, 2005, 2006, and 2007, the petitioner has not documented that it had sufficient net income to pay the difference between the wages paid to the beneficiary and the beneficiary's proffered wage, and the proffered wages to the beneficiaries of its other petitions.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>4</sup> A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2003 to 2007, as shown in the table below.

- In 2003, the Form 1120 stated net current assets of \$21,290.
- In 2004, the Form 1120 stated net current assets of \$12,685.
- In 2005, the petitioner provided a tax Account Transcript, which does not report net current assets.<sup>5</sup>

<sup>3</sup> The company [REDACTED] has filed an additional 23 I-140 petitions on behalf of other beneficiaries. Therefore, in any future filings, if [REDACTED] is the same entity as the petitioner, or a successor-in-interest to the petitioner, it must address its ability to pay these additional beneficiaries' proffered wages as well.

<sup>4</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>5</sup> For tax year 2005, the petitioner did not provide a complete tax return and instead provided an "Account Transcript" from the Internal Revenue Service. This two-page transcript did not indicate

- In 2006, the Form 1120 stated net current assets of \$56,728.
- In 2007, the Form 1120 stated net current assets of \$142,732.

Therefore, for the years 2003, 2004, and 2005, the petitioner did not have sufficient net current assets to pay the difference between the wages paid to the beneficiary and the beneficiary's proffered wage. For the years 2006 and 2007, the record does not establish that the petitioner had sufficient net current assets to pay the difference between the wages paid to the beneficiary and the beneficiary's proffered wage, and the proffered wages to the beneficiaries of its other petitions.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the AAO should analyze the petitioner's tax returns on the accrual method of accounting, instead of the cash method of accounting, which was utilized by the petitioner while operating its business. The petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. See <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed March 28, 2013). This office would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS). The petitioner provided a letter from its Certified Public Accountant (CPA) discussing what positive changes this may have on an analysis of the petitioner's financial circumstances.

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.<sup>6</sup> The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments.

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any Schedule L information, therefore, the AAO is unable to determine what, if any, net current assets the petitioner claimed for tax year 2005.

<sup>6</sup> Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. See <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed March 28, 2013).

In addition, counsel urges that the AAO consider the CPA's analysis of the petitioner's bank account balances. Counsel's reliance on the balances in the petitioner's bank accounts is misplaced. First, the letter from the CPA is not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank balances show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds discussed by the CPA would somehow reflect additional available funds that were not reflected on its tax returns, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was considered above in determining the petitioner's net current assets. Additionally, as noted above, the petitioner has sponsored other workers and must establish that it has the ability to pay all of its sponsored workers.

Counsel urges the consideration of the beneficiary's proposed full-time employment<sup>7</sup> as an indication that the petitioner's income will increase. Counsel cites *Masonry Masters, Inc. v. Thornburgh*, 875 F.2d 898 (D.C. Cir. 1989), in support of this assertion. Although part of this decision mentions the ability of the beneficiary to generate income, the holding is based on other grounds and is primarily a criticism of USCIS for failure to specify a formula used in determining the proffered wage.<sup>8</sup> More importantly, the beneficiary signed the labor certification, under penalty

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<sup>7</sup> The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). In a letter, dated January 22, 2009, the petitioner's president states that "[b]y hiring [the beneficiary] as a full-time employee, [redacted] would be alleviating some of its dependence on contracts." The director, in his decision, noted that the wages paid to the beneficiary fluctuate between quarters and annually, suggesting that the beneficiary is not employed full-time. On appeal, counsel repeats the petitioner's previous statement verbatim. In addition, the petitioner has provided a letter from its CPA, dated March 25, 2009, in which the CPA states that he has "an intimate understanding and detailed knowledge of this Company's accounting and finances." The CPA also states that "[i]f [the beneficiary] were working as permanent full-time employees [*sic*] at [redacted] ..., " suggesting again that the beneficiary is not a full-time employee of the petitioner. The beneficiary claimed to have been employed full-time by the petitioner since November 2002. While the petitioner is not required to employ the beneficiary full-time in the position offered until the beneficiary obtains permanent residence, the contradicted claims of the beneficiary's full-time employment with the petitioner cast doubt on the information provided. *Matter of Ho*, 19 I&N at 591 ("[d]oubt 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."). The petitioner must resolve these inconsistencies with independent, objective evidence in any further filings. *Id.* at 591-92.

<sup>8</sup> Subsequent to that decision, USCIS implemented a formula that involves assessing wages actually paid to the alien beneficiary, and the petitioner's net income and net current assets.

of perjury, on which he claimed to be employed full-time by the petitioner beginning in November 2002. The record contains a letter from the petitioner's vice president, dated June 18, 2007, which states that the petitioner has employed the beneficiary full-time since November 1, 2002. Therefore, the beneficiary's employment and ability to generate income has already been factored into the petitioner's revenue. Further, in this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a programmer analyst will significantly increase profits for the petitioner, given that he has been purportedly employed by the petitioner in this capacity since November 2002. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns.

On appeal, counsel asserts that the petitioner had significant subcontractor expenses during 2003 to 2008, and that the beneficiary will replace these independent contractors.<sup>9</sup> In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence that the position held by the current workers involves the same duties as those set forth on the labor certification. The petitioner has not documented the position, duty, or termination of the contract workers who performed the duties of the proffered position. If those workers performed other kinds of work, then the beneficiary could not have replaced them. Further, counsel claims that the petitioner is replacing independent contractors, which suggests that the work performed by persons in that position may not be full-time or permanent. As discussed above, the job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). Therefore, there is insufficient evidence to document that the beneficiary will be replacing workers currently employed in the offered position.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the labor certification was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The

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<sup>9</sup> The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S. workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner's tax returns reflect relatively low net income and net current assets in comparison to the beneficiary's proffered wage. As discussed above, while the petitioner claims to employ 15 workers, it has filed at least 33 I-140 petitions, and at least 180 I-129 petitions, since 2002, suggesting financial obligations beyond the scope revealed by its tax returns. The petitioner must establish that it can pay the proffered wage of each sponsored worker. Further, the letter from the petitioner's CPA reviewed the petitioner's tax returns from 2003 to 2007, however, in each year the CPA stated alternate figures for the petitioner's costs for independent contract labor that conflict with the amounts on the petitioner's tax returns.<sup>10</sup> The petitioner claimed to employ 15 workers in 2007, but reported wages and salaries of only \$69,166, approximately half of which would be accounted for by the wages paid to the beneficiary based on the W-2 form submitted. Further, while the petitioner claims to employ 15 workers, the letter from its CPA states that the petitioner employs 40 workers. However, it appears that all or a substantial portion of the petitioner's work is done through part-time and contract labor, and not through full-time employment, calling into question whether there is a *bona fide* job offer for full-time employment. The petitioner has not established the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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<sup>10</sup> The petitioner's reported "cost of labor" on Form 1120, Schedule A, line 3, for 2007 varied significantly from what the petitioner's CPA states in his analysis of the petitioner's tax return for that year. Similar discrepancies between the CPA's review of each year's taxes are documented by evidence in the record. This discrepancy casts doubt on whether the tax returns provided by the petitioner to USCIS were true and accurate copies of the returns filed with the IRS. See *Matter of Ho*, 19 I&N at 591. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Id.* at 591-92. The petitioner must address this in any further filings.

***Minimum Experience Requirement for the Position Offered***

The director's decision discusses various corrections to the labor certification, including that the minimum experience requirement in Part 14 of the labor certification was amended to state that the position offered required a minimum of two (2) years of experience in the position offered.<sup>11</sup> The director's decision states that this amendment changed the original requirement from four (4) years of experience, to two years of experience, however, this amendment was not stamped as accepted by DOL, whereas the other corrections on the labor certification were so stamped. On appeal, the petitioner has provided sufficient evidence, including correspondence both to and from DOL, to establish that it submitted the amendment to DOL prior to certification, based on a response to DOL's Notice of Findings.

Additionally, as raised by the director, the petitioner has also not established that the beneficiary is qualified for the offered position.

***Beneficiary's Qualifications for the Position Offered***

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

In the instant case, the labor certification states that the position offered requires a bachelor's degree in any field of study, and two years of experience in the position offered, programmer analyst, or two years of experience in an alternate occupation, also listed as programmer analyst.

***Education***

The director's decision denying the petition concludes that the beneficiary's Bachelor of Commerce degree was a three-year degree, equivalent to three years of study toward a bachelor's degree, and therefore the beneficiary did not possess a U.S. bachelor's degree, or a foreign equivalent degree, as required by the terms of the labor certification. Further, the director noted that the beneficiary's

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<sup>11</sup> The labor certification also states that an applicant would be qualified by virtue of two (2) years of experience in an alternate occupation, however, the petitioner indicated the same occupation, programmer analyst, for both the position offered and the related occupation, without specifying any means of differentiating the two occupations. Therefore, it is unclear from the record what, if any, experience in an alternate occupation is acceptable.

“post graduate diploma” from [REDACTED] “does not establish the equivalent to another year of study in a U.S. accredited university. There is no indication of the duration of courses or the number of hours invested in the coursework to establish the nine classes taken were equivalent to a year of university level coursework.” On appeal, counsel asserts that the beneficiary “has the equivalent of a US Bachelor’s degree either as a single source three year Indian degree or a combination of his three year degree and diploma.”

On the Form ETA 750B, signed by the beneficiary on September 25, 2003, the beneficiary represents that he received a Bachelor of Commerce degree after completing three years of education at [REDACTED] India, from June 1993 to June 1996. In addition to the beneficiary’s degree and a consolidated transcript, the record also contains a “post graduate diploma” in computer applications from the [REDACTED] stating that the beneficiary attended a one-year program from May 1995 to July 1996. This education was not listed on the labor certification. 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 same principle also applies to the beneficiary’s education.

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. Counsel argues on appeal that DOL reviewed the beneficiary’s experience and education and determined they were sufficient. Counsel states:

under the former labor certification process, [State Workforce Agencies] would initially review the case and supporting documentation for any deficiencies, including employment letter and degrees from the alien. If there were deficiencies, DOL would send a Request for Information and have the employer address the deficiencies. At no time did the SWA or DOL find that [the beneficiary’s] degree was insufficient to meet the requirements of the position.

However, the petitioner did not provide any correspondence to or from the SWA or DOL that would confirm these assertions.<sup>12</sup> Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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<sup>12</sup> The record contains correspondence dated May 2, 2006, from DOL to the petitioner, which states without reservation that DOL reviewed the petitioner’s minimum requirements on the labor certification, as listed on Form ETA 750A, as well as the beneficiary’s *claimed* qualifications, as listed on Form ETA 750B. As such, counsel’s claim that DOL reviewed the beneficiary’s degree(s) and experience letter(s) is not supported by the record. Additionally, as noted above, the beneficiary states he had a foreign bachelor’s degree on Form ETA 750.

Further, as noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>13</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.

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:

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<sup>13</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

[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 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

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

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

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

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

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

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

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).<sup>14</sup> The AAO will first consider whether the petition may be approved in the professional classification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

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.

Section 101(a)(32) of the Act defines the term “profession” to include, but is not limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(l)(3)(i)

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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<sup>14</sup> Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. In a letter accompanying the petition, the petitioner’s vice president stated that the application was to classify the beneficiary as “a member of the professions or skilled workers” and did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor's degree as a minimum for entry; the beneficiary possesses a U.S. bachelor's degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor's degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. 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).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the 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’ requirement of a single “degree” for members of the professions is deliberate.

The regulation also 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.” 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). 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) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its foreign equivalent is required. See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

Counsel for the petitioner in this matter argues that the beneficiary's combined education is the "equivalent" of a U.S. bachelor's degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification. Counsel argues that, in the alternative, the beneficiary's three-year degree from [REDACTED] is, by itself, "equivalent to a U.S. Bachelor's degree."

Counsel states that evaluations in the record document this equivalence. The record contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] president and senior evaluator for [REDACTED] on March 2, 2007. The evaluation states that the evaluator reviewed the beneficiary's diploma and transcript from [REDACTED] and this education is "equivalent to the completion of three years of study toward a four-year Bachelor's degree in Business Administration from a regionally accredited university in the United States." He then considers the beneficiary's one-year program of study from [REDACTED] and states this is "equivalent to completing one year (two semesters) of study in Computer Science from an accredited technical college in the United States." The evaluator concludes that the combination of the beneficiary's Bachelor's degree and post-secondary program of study are equivalent to the completion of a four-year degree.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] for [REDACTED] on March 23, 2009. The evaluation states that the evaluator reviewed the beneficiary's three-year diploma and transcript from [REDACTED] and concludes that this education is "the equivalent of Bachelor of Business Administration Degree from a Regionally Accredited College or University in the United States." The [REDACTED] evaluation conflicts with the [REDACTED] evaluation, in that the [REDACTED] evaluation relies on a combination of the beneficiary's education and the [REDACTED] evaluation relies on the beneficiary's Bachelor's degree alone to arrive at the conclusion that the beneficiary possesses a foreign equivalent degree. Additionally, the [REDACTED] evaluation concludes that the beneficiary's foreign degree is only equal to three years of study, and does not state that it is equivalent to a four-year U.S. bachelor's degree. The [REDACTED] evaluation states that the beneficiary earned the equivalent to 120 undergraduate credits, and lists courses, and their credits and GPA as attributed by the evaluator, however, the evaluator did not provide any information as to how she determined the number of credits earned per course. The beneficiary's consolidated transcript does not state the number of credits earned per course, or any other figure that could have been used to arrive at the number of credits stated by the evaluator. Further, [REDACTED] evaluation appears to be cursory, with the bulk of the evaluation giving the impression that it is a form letter rather than a thorough evaluation of the beneficiary's credentials, as the beneficiary, his credentials, and the university are only mentioned on the first three pages of the 22 page evaluation.

The evaluation by [REDACTED] incorporates by reference another evaluation in the record, prepared by [REDACTED] for [REDACTED] on March 20, 2009. Both [REDACTED] and [REDACTED] conclude that the beneficiary completed 120 credits. [REDACTED] does not provide a means of arriving at the conclusion that can be recreated, a fact that he acknowledges when he states, “[the beneficiary’s] degree contains, in our opinion, and on the basis of comparison of similar awards where official documentation has confirmed the total of contact hours, a total of 120 credit hours when converted to the United States system.” Thus, [REDACTED] has stated that the credentials he evaluated do not provide the number of contact hours required for the beneficiary’s degree. Instead, [REDACTED] evaluation relies on several “expert” letters which state, in summary, that “all” three-year Indian degrees require a minimum number of contact hours. Based on that minimum, which [REDACTED] asserts every student at every university in India pursuing every three-year degree must complete, [REDACTED] claims to be able to equate that minimum number of contact hours in a general degree to find, specifically, that the beneficiary completed a certain number of credit hours equivalent to a “Bachelor of Business Administration ... from an institution of postsecondary education in the United States of America.” This reliance on a general and abstract absolutism, which is not supported by evidence in the record, carries little weight as it is based on speculation, rather than on the beneficiary’s credentials.

As was the case with [REDACTED]’s evaluation, [REDACTED]’s evaluation is 34 pages in length, with hundreds of pages of attachments, however, [REDACTED] mentions the beneficiary, his credentials, or the university only on the first three pages, and again on the last page to reiterate the equivalency previously stated. [REDACTED] states only that he reviewed the beneficiary’s degree, but not the transcript of the beneficiary’s courses, in making his evaluation; in fact, the evaluator does not discuss any of the beneficiary’s courses anywhere in his 34 page evaluation.

[REDACTED]’s evaluation, referenced by [REDACTED], states that “inventing ratios for conversion to a GPA which, although initially appearing closer to the US system, would in fact have no genuine authority or wide applicability beyond particular programs at particular times in Indian history.” However, [REDACTED]’s evaluation states both a credit hour equivalency and a GPA equivalency for courses, without providing any indication as to the means by which these were calculated. Thus, one of the petitioner’s evaluators states that another has no genuine authority for her conclusions, casting doubt on the credibility of the evaluation.

Further, the AAO notes that while [REDACTED]’s evaluation references numerous attachments, these attachments are actually watermarked with a notation that states, “[t]his document provided on behalf of the client named on the evaluation by [REDACTED]”. This suggests that the evaluations by [REDACTED] and [REDACTED] are part and parcel, and do not represent two independent evaluations of the beneficiary’s credentials. As such, the petitioner has provided one set of evaluations, from [REDACTED] and [REDACTED] which conflict with the only other evaluation in the record, by [REDACTED]. Therefore, the evaluations in the record are at odds as to their conclusions regarding whether the beneficiary’s Bachelor’s degree alone, or in combination with his diploma from [REDACTED], is equivalent to a four-year U.S. bachelor’s degree.

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). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). See also *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). The evaluations in the record conflict with one another, therefore, the evaluations in the record do not demonstrate that the beneficiary's three-year degree is a foreign equivalent degree of a four-year U.S. bachelor's degree.

In the alternative, the petitioner relies on the beneficiary's three-year bachelor's degree combined with a one-year diploma as being equivalent to a U.S. bachelor's degree. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. See *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

Given the serious inconsistencies in credits discussed above and between the evaluations and the remaining evidence of record, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). 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." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>. 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.<sup>15</sup> 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.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>16</sup>

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<sup>15</sup> See *An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>16</sup> 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

In the section related to the Indian educational system, EDGE provides that a Bachelor of Commerce “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.” This information is inconsistent with two of the evaluations submitted. A bachelor’s degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm’r 1977). Therefore, the beneficiary’s three-year Bachelor of Commerce degree cannot be considered a foreign equivalent degree.

EDGE further discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor’s degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate 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. However, the “Advice to Author Notes” section states:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor’s degree.

In the instant case, the record does not contain any evidence establishing that the beneficiary’s postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor’s degree was required for admission into the program of study. Therefore, the beneficiary’s diploma from the [REDACTED] is not a foreign degree equivalent to a U.S. bachelor’s degree, either alone, or in combination with the beneficiary’s three year bachelor’s degree.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university. The petitioner has failed to overcome the director’s conclusions with reliable,

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(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.

peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The AAO will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

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

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

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

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

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

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

EDUCATION

Years of College Required: "X."

College Degree Required: "Bachelor's Degree."

Major Field of Study: "any."

TRAINING: None Required.

EXPERIENCE: Two years in the job offered, "Programmer Analyst," or two years in the related occupation of "Programmer Analyst."

OTHER SPECIAL REQUIREMENTS: "Must be willing to relocate to various unanticipated work locations throughout the USA every 4 to 10 months – Employer paid."

As discussed above, the beneficiary possesses a three-year Bachelor of Commerce degree. In addition, the beneficiary claims to possess a "post graduate diploma" in computer applications from [REDACTED]. While the face of this diploma states that it was issued for post-graduate study, the diploma also states that beneficiary was enrolled for "one year" from "May 1995 to July 1996." However, the beneficiary states on the labor certification that his course of studies at [REDACTED] occurred from June 1993 to June 1996. As these periods of education overlap, and as the beneficiary did not complete his Bachelor's degree until June 1996, the beneficiary had not yet completed his undergraduate studies at the time he enrolled in the "post graduate" program. Therefore, the diploma does not appear to be for post-graduate study. The record does not establish the entrance requirements for this program. However, as [REDACTED] does not appear on the list of accredited universities or institutions approved by the All-India Council for Technical Education (AICTE),<sup>17</sup> it is not an accredited institution capable of granting a post-graduate degree, or an accredited postsecondary program to assign any academic equivalency.<sup>18</sup> Therefore, the beneficiary's diploma appears to be for technical or vocational training. Even if the entrance requirement for the [REDACTED] program were the completion of secondary education, one year of study at a post-secondary institution does not suggest that it can be combined with a three-year degree, or if so combined that it may be deemed a foreign equivalent degree to a U.S. bachelor's degree.

The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.<sup>19</sup> The labor

<sup>17</sup> See <http://www.aicte-india.org> (accessed March 28, 2013).

<sup>18</sup> EDGE also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. EDGE provides that a postsecondary diploma is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree.

<sup>19</sup> The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the

certification states that the minimum education required for the position offered is a Bachelor's degree, without stating that any equivalency was acceptable. In Part 14 of the labor certification, DOL permits the petitioner to identify the number of years of college required, however, the petitioner completed this section by marking an "X" in that section without qualification or explanation. The director's denial was based on the determination that the labor certification required a four-year U.S. bachelor's degree, or foreign degree equivalent, and that the beneficiary did not possess the minimum education required by the terms of the labor certification. On appeal, the petitioner appears to concur that these are the minimum educational requirements, as, through counsel, it has argued that the beneficiary has the equivalent of a four-year U.S. bachelor's degree. Therefore, it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in any field of study or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.<sup>20</sup>

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at 14.<sup>21</sup> In

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equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

<sup>20</sup> In addition, for classification as a professional, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

<sup>21</sup> In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland

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

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the required education is clearly and unambiguously stated on the labor certification and does not include the language "or equivalent" or any other alternatives to a four-year bachelor's degree. As set forth above, the beneficiary does not have a four-year U.S. bachelor's degree, or its foreign equivalent.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

### ***Experience***

In the instant case, the labor certification states that the position offered requires two years of experience in the position offered, programmer analyst, or two years of experience in an alternate occupation, programmer analyst.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a programmer analyst with [REDACTED] in Georgia from March 1999 to September 1999, and as a "Sr. Software Quality Engineer" with [REDACTED] in New Jersey from September 2000 to October 2002. The beneficiary stated he began employment with the petitioner in November 2002.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(1)(3)(ii)(A). The record contains an undated letter from the chief technical officer of [REDACTED] in New York, which states that the beneficiary worked for that company on a project as a "Consultant/Quality Engineer." The letter does not state any dates of employment, or whether the employment was part-time or full-time. Further, the letter is vague and does not state any job duties. Therefore, the AAO cannot determine the length of his purported employment, or whether the employment was in the position offered. Further, in *Matter of Leung*, 16 I&N Dec.

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Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

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. As this experience was not provided to DOL on the labor certification, the AAO does not find this claimed experience to be credible.

The record contains a letter, dated January 20, 1999 from the vice president of [REDACTED]. This letter was written for the purpose of an H-1B visa application, and is akin to a letter offering of employment. As it predates the beneficiary's purported employment with [REDACTED], it cannot not verify that the beneficiary was employed, or the dates or length of employment, or whether the employment was full-time or part-time. Further, this letter does not provide a description of the beneficiary's job duties, or state his job title. This letter does not meet the requirements for an experience letter. 8 C.F.R. § 204.5(l)(3)(ii)(A).

The record contains a letter, dated July 21, 2003, from the human resources manager of [REDACTED] [REDACTED]<sup>22</sup> stating that it employed the beneficiary as a programmer analyst from August 2001 to November 2002. These dates of employment conflict with the dates claimed by the beneficiary on the labor certification, which were September 2000 to October 2002. On Form G-325A, filed separately by the beneficiary and signed on June 27, 2007, the beneficiary claims that his employment with [REDACTED], began August 2001 and ended November 2002. These inconsistencies cast doubt on the beneficiary's claimed employment experience. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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.

Further, the letter states the beneficiary was employed as a programmer analyst, however, on the labor certification the beneficiary claimed to have been employed as a "Sr. Software Quality Engineer." In addition, the duties described in this letter, which focus designing and developing software applications, appear to be different than those claimed by the beneficiary on the labor certification, which focus on software quality assurance. In any future filings, the petitioner must provide independent, objective evidence, such as payroll records, to overcome the inconsistencies in the record. *Id.* at 591-592, 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.

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<sup>22</sup> This letter states that [REDACTED] was formerly [REDACTED]. The record also contains a letter, dated December 1, 2000, which confirms a merger between [REDACTED] and another company, with [REDACTED], being the new name of the merged companies.

Even if the AAO were to consider this letter as evidence of the beneficiary's employment experience, the dates stated by the human resource manager indicate a period of employment of only 486 days (approximately one year and four months), which is less than the two years of experience in the position offered required by the terms of the labor certification.

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

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.