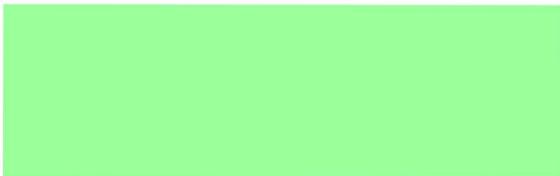


(b)(6)

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

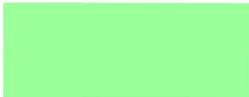


U.S. Citizenship
and Immigration
Services

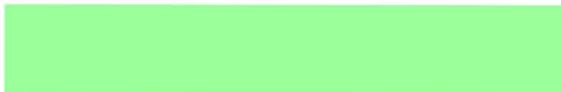


DATE: **JAN 31 2013**

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, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a self-described commercial real estate management firm. It seeks to employ the beneficiary permanently in the United States as a Senior Programmer Analyst. The petitioner requests classification of the beneficiary a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is July 31, 2006. *See* 8 C.F.R. § 204.5(d).

The director's September 29, 2008, decision denying the petition concludes that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification, and that the petitioner failed to establish its continuing ability to pay the proffered wage.

The AAO initially dismissed the appeal of the director's decision on December 5, 2011, for failure to respond to a Notice of Derogatory Information and Request for Evidence (NDI) from the AAO. However, as it appeared that counsel submitted a timely response to the AAO's NDI, the appeal was reopened. On July 20, 2012, the AAO issued a Notice of Reopening and Request for Evidence (RFE). The petitioner has submitted a response to this RFE.

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.¹

On appeal, for the first time, counsel asserts that a clerical error was made in filing the Form I-140 sponsoring the beneficiary under section 203(b)(3) of the Act, and that the Form I-140 should have designated the correct visa classification to be under section 203(b)(2) of the Act sponsoring the beneficiary as an advanced degree professional.² Counsel submits another Form I-140 intended to

¹ 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).

² The regulation at 8 C.F.R. § 204.5(k)(2) defines an advanced degree as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a

amend the previous filing and asserts that the beneficiary's educational credentials demonstrate that he has the equivalent of an advanced degree. Counsel additionally submits documentation of the petitioner's ability to pay the proffered wage and maintains that this new Form I-140 merits approval on this additional issue.

At the outset, it is noted that the petitioner's assertion that it should be permitted to change the visa classification sought for the first time on appeal to that of a second preference advanced degree professional will be rejected. Although the minimum level of education described in the certified ETA Form 9089 is a Master's degree, the petitioner requested a third preference visa classification as a skilled worker or professional on Form I-140. This is appropriate because a visa classification as a professional requires only that the ETA Form 9089's minimum educational requirement be a bachelor's degree. However, there is no provision in statute or regulation that compels U.S. Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification in response to a petitioner's request to change it, once the decision has been rendered. It is noted that there is no evidence in the record that the petitioner requested that the visa classification be changed from third preference to second preference prior to the director's September 29, 2008, decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Beneficiary's Qualifications for the Position Offered

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

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also 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. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on July 31, 2006,

master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate degree or a foreign equivalent degree.

which establishes the priority date.³ The proffered wage as stated on the ETA Form 9089 is \$56,056.00 per annum. The Immigrant Petition for Alien Worker (Form I-140) was filed on July 2, 2007. As indicated above, 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).

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a Senior Programmer Analyst provides the following job duties:

Develop standards to guide the use and acquisition of software and to protect vulnerable information; direct programmers and analysts to make database system changes; Test programs or databases, correct errors and make necessary modifications; Plan, coordinate and implement security measures to safeguard information in computer files against accidental or unauthorized damage, modification or disclosure; Approve, schedule, plan, and supervise the installation and testing of new products and improvements to computer systems; Train users and answer questions; Establish and calculate optimum values for database parameters; Specify users and user access levels for each segment of database; Develop data model; Develop methods for integrating different products so they work properly together, such as customizing commercial databases to fit specific needs.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Master's.

4-B. Major Field Study: "General."

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

7. Is there an alternate field of study that is acceptable.
The petitioner checked "no" to this question.
8. Is there an alternate combination of education and experience that is acceptable?
The petitioner checked "no" to this question.
9. Is a foreign educational equivalent acceptable?
The petitioner listed "yes" that a foreign educational equivalent would be accepted.
14. Specific skills or other requirements: The petitioner left this section blank.

The petitioner did not indicate that training or experience was required for the position offered. To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires only a Master's degree in any (general) field of study, without any experience.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was a Master's in Instrumentation and Technology. He listed the institution of study where that education was obtained as [REDACTED], India, and the year completed as 1992.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma from [REDACTED]. It indicates that the beneficiary was awarded a Bachelor of Science on July 28, 1992. The diploma also indicates 1987 and 1988 as the years attended. The petitioner also submitted under seal, as requested by the AAO in its July 20, 2012, RFE, the beneficiary's Master of Science (Tech) from [REDACTED] India, with a Provisional Certificate and diploma indicating that the beneficiary was first eligible for his degree on July 7, 1992. The AAO also received the beneficiary's marks sheets for the Bachelor of Science degree and the Master of Science (Tech) Degree.

DOL assigned the code of 15.1051.00 to the proffered position. According to DOL's public online database at <http://www.onetonline.org/link/summary/15-1121.00?redir=15-1051.00> (accessed December 31, 2012), which provides a crosswalk to the closest occupation similar to the proffered position containing its description of the position and requirements for the position most analogous to the petitioner's proffered position, the job falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 7.0 to < 8.0 to the occupation, which means that "[M]ost of these occupations require a four-year bachelor's degree, but some do not. Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A considerable amount of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.

Many of these occupations involve coordinating, supervising, managing, or training others. . . .

See id.

The position of Senior Programmer Analyst in this proceeding requires a Master's degree, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(1)(3)(ii)(C). Thus, combined with DOL's classification and assignment of educational and experiential requirements for the occupation, as well as the description of the job duties as set forth above, the certified position must be considered as a professional occupation.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

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

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

However, in this matter, the petitioner must establish eligibility for the requested benefit by submitting the required supporting documentation establishing that the beneficiary possesses the educational qualification required in the ETA Form 9089, which is a U.S. Master's degree or a foreign equivalent degree. *See* 8 C.F.R. 204.5(a)(3).

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

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

- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁴ *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.

⁴ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).^{5,6}

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale Linden Park Company v.*

⁵ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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

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

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

⁶ 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).

Smith, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this case, in support of the position that the beneficiary possesses the foreign equivalent of a U.S. Master's degree, the petitioner submitted copies of two evaluations from [REDACTED] and [REDACTED]. Both are signed by [REDACTED]. The first is dated October 1, 2003, and identifies the institution where the beneficiary attained his Master's degree as [REDACTED] rather than [REDACTED] as indicated on the diploma. In referring to the beneficiary's Bachelor's degree, [REDACTED] determines that the beneficiary "satisfied the requirements substantially similar to those required toward the completion of a Bachelor's degree from an accredited institution of higher education in the United States." In describing the beneficiary's Master's degree, he states that the beneficiary completed his studies in 1993, not 1992 as indicated by the beneficiary on the labor certification and as indicated on the diploma submitted to the AAO in response to its RFE. Finally, in the body of the evaluation on page 2, [REDACTED] states that the beneficiary's combined credentials represent a "Bachelor of Science degree in Computer Science." On page 1, however, the U.S. academic equivalency is printed in bold as a "Bachelor of Science in Engineering."

The second evaluation from [REDACTED] is dated October 16, 2008, and is also signed by [REDACTED]. In this report, [REDACTED] states that the beneficiary completed the equivalent of three years of U.S. undergraduate coursework at [REDACTED] and qualified for his degree in 1988. He describes the beneficiary's Master's degree from [REDACTED] as representing a three-year course of study and that he has the U.S. equivalent of a Master of Science degree in Engineering. The second evaluation from [REDACTED] does not reference the first evaluation.

In a letter, dated October 16, 2008, from [REDACTED], Managing Director of [REDACTED], [REDACTED] explains that the 2003 evaluation erred in referring to the wrong university attended by the beneficiary for his master's degree, as well as for the equivalency determination in the body of the evaluation in designating the beneficiary's credentials as representing a Bachelor of Science degree in Computer Science rather than the U.S. equivalent of a Master of Science degree in Engineering.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *see also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

As advised in the July 20, 2012, RFE issued to the petitioner by this office, because of the alterations of dates that appeared on the beneficiary's Master's degree of transcript of marks and the complete omission of a transcript of marks supporting the beneficiary's Bachelor's degree, the AAO requested verified copies of both under seal to be sent directly from the corresponding university. The AAO also advised the petitioner that it consults with 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." <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.⁷ 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.⁸

According to EDGE, a three-year Bachelor of Science degree from India is comparable to "three years of university study in the United States." The beneficiary's provisional certificate from [REDACTED] states that the beneficiary's examinations were in three parts, that the beneficiary completed Part I in April 1987, and that the beneficiary completed Parts I and II in April 1988. The beneficiary's Bachelor of Science degree indicates the same dates of passage for each part. However, the beneficiary's statement of marks was submitted to the AAO in response to its RFE, and indicates that the beneficiary failed two courses during the September 1986 semester. That semester does not appear to be reflected on the beneficiary's provisional certificate or his

⁷ 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.

⁸ 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.

degree. However, despite the discrepancies between the beneficiary's provisional certificate, degree, and statement of marks, it appears that the beneficiary pursued a three-year course of study at [REDACTED]

The beneficiary's degree from [REDACTED], a "Master of Science (Tech)" or a "M.Sc. (Tech)," indicates that it was awarded after examinations in March 1992. The beneficiary's statement of marks for this degree indicates that the beneficiary took examinations in February 1990, April 1991, and March 1992. As with the beneficiary's bachelor's degree, the statement of marks for the beneficiary's master's degree appears to document that the degree is broken into three parts. The entrance requirement for this program, although not provided by the petitioner or the evaluator, appears to be a Bachelor of Science in either mathematics and physics, or mathematics and electronics.⁹

EDGE contains descriptions of different Master of Science degrees available from Indian universities that may apply to this matter. These degrees, however, are predicated upon a determination of the type of bachelor's degree required for admission. Admission to the Master of Science (MS) program requires the completion of a "BS or other four year bachelor's degrees" and is awarded "upon completion of three semesters study as part of an integrated work program in the Information Technology field. Participating companies agree to integrate work requirements of their employees that qualify with the academic requirements for the degree." Therefore, the beneficiary's three-year degree does not appear to meet the four-year degree entry requirements for the MS. While the beneficiary's master's degree from [REDACTED] states that it is a "Tech" degree, the degree appears to be in an engineering field of study, and the petitioner's own evaluator stated that the beneficiary's major field of study at [REDACTED] was "Instrumentation Engineering." Further, the record does not indicate that the beneficiary participated in any integrated work programs. Therefore, the beneficiary's master's degree does not appear to be an MS degree.

A second master's level degree, the Master of Engineering or Master of Technology, is awarded "upon completion of 1.5 - 2 years of study beyond the four year BTech or BEng degree" and represents "attainment of a level of education comparable to a master's degree in the United States." While the evaluator's second evaluation concludes that the beneficiary possesses a master's degree in engineering, the record indicates that the beneficiary's Bachelor of Science degree appears to be a three-year degree, as discussed above, and does not appear to be a four-year bachelor's of

⁹ See [REDACTED] (accessed December 31, 2012) (indicating the admission requirements for a M.Sc. (Tech) as of the 2012-2013 academic year). While these requirements may have changed since the beneficiary's admission, they appear to coincide with the beneficiary's academic coursework, therefore, reliance on the current admission standards appears to mirror the second [REDACTED] evaluation's assessment that the beneficiary's undergraduate coursework was a three-year program of study focused on mathematics and physics. In any future filings, the petitioner should document the entrance requirements for the beneficiary's program of study at [REDACTED] as of his entry in 1990.

technology or engineering. Therefore, the beneficiary's three-year bachelor's degree does not meet the minimum requirements for admission to these types of masters' programs. As such, the beneficiary does not appear to hold a Master of Engineering or Technology degree.

A third master's level degree offered in India is the Master of Science (M.Sc), which is awarded "upon completion of two years of study beyond a three year bachelor's degree" and represents "attainment of a level of education comparable to a bachelor's degree in the United States." While the beneficiary's degree purports to be a "M.Sc." degree, it appears from the beneficiary's statement of marks from [REDACTED] that the beneficiary's program of study was in fact for three years. This is corroborated by the current program description maintained by the university. See [REDACTED]

[REDACTED] (accessed December 31, 2012) (indicating that each of the three M.Sc. (Tech) degrees offered require a three-year course of study after completion of a three-year Bachelor of Science in mathematics, physics, or electronics). It appears from the record that the beneficiary has completed three years of study at [REDACTED] and was awarded a master's level degree, which had an entrance requirement of a three-year Bachelor of Science degree. Therefore, it appears more likely than not that the beneficiary's three-year Master of Science (Tech) degree, which followed a three-year Bachelor of Science degree, is the foreign equivalent of a U.S. awarded master's degree which fulfills the degree requirement specified by the petition on the ETA Form 9089 and qualifies the beneficiary for preference visa classification under section 203(b)(3)(A)(ii) of the Act. However, while the beneficiary may possess the minimum qualifications for the position offered, the petitioner must also overcome the director's finding that the petitioner did not establish its continuing ability to pay the beneficiary's proffered wage.

Ability to Pay the Proffered Wage

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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The regulation 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.

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. The AAO's RFE asked the petitioner to provide a description of the beneficiaries' compensation, as it appeared that the petitioner paid its employees wages reported on Forms W-2, as well as other amounts reported on Forms 1099 as both "nonemployee compensation" and "substitute payments in lieu of dividends or interest." The petitioner provided a statement, dated September 27, 2012, explaining the payments on Forms 1099. The petitioner states that the beneficiary earned \$55,342.34 in 2006. This amount included \$30,000 in wages reported to the IRS on the beneficiary's W-2 statement, as well as \$25,342.34 reported on Form 1099. The petitioner states that of the Form 1099 amount, the figure of \$8,600 (reported on Form 1099, Box 8, as "substitute payments in lieu of dividends or interest") represents payments for an "en-cashed vacation payment," and a personal loan. As the loan would be an asset or liability already accounted for on the petitioner's tax returns, the AAO would not consider this type of "payment" as evidence of the petitioner's ability to pay, as the petitioner failed to document whether it had already accounted for this asset. Further, the petitioner's statement does not appear to be accurate, as it claims that "about \$600" was paid to the beneficiary for unused vacation leave, however, exactly \$8,000 was loaned to the beneficiary. As the petitioner did not provide any evidence to corroborate its claim that "about" \$600.00 was payment for unused vacation, the AAO will not consider this sum in its analysis.

Further, the petitioner represented to USCIS that it would employ the beneficiary full-time on its Form I-129, Petition for Nonimmigrant Worker (Case No. SRC04xxx52474), at a salary of \$45,000 through October 27, 2006, and \$56,056 (Case No. WAC07xxx50819) from October 28, 2006, through November 29, 2008. Using just the lower salary figure of \$45,000 per year (\$21.63 per hour), one week (40 hours) of paid vacation would have a value of over \$865. Therefore, this payment does not appear to reflect a payment for vacation at the salary the petitioner represented to USCIS that it would pay the beneficiary. The AAO notes, however, if the beneficiary's salary were in fact \$30,000 per year (\$14.42 per hour), as is supported by the beneficiary's W-2 statement, the "about \$600" figure would represent "about" one week of vacation time (\$576.92 for 40 hours of paid time, as determined by a work-year of 2,080 work hours). Further, the petitioner states that in 2007, this payment for unused vacation is reported in Box 7, "nonemployee compensation." The petitioner does not attempt to explain whether the vacation leave payment is reported in Box 7 or 8 in 2008. In 2009 and 2010, the petitioner claims the payment for unused vacation is reported in Box 7 again.

The petitioner further asserts that the remaining \$16,742.34 paid in 2006, as reported on Form 1099, Box 7, "nonemployee compensation," represents payment for a discretionary bonus "[b]ecause [the beneficiary] did such an excellent job." However, the petitioner states that in 2008 this same "bonus" was reported on Form 1099 in both Box 7 and Box 8, as both "nonemployee compensation" and as "substitute payments in lieu of dividends or interest," respectively. However, in 2007, 2009, and 2010, the petitioner states that the beneficiary's unused vacation and the same bonus were reported in Box 7 only. The petitioner does not attempt to provide any explanation as to why it would split this bonus payment between these boxes in 2008, but not any other year. The discrepancies between the beneficiary's salary, and the reasons for the payments represented on Form 1099, casts doubt on the petitioner's claim that the figures on Form 1099 represent earned compensation. See *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) ("Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."). The petitioner did not provide any evidence to corroborate its statement. The AAO does not find the petitioner's explanation credible, as it claims payment for the same "work" is sometimes reported as nonemployee compensation or substitute payments for interest or dividends, without any explanation for the changes from year to year. Further, the AAO notes that as substantial portions of the beneficiary's "wages" are in the form of nonemployee compensation and substitute payments in lieu of dividends or interest, it casts doubt on whether the job offer is realistic and whether the position offered is for full-time employment. The petitioner must resolve these inconsistencies with independent, objective evidence in any further filings. *Matter of Ho*, 19 I&N at 591-92. Specifically, the petitioner, who claims to have employed the beneficiary full-time since January 2004, made representations to USCIS on its Form I-129, Petition for Nonimmigrant Worker (Case No. SRC04xxx52474), that it would employ the beneficiary full-time at a salary of \$45,000 per year through October 27, 2006. However, as the petitioner indicates in its letter, dated September 27, 2012, the petitioner paid the beneficiary only \$30,000 in wages in 2006, despite the petitioner's confirmation that the beneficiary "never took any vacation time off" in 2006. Therefore, it appears that the beneficiary's employment has not been full-time as the petitioner represented in filing Form I-129, and as the petitioner has claimed in the instant petition. The job offer must be for a permanent and full-time position. See 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. See Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994). While the petitioner is not required to employ the beneficiary full-time in the position offered until the beneficiary obtains permanent residence, the contradicted claims of full-time employment with the petitioner since 2004 cast doubt on the information provided. *Matter of Ho*, 19 I&N at 591. Further, the petitioner's September 27, 2012, letter suggests that the beneficiary is employed in various other capacities, for which he is paid on Form 1099, including updating tenant records in 2006, 2007, and 2008, as well as training bookkeepers to take over these functions in 2009 and 2010, and for repairing and maintaining computers and computer networks for thirteen apartment buildings in 2009 and fifteen apartment buildings in 2010. On the labor certification, the beneficiary claims to have been employed by the petitioner in the position offered since January 1, 2004. However, these duties do not appear to be within the scope of the duties specified on the labor certification, which are described above. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for

whom the certification was granted, and for the area of intended employment stated on the labor certification. 20 C.F.R. § 656.30(c)(2). It seems that the petitioner has employed the beneficiary as a network and computer systems administrator, and possibly as a bookkeeper, at various unspecified locations, outside the terms of the labor certification. See *Sunoco Energy Development Company*, 17 I&N Dec. 283 (Reg'l Comm'r 1979). The petitioner has not established that the proposed employment will be in accordance with its terms. *Matter of Izdebska*, 12 I&N Dec. 54 (Reg. Comm. 1966).

Therefore, on the Form 1099s in the record, the AAO does not consider applicable any compensation designated as "substitute payments in lieu of dividends or interest" because these payments do not clearly represent employment-based compensation. Further, the AAO does not consider applicable the amounts designated as "nonemployee compensation" because these payments do not clearly represent employment-based compensation.

However, even if the AAO were to consider the income reported on Form W-2, and the "nonemployee compensation" reported on Form 1099 Box 7, the petitioner has failed to document its ability to pay the beneficiary's proffered wage from the priority date onward. The charts of wages paid below are based on the Wage and Tax Statements (W-2s) in the record and the amounts indicated in Box 7 on Forms 1099 only. In the instant case, the petitioner submitted evidence of the following amounts paid to the beneficiary:

<u>Year</u>	<u>Amount Paid</u>	<u>Difference from Proffered Wage of \$56,056</u>
2006	\$46,742.34	-\$9,313.66
2007	\$43,710.31	-\$12,345.69
2008	\$41,180	-\$14,876
2009	\$47,880	-\$8,176
2010	\$53,860	-\$2,196
2011	\$59,710.06	Paid in excess of proffered wage
2012	\$51,137.26 YTD ¹⁰	Unknown ¹¹

¹⁰ Year-to-Date (YTD) amount paid by the petitioner to the beneficiary as of October 5, 2012.

¹¹ The record contains only a single pay statement for the beneficiary. This statement indicates that the beneficiary was paid \$2,000 in base wages for "0.0" hours worked, and does not state a rate of pay. The statement indicates the beneficiary has been paid \$38,062.26 in regular compensation YTD; as this figure cannot be derived from regular payments of that same amount, this indicates that the beneficiary is not paid \$2,000 per pay statement in regular compensation. Given the discrepancies in the salary paid to the beneficiary from year to year, the AAO is unable to determine if the beneficiary is paid a regular, hourly wage. Therefore, the single pay statement provided is insufficient to document whether the beneficiary will be paid the proffered wage in 2012. In any future filings, the petitioner should submit independent, objective evidence establishing the beneficiary's hourly salary, such as sufficient number of pay statements to corroborate that the beneficiary is paid a set annual or hourly salary. *Matter of Ho*, I&N 19 at 591-92.

A petitioner's filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA Form 9089. The petitioner is obligated to show that it has sufficient funds to pay the proffered wages to all the sponsored beneficiaries from their respective priority dates or in accordance with the regulation at 8 C.F.R. § 204.5(g)(2). The petitioner is responsible for establishing its continuing ability to pay each respective proffered wage until the corresponding beneficiary attains lawful permanent resident status.

In this case, the AAO issued a Notice of Derogatory Information and Request for Evidence on October 4, 2011, requesting, *inter alia*, that the petitioner provide information relevant to other beneficiaries that it has sponsored, including evidence of payment of wages. The petitioner, through counsel, states that it has sponsored two employees in addition to the beneficiary, indicated below as "SRV" (SRC 08xxx52174) and "MSM" (LIN 08xxx51503). USCIS records show that SRV attained permanent resident status on February 27, 2012. SRV's proffered wage is \$81,765 and his priority date is November 16, 2007. The petitioner submitted evidence of the following amounts of compensation paid to SRV:

<u>Year</u>	<u>Amount Paid</u>	<u>Difference from Proffered Wage of \$81,765</u>
2006	Not Applicable	Not Applicable
2007	\$27,750	-\$54,015
2008	\$41,182	-\$40,583
2009	\$53,405	-\$28,360
2010	\$45,936.60	-\$35,828.40
2011	Not Provided	
2012	Not Provided	

MSM's proffered wage is \$46,051 and his priority date is January 26, 2005. Counsel states that MSM left the petitioner's employment on April 27, 2011. However, during the pendency of his employment with the petitioner, the petitioner is obligated to show its ability to pay the proffered wage.

The petitioner submitted evidence of the following amounts of compensation paid to MSM:

<u>Year</u>	<u>Amount Paid</u>	<u>Difference from Proffered Wage of \$46,051</u>
2006	\$33,125.75	-\$12,925.25
2007	\$77,017.14	Paid in excess of proffered wage
2008	\$42,078.85	-\$3,972.15
2009	\$52,423.35	Paid in excess of proffered wage
2010	\$45,713.66	-\$337.34
2011	Not Provided	
2012	Not Provided	

Including the beneficiary, the total difference between payment of the proffered wages and the actual wages paid to each beneficiary resulted in deficiencies for several years as follows: -\$22,238.91 in 2006; -\$66,360.69 in 2007; -\$59,431.15 in 2008; -\$36,536 in 2009; and -\$38,361.74 in 2010. The petitioner paid the beneficiary in excess of the proffered wage for 2011. However, because the petitioner did not provide the W-2 statements or Forms 1099 for SRV and MSM for 2012, the AAO cannot determine whether the petitioner has the ability to pay the beneficiary's proffered wage in 2012.

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 sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

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

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

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

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

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

If the net income is sufficient to cover the proffered wage or the difference between any actual payment of wages and the proffered wage during a given period, then the petitioner is deemed to have established the ability to pay the proffered wage for that period of time.

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the AAO closed on October 12, 2012, with the receipt by the AAO of the petitioner’s submissions in response to the AAO’s RFE. As of that date, the petitioner’s 2011 federal income tax return was the most recent return available. The petitioner has submitted copies of its 2006, 2007, 2008, 2009, 2010, and 2011 tax returns. Its net income as set forth below was:

- In 2006, the Form 1120 stated net income was -\$670.
- In 2007, the Form 1120 stated net income was \$636.
- In 2008, the Form 1120 stated net income was -\$430.
- In 2009, the Form 1120 stated net income was -\$12,711.
- In 2010, the Form 1120 stated net income was -\$138.
- In 2011, the Form 1120 stated net income was -\$43,456.

Therefore, for 2006, 2007, 2008, 2009, 2010, and 2011, the petitioner did not have sufficient net income to pay the difference between the wages paid and the beneficiaries’ proffered wages.

Besides net income, as an alternative, USCIS will also examine a petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.¹² A corporation’s year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation’s end-of-year net current assets or (net income) can cover the proffered wage or any difference between the actual wages paid and the proffered wage, the petitioner is expected to be

¹²According 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.

able to pay the full proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2006, 2007, 2008, 2009, 2010, and 2011, as shown in the table below.

- In 2006, the Form 1120 stated net current assets were \$0.¹³
- In 2007, the Form 1120 stated net current assets were \$92,874.
- In 2008, the Form 1120 stated net current assets were \$95,458.
- In 2009, the Form 1120 stated net current assets were \$84,556.
- In 2010, the Form 1120 stated net current assets were \$82,783.
- In 2011, the Form 1120 stated net current assets were \$161,215.

Therefore, for the years 2007 through 2011, the petitioner had sufficient net current assets to cover the cumulative difference between the actual compensation paid to the beneficiaries and their respective proffered wage(s). In 2006, the year of filing and the priority date, the petitioner did not have sufficient net current assets to pay the difference between the wages paid and the beneficiaries' proffered wages.

Acknowledging that the petitioner's net income and net current assets were insufficient to demonstrate its ability to pay the beneficiaries' proffered wages in 2006, counsel asserts that USCIS should prorate the proffered wage for the portion of 2006 that occurred after the priority date. We will not, however, 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 may prorate the proffered wage if the record contains evidence of net

¹³ The petitioner has provided a certified tax return from the Internal Revenue Service (IRS) for tax year 2006, signed by the petitioner's president on September 17, 2007, which attests under penalty of perjury that the petitioner possessed no assets and no liabilities at the beginning of tax year 2006, and again at the end of tax year 2006. For 2006, corporations with total receipts (line 1a plus lines 4 through 10 on page 1) **and** total assets at the end of the tax year less than \$250,000 are not required to complete Schedule L if the "Yes" box on Schedule K, question 13, is checked. See <http://www.irs.gov/instructions/i1120> (accessed December 31, 2012). The petitioner checked "Yes" on Schedule K, question 13. However, the petitioner has provided a certified tax return from the IRS for its tax year 2007, as well as its tax transcript for tax year 2007, both of which indicate the petitioner claimed in 2007 to have beginning of the tax year total assets reported of \$161,369, which should be the same amount of assets as reported for the end of its 2006 tax year. As the petitioner claimed \$242,998 in total receipts in 2006 (Form 1040, Line 1a) and beginning of the year assets totaling \$161,369 as of January 1, 2007, it is unclear whether or not it was required to complete Schedule L. This discrepancy between the tax returns provided casts doubt on the veracity of the information provided by the petitioner. *Matter of Ho*, 19 I&N at 591. In any future filings, the petitioner must provide independent, objective evidence of its financial ability to pay the beneficiary's proffered wage from the priority date onward that will meet the regulatory requirements of 8 C.F.R. § 204.5(g), such as audited financial statements or annual reports. *Id.* at 591-92 (inconsistencies in the record must be overcome by independent, objective evidence).

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), the petitioner has not submitted such evidence.

As neither the petitioner's net income of -\$670, nor its net current assets of \$0 could cover the difference between the proffered wages and the wages paid, \$22,238.91, the petitioner did not establish its ability to pay in 2006. Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner has not established that it had the continuing ability to pay the beneficiary's proffered wage through an examination of wages paid to the beneficiary, or its net income, or its net current assets.

Counsel also provided copies of the petitioner's 2006 bank statements. Reliance on the balances in the petitioner's banks statements is misplaced. First, 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 generally do not reflect other encumbrances that a petitioner may have that would affect its continuing 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, such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L, if any, as stated above, that is already included in a calculation of the petitioner's net current assets.

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 priority date onward.

In some cases, 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* 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 *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturière. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability such as the number of years the petitioner has been doing business, the

established historical growth of the petitioner's business or occurrence of any uncharacteristic business expenditures or losses.

In the instant case, it is noted that the petitioner submitted its 2006 through 2011 tax returns, as well as certified returns for 2006 to 2009, and tax transcripts for 2007 to 2010. However, as indicated above, the discrepancies between the beneficiary's 2006 and 2007 tax returns cast doubt on the veracity of the information provided. In addition, as discussed above, the fluctuating wages paid to the beneficiary from 2006 to 2012, as well as the other workers discussed above, suggests that the petitioner may not be able to employ these employees full-time despite obligations related to their nonimmigrant visas. Although salaries were paid to the three beneficiaries discussed above during the relevant years, losses or negative balances were reported in both net income and net current assets in 2006, which is the year covering the priority date. The petitioner presented no unique business circumstances analogous to *Sonegawa* that would make this petition eligible under those circumstances. The petitioner's gross sales and total wages paid to all employees are modest and do not document its business growth over the five (5) year period documented, but rather show inconsistent gross sales figures from year to year. Further, the petitioner's quarterly state tax returns document that it has had seven (7) employees at one point, but recently has employed only the instant beneficiary and the other beneficiary, "SRV," documenting more than a two-thirds reduction of its workforce during the period documented. Thus, assessing the overall 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 beneficiary's educational credentials satisfied the requirements of the labor certification or that the petitioner had the continuing financial ability to pay the proffered wage beginning on the priority date.

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.