



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 26 2013

OFFICE: NEBRASKA SERVICE CENTER

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, Nebraska 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 landscape service. It seeks to employ the beneficiary permanently in the United States as an irrigation technician. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (the DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The director also determined that the petitioner failed to demonstrate its ability to pay the beneficiary the proffered wage from the priority date and subsequently.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

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 priority date of the petition is April 27, 2001, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).³ The Immigrant Petition for Alien Worker (Form I-140) was filed on July 5, 2007.

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

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).

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.

The job qualifications for the certified position of irrigation technician are found on Form ETA-750 Part A. Item 13 describes the job duties to be performed as follows:

Performs various technical analysis, modifications, repair, and routine maintenance of complex industrial and multiple unit residential irrigation systems; inspects existing installations for adherence to performance standards and other parameters; participates in desing of irrigation projects based on specifications provided by client and/or project engineer; read schematic drawings for information used in new installations, and for maintenance of existing systems; diagnoses problems in existing systems and either advises management of material and labor needs, or in simple cases, performs repair himself. [sic]

The minimum education, training, experience, and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	None specified
High school	None specified
College	4 years**
College Degree Required	Agricultural/hydraulic engineering
Major Field of Study	None specified

Experience:

Job Offered	3 years**
(or)	
Related Occupation	1 year as an irrigation system/agricultural design engineer**

Block 15:

Other Special Requirements	**Stated requirements are in the alternative: 3 years in the job offered, or university education in agricultural engineering plus 1 year of professional experience in irrigation system design.
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As set forth above, Section 14 indicates that the proffered position requires four years of college culminating in a degree in agricultural/hydraulic engineering and three years of experience in the job offered of irrigation technician or one year of experience in the related occupation of irrigation

system/agricultural design engineer. Section 15, however, introduces a different set of requirements, either three years of experience in the job offered of irrigation technician, or university education in agricultural engineering plus one year of professional experience in irrigation system design. In section 15, the amount of university education is not specified.

When asked on Part B, Section 11 of the labor certification to list the names and addresses of schools, colleges, and universities attended, the beneficiary stated "NONE." The record of proceeding contains no information regarding the beneficiary's educational qualifications for the proffered position of irrigation technician.

The director denied the petition on March 23, 2009. He determined that the petitioner failed to demonstrate that the beneficiary possessed the requisite education for the position as of the priority date. Specifically, the director found that, as of the priority date, the beneficiary did not possess a four-year college degree in agricultural/hydraulic engineering plus one year of professional experience in irrigation system design, or alternatively, three years of experience in the job offered plus one year of professional experience in irrigation system design.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel asserted that the director misread the labor certification requirements and that the beneficiary's three years of experience in the proffered position of irrigation technician as of the priority date was sufficient to qualify him for that position. Counsel claims that an applicant could qualify for the position based on four years of college and one year of experience in irrigation systems design or alternatively based on three years of experience in the proffered position of irrigation technician.

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

Based on the terms of the labor certification, the AAO finds the minimum requirements for the proffered position of irrigation technician to be a four-year bachelor's degree in agricultural/hydraulic engineering and three years of experience in the job offered or one year of experience in irrigation system design. Counsel contends that the requirements for the proffered position of irrigation technician are instead three years of experience in the job offered or a bachelor's degree in agricultural/hydraulic engineering and one year of experience in irrigation system design. The AAO finds that the beneficiary fails to meet the minimum requirements for the proffered position as listed on the labor certification.

On August 2, 2012, the AAO issued a request for evidence (RFE) to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding regarding the beneficiary's prior education. The AAO also noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of four years of college culminating in a degree in agricultural/hydraulic engineering and three years of experience in the job offered of irrigation

technician or one year of experience in the related occupation of irrigation system/agricultural design engineer might be met through a combination of lesser degrees or a quantifiable amount of work experience.

In response to the AAO's RFE, counsel submits a brief, the petitioner submits a letter dated September 7, 2012 from its President and CEO, and the beneficiary submits a signed and notarized declaration regarding his prior employment experience. In counsel's brief, he contends that the director misread the requirements of the labor certification, which allowed for as little as three years of experience in the proffered position of irrigation technician instead of a four-year college degree. In the petitioner's letter [REDACTED] states that his business completed the labor certification in a good faith effort and that his business did not mean for the position to require four years of education if an applicant possessed the requisite prior experience. He states that his business understood two years of prior employment experience to be equivalent to four years of study. [REDACTED] further states that he no longer possesses any recruitment materials regarding the position, as the priority date fell back in 2001.

At the outset, 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 United States Citizenship and Immigration Services (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

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

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).⁵

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).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More

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).

specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

The AAO notes the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* 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. *Id.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA 750 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree).

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 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. 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.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word “degree” in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress’ narrow requirement of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if the AAO did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, the AAO could not consider education earned at an institution other than a college or university.

The petitioner failed to provide copies of notices of Internet or newspaper advertisements, which might have advised any otherwise qualified U.S. workers that the educational requirements for the job may have been met through a quantitatively lesser degree or defined equivalency.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification, and the petition would be denied on that basis as well. See 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

The petitioner has not established that the beneficiary 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 *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).

According to the plain terms of the labor certification, the applicant must have three years of experience in the job offered of irrigation technician or one year of experience in the related occupation of irrigation system/agricultural design engineer.

8 C.F.R. § 204.5(l)(3)(ii)(A) states:

General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers, giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Part B, Item 15 of Form ETA 750 has been amended to identify four employment experiences for the beneficiary. According to Section 15, the beneficiary worked for [REDACTED] Inc. in [REDACTED] as an irrigation technician from January 1993 until December 1995. Section 15 indicates that the beneficiary worked for the petitioner, [REDACTED] in [REDACTED] California, as an irrigation technician and supervisor from September 1997 until August 1998. Section 15 indicates that the beneficiary worked again for [REDACTED] in [REDACTED] California, as an irrigation technician from August 1998 until October 1999. Lastly, according to Section 15, the beneficiary has been working for the petitioner, [REDACTED] Service, in [REDACTED] California, in the same position previously held, from October 1999 to the present.

As evidence of the beneficiary's qualifying experience, the petitioner initially provided copies of IRS Form W-2 and pay statements that were issued by [REDACTED] to the beneficiary. The petitioner provided no letters describing the beneficiary's employment, in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(A). In his January 20, 2009 RFE, in addition to requesting evidence regarding the beneficiary's academic degree, the director requested evidence of the beneficiary's qualifying experience "in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties." In response, the petitioner provided a single document dated February 25, 2009 and entitled, "Declaration Under Oath." In this declaration, [REDACTED] claims to have been employed by [REDACTED] Inc. from July 1991 until May 2006 as a supervisor "of workers engaged in the various tasks involved in systems installation, repair, and maintenance." [REDACTED] claims that "[f]rom the period of January 1993 until December 1995, [the beneficiary] worked full-time under my supervision as an Irrigation Technician." [REDACTED] includes duties that the beneficiary performed.

The letter, however, fails to comply with the regulatory requirements for evidence of employment. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that the letter must be from the employer, not

from an individual who formerly worked for the same employer. Such letters must be written on company letterhead and include the name and address of the employer and the title of the individual attesting to the beneficiary's employment experience. Further, the employment letter must explain in detail the period of time during which the beneficiary worked for the company, including all of the duties that the beneficiary performed. In the instant case, the declaration claims only to document 35 months of experience, not a full three years. Thus, the evidence in the record does not demonstrate that the beneficiary has the experience that he claimed on Form ETA 750B and does not demonstrate that the beneficiary has the amount of experience that is required on Form ETA 750.

In its August 2, 2012 RFE, the AAO requested that the petitioner provide additional documentary evidence, complying with the regulatory requirements, in support of the beneficiary's prior employment experience. In response, counsel states that the signed and notarized declaration that [REDACTED] submitted on behalf of the beneficiary regarding the beneficiary's past work experience was sufficient according to the terms of 8 C.F.R. § 204.5(g)(1), as no further evidence was available.

The petitioner additionally submits a signed and notarized declaration from the beneficiary. The beneficiary states that his previous experience as an irrigation technician was undocumented, as he did not possess authorization to work. Thus, he has not been able to obtain experience letters conforming to regulatory requirements. The petitioner submits copies of some of the beneficiary's pay stubs from [REDACTED] in 1996 and 1997. The AAO notes that these pay statements list a different social security number (SSN) for the beneficiary than that listed on the Form I-140 and on the beneficiary's Forms W-2 Wage and Tax Statements for 2002 through 2008.⁶

⁶ Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding SSN fraud and misuse are serious crimes and will be subject to prosecution.

The following provisions of law deal directly with SSN fraud and misuse:

- **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to *...willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 failed to establish that the beneficiary is qualified for the offered position.

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).

Here, the Form ETA 750 was accepted on April 27, 2001. The proffered wage as stated on the Form ETA 750 is \$29.94 per hour (\$62,275.20 per year based on a 40-hour work week).

both. See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on March 27, 2013).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone *...knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

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). In the instant case, the petitioner's tax returns demonstrate that it paid between approximately \$1.6 million and \$4.4 million in the cost of labor between 2001 and 2007 and between approximately \$83,000.00 and \$1.7 million in salaries and wages during that time. As counsel highlighted on appeal, the petitioner's sales have grown, culminating in approximately \$14 million in 2007. Moreover, the petitioner stated on the petition that it employs 163 workers and that it has been in business since 1999. Thus, assessing the totality of the circumstances in this individual case, it is concluded that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage.

The evidence submitted does establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

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.