



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: SEP 27 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner is a mechanical consulting engineering business. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer/designer. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box "e" at Part 2, indicating that it seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL).

The 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 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

As set forth in the director's denial, at issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and whether or not the beneficiary is qualified for the proffered 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). The petitioner must also demonstrate that, on the priority date, the beneficiary had the

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).

qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the Form ETA 750 was accepted on July 14, 2004. The proffered wage as stated on the Form ETA 750 is \$58,656 per year. The Form ETA 750 states that the position requires a four-year Bachelor of Science degree in mechanical engineering.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1984, and to employ 15 workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the Form ETA 750B, signed by the beneficiary on March 9, 2007, the beneficiary states that he has worked for the petitioner since February 2003.

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

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date. However, the petitioner has submitted the Form W-2 for 2004 to 2012 as evidence that it paid the beneficiary a portion of the proffered wage in each year since the priority date, as shown in the table below

| <u>Year</u> | <u>Wages Paid</u> | <u>Proffered Wage</u> | <u>Difference between the proffered wage and wage paid</u> |
|-------------|-------------------|-----------------------|--|
| 2004 | \$42,296.42 | \$58,656.00 | \$16,359.58 |
| 2005 | \$46,125.14 | \$58,656.00 | \$12,530.86 |
| 2006 | \$48,904.74 | \$58,656.00 | \$9,751.26 |
| 2007 | \$58,867.38 | \$58,656.00 | Paid in excess of proffered wage |
| 2008 | \$68,705.50 | \$58,656.00 | Paid in excess of proffered wage |
| 2009 | \$68,384.61 | \$58,656.00 | Paid in excess of proffered wage |
| 2010 | \$67,305.36 | \$58,656.00 | Paid in excess of proffered wage |
| 2011 | \$67,190.22 | \$58,656.00 | Paid in excess of proffered wage |

| <u>Year</u> | <u>Wages Paid</u> | <u>Proffered Wage</u> | <u>Difference between the proffered wage and wage paid</u> |
|-------------|-------------------|-----------------------|--|
| 2012 | \$67,513.00 | \$58,656.00 | Paid in excess of proffered wage |

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).

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 petitioner’s tax returns demonstrate its net income for 2004 to 2012, as shown in the table below.

| <u>Year</u> | <u>Net income</u> | <u>Difference between the proffered wage and wage paid</u> |
|-------------|-------------------|--|
| 2004 | \$0.00 | \$16,359.58 |
| 2005 | \$53,042.00 | \$12,530.86 |
| 2006 | (\$110,229.00) | \$9,751.26 |

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

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner’s net current assets. Net current assets are the difference between the petitioner’s current assets and current liabilities.² 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 and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner’s tax returns demonstrate its end-of-year net current assets for 2004 and 2006, as shown in the table below.

| <u>Year</u> | <u>Net current assets</u> | <u>Difference between the proffered wage and wage paid</u> |
|-------------|---------------------------|--|
| 2004 | (\$19,189.00) | \$16,359.58 |
| 2006 | (\$16,678.00) | \$9,751.26 |

For the years 2004 and 2006, the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of

²According 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.

the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

On appeal, counsel asserts that the petitioner did have the ability to pay the proffered wage in 2004 and 2006, according to their 2004 audited financial statements and a totality of circumstances analysis. The record contains the petitioner's tax returns for 2004 to 2012, which indicate that the returns were prepared according to the cash method of accounting. As noted above, the petitioner does not have the ability to pay the proffered wage in 2004 and 2006, according to these returns. On appeal, counsel asserts that USCIS should also examine a 2004 audited financial statement of the petitioner, prepared according to the accrual method of accounting, because audited financial statements are one of the regulatory accepted forms of evidence.

As was noted in the AAO's NOID, the petitioner's tax returns were prepared pursuant to the cash method of accounting, in which revenue is recognized when it is received, and expenses are recognized when they are paid. See <http://www.irs.gov/publications/p538/ar02.html#d0e1136> (accessed November 15, 2011). This office would, in the alternative, have accepted tax returns prepared pursuant to accrual method of accounting, if those were the tax returns the petitioner had actually submitted to the Internal Revenue Service (IRS).

This office is not, however, persuaded by an analysis in which the petitioner, or anyone on its behalf, seeks to rely on tax returns or financial statements prepared pursuant to one method, but then seeks to shift revenue or expenses from one year to another as convenient to the petitioner's present purpose. If revenues are not recognized in a given year pursuant to the cash accounting method then the petitioner, whose taxes are prepared pursuant to cash rather than accrual, and who relies on its tax returns in order to show its ability to pay the proffered wage, may not use those revenues as evidence of its ability to pay the proffered wage during that year. Similarly, if expenses are recognized in a given year, the petitioner may not shift those expenses to some other year in an effort to show its ability to pay the proffered wage pursuant to some hybrid of accrual and cash accounting.³ The amounts shown on the petitioner's tax returns shall be considered as they were submitted to the IRS, not as amended pursuant to the accountant's adjustments. Highlighting the marked difference between the two methods of accounting, according to the petitioner's 2004 tax return, its net income was \$0; however, according to the 2004 audited financial statement, the petitioner's net income was \$140,189.

As the record stands now, counsel states that we should consider the financial statements for 2004 that were prepared based on the accrual method, which records revenue when it is earned. This means that in 2004, income was recorded on the date revenue was earned or the date the service was performed. Counsel then requests that for 2005 onward, we examine the petitioner's tax returns prepared according to the cash method of accounting. Under the cash accounting method, revenue is recorded when it is received. Therefore it is conceivable for the petitioner to have earned revenue in

³ Once a taxpayer has set up its accounting method and filed its first return, it must receive approval from the IRS before it changes from the cash method to an accrual method or vice versa. See <http://www.irs.gov/publications/p538/ar02.html#d0e2874> (accessed November 15, 2011).

2004, record it on the audited financial statement according to the accrual method, but to then also record this same revenue when it was received in 2005, under the cash accounting method. The petitioner is correct that either way of preparing tax returns and financial statements is acceptable; however, to switch the accounting method when conducting an analysis creates an inaccurate picture of the petitioner's income, as is obvious when examining the difference between net income listed on the tax return and the audited financial statement for the same year.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

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

In the instant case, the petitioner has shown steady growth in gross receipts and amount of wages paid on a yearly basis from the time of the priority date. The petitioner has been in business for over 25 years and has submitted evidence of awards received in its business. The petitioning business also pays substantial officer compensation to its owners. Furthermore, the amount of wages owed to the beneficiary in 2004 and 2006 represent two percent and one percent, respectively, of the total wages paid in those years.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has established that it had the continuing ability to pay the proffered wage. The evidence submitted establishes that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

With regard to the beneficiary's qualifications, 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).

In the instant case, the petitioner has requested classification as a professional pursuant to section 203(b)(3)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(ii) the labor certification requires a four-year Bachelor of Science degree in Mechanical Engineering.

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

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

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

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁴ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14)

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

determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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

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

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

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own

determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

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

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

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a professional. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. See also 8 C.F.R. § 204.5(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states, in part:

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

Section 101(a)(32) of the Act defines the term "profession" to include, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the offered position is not statutorily defined as a profession, "the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation." 8 C.F.R. § 204.5(1)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(1)(3)(i)

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor's degree as a minimum for entry; the beneficiary possesses at least a U.S. bachelor's degree or a foreign equivalent degree from a college or university; and the job offer portion of the labor certification requires at least a bachelor's degree or a foreign equivalent degree. The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1),

(12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As is noted above, in order to be classified as a professional, the beneficiary must possess at least a U.S. bachelor's degree or a foreign equivalent degree from a college or university. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university. The degree must also be from an accredited program.

In the United States, institutions of higher education are not authorized or accredited by the federal government.⁵ Instead, the authority to issue degrees is granted at the state level. However, state approval to operate is not the same as accreditation by a recognized accrediting agency.

According to the U.S. Department of Education (DOE), "[t]he goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality."⁶ Accreditation also ensures the nationwide recognition of a school's degrees by employers and other institutions, and also provides institutions and its students with access to federal funding.

⁵ See <http://ope.ed.gov/accreditation> (accessed September 11, 2013).

⁶ <http://www2.ed.gov/print/admins/finaid/accred/accreditation.html> (accessed September 11, 2013).

Accrediting agencies are private educational associations that develop evaluation criteria reflecting the qualities of a sound educational program, and conduct evaluations to assess whether institutions meet those criteria.⁷ Institutions that meet an accrediting agency's criteria are then "accredited" by that agency.⁸

The DOE and the Council for Higher Education Accreditation (CHEA) are the two entities responsible for the recognition of accrediting bodies in the United States. While the DOE does not accredit institutions, it is required by law to publish a list of recognized accrediting agencies that are deemed reliable authorities as to the quality of education provided by the institutions they accredit.⁹

The CHEA, an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. The presidents of American universities and colleges established CHEA in 1996 "to strengthen higher education through strengthened accreditation of higher education institutions."¹⁰ CHEA also recognizes accrediting organizations. "Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established."¹¹ According to CHEA, accrediting institutions of higher education "involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort."¹²

In summary, accreditation provides assurance of a basic level of quality of the education provided by an institution as well as the nationwide acceptance of its degrees. An unaccredited degree does not provide a sufficient assurance of quality.

Since a U.S. degree must be from an accredited institution of higher education, a foreign degree must also be accredited by any existing comparable system of accreditation for that country in order to qualify as the foreign equivalent of a U.S. degree under 8 C.F.R. § 204.5(1)(3)(ii)(C). Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from an accredited college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the beneficiary possesses a Bachelor of Science degree in mechanical engineering from [REDACTED] in Manila, Philippines, completed in 1980.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed September 9, 2013).

¹¹ *Id.*

¹² *Id.*

The record contains a copy of the beneficiary's Bachelor of Science degree in mechanical engineering and transcripts from [REDACTED] issued in 1980.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] on June 25, 2004. The evaluation states that the beneficiary has "the equivalent of a bachelor's degree in mechanical engineering from a regionally accredited college or university in tile [sic] United States."

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." See <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.¹³

According to EDGE, a four or five-year Bachelor of Science degree from the Philippines "represents attainment of a level of education comparable to a bachelor's degree in the United States." However, according to publicly available information, [REDACTED] does not currently offer an accredited bachelor's degree program in mechanical engineering.

In the Philippines, higher education is accredited by the Commission of Higher Education (CHED), which was established in 1994 by the Department of Education, Culture and Sports (DECS), now referred to as the Department of Education. The CHED creates standards that institutions and degree programs must meet before they are recognized. A check of the CHED website (accessed September 11, 2013) shows that [REDACTED] is a recognized institution offering accredited degree programs in a variety of fields, but is not currently accredited to offer a Bachelor of Science degree in mechanical engineering.

¹³ 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. v. USCIS*, 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.

In a Notice of Intent to Deny (NOID) dated September 12, 2012, the director notified the petitioner of the above. In response, counsel for the petitioner asserted that the mechanical engineering program was accredited at the time the beneficiary graduated from [REDACTED] and submitted three additional credential evaluations. The first evaluation of the beneficiary's educational credentials was prepared by [REDACTED] on September 20, 2012. The evaluation states that the beneficiary has "the equivalent of a bachelor's degree in mechanical engineering from a regionally accredited college or university in tile [sic] United States." The evaluation also states that [REDACTED] was recognized by the "Ministry of Education and Culture, the organization responsible for assessing complexity and assuring quality of degree programs from 1978 to 1981 in the Philippines. This recognition parallels regional accreditation of tertiary educational institutions in the United States." It is unclear from the evaluation which source [REDACTED] used to support this assertion. [REDACTED] includes the cover pages and information from the *Profiles of Philippine Universities and Colleges* published in 1975 by the Philippine-American Educational Foundation. The publication confirms that [REDACTED] was approved to offer the mechanical engineering program in 1953 and that this program continued to be offered as of 1975, the year of publication. However, this information is insufficient to establish that [REDACTED] offered an accredited Bachelor of Science in mechanical engineering program from 1974 to 1980, when the beneficiary claims to have attended the school, or from 1978 to 1981, as claimed by [REDACTED].

The second evaluation is from [REDACTED] on October 4, 2012. [REDACTED] states

The Bachelor of Science in Mechanical Engineering has been discontinued and is no longer offered by the University. The program was first approved by the Department of Education and Culture of the Philippines in 1953. Between 1978 and 1981 [REDACTED] was institutionally recognized by the Ministry of Education and Culture, which was at the time the institution with governmental mandate for the oversight of postsecondary degree level programs offered by private universities. Such recognition is the equivalent of recognized postsecondary accreditation in both institutional and programmatic terms in the United States.¹⁴

[REDACTED] cites the *Profiles of Philippine Universities and Colleges* published in 1975 by the Philippine-American Educational Foundation as his source for this information. However, as noted above, this document does not establish that [REDACTED] offered an accredited bachelor's degree program in mechanical engineering from 1974 to 1980, when the beneficiary claims to have attended the school, or from 1978 to 1981, as claimed by [REDACTED].

¹⁴ We note that in 1953, the Department of Education and Culture did not exist in the Philippines as it was not created until 1975. In 1953, the Department of Education was the organization that issued the initial approval of the Bachelor of Science in mechanical engineering program. <http://www.deped.gov.ph/index.php/about-deped/history> (accessed September 9, 2013).

The third evaluation was prepared by [REDACTED] on October 6, 2012. The evaluation concludes that the [REDACTED] is an accredited institution of higher learning in the Philippines, and that through his Bachelor of Science degree in mechanical engineering the beneficiary "satisfied the requirements that are substantially comparable to those of an accredited institution of higher education in the United States." [REDACTED] does not discuss whether or not the mechanical engineering degree program is currently offered or accredited or whether or not it was accredited at the time the beneficiary was awarded his degree.

As the evaluations did not provide evidence of [REDACTED] accreditation at the time the beneficiary was awarded his degree, the director found that the petitioner had failed to establish that the beneficiary was qualified for the proffered position.

On appeal, counsel states that [REDACTED] stopped offering the mechanical engineering program in the 1996-1997 academic year and that the program was accredited at the time the beneficiary received his degree. In support of his assertions, counsel submitted a letter from CHED. The letter dated October 4, 2012 from an administrative officer of the CHED, National Capital Region, states "[t]he [REDACTED] is offering Bachelor of Science in Mechanical Engineering program with Government Recognition No. 1 series of 1953, dated January 5, 1953 issued by Department of Education-Manila." The letter states that [REDACTED] is offering the mechanical engineering program as of the date of the letter. This contradicts the information contained in the submitted evaluations and the assertions of counsel. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Upon review, the AAO found that the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in mechanical engineering from an accredited program. The AAO informed the petitioner of its conclusions in a Notice of Intent to Dismiss (NOID) dated June 28, 2013. The AAO's NOID specifically identified the inconsistency in the record noted above and notified the petitioner that it must resolve and rebut the inconsistency with independent, objective evidence. In response to the AAO's NOID, counsel submitted a copy of the certificate of Government Recognition No. 1 Series of 1953, dated January 5, 1953, issued by the Department of Education granting the [REDACTED] "recognition of and authority to grant Bachelor of Science in Mechanical Engineering degrees based on a four-year course in mechanical engineering." This document indicates that the degree program was initially approved in 1953, but does not indicate that it was accredited in any subsequent year.

Counsel further submitted a copy of a certification from the CHED dated September 27, 2012, certifying that [REDACTED] is a duly recognized private higher education institution. This document indicates that [REDACTED] is an accredited institution, a claim supported by publicly available CHED records. However, it does not indicate what degree programs [REDACTED] offers or the dates of accreditation of the specific programs.

Additionally, counsel submitted a new letter from CHED and a letter from the [REDACTED] registrar

Specifically, the letter dated July 11, 2013 from the Office of the Registrar of [REDACTED] stated, "Our University offered the Bachelor of Science in Mechanical Engineering program as authorized by Government Recognition No. 1 Series of 1953, dated January 5, 1953 issued by the Department of Education, Manila, Philippines." The [REDACTED] further indicated, "please note that the said program was discontinued starting in School Year 1996-1997." The letter dated July 12, 2013 from the Director of CHED, stated "[w]ith regard to the status of the Bachelor of Science in Mechanical Engineering (B.S.M.E.) program it was discontinued in School Year 1996-1997 per certification of [REDACTED] registrar] dated July 11, 2013." However, neither counsel nor the petitioner attempt to explain why the previous letter from CHED stated that [REDACTED] "is offering" the bachelor's degree in mechanical engineering. The submission of a second letter with contradictory information does not resolve the inconsistency in the record, nor does it indicate which letter contains the correct information. Furthermore, the submission of inconsistent information by the same source leads to doubts about the credibility of the source. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). While the letters may discuss when [REDACTED] discontinued the Mechanical Engineering program, they fail to state or corroborate that the program continued to be accredited.

Counsel also submitted a copy of the beneficiary's certificate as a mechanical engineer from the Board of Mechanical Engineering (Board) issued in 1983 and a copy of the Commonwealth Act No. 294 "An Act to regulate the practice of mechanical engineering in the Philippines, to provide for licensing, the operating personnel in mechanical plants and for other purposes." Counsel contends that as the Commonwealth Act No. 294 requires that an applicant must have "graduated from an engineering school or college approved by the Board as of satisfactory standing, after completing an approved course of not less than four years in mechanical engineering," and that as the beneficiary was licensed according to the Commonwealth Act No. 294, the beneficiary's degree program was therefore a program approved by the Board. Whether or not the beneficiary's degree program was approved by the Board is not at issue. The Board is not the governmental body responsible for accreditation. Therefore, this evidence fails to establish that the beneficiary's degree is from an accredited program.

Counsel further submits a copy of a certificate from the [REDACTED] showing the beneficiary's completion of the [REDACTED] for Mechanical Engineers. It is unclear from counsel's brief how this certificate relates to the beneficiary's education, or whether or not the beneficiary's bachelor degree program was duly accredited.

Counsel asserts that the above named documents are sufficient to establish that [REDACTED] offered an accredited Bachelor of Science degree in mechanical engineering at the time the beneficiary received his degree. However, neither counsel nor the petitioner attempt to explain why the previous letter stated that [REDACTED] offered an accredited degree program in mechanical engineering. The submission of a second letter with contradictory information does not resolve the inconsistency in the record, nor does it indicate which letter contains the correct information. Furthermore, the submission of inconsistent information by the same source leads to doubts about the credibility of the source. 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. *Matter of Ho*, 19 I&N Dec.

582, 591 (BIA 1988). Furthermore, the letter may discuss when [REDACTED] discontinued the Mechanical Engineering program, but fails to state or corroborate that the program continued to be accredited at the time the beneficiary was awarded his degree.

In summary, the beneficiary has a Bachelor of Science degree in mechanical engineering from [REDACTED] in the Philippines. However, at the time the degree was awarded, the Philippine educational system had an official system of accreditation for institutions of higher education. The petitioner has failed to establish that the school that awarded the beneficiary's degree was accredited when the degree was awarded. Therefore, the beneficiary's foreign degree does not qualify as a baccalaureate degree within the meaning of 8 C.F.R. § 204.5(l)(3)(ii)(C).

The petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from an accredited program at a college or university. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act. The director's decision is withdrawn in part and affirmed in part.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.