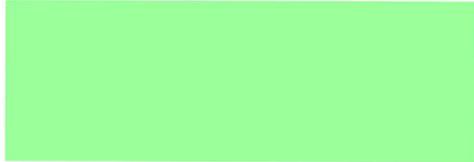




U.S. Citizenship
and Immigration
Services

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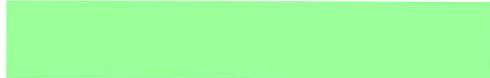


DATE: **JAN 29 2013**

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner is a computer training and consulting company. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment 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 and that the beneficiary did not possess a U.S. bachelor's degree as required by the terms of the labor certification and for classification as a professional. 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 May 3, 2010 denial, an 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.

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 September 8, 2003. The proffered wage as stated on the Form ETA 750 is \$52,000 per year. The Form ETA 750 states that the position requires a bachelor of science degree in computer science and three years of experience in the job offered as systems analyst.¹

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.²

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 2000 and to currently employ 10 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on September 4, 2003, the beneficiary did not claim to have worked for the petitioner.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2003 or subsequently.

¹ Although the Form ETA 750 indicates that experience in the alternate occupation of programmer analyst is acceptable, the form does not indicate the number of years or months of experience required in the alternate occupation.

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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).

The record before the director closed on January 13, 2010 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 2009 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2008 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2003 to 2008, as shown in the table below.

In 2003, the Form 1120S stated net income³ of \$7,171.⁴
In 2004, the Form 1120S stated net income of -\$22,981.
In 2005, the Form 1120S stated net income of -\$43,560.
In 2006, the Form 1120S stated net income of -\$19,036.
In 2007, the Form 1120S stated net income of \$563.
In 2008, the Form 1120S stated net income of -\$13,138.

Therefore, for the years 2003, 2004, 2005, 2006, 2007, and 2008, the petitioner did not have sufficient net income to pay the proffered wage.

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

³ 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 23 (1997-2003) line 17e (2004-2005) line 18 (2006-2011) of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed December 12, 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 additional income, deductions, and other adjustments shown on its Schedule K for 2003 and 2004, the petitioner’s net income is found on Schedule K of its 2003 and 2004 tax returns.

⁴ In his decision, the director prorated the proffered wage for 2003. USCIS will not prorate the proffered wage for the portion of the year that occurred after the priority date. We will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary’s wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. The director erred in prorating the wage for 2003. This portion of the director’s decision is withdrawn.

petitioner's current assets and current liabilities.⁵ 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 2003, 2004, 2005, 2006, 2007, and 2008 as shown in the table below.

In 2003, the Form 1120S stated net current assets of \$36,472.

In 2004, the Form 1120S stated net current assets of \$31,066.

In 2005, the Form 1120S stated net current assets of \$0.⁶

In 2006, the Form 1120S stated net current assets of \$0.

In 2007, the Form 1120S stated net current assets of \$0.

In 2008, the Form 1120S stated net current assets of \$0.

Therefore, for the years 2003, 2004, 2005, 2006, 2007, and 2008 the petitioner did not have sufficient net current assets to pay the proffered wage.

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 relies on *Construction and Design Co v. USCIS*, 563 F.3d 593 (7th Cir. 2009) for the contention that as a small business structured as an S Corporation, any losses reported on the petitioner's tax returns were for accounting purposes only and should not be considered in evaluating its ability to pay the proffered wage. In *Construction and Design Co.*, the court found that the petitioner did not have the ability to pay the proffered wage because the record did not contain any evidence as to where the petitioner would obtain the extra money to pay the beneficiary's salary. Moreover, the court reflects, "And despite our earlier point that the owner of a Subchapter S corporation has an incentive to recharacterize his salary as income, this company reports essentially no income, whether income taxable as corporate income or passed through to the shareholders to be taxed as personal income to them." *Id.* at 597. The instant petition is not located within the Seventh Circuit.

The petitioner has provided bank account statements and analyses for all relevant years and argues that the evidence submitted establishes that the losses on the petitioner's taxes were merely for

⁵According 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.

⁶ Schedule L of the petitioner's 2005, 2006, 2007, and 2008 tax returns is blank.

accounting purposes, and that the petitioner had sufficient cash on hand to pay the proffered wage. However, bank statements are 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 statements 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 reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that were considered in determining the petitioner's net current assets.⁷

Similarly, in calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. The record contains a letter from Sovereign Bank approving a \$50,000 line of credit to the petitioner. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5th ed. 1998).

Since the line of credit is a "commitment to loan" and not an existent loan, the petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. See *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Moreover, the petitioner's existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner's net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if the petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977).

Finally, the petitioner submits an affidavit from [REDACTED] in which he states that he is "completely willing to adjust [his] compensation" in addition to the compensation of "other officers and employees of the company and loans to shareholders" to pay the

⁷The AAO notes that the petitioner's tax returns do not specify any cash on Schedule L.

beneficiary the proffered wage. He additionally states that he has the “complete right” to determine his compensation if he “so desires.” He also states he solely controls the “compensation of all company officers and employees and disbursements of loans to shareholders.”

The sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on the Form 1120S U.S. Corporation Income Tax Return. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

In this case, however, the petitioner is not owned by a sole shareholder who has the authority to allocate expenses of the corporation. The documentation presented here indicates that [REDACTED] currently holds [REDACTED] of the company's stock, and [REDACTED] holds [REDACTED] of the company's stock. Moreover, the affiant, [REDACTED] is not currently a shareholder according to the documents in the record. The record shows that in 2003, the affiant held a [REDACTED] share in the company. However, beginning in 2004, the only shareholders were [REDACTED]. Additionally, as no evidence was submitted to support the affiant's assertion that he has the “complete right” to determine compensation and loans to officers, shareholders, and employees, his statements cannot be relied upon. There is nothing in the record to support who the officers of the company are and whether they would agree to reduce their compensation. Nor is there anything in the record to indicate the amount, if any, the officers are paid in compensation. In fact, according to the petitioner's 2003, 2004, 2005, 2006, 2007, and 2008 IRS Forms 1120S, no compensation was paid to officers for any of the relevant years, nor were there any salaries and wages reflected in the tax returns for payment to employees.⁸

Counsel cites to *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg'l Comm'r 1977) which states, “in examining a petitioner's ability to pay the proffered wage, the fundamental focus of the USCIS' determination is whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage.” *Id.* At 145. Accordingly, after a review of the petitioner's federal tax returns and all other relevant evidence, we conclude that the petitioner has not established that it had the ability to pay the salary offered as of the priority date of the petition and continuing to present.

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

⁸ The AAO notes that the petitioner sponsored the beneficiary on an H-1B non-immigrant visa from 2004 until 2012, however, the petitioner does not claim any salaries or wages on its tax returns for 2004 to 2008, nor does the petitioner ever present any evidence that it has employed and paid the beneficiary a salary.

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 Form ETA 750 was accepted for processing by the DOL.

On appeal, the petitioner's counsel asserts that the totality of the circumstances should be considered in evaluating the petitioner's ability to pay the proffered wage. The petitioner's counsel argues that the AAO should consider petitioner's reputation in the industry and the beneficiary's ability to increase profitability in evaluating its ability to pay under a totality of the circumstances test.

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 petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, 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, counsel argues that the petitioner has an established reputation in the industry as that of the petitioner in *Sonogawa*. To support its assertion, it states that it established an IT training entity in 2003 called [REDACTED] as a d/b/a,⁹ and since then, it has been named a Department

⁹ The petitioner has not submitted any evidence to support the assertion that [REDACTED] is a [REDACTED] and the petitioner's tax records submitted to USCIS do not reflect a d/b/a. A check of the New York state department of state website reveals that [REDACTED] is a separate entity of [REDACTED]. As they are two separate entities, [REDACTED] will not be considered in this analysis. *See* http://appext9.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION (accessed December 12, 2012).

of Labor vendor of information technology training services and has conducted trainings to at least one-hundred U.S. Department of Labor employees per year in the New York and New Jersey area. Unlike in *Sonegawa*, where the petitioner had multiple famous and distinguished clients, recognition for its work in national magazines such as *Time* and *Look*, and speaking engagements and lectures at some of the nation's top universities, the petitioner has not submitted any such evidence. The record contains one contract between [REDACTED] dated May 1, 2009. However, the petitioner, [REDACTED] does not appear to be a party to this contract. As noted previously, the [REDACTED] is a separate entity from the petitioner, [REDACTED]

Furthermore, one contract with a county government is not dispositive of a sound business reputation in the industry. The petitioner has not submitted any evidence of its sound business reputation in the industry, and even though it claims to have an ongoing relationship with the U.S. Department of Labor, no evidence was provided to support its assertion. 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 petitioner next argues that the beneficiary's employment will increase profitability. Against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977), states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

In this instance, no detail or documentation has been provided to explain how the beneficiary's employment as a systems analyst will significantly increase profits. This hypothesis cannot be concluded to outweigh the evidence presented in the corporate tax returns. Further, counsel cites to two decisions issued by the AAO concerning the beneficiary's ability to increase profitability, but he does not provide their published citations. Thus, it is impossible to ascertain to which cases he refers. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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.

¹⁰ In its brief, the petitioner's counsel refers to the establishment of two other entities, [REDACTED] but there is no evidence submitted to establish that these entities are not separate entities from the petitioner.

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

As discussed in the director's denial, another issue in this case is whether the beneficiary qualifies for the proffered position. The director's decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree as required by the terms of the labor certification and for classification as a professional.

On appeal, counsel argues that because the DOL certified the labor certification after review of the recruitment and the beneficiary's credentials, then "it is clear that in the opinion of the petitioner and the DOL the beneficiary's education and credentials completely satisfy the requirements for the position."

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

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time 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).¹¹ *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

¹¹ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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

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

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

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. Therefore, counsel's argument that since the DOL certified the labor certification, the beneficiary has satisfied the educational requirements is without merit.

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).¹² 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,

¹² 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. 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.

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)(l), (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.

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 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.

Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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).

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

EDUCATION

Grade School: None specified.

High School: None specified.

College: None specified.

College Degree Required: Bachelor of Science.

Major Field of Study: Computer Science.

TRAINING: None Required.

EXPERIENCE: Three years experience in the job offered or experience in the related occupation of programmer analyst (no years or months of experience are specified).

OTHER SPECIAL REQUIREMENTS: Experience must include UNIX, Shell Scripting, JAVA programming, ORACLE, SYBASE, and SQL.

The labor certification does not contain any language regarding the acceptance of a foreign equivalent degree. Therefore, the beneficiary must possess a U.S. Bachelor of Science degree in computer science to qualify as a professional.

The labor certification states that the beneficiary possesses a bachelor of science degree in applied chemistry and chemical technology from the [REDACTED] completed in 1990; a master of science degree in applied chemistry and chemical technology from the [REDACTED] completed in 1992; and a master of science degree in computer science from the [REDACTED] completed in 1995.

The record contains a copy of the beneficiary's degrees and transcripts from the [REDACTED] issued in 1993, 1995, and 1996 respectfully.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] on October 12, 1998. The evaluation states that the beneficiary has the equivalent of a Bachelor of Science degree in chemistry and a Bachelor of Science degree in computer science.

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 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 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.

According to EDGE, a three-year Bachelor of Science degree from [REDACTED] is comparable to “three years of university study in the United States.”

EDGE further discusses master’s degrees, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a master’s degree of arts, science, commerce, or social science following a two or three year bachelor's degree represents attainment of a level of education comparable to a bachelor’s degree in the United States.

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 as required by the labor certification from a college or university. 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.

As discussed above, the labor certification states that the offered position requires a bachelor of science degree in computer science and three years of experience in the proffered position of systems analyst or experience in the alternate occupation of programmer analyst.

As discussed above, according to EDGE, a three-year bachelor of science degree from [REDACTED] is comparable to three years of university study in the U.S.

The labor certification, however, contains no language permitting an equivalent to a U.S. bachelor’s degree such as that possessed by the beneficiary.¹⁵ Nonetheless, the AAO will examine any evidence submitted by the petitioner that it intended the labor certification to require an alternative to a U.S. bachelor’s degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.¹⁶

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 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 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.

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

Specifically, the record contains a copy of the signed recruitment report required by 20 C.F.R. § 656, all recruitment conducted for the position, and the posted notice of the filing of the labor certification. The record also contains an affidavit by the president of the petitioner regarding the petitioner's intent in hiring workers with equivalent education and experience.

The posting notice and newspaper advertisements used during the recruitment process explicitly state that a bachelor of science plus three years of experience is required for the position. No equivalency language is used in the recruitment.

In an affidavit submitted on appeal, the president of the petitioner states that "during all phases of recruitment, we considered a foreign 'equivalent' of a U.S. Bachelor's Degree in Computer Science as satisfying the minimum requirements for the job as stated in ETA750." The president further indicates that a combination of advanced study and/or experience would also satisfy the requirement that the worker met the required minimum of a U.S. bachelor's degree. However, the labor certification and the recruitment do not contain any language permitting the acceptance of an equivalent degree or alternative requirements such as education and experience for the position. The petitioner has not submitted any further evidence that recruitment was conducted in a manner consistent with the intent to accept the equivalent of a US bachelor's degree or any alternative requirements. 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 labor certification and the recruitment make clear that the minimum requirements for the position are a U.S. Bachelor of Science degree.

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 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 computer science. 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, and the petitioner failed to include any equivalency language in the labor certification or in the recruitment. A statement made regarding the intent of the

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.

petitioner after the completion of the labor certification absent any corroborating evidence to support its assertion will not suffice. Therefore, the beneficiary does not qualify for classification as a skilled worker.¹⁷

On appeal, counsel argues that “a lack of any specific education equivalency language in the ETA-750” should not be construed by the Service as indicative of the petitioner’s unwillingness to hire otherwise qualified candidates who possessed education and/or a combination of education, training, or experience...” To support his assertion, counsel relies on *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc)). In *Kellogg*, BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In the instant case, there are no alternative requirements listed on the ETA 750, and the issue in this case is not whether the labor certification was unlawfully tailored to the alien’s qualifications. Thus, *Kellogg* and the absence of *Kellogg* language on the ETA 750 is not relevant to the instant case.

On appeal, counsel further argues that according to *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), USCIS should accept the petitioner’s definition of “equivalent” for recruiting purposes, and assess the petition under the skilled worker category. Counsel also on *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) to support its contention that USCIS should accept its definition of “equivalent.”

In *Snapnames, Inc.*, 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. In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be

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).

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

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, "B.S. Computer Science," and does not include the language "or equivalent" or any other alternatives to a four-year bachelor's degree. Therefore, there is no equivalency language to evaluate, and *Snapnames.com, Inc.* and *Grace Korean* are not relevant to the instant case.

Finally, counsel relies on three cases, *Matter of Bienkowski*, 12 I.&N. Dec. 17 (D.D. 1966); *Matter of Arjani* 12 I.&N. Dec. 649 (R.C. 1967); and *Matter of Devnani*, 11 I.&N. Dec. 800 (Acting D.D. 1966). None of these cases are relevant to the instant proceedings. In the instant case, the petitioner failed to indicate that it would accept a foreign equivalent to a U.S. bachelor's degree, and thus the beneficiary must have a U.S. bachelor's degree to qualify as a professional.

In *Matter of Bienkowski*, the District Director found that the beneficiary qualified for an immigrant visa because his extensive employment experience and high level of achievement in his field were sufficient to overcome his lack of a degree in economics even though he had completed coursework at several universities.

In *Matter of Arjani*, the Regional Commissioner found that the beneficiary qualified as a "member of the professions" within the meaning of INA § 101(a)(32) based on the beneficiary's education which included a bachelor of commerce degree in accounting from India with postgraduate work toward a master of commerce degree combined with nine years of specialized experience and admission to the Association of International Accountants by examination.

In *Matter of Devnani*, the Acting District Director found that the beneficiary's high level of education and a U.S. master's degree, combined with the beneficiary's "extensive specialized experience in the

chemical industry qualifies him for professional status as an organic chemist.” The beneficiary held a bachelor of science in chemistry from India, determined to be the equivalent of two years of U.S. studies, as well as a master of business administration completed at a U.S. university and over ten years of experience in the chemical industry.

We note that based on the time period for the cases cited that the preference categories and immigration framework was different. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job-related basis: the third and sixth preferences under 8 U.S.C.A. § 1153(a) and (6). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended under 8 U.S.C.A. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled. The regulation now clearly states at 8 C.F.R. § 204.5(1)(3)(ii)(C) that if the petition is for a professional, the evidence must show that the beneficiary has a baccalaureate or foreign equivalent degree.

Further, prior to IMMACT 90, there was no definition of the term “professional.” Now, however, professional is defined at INA § 101(a)(32) and 8 C.F.R. § 204.5(1)(3)(ii)(C) which explicitly requires a bachelor's degree. Therefore, the cases cited, which were all decided prior to IMMACT 90, are irrelevant.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree as of the priority date and failed to establish that it would accept an equivalent to a US bachelor's degree. 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.

Beyond the decision of the director,¹⁸ the beneficiary has failed to establish that he is qualified for the offered position. 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 Matter of Silver Dragon Chinese*

¹⁸ 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 (9th 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).

Restaurant, 19 I&N Dec. 401, 406 (Comm'r 1986). See also, *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 (1st Cir. 1981).

In the instant case, the labor certification states that the beneficiary's experience must include UNIX, Shell Scripting, JAVA programming, ORACLE, SYBASE, and SQL experience. On the labor certification, the beneficiary does not list experience with any of the programs that the petitioner requires. Furthermore, none of the experience letters included in the record state that the beneficiary has experience with any of the required programs and software.

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.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Counsel argues that the evidence presented, "clearly met the standard of proof and provided sufficient relevant, probative and credible evidence establishing its ability to pay the proffered wage and the beneficiary's eligibility for the position of Systems Analyst." Nothing in the record of proceeding contains any type of notice from the director or any other USCIS representative that would have misled counsel into his assertion that USCIS requires "convincing" or "persuading" beyond what legal authority guides the agency in statute, regulatory interpretation, precedent case law and administrative law and procedure. Generally, when something is to be established by a preponderance of evidence, it is sufficient that the proof establish that it is probably true. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). The evidence in each case is judged by its probative value and credibility. Each piece of relevant evidence is examined and determinations are made as to whether such evidence, either by itself or when viewed within the totality of the evidence, establishes that something to be proved is probably true. Truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989).

In this case, the petitioner has not established eligibility for the benefit sought by a preponderance of the evidence.

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.