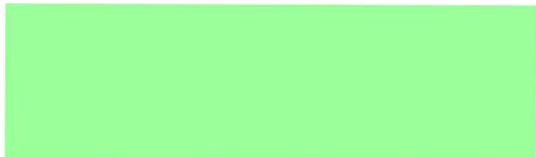




U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **FEB 08 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:

SELF REPRESENTED

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,

Rachel Pitino
for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a provider of information technology services.¹ It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition or that the beneficiary possessed the educational qualifications required by the labor certification to perform the proffered position as of the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact.² The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's March 28, 2008 denial, the first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "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."

¹ According to public records contained in the database which is maintained by the Illinois Secretary of State, Department of Business Services, the petitioner's original name was [REDACTED]. This is the name which was used on Form I-140 in the filing of the initial petition submission. However, the Illinois Secretary of State's database indicates that the petitioner changed its name to [REDACTED] on February 23, 2007. <http://www.ilsos.gov/corporatellc/CorporateLlcController> (accessed September 24, 2012).

² The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the petitioner. The designated attorney on the Form G-28 is on the list of suspended and expelled practitioners and is suspended by the State of Colorado. Therefore, the AAO will not recognize the attorney in this proceeding. See 8 C.F.R. §§ 1.1(f), 103.2(a)(3), 292.

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 ETA Form 9089, Application for Permanent 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 ETA Form 9089, Application for Permanent 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 ETA Form 9089 was accepted on December 21, 2006. The proffered wage as stated on the ETA Form 9089 is \$60,000.00 per year. The ETA Form 9089 states that the position requires a bachelor's degree in accounting, MIS, engineering, business, CIS, CS, or math in addition to 60 months of experience in the job offered of systems analyst or 24 months of experience as a QA analyst/tester, programmer/analyst, business/analyst, or software developer.

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.³

On appeal, the petitioner submits a brief; a copy of *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005); a copy of a letter dated June 13, 1994 from the DOL; a copy of a letter dated July 23, 2003 from [REDACTED] U.S. Citizenship and Immigration Services (USCIS) Director of Business and Trade Services to [REDACTED] Esq.; a copy of a letter dated June 30, 2003 from [REDACTED]; a copy of a letter dated January 7, 2003 from [REDACTED] a copy of a letter dated December 27, 2002 from [REDACTED] a list of Form I-140 petitions filed by [REDACTED] with the names of their associated beneficiaries; copies of the petitioner's Internal Revenue Service (IRS) Forms W-3, Transmittal of Wage and Tax Statements, for 2006 and 2007; and copies of the petitioner's U.S. Income Tax Return for an S Corporation (Form 1120S) for 2006 and 2007.

³ 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). However, for reasons identified below, only some of the evidence submitted on appeal may be considered. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2001 and currently to employ 35 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on February 28, 2007, the beneficiary claimed to have worked for the petitioner since November 5, 2004.

On appeal, the petitioner asserts that it had the ability to pay not only the beneficiary, but also the beneficiaries of all of the other pending Form I-140 petitions as indicated by the spreadsheet submitted on appeal. On appeal, the petitioner further references the wages paid in 2006 and 2007, its net income in both 2006 and 2007, net current assets in both 2006 and 2007, and cash on hand in both years to assert that these sums all go towards demonstrating its ability to pay the proffered wage. The petitioner also asserts that USCIS should take into consideration the totality of the petitioner's financial circumstances in a determination of its ability to pay. With respect to the educational requirements of the proffered position, the petitioner asserts that it clearly defined what was intended by "functional equivalent" of a bachelor's degree. The petitioner further asserts that the evidence provided demonstrates that the beneficiary holds the functional equivalent of a bachelor's degree as permitted by the terms of the labor certification.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, 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, 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).

USCIS records indicate that the petitioner has filed 380 petitions since its establishment in 2001, including 315 Form I-129 petitions and 65 Form I-140 petitions.⁴ The petitioner would need to demonstrate its ability to pay the proffered wage for each Form I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

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

⁴ [REDACTED] filed 38 Form I-140 petitions and 145 Form I-129 petitions. [REDACTED] filed 27 Form I-140 petitions and 170 Form I-129 petitions.

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 beneficiary claims to have worked for the petitioner since November 5, 2004. However, evidence of wages paid to the beneficiary submitted with the initial petition submission consisted of only one pay statement issued to the beneficiary by the petitioner in 2006 and one pay statement issued to the beneficiary by the petitioner in 2007.

On November 13, 2007, the director issued a request for evidence (RFE), requesting among other things, evidence of wages paid to the beneficiary in any years in which the petitioner employed him, in the form of either IRS Forms W-2 or 1099. The petitioner's response contained none of the forms of evidence of wages paid which the director requested.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director, the petitioner declined to provide copies of the IRS Forms W-2, which it issued to the beneficiary during all the years in which it supposedly employed the beneficiary. Wage and Tax Statements would have demonstrated the amount of wages paid to the beneficiary and further reveal the petitioner's ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. 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).

In the instant case, the petitioner has provided pay statements, which show compensation received from the petitioner, as shown in the table below.

- In 2006, the pay statement reflects compensation of \$3,750.00.
- In 2007, the pay statement reflects compensation of \$7,500.00.

The petitioner has not established that it paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2006 or subsequently. Therefore, the petitioner must still demonstrate the ability to pay the beneficiary the difference between the wages already paid and the full proffered wage for 2006 and 2007, that difference being \$56,250.00 and \$52,500.00 respectively.

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

Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

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

In his RFE, the director noted that the petitioner had filed numerous Form I-140 petitions and indicated that the petitioner must demonstrate the ability to pay the beneficiaries of all Form I-140 petitions. In order to ascertain whether the petitioner had such ability, the director specifically requested that the petitioner supply a list of all Form I-140 petitions, which it had filed, including the receipt numbers for all petitions, the names and dates of birth for the associated beneficiaries, the permanent jobs offered, and the proffered wages associated with the petitions.

In response, the petitioner submitted only copies of Forms I-797, Notice of Action, which represent receipt notices for a number of petitions which the petitioner filed. The petitioner submitted copies of Forms I-797 for two I-129 petitions, which the petitioner filed in behalf of the beneficiary of the instant petition (each of which represents a request for an extension of stay in H-1B status); copies of two Forms I-797 for I-140 petitions filed by [REDACTED]; and copies of 26 Forms I-797 representing I-140 petitions filed by [REDACTED]. The petitioner did not, however, provide a complete list of all Forms I-140 which it filed; the dates of birth for the beneficiaries associated with all of the petitions; the specific jobs which were offered to each of the beneficiaries; or the proffered wage associated with each petition. Again, it must be noted that the petitioning entity was [REDACTED], a company which was established on January 12, 2001. [REDACTED] changed its name to [REDACTED] on February 23, 2007, subsequent to filing ETA Form 9089 but prior to filing Form I-140. USCIS records show that the combined total of all petitions filed by [REDACTED] and [REDACTED] is 280 with 65 of those petitions being Forms I-140 alone. In its response, the petitioner accounted for only two Form I-129 petitions and 28 Form I-140 petitions. It did not provide the evidence requested by the director and it provided no explanation for its failure comply with the request.

On appeal, the petitioner submits a list of Forms I-140 which it filed with USCIS. The list includes the names of the beneficiaries associated with each petition, the beneficiaries' dates of birth, the proffered position in each case, the proffered wages, and the wages already paid to each beneficiary. However, the list only accounts for 27 Form I-140 petitions. Further, the evidence was requested but not provided in response to the director's RFE, and was not accompanied by an explanation regarding why the information was not provided in response to the director's RFE.

The purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. at 764; *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal.

The record before the director closed on December 21, 2007 with the receipt by the director of the petitioner's submissions in response to the director's RFE. As of that date, the petitioner's 2007 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2006 was the most recent return available at that time. However, the petitioner's 2007 federal income tax return was available by the time the instant appeal was filed, and the petitioner submitted the return on appeal. The petitioner's tax returns demonstrate its net income for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S stated net income⁵ of \$226,894.00
- In 2007, the Form 1120S stated net income of \$265,752.00.

Therefore, for the years 2006 and 2007, the petitioner did not demonstrate sufficient net income to pay the proffered wage to the beneficiaries of all of its pending Form I-140 petitions and the prevailing wage to the beneficiaries of all of its pending Form I-129 petitions.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁶ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006 and 2007, as shown in the table below.

- In 2006, the Form 1120S, Schedule L stated net current assets of \$248,458.00.
- In 2007, the Form 1120S, Schedule L stated net current assets of \$214,755.00.

Therefore, for the years 2006 and 2007, the petitioner did not demonstrate sufficient net current assets to pay the proffered wage to the beneficiaries of all of its pending Form I-140 petitions and the prevailing wage to the beneficiaries of all of its pending Form I-129 petitions.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the proffered wages for all of its beneficiaries as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

⁵ Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions, or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions, or other adjustments, net income is found on line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 6, 2012) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for 2006 or 2007, the petitioner's net income is found on line 21 of the first page of its tax returns.

⁶ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

On appeal, the petitioner submits a spreadsheet with a list of Form I-140 petitions which were filed by the petitioner. The spreadsheet identifies the receipt number associated with each petition, the name and date of birth for each beneficiary, the proffered wage and the wage which the petitioner purports to have paid each beneficiary. The petitioner asserts that this list demonstrates that the petitioner had the ability to pay not only the beneficiary of the instant visa petition, but also the beneficiaries of the other Form I-140 petitions. Additionally, counsel notes that the spreadsheet does not “include petitions filed where (i) the beneficiaries have adjusted to lawful permanent resident (LPR) status; (ii) resigned from the company; (iii) indicated that they no longer would need an immigrant petition on their behalf and (iv) where [sic] terminated and withdrawn by the petitioner.”

First, the information purported to be contained in the spreadsheet (e.g., receipt number for all Form I-140 petitions filed by the petitioner, names and dates of birth for each beneficiary, proffered position titles for all permanent positions, and the proffered wage associated with each petition) was requested by the director in his RFE. The petitioner did not provide such information in response to the director’s request and provided no explanation for the failure to provide the requested evidence. The petitioner is now providing such information for the first time on appeal. As explained above, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. at 764; *Matter of Obaigbena*, 19 I&N Dec. at 533.

Second, the petitioner states that the list does not include petitions for beneficiaries who have adjusted to LPR status, resigned from the company, indicated that they no longer would need an immigrant petition, or were terminated and their petitions were withdrawn. However, the petitioner provided no documentary evidence substantiating these claims. The petitioner did not provide copies of the withdrawal requests, which the petitioner would have had to submit to USCIS, and the associated acknowledgement of withdrawal notices, which USCIS would have issued in response. The petitioner did not provide evidence of the adjustment of status for any of the beneficiaries. The petitioner did not provide letters of termination or resignation from any beneficiaries. 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)). Further, the petitioner’s assertions do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BAI 1983).

Without such evidence, the spreadsheet is not complete and does not demonstrate the totality of the petitions which the petitioner has filed with USCIS or the wages paid to the beneficiaries of all such petitions.

On appeal, the petitioner asserts that the petitioner paid over \$2.7 million in wages for 2007 and over \$2.7 million in wages for 2006 and that this is indicative that it had the ability to pay. In support of these assertions, the petitioner submits copies of IRS Forms W-3, Transmittal of Wage and Tax Statements, for 2006 and 2007. However, while IRS Form W-3 shows \$2.7 million in total wages paid by [REDACTED] in 2007, the IRS Form W-3 for 2006 shows \$1.8 million in total wages paid by [REDACTED], not the \$2.7 million which the petitioner claims.

Nevertheless, reliance on the petitioner's gross receipts and wage expenses is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

Further, the petitioner has not demonstrated that the amount of wages paid accounts for the beneficiaries of all 380 of the Form I-140 and Form I-129 petitions which the petitioner filed.

On appeal, the petitioner asserts that the petitioner reported \$265,752.00 in net income and \$217,752.00⁷ in net current assets for 2007; and \$226,894.00 in net income and \$248,458.00 in net current assets for 2006. The AAO has already analyzed the petitioner's ability to pay with respect to its net income and net current assets, taking into consideration evidence of wages paid. The petitioner provided evidence of having paid the beneficiary alone, and of having paid him \$3,750.00 in 2006 and \$7,500.00 in 2007. The petitioner provided no documentary evidence of wages paid to the beneficiaries of all of the Form I-140 and Form I-129 petitions. Further, the petitioner did not report sufficient net income or net current assets to pay the beneficiaries of all of its Form I-140 and Form I-129 petitions.

On appeal, the petitioner asserts that the petitioner had cash on hand equivalent to \$217,752⁸ at year-end 2007 and \$248,458 at year-end 2006. However, the cash-in-hand figure represents the petitioner's net current assets for each year. The AAO has already analyzed the petitioner's net current assets as explained above.

The petitioner'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 ETA Form 9089 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 \$100,000.00. 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

⁷ The petitioner actually reported \$214,755.00 in net current assets for 2007. The petitioner's figure is erroneous.

⁸ The petitioner's figure is erroneous. The petitioner had \$214,755.00 in cash on hand at the end of 2007, according to its Form 1120S, Schedule L.

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 *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 had been operating for only six years at the time the instant appeal was filed. The petitioner provided financial documentation for only two years of business operations. The evidence does not demonstrate the historical growth of the petitioner's business, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether the beneficiary is replacing a former employee or an outsourced service. Further, since its establishment in 2001, the petitioner has filed 380 petitions and has neither accounted for all of them nor provided documentary evidence demonstrating that it has the ability to pay the beneficiaries of all such petitions. 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.

As set forth in the director's March 28, 2008 denial, the second issue in this case is whether or not the beneficiary possesses the educational qualifications required by the labor certification to perform the proffered position as of the priority date of the visa petition

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

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

(b)(6)

- (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).⁹ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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

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

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

⁹ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

§ 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).¹⁰ The AAO will first consider whether the petition may be approved in the professional classification.

¹⁰ 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.

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).

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.

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. The petitioner 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.

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 *Snapshot.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 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.

In the instant case, the labor certification states that the beneficiary possesses a Bachelor of Commerce degree in accounting from the [REDACTED] (Mumbai), India, completed in 1980.

The record contains a copy of the beneficiary's Bachelor of Commerce diploma and transcripts from the

[REDACTED], India, issued in 1980.

The record also contains an evaluation of the beneficiary's educational credentials prepared by Professor Solomon Appel on December 13, 2007.¹¹ The evaluation states that the beneficiary attained the equivalent of a Bachelor of Science degree, with a dual major in management information systems and accounting, from an accredited U.S. college or university, based upon a combination of the completion of a Bachelor of Commerce program at the [REDACTED] in India and six years of professional experience in computing.

In setting forth his analysis of the beneficiary's formal education, Professor [REDACTED] states that the beneficiary completed general studies and specialized studies leading to a bachelor's-level diploma and that "most such courses would qualify as equivalent to courses in US institutions." According to Professor [REDACTED] the beneficiary completed specialized studies in his major area of concentration, commerce, specializing in financial accounting and auditing, and related subjects." Professor [REDACTED] concludes that "[t]he nature of the courses and the credit hours involved indicate that he [the beneficiary] completed the equivalent of *three years of academic studies* toward a Bachelor's Degree, majoring in Accounting, from an accredited college or university in the United States" (emphasis added).

Professor [REDACTED] then turns to the beneficiary's work experience, stating:

In addition to his university studies, and his prior employment in accounting,¹² [the beneficiary] completed approximately six years of bachelor's-level employment experience and training in management information systems, and related areas, characterized by increasingly advanced responsibility and complexity under the supervision of managers, and together with peers, at a bachelor's-level of practical experience. My conclusions concerning [the beneficiary's] professional history are based upon my review of reference letters from former employers.

Having summarized the nature of the beneficiary's experience in the field of management information systems, Professor [REDACTED] identifies two specific employment experiences which form the basis for his considering the beneficiary to have attained the equivalent of a bachelor's degree in management information systems.

It should be noted, however, at this point, that the summary identified above characterizes the nature of the beneficiary's experience using language, which is applicable to assessing degree equivalence in the case of H-1B nonimmigrant visas, as articulated in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). This

¹¹ The evaluation is prepared on [REDACTED] letterhead. However, neither the petitioner nor the evaluation make clear whether Professor [REDACTED] prepared the evaluation under the auspices of [REDACTED] or whether the college endorses or agrees with his findings.

¹² The petitioner provided no evidence of the beneficiary's work experience in the field of accounting.

method for determining degree equivalence does not apply to immigrant visa petitions. Further, the method articulated within this section for determining whether or not the beneficiary is considered to be performing at the professional level of the occupation includes the provision of specific types of evidence from other professionals or associations indicating that others within the field recognize the beneficiary's professional status. For example, the petitioner of an H-1B beneficiary might provide attestation from two recognized authorities in the field who attest to the beneficiary's expertise in the field. Alternately, the petitioner of the H-1B beneficiary might provide evidence of the beneficiary's membership in a recognized association or society in the field; evidence of published material by or about the alien in professional publications, trade journals, books, or major newspapers; licensure or registration to practice the profession in a foreign country; or evidence of achievements which a recognized authority has determined to be significant contributions to the field of the profession. Again, while these criteria apply to H-1B nonimmigrant visas and not to immigrant visas, they serve as indicia which would go towards supporting a claim that an alien was performing at the professional level within an occupation and that other authorities recognized his level of competence. Such a demonstration would still be apart from whether or not the beneficiary's formal education equates to a U.S. baccalaureate degree, however.

In the instant situation, Professor [REDACTED] claims that the beneficiary was performing "bachelor's-level" work, and he goes on to articulate the specific duties which the beneficiary performed while working as a business analyst at the [REDACTED] in Newnan, Georgia from April 30, 2001 until November 4, 2004 and as a business analyst for [REDACTED] in Bombay, India from May 1, 1997 until November 30, 1999. However, while making the claim that the beneficiary performed certain duties and did so at "the bachelor's-level," Professor [REDACTED] provides no objective standards for assessing the beneficiary's level of qualification and no testimony from recognized experts who could attest to the beneficiary's level of expertise in his employment experience. Further, the petitioner has provided no documentary evidence demonstrating that the beneficiary completed any formal tertiary education in the field of management information systems prior to commencing his employment in either of the two position identified. Therefore, to assert that the beneficiary worked at the professional level within a field without any formal training is unfounded.

Professor [REDACTED] concludes his evaluation by stating:

As set forth above, [the beneficiary] completed approximately six years of work experience and training in positions of progressively increasing responsibility and sophistication, characterized by the theoretical and practical application of specialized knowledge under superiors, together with peers, with baccalaureate-level training in management information systems and related subjects. At the equivalency ratio of three years of work experience for one year of college training, promulgated by the USCIS, [the beneficiary] completed, in time equivalence, two years of the baccalaureate-level educational training required in connection with the attainment of a bachelor's degree, in addition to his completion of the aforementioned studies in Accounting...

Accordingly, based on the reputation of the [REDACTED], the number of years of coursework, the nature of the coursework, the grades attained in the courses, and the hours of academic coursework, as well as approximately six years of work experience and training in management information systems, and related areas, I conclude that [the beneficiary] completed the equivalent of a Bachelor of Science Degree, with a dual major in Management Information Systems and Accounting, from an accredited institution of higher education in the United States.

Thus, in his conclusion, Professor [REDACTED] applies an equivalence formula which applies solely to H-1B nonimmigrant visas and has no corresponding application to immigrant visas. Additionally, Professor [REDACTED] has clearly noted that the beneficiary's Bachelor of Commerce degree, in and of itself, is equivalent to only three years of tertiary education in the United States and that the assertion of baccalaureate equivalence is based upon a combination of the beneficiary's three-year degree and work experience.

The petitioner relies on the beneficiary's three-year bachelor's degree combined with approximately six years of experience in the field of management information systems 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.

The AAO has 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 are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.¹³ 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.¹⁴

¹³ 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.

¹⁴ 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

According to EDGE, a three-year Bachelor of Commerce degree from India is comparable to “two to three years of university study in the United States.”

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.

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.

The record of proceeding contains a document entitled diploma, which was awarded to the beneficiary by [REDACTED] in Mumbai, India in 1999. The award indicates that it was granted upon the completion of a course in “Hardware.” The record also contains a document entitled, diploma, which was awarded by [REDACTED] in Mumbai, India in 1998. The award indicates that it was granted upon completion of a single-day course in Corel Draw, Photoshop E/Web Page Designing, which was conducted on June 3, 1998. The record also contains three certificates, which were awarded to the beneficiary by [REDACTED] for completing courses in “Computer Hardware Engineering,” “Data Processing,” and “Database Management.” The duration of the last three courses is not identified, nor is the location of the entity which provided the training.

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

The evidence in the record on appeal did not establish that any of the beneficiary's diplomas or certificates were 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. The evidence does not even demonstrate that any of the courses represented by the certificates constitute academic education, as opposed to professional or continuing education.

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in Accounting, MIS, Engineering, Business, CIS, CS, or Math.

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 provided no reliable, peer-reviewed information which would overcome the conclusions of EDGE. 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 Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm.

1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

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

- H.4. Education: Bachelor’s degree in accounting or MIS.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: Engineering, business, CIS, CS, or math.
- H.8. Alternate combination of education and experience: Bachelor’s degree and two years of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 24 months as a QA analyst/tester, programmer/analyst, business/analyst or software developer.
- H.14. Specific skills or other requirements: a) Some travel may be required to work at various client locations in the USA. b) Will accept functional equivalent Bachelor degree by taking into account any reasonable combination of education, training and experience for the position offered.

As is discussed above, the beneficiary possesses a Bachelor of Commerce degree in accounting from the [REDACTED] India, which is equivalent to two to three years of university study in the United States.

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.¹⁵ In Section H.14 of

¹⁵ 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

ETA Form 9089, the petitioner states that it would “accept functional equivalent Bachelor degree by taking into account any reasonable combination of education, training and experience for the position offered.” However, the petitioner provided no indication of how it would determinate what constitutes a functional equivalent Bachelor degree. It provided no formula for quantifying an appropriate amount of work experience in lieu of formal education. Further, In Section H.8, the petitioner had already identified the specific alternate educational and experiential qualifications, which it would accept in lieu of a bachelor’s degree in Accounting or MIS. That alternate qualification is a bachelor’s degree in engineering, business, CIS, CS, or math and 24 months of experience as a QA analyst/tester, programmer/analyst, business/analyst, or software developer. Had the petitioner intended to allow for a lesser educational qualification, it could have so indicated in Section H.8. Yet it did not. Further, on appeal, the petitioner asserts that “functional equivalent Bachelor degree” is not a vague term and that the evaluation provided in response to the director’s RFE explains that the beneficiary has such a functional equivalent degree, achieved through a combination of formal education and work experience. Yet, even on appeal, the petitioner never defined what would be considered a functional equivalent. The petitioner provided no indication regarding the petitioner’s intent and no evidence showing how such intent was communicated to the DOL or potentially qualified U.S. workers.¹⁶

The petitioner failed to establish that that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor’s or

in order to qualify for the job.” See Memo. from [REDACTED] 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 equivalent of a college degree does in no way bind [USCIS] to accept the employer’s definition.” See Ltr. From [REDACTED] U.S. Dept. of Labor’s Empl. & Training Administration, to [REDACTED] (March 9, 1993). The DOL has also stated that “[w]hen the term equivalent is used in conjunction with a degree, the AAO understands to mean the employer is willing to accept an equivalent foreign degree.” See Ltr. From [REDACTED] U.S. Dept. of Labor’s Empl. & Training Administration, to [REDACTED] (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

¹⁶ In limited circumstances, USCIS may consider a petitioner’s intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer’s subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner’s intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary’s credentials. Such a result would undermine Congress’ intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. See *Id.* at 14.

foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in accounting, MIS, engineering, business, CIS, CS, or math 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.¹⁷

The AAO notes 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 *14.¹⁸ In 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, the petitioner had the opportunity, on appeal, to establish its intent regarding the term "or equivalent" on the labor certification and the minimum educational requirements of the labor certification. The petitioner failed to establish that "or equivalent" was intended to mean that

¹⁷ 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).

¹⁸ In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d at 1174, 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 Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

the required education could be met with an alternative to a four-year U.S. bachelor's degree or foreign equivalent.

On appeal, the petitioner asserts that it provided a formal education and professional work experience evaluation, which states that the beneficiary has the equivalent of a U.S. bachelor's degree through the combination of a 3-year bachelor's degree and 6 years of relevant experience. The petitioner explains that the evaluator "used the formula set forth in 8 CFR § 214.2(h)(4)(iii)(D)(5) applicable to nonimmigrant petitions." On appeal, the petitioner refers to the evaluation which the petitioner submitted in response to the director's RFE. The AAO discussed the evaluation above and noted, as acknowledge by the petitioner, the formula for determining degree equivalence which the evaluator used applies to nonimmigrant petitions and not to immigrant petitions. Immigrant visa regulations have no corresponding guidance for determining degree equivalence.

On appeal, the petitioner asserts that the director was unfair in determining that the petitioner's language pertaining to "functional equivalent degree" was "vague, ambiguous and not applicable when taken in the content of the above listed requirements." The petitioner further asserts that it "has used an objective measure of foreign education equivalency as set forth in the service's own regulations (albeit for non immigrant [sic] H-1B petitions)." However, the petitioner did not use an objective measure of foreign education equivalency. The objective measure of degree equivalence was applied by the evaluator and was done so erroneously. If the petitioner had intended to allow something other than a bachelor's degree in the fields identified, it could have set forth those specific requirements in Section H.8 of ETA Form 9089. In fact, the petitioner included alternate educational requirements. However, rather than identifying a lesser educational qualification as acceptable, the petitioner indicated that the position required at least a bachelor's degree. The petitioner indicated that it would accept 24 months of experience in alternate occupations in lieu of 60 months of experience in the job offered. The petitioner made no provisions on ETA Form 9089 for permitting less than a bachelor's degree or a foreign equivalent degree.

On appeal, the petitioner asserts that the director's decision was erroneous because USCIS has elsewhere identified alternate guidelines for determining degree equivalence. Counsel cites *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d at 1174.

In *Grace Korean*, a federal district court held 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." *Id.* at 1179. 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. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). A judge in the same district, however, subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 *5 (D. Or. Nov. 30, 2006).

On appeal, the petitioner also cites an interoffice memorandum issued on June 13, 1994 by [REDACTED] for DOL, Employment and Training Administration, Region VI. In her memorandum, [REDACTED] intends to clarify how to interpret the term “or equivalent” after a specified degree requirement, as it then appeared on Form ETA 750. [REDACTED] notes that it is not necessary to include the term “or equivalent” on Form ETA 750 in instances in which the beneficiary has a foreign degree which is equivalent to a U.S. degree. She does not provide any guidance regarding how to determine degree equivalence based upon various combinations of education and experience. Further, The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”) *See also* [REDACTED] Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding “Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service,” dated February 3, 2006. The AAO is in no way bound by the regulations of other agencies and still less by the internal policy memoranda of other agencies.

On appeal, the petitioner submits copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from [REDACTED] of the INS Office of Adjudications and the BCIS Office of Program and Regulatory Development to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the July 2003 letter, Mr. [REDACTED] states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor’s degree.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm’r 1968); *see also*, Memorandum from [REDACTED] Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. [REDACTED] correspondence, permits a certain combination of progressive work experience and a bachelor’s degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken

together, equals the same amount of coursework required for a U.S. baccalaureate degree. The AAO does not find the determination of the credentials evaluation probative in this matter. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm'r 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

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.

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.