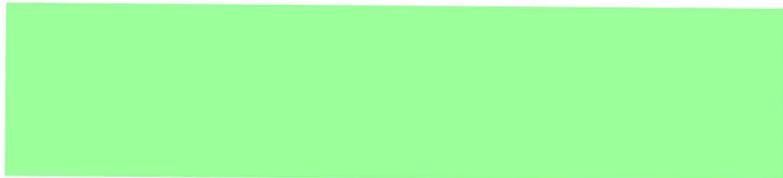


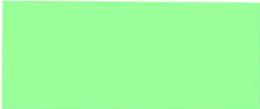
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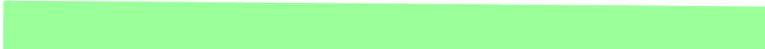
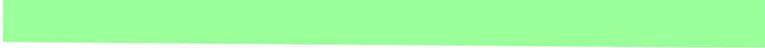
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

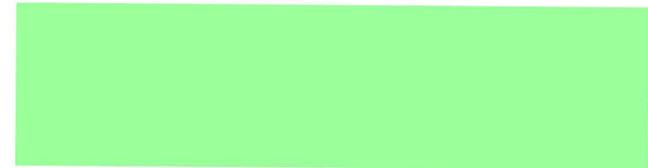


DATE: **MAY 30 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg", followed by a horizontal line.

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will remain denied.

The petitioner describes itself as a hospitality company. It seeks to permanently employ the beneficiary in the United States as a financial manager. The petitioner requests classification of the beneficiary as 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 director's decision denying the petition concludes that the beneficiary did not possess the minimum level of education required by the terms of the labor certification.

On August 27, 2012, the AAO dismissed the appeal, holding that the petitioner failed to establish that the beneficiary possessed the education required by the terms of the labor certification and that the petitioner failed to demonstrate its ability to pay the proffered wage from the priority date onwards. The petitioner then filed a motion to reopen and reconsider the AAO decision. We will accept the motion to reopen the matter based on the new information submitted and the motion to reconsider based on arguments made by counsel. Thus, the instant motions are granted. 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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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 December 1, 2003,

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

which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).<sup>2</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on February 27, 2007.

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

Prepare financial reports; prepare special reports required by regulatory authorities; direct the organizations[sic] financial goals, objectives and budgets; invest funds and manage associated risks, supervise cash management activities, execute capital-raising strategies to support company's expansion, and deal with mergers and acquisitions; monitor and control the flow of cash receipts and disbursements; minimize the risks and losses.

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	8
High school	4
College	4
College Degree Required	Bachelors
Major Field of Study	Accounting

Experience:

Job Offered	2
(or)	
Related Occupation	none

Block 15:

Other Special Requirements none

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<sup>2</sup> 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.

As set forth above, the proffered position requires four years of college culminating in a bachelors degree in accounting plus two years of experience in the job offered of financial manager. As stated in the previous AAO decision, the beneficiary's diplomas and transcripts from [REDACTED] in India as well as the credential evaluation from [REDACTED] failed to establish that the beneficiary held a foreign equivalent degree to a Bachelor of Science degree with a specialization in accounting as of the priority date. With its motion, the petitioner submits a credentials evaluation dated September 18, 2012 from [REDACTED] of the [REDACTED]. [REDACTED] examined the beneficiary's Bachelor of Laws (Special) from [REDACTED] and concluded that the beneficiary holds the equivalent of a U.S. Bachelor degree in Legal Studies. [REDACTED] relied upon the number of years required to achieve a Bachelor of Laws in reaching his conclusion. [REDACTED] then cites the EB-2 immigrant classification that a U.S. bachelor's degree plus five years of experience is equivalent to a U.S. Master's degree, considered the beneficiary's years of experience with Modern Automobiles, and concluded with no specific explanation that the beneficiary holds the equivalent of a Bachelor of Science with major in Accounting.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. See *id.* USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *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).

Although the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), establishes that the beneficiary's Bachelor of Laws degree is equivalent to a U.S. bachelor's degree,<sup>3</sup> the evaluation did not analyze the beneficiary's experience as related to courses required for a bachelor's degree in accounting or otherwise demonstrate how the beneficiary's particular experience would be the equivalent of a degree in a field other than Law.

The previous AAO decision considered the recruitment materials submitted in determining whether the petitioner intended a combination of education and experience to be equivalent to the required bachelor's degree in Accounting. The decision specifically considered copies of the classified advertisements posted in the [REDACTED] on August 17, 19, and 21, 2003, as well as the Job

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<sup>3</sup> It is noted that EDGE states that the beneficiary's Bachelor of Science degree in Chemistry is not equivalent to a U.S. bachelor's degree. The petitioner submitted no evidence to establish that this degree would otherwise bear upon the required specialty of Accounting.

Notice posted from August 25, 2003 through September 24, 2003 at the petitioner's business premises. The decision noted that the newspaper advertisements include no education requirements, and thus are insufficient to apprise U.S. workers of the true minimum requirements for the position, which are a bachelor's degree in accounting. *See* 20 C.F.R. § 656.21(g). Also, the Job Notice stated that a bachelor's degree in accounting was required and did not specify any equivalencies for that degree with specialization.

With the motion, the petitioner submitted an undated letter from its president stating that the petitioner "was willing to consider applicants who had . . . multiple degrees or degrees and education . . . our intention was to require four years of academic coursework, and two years of skilled experience. We intended to allow for a combination of degree or majors to reach the total of four years of coursework." However, this intention was not reflected in the petitioner's recruitment efforts for the labor certification. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Counsel states on motion that the petitioner's failure to include an equivalency for a bachelor's degree in accounting was a "mere oversight" due to the space available on the Form ETA 750. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The recruitment materials submitted could have demonstrated the petitioner's intent to consider some sort of equivalency to the stated education constituting the minimum requirements of the position, however, as discussed above, the materials submitted in this case demonstrated no such intent.

Counsel also states that the DOL processed the labor certification for over three years without notifying the petitioner that the beneficiary did not meet the requirements of the position. As stated in the previous AAO decision, 20 C.F.R. § 656.1(a) describes 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).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

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

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>5</sup>

Counsel presented no argument that DOL should properly determine whether the beneficiary's qualifications meet the requirements for the position as stated on the labor certification. In

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

<sup>5</sup> 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).

summary, the AAO concludes that the petitioner has failed to establish that the beneficiary meets the requirements of the labor certification as of the priority date. As a result, the petition will remain denied on this basis.

With regards to the petitioner's ability to pay the proffered wage, 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.

As noted in the AAO's prior decision, 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 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 December 1, 2003. The proffered wage as stated on the Form ETA 750 is \$45,000 per year.

In the AAO's August 27, 2012 decision, we specifically reviewed evidence of the petitioner's ability to pay the proffered wage in the form of Internal Revenue Service (IRS) Form W-2s from 2008 through 2011 and the petitioner's IRS Forms 1120S for 2003 through 2011. The AAO's decision stated that the petitioner demonstrated its ability to pay the proffered wage in 2004, 2005, 2006, 2007, 2008, and 2011. In addition to Forms W-2 stating wages paid by the petitioner to the beneficiary of \$42,000 in 2009 and 2010, the petitioner's 2003 Form 1120S stated net income of \$40,523 and net current assets of -\$49,380; its 2009 Form 1120S stated net income of -\$33,556 and net current assets of -\$61,842; and its 2010 Form 1120S stated net income of -\$13,198 and net current assets of -\$77,077. Accordingly, the AAO decision concluded that the petitioner did not establish its ability to pay the proffered wage in 2003, 2009, or 2010.

On motion, counsel requests that we prorate the petitioner's proffered wage for 2003 to establish the petitioner's ability to pay the proffered wage in that year. The petitioner submits a 2003 Form W-2 stating that the petitioner paid the beneficiary \$4,000 in that year. 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 will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

On motion, counsel admits that the tax returns in the record do not establish the petitioner's ability to pay the proffered wage in 2009 and 2010, but states that the petitioner's overall financial position, especially in light of the recession beginning in 2008, should be considered. Counsel states that the petitioner's owner was out of the country in 2009 and 2010, which resulted in lower than usual income for the petitioner. The petitioner submitted no evidence that its owner was out of the country as claimed or how the owner's absence would affect the profitability of a hotel. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Counsel notes that the petitioner has been in business for 19 years and has agreements with various travel websites to boost its sales and future prospects and that it demonstrated its ability to pay the proffered wage in the other years at issue. The petitioner failed to demonstrate its ability to pay the proffered wage in 2003, 2009, and 2010, so a prospective promise of increased revenue would not affect the petitioner's ability to pay the proffered wage in past years. Counsel also states that real property owned by the petitioner demonstrates assets available to pay the proffered wage. The petitioner submitted no evidence that any equity in the property could be used to pay the proffered wage. It is noted that the real property claimed is the actual location of the lodging facility, so that it

could not be sold to meet its salary obligations. Nor was evidence submitted to demonstrate that a line of credit or equity line mortgage could be obtained on the property.<sup>6</sup>

In the instant case, the petitioner submitted no new reliable evidence concerning its ability to pay the proffered wage from the priority date onwards. As stated in the prior AAO decision, although the petitioner has been in business for 19 years and has paid employees over that time, the total wages paid do not demonstrate that the petitioner paid ten employees as it claimed to have on its petition. In addition, the petitioner did not submit any evidence to demonstrate how an economic downturn specifically affected its business or any reason for its failure to demonstrate the ability to pay the proffered wage in 2003. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

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

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<sup>6</sup> In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5<sup>th</sup> ed. 1998).

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

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 Form ETA 750. 20 C.F.R. § 656.30(c)(2). The Form ETA 750 states the proffered position is as a financial manager. However, with the motion, the petitioner submitted a Registration Form & Hotel Agreement with [REDACTED] that lists the beneficiary as the reservation contact person. A reservations agent is a position different from a financial manager, encompassing different duties and responsibilities. The petitioner is not in compliance with the terms of the labor certification and 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). As a result, the petition may be denied on this basis as well.

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 motions to reopen and reconsider are granted and the decision of the AAO dated August 27, 2012 is affirmed. The petition remains denied.