

(b)(6)

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



U.S. Citizenship
and Immigration
Services

DATE: **MAR 13 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

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

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 (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: On July 17, 2007, United States Citizenship and Immigration Services (USCIS), Texas Service Center (TSC), received an Immigrant Petition for Alien Worker, Form I-140, from the petitioner. The employment-based immigrant visa petition was initially approved by the TSC director (the director) on November 4, 2008. On May 2, 2013, the director issued a Notice of Intent to Revoke (NOIR). On June 28, 2013, the director issued a Notice of Revocation (NOR). The petitioner appealed the director's NOR to the Administrative Appeals Office (AAO). The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that “[t]he Attorney General [now Secretary, Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

The petitioner describes itself as a software development and consulting business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. 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).¹ The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).² The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is March 5, 2004. *See* 8 C.F.R. § 204.5(d). The director's decision revoking approval of the petition concludes that the beneficiary does not have a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification. The decision also finds that the petitioner did not establish that the beneficiary possesses the required experience or that the petitioner has the ability to pay the proffered wage as of the priority date. The director found that the evidence submitted by the petitioner in response to the NOIR failed to overcome these findings. Accordingly, the director revoked the approval of the petition under the authority of 8 C.F.R. § 205.2.

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.

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. 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.

² This petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, and since another beneficiary has not been issued lawful permanent residence based on the labor certification, the requested substitution will be permitted.

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.³

The Secretary of DHS has the authority to revoke the approval of any petition approved by her under section 204 for good and sufficient cause. See Section 205 of the Act; 8 U.S.C. § 1155. This means that notice must be provided to the petitioner before a previously approved petition can be revoked. More specifically, the regulation at 8 C.F.R. § 205.2 reads:

(a) *General.* Any [USCIS] officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition **upon notice to the petitioner** on any ground other than those specified in § 205.1 when the necessity for the revocation comes to the attention of this [USCIS]. (emphasis added).

Further, the regulation at 8 C.F.R. § 103.2(b)(16) states:

(i) Derogatory information unknown to petitioner or applicant. If the decision will be adverse to the applicant or petitioner and is based on derogatory information considered by [USCIS] and of which the applicant or petitioner is unaware, he/she shall be advised of this fact and offered an opportunity to rebut the information and present information in his/her own behalf before the decision is rendered, except as provided in paragraphs (b)(16)(ii), (iii), and (iv) of this section. Any explanation, rebuttal, or information presented by or in behalf of the applicant or petitioner shall be included in the record of proceeding.

Moreover, *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988); *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987) provide that:

A notice of intention to revoke the approval of a visa petition is properly issued for "good and sufficient cause" when the evidence of record at the time of issuance, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. However, where a notice of intention to revoke is based upon an unsupported statement, revocation of the visa petition cannot be sustained.

Here, in the NOIR the director gave the petitioner notice that it had failed to establish that the beneficiary has a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification; the beneficiary possesses the required experience; or that the petitioner has the ability to pay the proffered wage as of the priority date. The director specifically asked the petitioner to submit additional evidence to overcome these findings.

³ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

The AAO notes that the NOIR was properly issued pursuant to *Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). Both cases held that a notice of intent to revoke a visa petition is properly issued for “good and sufficient cause” when the evidence of record at the time of issuance, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner’s failure to meet his burden of proof. The director’s NOIR sufficiently detailed the evidence in the record, pointing out specific evidence or information relating to the beneficiary’s education credentials and qualifying experience in the experience letter and the lack of evidence of the petitioner’s ability to pay the proffered wage, and thus was properly issued for good and sufficient cause.

As set forth in the director’s NOIR and NOR, the issue in this case is whether or not the beneficiary has a U.S. bachelor's degree or foreign equivalent degree and two (2) years of experience as required by the terms of the labor certification. The beneficiary must 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). The NOIR and NOR also find that the petitioner did not establish that it has the ability to pay the proffered wage as of the priority date.

Beneficiary’s Education Credentials

At the outset, 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) 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:

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

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 or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).⁵ The AAO will first consider whether the petition may be approved in the professional classification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. See also 8 C.F.R. § 204.5(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.

⁵ Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

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(l)(3)(ii)(C).

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

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(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).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor’s degree as a minimum for entry; the beneficiary possesses a U.S. bachelor’s degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor’s degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

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

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

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

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

Part B, Item 11 of the labor certification states that the beneficiary's education related to the offered position is a Bachelor's of Science degree in Physics, Math and Economics, from the [REDACTED], completed in 1995.

The record contains a copy of the beneficiary's Bachelor of Science diploma and transcripts from the [REDACTED] completed in 1995. The record also contains a copy of a certificate of business professional programmer issued to the beneficiary by the [REDACTED] reflecting successful qualification in all modules of the [REDACTED] examination, completed in 1999.

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on May 22, 2013. The evaluation concludes that the beneficiary's Bachelor of Science degree is equivalent to a Bachelor of Science degree with a concentration in Mathematics from a regionally accredited college or University in the United States.

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on May 20, 2013. The evaluation concludes that the beneficiary's Bachelor of Science degree is equivalent to a Bachelor of Science with a concentration in Mathematics from an institution of postsecondary education in the United States.

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] Ph.D. for [REDACTED] on October 16, 2008. The evaluation concludes that the beneficiary's Bachelor of Science degree is equivalent to a four-year Bachelor's degree with a concentration in Mathematics from an accredited University in the United States and additional training in computer information systems. The evaluation also concludes that the beneficiary's Bachelor of Science degree, when combined with credit for [REDACTED] coursework from [REDACTED], is equivalent to a bachelor's degree with a minor in computer information systems from an accredited university in the United States.

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.* at 795. 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).

The petitioner relies on the beneficiary's three-year bachelor's degree as being equivalent to a U.S. bachelor's degree. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

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.⁶

According to EDGE, a three-year Bachelor of Science degree from India is comparable to "three years of university study in the United States."

EDGE also discusses postsecondary DOEACC 'O' Level Examinations, for which the entrance requirement is completion of Higher Secondary Certificate or equivalent. EDGE provides that a DOEACC 'O' Level Examination is comparable to one year of university study in the United States, but

⁶ 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.

does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree.

Therefore, based on the conclusions of EDGE, 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 engineering, computer science, math or MIS. The AAO informed the petitioner of EDGE's conclusions in a Request for Evidence (RFE) dated December 6, 2013.

In response to the RFE, counsel submits a letter stating that the record contains evaluations from three eminent evaluators finding the beneficiary's education to be equivalent to a Bachelor Science degree with a concentration in Mathematics from a U.S. college or university and an expert opinion letter from Professor [REDACTED]. Counsel specifically refers to [REDACTED] evaluation and expert opinion of the three-year versus four-year degrees and [REDACTED] references to UNESCO regulations recommending that three-year degrees should be treated as equivalent to a bachelor's degree. Counsel also cites to American Immigration Lawyers Association (AILA) minutes as an indicator that the beneficiary's three-year degree should be accepted as equivalent to a U.S. degree. Counsel's reliance on the AILA minutes is misplaced. Additionally, counsel misinterprets the AILA minutes regarding European three-year degrees to apply to the instant beneficiary's Indian three-year degree and, as discussed below, the evaluator's reliance on coursework as being comparable to a four-year degree in the instant case is not sufficiently detailed or supported. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS, formerly the Service or INS, are binding on all USCIS employees in the administration of the Immigration and Nationality Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Dr. [REDACTED] goes on at length about Carnegie Units and Indian degrees in general, concluding that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate but makes no attempt to assign credits for individual courses. Dr. [REDACTED] credibility is seriously diminished as he completely distorts an article by [REDACTED] and [REDACTED]. Specifically, Dr. [REDACTED] asserts that this article concludes that because the United States is willing to consider three-year degrees from Israel and the European Union, "Indian bachelor degree-holders should be provided the same opportunity to pursue graduate education in the U.S." While this is the conclusion of the article, the specific means by which Indian bachelor degree holders might pursue graduate education in the United States provided in the discussion portion of the article in no way suggests that Indian three-year degrees are, in general, comparable to a U.S. baccalaureate. Specifically, the article proposes accepting a first class honors three-year degree *following* a secondary degree from a CBSE or CISCE program *or* a three-year degree *plus* a post graduate diploma from an institution that is accredited or recognized by the NAAC and/or AICTE. The record contains no evidence that the beneficiary in this matter received his secondary education from a

⁷ A letter dated July 10, 2007 from Professor [REDACTED] states that, to his knowledge there is no Indian bachelor's degree that requires fewer than 1800 contact hours for graduation, which is what is required in the U.S. and translates to 120 credit hours. While Professor [REDACTED] states that the educational record he has examined represents a single-source degree which is equivalent to a bachelor's degree in the United States, the letter does not reference the beneficiary or the beneficiary's credentials.

CBSE or CISCE program. Finally, the record lacks evidence that the beneficiary completed a post-graduate degree. Thus, Dr. [REDACTED] reliance on this article is disingenuous.

Dr. [REDACTED] reliance on *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006) is equally misplaced. In that case, the alien not only had a credential beyond a three-year degree, the judge determined that even with that extra credential, the alien was only eligible as a skilled worker pursuant to section 203(b)(3) of the Act, and *not* as either a professional or an advanced degree professional pursuant to section 203(b)(2) of the Act. *Id.*

Ultimately, the record contains no evidence that the Carnegie Unit is a useful way to evaluate Indian degrees. Moreover, the petitioner has not demonstrated that the use of this system produces consistent results, as would be expected of a workable system. The Carnegie Unit was adopted by the Carnegie Foundation for the Advancement of Teaching in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject.⁸ For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.⁹ This unit system was adopted at a time when high schools lacked uniformity in the courses they taught and the number of hours students spent in class. The Carnegie Unit does not apply to higher education.¹⁰

The record fails to provide peer-reviewed material confirming that assigning credits by lecture hour is applicable to the Indian tertiary education system. For example, if the ratio of classroom and outside study in the Indian system is different than the U.S. system, which presumes two hours of individual study time for each classroom hour, applying the U.S. credit system to Indian classroom hours would be meaningless. Robert A. Watkins, The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise" at 12, available at http://handouts.aacrao.org/am07/finished/F0345p_M_Donahue.pdf, accessed February 4, 2014, provides that the Indian system is not based on credits, but is exam based. *Id.* at 11. Thus, transfer credits from India are derived from the number of exams. *Id.* at 12. Specifically, this publication states that, in India, six exams at year's end multiplied by five equals 30 hours. *Id.*

Dr. [REDACTED] also relies on an article he coauthored with Dr. [REDACTED]. The record contains no evidence that this article was published in a peer-reviewed publication or anywhere other than the Internet. The article includes British colleges that accept three-year degrees for admission to graduate school but concedes that "a number of other universities" would not accept three-year degrees for admission to graduate school. Similarly, the article lists some U.S. universities that accept three-year degrees for admission to graduate school but acknowledges that others do not. In fact, the article concedes:

⁸ The Carnegie Foundation for the Advancement of Teaching was founded in 1905 as an independent policy and research center whose motivation is "improving teaching and learning." See <http://www.carnegiefoundation.org/about-us/about-carnegie> (accessed March 13, 2014).

⁹ <http://www.carnegiefoundation.org/faqs> (accessed March 13, 2014).

¹⁰ See <http://www.suny.edu/facultysenate/TheCarnegieUnit.pdf> (accessed March 13, 2014).

None of the members of N.A.C.E.S. who were approached were willing to grant equivalency to a bachelor's degree from a regionally accredited institution in the United States, although we heard anecdotally that one, [REDACTED] had been interested in doing so.

In this process, we encountered a number of the objections to equivalency that have already been discussed.

[REDACTED] Ed.D., President of [REDACTED] commented thus,

“Contrary to your statement, a degree from a three-year “Bologna Process” bachelor’s degree program in Europe will NOT be accepted as a degree by the majority of universities in the United States. Similarly, the majority do not accept a bachelor’s degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI.”

* * *

[REDACTED] raise similar objections to those raised by [REDACTED]

“The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute the an [sic] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year US Bachelor’s degree.

The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly from Year 12 of your education. In the US, there are no degree programs entered from a stage lower than Year 12, and there are no 3-year degree programs. Without the additional advanced standing year, there’s no equivalency.

Finally, these materials do not examine whether those few U.S. institutions that may accept a three-year degree for graduate admission do so on the condition that the holder of a three-year degree complete extra credits.

Finally, Dr. [REDACTED] relies on a UNESCO document. The relevant language relates to “recognition” of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

“Recognition” of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State and deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation

in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for inclusion in a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define “comparable qualification.” At the heart of this matter is whether the beneficiary’s degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

In fact, UNESCO’s publication, “The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific” 82 (2d ed. 2004) (accessed on February 4, 2014 at <http://unesdoc.unesco.org/images/0013/001388/138853E.pdf>), provides:

Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. UGC, AICTE and AIU are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.)

We have also reviewed AACRAO’s Project for International Education Research (PIER) publications: the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual.

One of the PIER publications also reveals that a year-for-year analysis is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at 180 explicitly states that “transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year.” The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate “may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis.” This information seriously undermines the evaluations submitted which attempt to assign credits hours for the beneficiary’s three-year baccalaureate that are close to or beyond the 120 credits typically required for a U.S. baccalaureate.

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).

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university. The petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The AAO will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(1)(2).

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

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(1)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(1)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

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

EDUCATION

Grade School: Blank.

High School: Blank.

College: Blank

College Degree Required: Bachelor’s degree.

Major Field of Study: Engineering, Computer Science, Math or MIS.

TRAINING: Blank.

EXPERIENCE: 2 years in the job offered or 2 years of experience in the related occupation of IT Consultant.

OTHER SPECIAL REQUIREMENTS: Blank.

As is discussed above, the beneficiary possesses a Bachelor of Science from the [redacted] completed in 1995, which is equivalent to three years of university in the United States.

The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.¹¹ Nonetheless, the AAO

¹¹ The DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job.” See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep’t. of Labor’s Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep’t. of Labor’s Empl. & Training Administration, Interpretation of “Equivalent Degree,” 2 (June 13, 1994). The DOL’s

RFE permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.¹² Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. The petitioner failed to provide any of the requested documentation to establish its intent to accept an alternative to a U.S. bachelor's degree or a single foreign equivalent degree. The petitioner failed to establish that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's or foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in engineering, computer science, mathematics or MIS, or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that

certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

¹² In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. See *Id.* at 14.

the word “equivalent” in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at 14.¹³ In addition, 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 (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term “bachelor’s or equivalent” on the labor certification necessitated a single four-year degree).

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the required education is clearly and unambiguously stated on the labor certification and does not include the language “or equivalent” or any other alternatives to a four-year bachelor’s degree.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor’s degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beneficiary’s Experience

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

¹³ In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

The labor certification states that the offered position requires two (2) years of experience in the offered position or in the related occupation of IT consultant.

Part B, Item 15 of the labor certification states that the beneficiary qualifies for the offered position based on experience as: an assistant manager with [REDACTED] from October 2002 to December 2003; a resource manager with [REDACTED] from December 2003 to June 2004; a programmer analyst with [REDACTED] from October 2004 to January 2005; a programmer analyst with [REDACTED] from January 2005 to November 2005; a business analyst with [REDACTED] from November 2005 to June 2006; and a technical recruiter with [REDACTED] from June 2006 to July 9, 2007, the date on which the beneficiary signed the Form 750B. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *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.

The record contains a letter dated January 28, 2004, from [REDACTED] human resources, on [REDACTED] letterhead stating that the company accepts the beneficiary's resignation as assistant manager and acknowledging that it employed the beneficiary from October 31, 2002 to December 8, 2003. However, the letter does not describe the beneficiary's duties in detail. Furthermore, the job title in the letter and the job description on the labor certification indicate that this experience is not in the proffered position or in the related position of IT consultant.

The record contains an experience letter dated January 5, 2009, from [REDACTED] HR Manager on [REDACTED] letterhead stating that the company employed the beneficiary as a Technical Recruiter from June 2006 to December 2008. However, the letter does not provide the address of the employer and the beneficiary's specific dates of employment.

The record contains an experience letter dated June 10, 2006 from [REDACTED] vice president, on [REDACTED] letterhead stating that the company employed the beneficiary as a business analyst from November 2005 to June 2006. However, the letter does not provide the beneficiary's specific dates of employment.

The record contains an experience letter dated July 20, 2004, from [REDACTED] manager-human resources, on [REDACTED] letterhead stating that the company employed the beneficiary as a resource manager from December 1, 2003 to June 25, 2004. However, the letter does not provide the address of the employer. Additionally, a portion of this experience was gained after the priority date.

Moreover, the job titles and/or job descriptions in the experience letters from [REDACTED] and [REDACTED] indicate that the beneficiary was not employed by them in the proffered position or as an IT consultant. Further, the beneficiary's experience with these employers was obtained after the priority date of the instant labor certification.

The record contains an experience letter dated July 15, 2009, from [REDACTED] CEO, on [REDACTED] letterhead stating that the company employed the beneficiary as a programmer analyst-database developer from January 2009 to June 2009. However, the letter does not provide the address of the employer or sufficiently specify the beneficiary's dates of employment. Moreover, the beneficiary's experience was obtained after the priority date of the instant labor certification.

The record contains an experience letter dated December 10, 2005, from [REDACTED] Human Resource manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a programmer analyst from January 2005 to November 2005. However, the letter does not provide the address of the employer and the beneficiary's specific dates of employment. The record also contains an employment contract dated September 13, 2004, between [REDACTED] and the beneficiary, and an appointment letter dated October 1, 2004, reflecting that the beneficiary was to report for work with [REDACTED] New Delhi location on October 1, 2004. The record also contains pay slips from [REDACTED] to the beneficiary for October 2004 through December 2004 and a 2005 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, reflecting payment from [REDACTED] to the beneficiary. However, the employment contract, appointment letter, pay slips and Forms W-2 do not meet the requirements of 8 C.F.R. § 204.5(g)(1). Moreover, the beneficiary's experience was gained after the priority date of the instant labor certification.

The record contains an experience letter dated April 9, 1999, from [REDACTED] area manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a software developer from June 1995 to December 1998. However, the letter does not describe the beneficiary's duties in detail or provide the beneficiary's specific dates of employment. The record contains a second experience letter dated May 28, 2013, from [REDACTED] on [REDACTED] letterhead, stating that the beneficiary was employed by [REDACTED] from June 1995 to December 1998 and providing a description of the beneficiary's duties. However, the letter still does not provide the beneficiary's specific dates of employment. Moreover, the letter does not meet all of the requirements of 8 C.F.R. § 204.5(g)(1) and the petitioner has not established the need for secondary evidence with any documentary evidence of the qualifying employer's closing;¹⁴ the petitioner also does not submit affidavits from two persons to establish the fact of the beneficiary's employment as required by 8 C.F.R. § 103.2(b)(2). Finally, the signature on the most recent letter does not match the signature of [REDACTED] on the initial experience letter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile

¹⁴ While a letter dated August 10, 2013, from the beneficiary indicates that [REDACTED] underwent management changes and closed its [REDACTED] location, publicly available information reflects that the company still exists. See [www.\[REDACTED\]](http://www.[REDACTED]) (accessed March 13, 2014).

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).

The record contains an experience letter dated November 26, 2001, from [REDACTED] manager HR, on [REDACTED] letterhead stating that the company employed the beneficiary as a programmer analyst from January 2000 to November 2001. However, the letter does not provide the full address of the employer, describe the duties in detail or provide the beneficiary's specific dates of employment. The record contains a second experience letter dated May 31, 2013, from [REDACTED] on [REDACTED] letterhead, stating that the signatory was a director at [REDACTED] at the same time the beneficiary was employed by [REDACTED] (a wholly owned subsidiary of [REDACTED]). The signatory states that the beneficiary was employed with [REDACTED] from January 26, 2000 to October 25, 2001 as a programmer analyst and provides a job description for the beneficiary. However, the letter does not provide the address of the qualifying employer. Moreover, the letter does not meet all of the requirements of 8 C.F.R. § 204.5(g)(1) and the petitioner has not established the need for secondary evidence with any documentary evidence of the qualifying employer's closing;¹⁵ the petitioner also does not submit affidavits from two persons to establish the fact of the beneficiary's employment as required by 8 C.F.R. § 103.2(b)(2).

The record contains an experience letter dated September 20, 1999, from [REDACTED] DGM-HR, on [REDACTED] letterhead stating that the company employed the beneficiary as a programmer/analyst from January 18, 1999 to September 10, 1999. However, the letter does not provide the address of the employer. A second experience letter dated September 14, 1999, from [REDACTED] DGM-HR, on [REDACTED] letterhead, states that the company employed the beneficiary as a programmer/analyst from January 18, 1999 to September 10, 1999 and provides the address of the qualifying employer. However, these experience letters only account for 235 days of experience in the proffered position.

In response to the RFE, counsel states that the petitioner maintains that the beneficiary possesses more than two years of experience and submits additional experience letters. Counsel submits a January 14, 2014 affidavit from [REDACTED] Technical Lead, [REDACTED] stating that he was a colleague of the beneficiary's at [REDACTED] Mr. [REDACTED] confirms that the beneficiary was employed by [REDACTED] (a wholly owned subsidiary of [REDACTED]) from January 26, 2000 to October 25, 2001 and provides a description of the beneficiary's job duties. Counsel also submits a January 13, 2014 affidavit from [REDACTED], a colleague of the beneficiary's at [REDACTED] (a wholly owned subsidiary of [REDACTED]). Mr. [REDACTED] confirms that the beneficiary was employed by [REDACTED] from January 26, 2000 to October 25, 2001 as a programmer analyst and provides a description of the beneficiary's job duties. While the petitioner submits affidavits from two persons to establish the fact of the beneficiary's employment as

¹⁵ A letter dated August 10, 2013, from the beneficiary indicates that he actually was employed by [REDACTED] while working for [REDACTED] but that the North Carolina office out of which he was employed was closed and [REDACTED] was purchased by [REDACTED]. Publicly available information reflects that the company still exists. See [www.\[REDACTED\]](http://www.[REDACTED]). Further, the beneficiary's Form W-2 for 2001 reflects that the beneficiary was paid by [REDACTED] out of the [REDACTED], California office. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

required by 8 C.F.R. § 103.2(b)(2), the petitioner has not established the need for secondary evidence with any documentary evidence of the qualifying employer's closing. Additionally, the affidavits do not meet all of the requirements of 8 C.F.R. § 204.5(g)(1), as the first affidavit does not provide the title of the beneficiary's position and both affidavits in response to the RFE do not provide the address of the qualifying employer.

In response to the RFE, counsel submits a January 10, 2014 affidavit from [REDACTED] stating that [REDACTED] employed the beneficiary as a software developer from June 15, 1995 to December 2, 1998, providing a description of the beneficiary's duties. However, the affidavit does not meet all of the requirements of 8 C.F.R. § 204.5(g)(1) as the affidavit does not provide the address of the qualifying employer. Further, the petitioner has not established the need for secondary evidence with any documentary evidence of the qualifying employer's closing; and has not submitted affidavits from two persons to establish the fact of the beneficiary's employment as required by 8 C.F.R. § 103.2(b)(2). Finally, counsel failed to address the inconsistencies in the signature of Rajesh Sangtani between the two experience letters discussed above. *Matter of Ho*, 19 I&N Dec. at 591-92.

The AAO affirms the director's decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Ability to Pay

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 March 5, 2004. The proffered wage as stated on the Form ETA 750 is \$60,000.00 per year.

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 2001, to have a gross annual income of \$4 million, and to currently employ 45 workers. On the Form ETA 750B, signed by the beneficiary on July 9, 2007, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, 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 established that it employed and paid the beneficiary \$30,150.00 in 2009, \$64,675.46 in 2010 and \$40,694.95 in 2011. Counsel failed to submit the beneficiary's 2012 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement. The petitioner established that it paid the beneficiary the full proffered wage in 2010 and partial wages in 2009 through 2011. The petitioner must establish that it had the ability to pay the full proffered wage in 2004 through 2008 and in 2012. The petitioner must establish that it had the ability to pay the difference between the proffered wage and the wages actually paid to the beneficiary, which is \$29,850.00 in 2009 and \$19,305.05 in 2011.

In response to the RFE, counsel states that the beneficiary was issued another 2009 Form W-2 by [REDACTED] which should be considered as actual wages paid to the beneficiary by the petitioner. However, as discussed in the RFE, the record contains tax returns for [REDACTED] and subsidiaries and the record reflects that the petitioner's stock was purchased by [REDACTED] however, the tax returns for the petitioner reflect that it filed separate tax returns from [REDACTED] after the stock purchase and there is no evidence that the petitioner is included in [REDACTED] tax returns as a subsidiary. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the 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, 558 F.3d 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*, 719 F. Supp. 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 income tax return for 2011 is the most recent return in the record.

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.¹⁶ 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 failed to submit annual reports, federal tax returns or audited financial statements for 2008, 2009 and 2012. In response to the RFE, counsel states that copies of the petitioner's tax records for 2004 through 2011 are already in the record and the petitioner had reported substantial net income and net current assets in each year except 2008, when the company was acquired by [REDACTED] and its financials were included with the financials for other entities owned by [REDACTED] however, as discussed above, there is no evidence that the petitioner is included in [REDACTED] tax returns as a subsidiary. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530; *Sitar v. Ashcroft*, 2003 WL 22203713.

In addition, according to USCIS records, the petitioner has filed multiple I-140 petitions on behalf of other beneficiaries. If a petitioner has filed multiple petitions for multiple beneficiaries, it must establish that it has the ability to pay the proffered wages to each beneficiary. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition, and analyze the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider the petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

The petitioner submitted partial information on some of the Form I-140 immigrant petitions it filed on behalf of other beneficiaries, and the wages actually paid to them from 2007 through 2012. However, for those beneficiaries whose priority dates are prior to 2007, the petitioner failed to submit Forms W-2 for 2004 through 2006. In response to the RFE, counsel does not dispute that there is missing information regarding other beneficiaries, but states that it is unable to provide such information because current management does not have access to all the records of employees since 2004. Counsel erroneously

¹⁶According 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 as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

contends that the AAO should accept that proffered wages were actually paid to these beneficiaries because USCIS had made positive determinations of financial ability to pay the proffered wages in those cases as they were employed by the petitioner in H-1B nonimmigrant status.

The documentation in the record reflects the following:

Year	Net Income	Calculation of Net Current Assets	W-2 Wage	Balance Due to Instant Beneficiary	Balance Due to Other Beneficiaries¹⁷	Total Remaining Balance
2004	\$15,703.00	\$108,366.00	\$0.00	\$60,000.00	\$132,675.00	\$192,675.00
2005	\$113,028.00	\$167,025.00	\$0.00	\$60,000.00	\$132,675.00	\$192,675.00
2006	-\$71,948.00	\$204,535.00	\$0.00	\$60,000.00	\$132,675.00	\$192,675.00
2007	\$116,130.00	\$292,124.00	\$0.00	\$60,000.00	\$72,675.00	\$132,675.00
2008	Unknown	Unknown	\$0.00	\$60,000.00	\$72,675.00	\$132,675.00
2009	Unknown	Unknown	\$30,150.00	\$29,850.00	\$96,771.88	\$126,621.88
2010	\$96,635.00	\$1,281,940.00	\$64,675.46	\$0.00	\$114,008.34	N/A
2011	\$142,869.00	\$1,226,528.00	\$40,694.95	\$19,305.05	\$373,868.46	\$393,173.51
2012	Unknown	Unknown	Unknown	\$60,000.00	\$328,980.07	\$388,980.07

Therefore, for the years 2004 and 2006, the petitioner did not have sufficient net income to pay the instant proffered wage. However, for the years 2004 through 2007 and 2010 through 2011, the petitioner had sufficient net current assets to pay the instant proffered wage. The petitioner failed to provide requested information for the years 2008, 2009 and 2012, precluding the AAO from making a determination as to whether the petitioner had sufficient net income or net current assets in those years to pay the proffered wage. The petitioner failed to provide necessary information regarding proffered wages and actual wages paid to all Form I-140 immigrant petition beneficiaries during the relevant years, precluding the AAO from making a determination as to whether the petitioner had the ability to pay the proffered wage in all relevant years. Even with incomplete information regarding wages owed to beneficiaries of other Form I-140 immigrant petitions in 2004 and 2005, the petitioner did not have sufficient net income or net current assets to pay the known wages owed.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

¹⁷ These amounts only reflect the wages owed to beneficiaries about whom the petitioner provided the requested information. It is noted that the petitioner failed to provide information regarding more than twenty other beneficiaries.

In response to the RFE, counsel requests that USCIS prorate the proffered wage for the portion of the year that occurred after the priority date. We will not, however, consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While USCIS 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.

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 failed to submit its 2007, 2008 and 2012 tax returns and necessary information regarding other I-140 petitions filed on its behalf, precluding the AAO from making a determination as to whether it has the ability to pay the proffered wage for 2007, 2008 and 2012 or any other relevant year. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. 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. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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). Here, that burden has not been met.

ORDER: The appeal is dismissed.