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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 2 3 2014 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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,

for
Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and we dismissed the appeal on February 1, 2013. The petitioner filed a motion to reopen and reconsider our decision, and we reopened and affirmed the prior decision on August 15, 2013. The petitioner filed a second motion to reopen and reconsider, and we again reopened the matter and affirmed our prior decision on May 9, 2014. The matter is again before us as a motion to reopen and reconsider.[1] The prior decision of the AAO, dated May 9, 2014, will be reopened, a new decision will be entered, and the petition will remain denied.

The petitioner states on the Form I-140 that it operates as " " It seeks to employ the beneficiary permanently in the United States as an "Industrial Engineer/Quantitative Analyst." The director's decision denying the petition concludes that the job offer portion of the labor certification does not meet the minimum requirements for classification as a member of the professions with an advanced degree. We affirmed the director's decision on appeal, as well as the petitioner's motions to reopen and reconsider our decision, concluding, as did the director, that the requirements in Parts H.8-C and H.14 of the labor certification demonstrate that the position offered does not qualify as a position under the advanced degree professional category.

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.[2] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion. We may deny a petition that fails to comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision.[3]

The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), which, in pertinent part, provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." *Id.*

[1] The instant motion contains new facts with supporting documentation to meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2). Counsel asserts on motion that our previous decision constituted an erroneous decision through misapplication of law or policy and therefore qualifies for consideration as a motion to reconsider under 8 C.F.R. § 103.5(a)(3). Therefore, the petitioner's motion is properly filed.

[2] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[3] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[4] The priority date of the petition is August 21, 2011.[5]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in "Industrial Engineering."
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: "Business Administration or related field."
H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A. If Yes, specify the alternate level of education required: Other.
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: "Combination of education and experience in lieu of a Master's degree."
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "4."
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Applicant must have a combination of education and experience equivalent to a Master's degree in Industrial Engineering, Business Administration, or a related field, with strong statistical background and analytical skills and a minimum of three years of experience in the financial industry. Excellent writing and communication skills are also necessary. (The three years of experience in the financial industry is a necessity of the business to ensure sufficient exposure to the financial services industry to enable the applicant to perform the required duties effectively. This experience may have been gained either as a part of the degree equivalency or separately.) (The 4 years of experience in Block H.8-C. reduces to 2 years for a Bachelor's degree holder in any of the specified fields.)

Part J of the labor certification states that the beneficiary possesses a Bachelor's degree in Industrial Engineering from the [redacted] completed in 1998. The record contains a copy of the beneficiary's bachelor's degree and academic transcripts from the [redacted] issued in 1998.

In our previous decision we held: (1) that U.S. Citizenship and Immigration Services (USCIS), and not the DOL, has the authority to determine whether the *position* offered qualifies for a specific employment-based classification under the Act irrespective of the role of the DOL in certifying the labor certification; (2) that the position offered does not qualify for classification within the advanced degree professional category because the minimum requirements for the position allow for education that is less than an advanced degree; and (3) that the beneficiary does not possess five years of post-

[4] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[5] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

baccalaureate experience in the specialty to be classified as an advanced degree professional. Counsel raises each of these issues again on motion.

II. LAW AND ANALYSIS

The Roles of DOL and USCIS in the Immigrant Visa Process

Regarding the authority of the USCIS, counsel asserts that USCIS has misinterpreted the regulations regarding its authority to review employment-based immigrant petitions. Specifically, counsel states that "USCIS has failed to distinguish the educational and experience requirements *for the position* from the educational and experience qualifications *of the alien*. The former falls to the DOL; the latter to USCIS." Counsel further states the following in summary, which will be discussed at greater length below:

> [T]he respective roles of the Department of Labor and the USCIS in the employment immigration process present an important issue, one that affects and has affected thousands and thousands of immigrant petitions based on certified labor certifications. Contrary to statute, regulations, and case law, the USCIS has encroached upon the domain of the DOL by seeking to substitute its own interpretation of education and experience parameters specifically mandated for the DOL's form ETA-9089. The law is clear that the employer and the DOL define the job offered and the USCIS determines whether the alien worker satisfies the position requirements. Following this division of authority, the DOL has certified a minimum Master's degree level position to the USCIS. And we have shown that [the beneficiary] has the Bachelor's degree and five years of progressive post-baccalaureate experience to meet this requirement.

In our decisions dated August 15, 2013 and May 9, 2014, we discussed the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As counsel asserts that we have encroached upon the DOL's authority, we clarify at the outset what the division of authority between the DOL and the USCIS entails.

The Authority of the DOL

The court in *SnapNames.com, Inc. v. Chertoff (SnapNames)*, No. CV 06-65-MO, 2006 WL 3491005 (D. Or. Nov. 30, 2006), provided an accurate assessment of the employment-based immigrant petition process and the division of authority between the DOL and USCIS, as follows:[6]

> Certain employment-based visa petitions . . . require a labor certification [that is certified by the DOL] (*See* 8 C.F.R. § 204.5(k)(4) for advanced degree professionals; 8 C.F.R. § 204.5(l)(3)(i) for professionals, skilled workers and other workers).
>
> . . .

[6] We have modified this analysis slightly to include the regulations pertaining to advanced degree professionals under 8 C.F.R. § 204.5(k)(4) and professionals under 8 C.F.R. § 204.5(l)(3)(i).

> [T]he petitioner submits an application for certification to the DOL describing the job at issue and identifying the alien beneficiary. The petitioner also defines the "minimum education, training, and experience for a worker to perform satisfactorily the job duties." In issuing the certification, the DOL considers the job, as defined by the petitioner, and certifies that (1) "there are not sufficient workers who are able, willing, qualified ... 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 ... labor," and (2) "the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed." 8 U.S.C. § 1182(a)(5)(A)(i).

SnapNames.com, Inc., 2006 WL 3491005, at *4-5. Other federal circuit courts have described the authority of the DOL as follows:

> 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).[7]

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.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, similarly stated:

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

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984). These cases demonstrate that, pursuant to section 212(a)(5)(A)(i) of the Act, the DOL certifies that the beneficiary's employment will not adversely affect similarly employed U.S. workers.

As will be discussed further below, one issue that appears to cause confusion regarding the division of authority between the DOL and USCIS relates to which agency reviews the beneficiary's qualifications. Although the DOL may also address the beneficiary's qualifications for its specific purposes, this is primarily a requirement for USCIS. As the court stated in *Madany v. Smith*, 696

[7] Based on revisions to the Act, the current citation is section 212(a)(5)(A).
[8] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

F.2d at 1012, the fact that an inquiry into an alien's skills or qualifications is not one of the inquiries expressly allocated to DOL, discussed below under the section on USCIS authority, "this does not mean that DOL cannot, or does not, undertake analysis of an alien's qualifications as it performs its statutory functions." (Emphasis added). The court further stated:

> Indeed, DOL may gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers. The fact that DOL may find such an analysis useful, however, does not foreclose INS from considering alien qualifications in the preference classification decision.

Id. Therefore, the DOL has the authority to determine the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. Any inquiry that the DOL makes into the beneficiary's qualifications is done for the purpose of performing its statutory functions under section 212(a)(5)(A)(i) of the Act regarding the potential impact of the beneficiary's employment upon the U.S. workforce.

Therefore, the authority of the DOL regarding employment-based visa petitions under section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i), is to certify:

(1) That 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
(2) That the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The Authority of the USCIS

The court in *SnapNames* continued its analysis of the division authority between the DOL and USCIS, as follows:[9]

> Once certified, the petitioner applies for a visa with [USCIS], submitting DOL's certification in support as required by the regulations. 8 C.F.R. § 204.5(k)(4) (advanced degree professionals); 8 C.F.R. § 204.5(l)(3)(i) (professionals, skilled workers and other workers). It is then [USCIS's] responsibility to determine whether the alien is qualified for a visa under the applicable statute and regulations and under the terms of the certification. 8 U.S.C. § 1154(b); 8 C.F.R. § 204.5(l)(3)(ii)(A)-(D). (Emphasis added).

SnapNames.com, Inc., 2006 WL 3491005, at *4-5. We note the following in further establishing the authority of USCIS in adjudicating employment-based immigrant petitions:

[9] As noted above, we have also included the citations here relating to advanced degree professionals and professionals.

1. *USCIS Determines Whether the Beneficiary Qualifies for Classification Within the Category Requested Under the Act.*

The regulations pertaining to employment-based immigrant petitions under 8 C.F.R. § 204.5 specifically state what documentation must be submitted to USCIS with the Form I-140 to demonstrate that the beneficiary qualifies for classification under the particularly category requested. *See* 8 C.F.R. § 204.5(k)(3) (for "advanced degree professionals," relating to the instant case); *see also, e.g.*,, 8 C.F.R. § 204.5(l)(3)(C) (for "professionals"); 8 C.F.R. § 204.5(l)(3)(ii)(B) (for "skilled workers"); and 8 C.F.R. § 204.5(l)(3)(ii)(D) (for "unskilled (other) workers").[10] Accordingly, based upon the documentation required by these regulations, USCIS makes the determination as to whether the beneficiary meets the requirements for classification under the particular employment-based category requested.

It is significant that none of the inquiries assigned to the DOL under section 212(a)(5)(A)(i) of the Act, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the alien is qualified for a specific immigrant classification. "There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise." *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983) (*Citing Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977)).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> 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). Therefore, USCIS, and not the DOL, determines whether the beneficiary is qualified for the employment-based classification requested.

2. *USCIS Determines Whether the Beneficiary Meets the Terms of the Labor Certification.*

The petitioner must establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (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).

[10] Although the instant petition is filed under the "advanced degree professional" category, the regulations relating to "skilled workers," "professional," and "unskilled (other) workers" are cited throughout this decision as additional support of the authority of USCIS in adjudicating employment-based immigrant petitions.

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).

Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See SnapNames.com, Inc.*, 2006 WL 3491005, at *7 (D. Or. Nov. 30, 2006). Therefore, USCIS has the authority to determine whether the beneficiary meets the terms of the labor certification.

3. USCIS Determines Whether the Position Offered as Stated on the Labor Certification Meets the Requirements of the Employment-Based Classification Requested.

On motion, counsel correctly states that USCIS has the authority to determine whether the beneficiary is qualified for the position offered. Counsel has not questioned the authority of USCIS to determine whether the beneficiary meets the terms of the labor certification. Instead, at issue in this case is whether USCIS or the DOL has the authority to determine whether the *position* offered meets the advanced degree professional requirements for the *classification*.

In our previous decision, we cited the regulation pertaining to visa petitions filed for "advanced degree professionals" under 8 C.F.R. § 204.5(k)(4)(i) to demonstrate the authority of USCIS to determine whether a position qualifies under this particular category. On motion, counsel states that the regulation at 8 C.F.R. § 204.5(k) "is all about '*Aliens* who are members of the professions holding advanced degrees . . .' not *positions*."

The regulation at 8 C.F.R. § 204.5(k) states the following, in pertinent part:

> (k) *Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.*
>
> (3) *Initial evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree . . .
>
> . . .
>
> (4) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program—*
> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor

> Market Information Pilot Program. . . . *The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.*

(Emphasis added). Counsel's assertion that 8 C.F.R. § 204.5(k) only addresses the qualifications of alien beneficiaries is incorrect. The regulation at 8 C.F.R. § 204.5(k)(3) does refer to whether the *alien* qualifies for classification as an advanced degree professional, as counsel asserts; however, the regulation at 8 C.F.R. § 204.5(k)(4)(i), italicized above, refers to whether the *position* qualifies for this classification. The determination by USCIS as to whether "the job offer portion of the labor certification . . . requires a professional holding an advanced degree or the equivalent" is an inquiry USCIS makes that is distinct from the review of the beneficiary's qualifications. If USCIS only had authority to determine whether the beneficiary, and not the *position offered*, qualifies for classification under the advanced degree professional category as counsel asserts, one may ask why the regulations state that USCIS must determine that the "job offer portion of the labor certification . . . requires a professional holding an advanced degree." The plain meaning of 8 C.F.R. § 204.5(k)(4)(i) is that USCIS has the authority to verify that the *position offered* qualifies as an advanced degree professional position because the "job offer portion of the labor certification," which includes the position's minimum requirements, relates solely to the position offered and is separate from the requirement that the *beneficiary* must qualify as an advanced degree professional. Therefore, the regulation at 8 C.F.R. § 204.5(k)(3) requires that USCIS determine whether the *beneficiary* qualifies as an advanced degree professional, and the regulation at 8 C.F.R. § 204.5(k)(4)(i) requires that USCIS determine whether the *position offered* meets the requirements for an advanced degree professional position.

On the labor certification, both the primary and the alternative requirements constitute the minimum requirements for the position offered. In ascertaining whether the position offered qualifies for classification as an advanced degree professional position, USCIS must ensure that both the primary and alternate requirements of the position offered meet the requirements of a professional holding an advanced degree or the equivalent. If the DOL finds that the alternate requirements as stated on the labor certification are substantially equivalent to the primary requirements to warrant granting certification, this only means that the DOL is certifying that this position will not adversely affect similarly employed U.S. workers. However, the mere fact that the DOL certifies the labor certification does not prevent USCIS from concluding that the overall minimum requirements for the position, including both the primary and the alternate requirements, do not meet the minimum requirements for the classification requested in the immigrant visa petition.[11]

On motion, counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007), for the premise that the DOL determines the requirements of the proffered position and that USCIS cannot make an inquiry into whether the position as certified by the DOL meets the requirements of a

[11] We also note that when the DOL certifies the labor certification, this does not prevent USCIS from addressing whether the position offered constitutes a *bona fide* job offer, including whether the labor certification may be subject to fraud or willful misrepresentation under 20 C.F.R. § 656.31(d), particularly when the petitioner fails to disclose a family or corporate relationship as requested in Part C.9 of the labor certification.

particular classification. As we stated in our prior decision, the holding in *Hoosier Care* is not binding here as the instant matter is not within the Seventh Circuit. We are bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose.

Even if the instant case had arisen in the Seventh Circuit, we find that the court's holding in *Hoosier Care* regarding the division of authority between USCIS and the DOL, based upon the regulation at 8 C.F.R. § 204.5(l)(4), differs from our interpretation of the Act and this regulation. In *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967, 982-84, 125 S. Ct. 2688, 2700-01, 162 L. Ed. 2d 820 (2005), the Supreme Court held that, consistent with "*Chevron* deference," an agency charged with interpreting a statute that is silent or ambiguous as to a particular issue may choose a different construction than a court "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Id.* An agency's interpretation is entitled to *Chevron* deference because "it is for agencies, not courts, to fill statutory gaps." *Id.* at 982 (c*iting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–844, and n. 11, 104 S.Ct. 2778)). The holding of *Brand X* allows for *Chevron* deference to an agency's interpretation even if a court's decision precedes that of an agency. *Id.* at 983.

First, in this case, the Act is silent as to the issue of whether the DOL or USCIS has the authority to determine whether a position offered meets the necessary requirements under employment-based immigrant petition classifications. Second, the regulation that the court cited in *Hoosier Care* regarding the division of authority between USCIS and the DOL, 8 C.F.R. § 204.5(l)(4), is ambiguous, and therefore, *Chevron* deference should be given to our interpretation of it. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621 (2000) (citing *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), in which the court held that "an agency's interpretation of its own regulation is entitled to deference.")

Specifically, the regulation relied upon by the court in *Hoosier Care* at 8 C.F.R. § 204.5(l)(4) states the following:

> (1) *Differentiating between skilled and other workers.* The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, *as certified by the Department of Labor.* In the case of a Schedule A occupation or a shortage occupation within the Labor Market Pilot Program, the petitioner will be required to establish to the director that the job is a skilled job, i.e., one which requires at least two years of training and/or experience.

(Emphasis added). The court in *Hoosier Care* held that this language means that "the determination of what *kind* of training is required to classify an alien as a 'skilled' worker is made by the Labor Department upon consideration of the submission by the alien's prospective employer." 482 F.3d at 989. The court further concluded that USCIS only determines whether the alien meets the requirements of the labor certification. *Id.* The language of 8 C.F.R. § 204.5(l)(4) is ambiguous because it states on *what* the determination of whether a worker is a skilled or other worker will be

based, but it does not specifically state *which agency* will make that determination. However, the next phrase in this regulation states that this determination will be based on the requirements of the labor certification "as certified by the Department of Labor," which demonstrates that USCIS will make this determination based upon the already certified labor certification.

We stated in our previous motion that the logical interpretation of this regulation at 8 C.F.R. § 204.5(l)(4) is that USCIS, and not DOL, makes the determination of whether the filing meets the requested category because, in deciding whether to certify a particular labor certification, the DOL is not notified as to what level of classification ("professional," "skilled worker," etc.) the employer is seeking for the position offered. Further, the DOL does not and is not required to review the regulations pertaining to each of these categories. It is the Form I-140 that is filed with USCIS, which is not part of the labor certification process and not reviewed by the DOL, that states which level of classification the employer seeks. The regulations have the same pattern stated above for the "advanced degree professional" and "professional" categories, 8 C.F.R. §§ 204.5(k)(4)(i) and 204.5(l)(3)(i), respectively, which give USCIS the authority to determine whether the position falls within the particular category at issue.[12] Nothing in the regulations at 20 C.F.R. § 656, pertinent to labor certifications, gives the DOL this authority.

Therefore, despite the court's holding in *Hoosier Care* that the DOL determines whether a position offered meets the requirements for skilled worker classification under the Act, pursuant to the Supreme Court's holding of *Brand X*, we reach a different interpretation, namely that USCIS has the authority to determine whether a position offered meets the requirements for classification under the category requested, regardless of whether it is in the advanced degree professional, professional or skilled worker category.

As further support for the conclusion that USCIS has the authority to determine whether the position offered qualifies for consideration under the particular category requested, the regulation for "professional workers" and "skilled workers" similarly give USCIS this authority.[13] Although not the category at issue in this case, the regulation at 8 C.F.R. § 204.5(l)(3)(i) regarding the "professional worker" category states that "[e]very petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . The job offer portion of an individual labor certification . . . must demonstrate that the job requires the minimum of a baccalaureate degree." The fact that this regulation, which pertains only to USCIS and is nearly identical to 8 C.F.R. § 204.5(k)(i), requires that the job offer portion of the labor certification meets a particular threshold demonstrates that USCIS has the authority to determine whether the position as

[12] The second sentence of 8 C.F.R. § 204.5(l)(4) states, "The petitioner will be required to establish to the director that the job is a skilled job, i.e., one which requires at least two years of training and/or experience" [in the case of a Schedule A occupation or a shortage occupation] (Emphasis added). However, the reference to the director's review of the minimum requirements in this sentence is specific to Schedule A or shortage occupations in which a certified labor certification application is not required. In those cases, the petitioner must submit a completed labor certification application signed by the petitioner and the beneficiary to USCIS directly, even though it is not first certified by DOL.

[13] As noted above and in our previous decision, the regulations for "professional workers" and "skilled workers" do not relate to the instant petition but are instructive in demonstrating the authority of USCIS in the adjudication of immigrant petitions. We again cite them here to demonstrate that the regulations consistently demonstrate that USCIS has the authority to determine whether the position offered qualifies under a particular preference category.

stated on the labor certification, and certified by DOL, qualifies as a position offered for the requested classification.

Similarly, not the category requested here, the meaning of the regulation at 8 C.F.R. § 204.5(l)(4)[14] regarding the "skilled worker" classification is that USCIS will make the determination of whether a worker is a skilled or other worker based upon the already certified labor certification.

To support the assertion that the DOL determines whether the position offered qualifies under a particular classification, counsel has submitted the DOL's Standard Operating Procedures (SOP),[15] dated December 10, 2010, which includes a section on "verifying job opportunity requirements." This section states in Part C that in certifying the labor certification, the DOL analyst determines whether the primary and alternate requirements are substantially equivalent by using Specific Vocational Preparation (SVP). The regulation at 20 C.F.R. § 656.17(h) states, in pertinent part:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones.
>
> . . .
>
> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought.

The DOL's Standard Operating Procedures provides an SVP chart which equates levels of education to an equivalent number of years of vocational preparation, which allows both experience and education to be measured under one common denominator. Counsel seems to state that because the DOL utilized the SVP Worksheet in the instant case to determine that the alternative education and experience requirements of the labor certification are substantially equivalent to the primary education and experience requirements, the DOL has certified that the position qualifies for classification as a master's degree level position under the advanced degree professional category. However, as stated above, the Ninth Circuit stated the following, relying in part on *Madany*, 696 F.2d at 1008:

> [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.

Although the DOL's inquiry into SVP relates to the "job opportunity requirements" and whether the beneficiary meets those requirements, as stated above, the court held in *Madany v. Smith*, 696 F.2d at 1012, that even though an inquiry into an alien's skills or qualifications is not one of the inquiries expressly allocated to DOL, "this does not mean that DOL cannot, or does not, undertake analysis of

[14] As stated above, this is the regulation that the court addressed in *Hoosier Care*.

[15] We note that these Standard Operating Procedures state "Internal Use Only" for use by the DOL.

an alien's qualifications as it performs its statutory functions." Accordingly, the court held that "DOL may gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers." *Madany*, 696 F.2d at 1012. The DOL's inquiry into SVP serves this purpose to prevent the employment of alien beneficiaries from adversely impacting U.S. workers. Counsel has not stated how SVP applies to whether the position offered qualifies under the advanced degree professional category. As stated above, the SVP is used to determine whether the alternate and primary requirements are normal for the occupation, a requirement mandated by the DOL regulations apart from those of USCIS relating to immigrant visa classification. The DOL regulations at 20 C.F.R. § 656.17 do not state anything about certifying a particular position under a particular immigrant visa classification.

Therefore, in summary regarding the division of authority between the DOL and USCIS, as supported by section 212(a)(5)(A)(i) of the Act, as well as the court's decision in *Madany v. Smith*, 696 F.2d at 1012-1013 (D.C. Cir. 1983), the DOL only has the authority under section 212(a)(5)(A)(i) of the Act to certify:

> (1) That 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
> (2) That the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. § 1182(a)(5)(A)(i). As demonstrated above, USCIS has the authority to determine:

> (1) Whether the beneficiary qualifies for classification within the category requested under the Act;
> (2) Whether the beneficiary meets the terms of the labor certification for classification under the category requested; and
> (3) Whether the position offered as stated on the labor certification meets the requirements of the employment-based classification requested.

The Position Offered Does Not Qualify for Classification as an Advanced Degree Professional Position

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

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

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

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(4)(i). Both of these requirements describe the minimum requirements for classification under section 203(b)(2) of the Act. Therefore, USCIS has the obligation to determine whether both the primary and alternate requirements, as minimum requirements for the position offered, meet the terms of the Act for classification as an advanced degree professional.

In this case, Part H.8-C of the labor certification states that the petitioner would accept a master's degree and three years of experience as the primary qualifications or "other" education as the alternate, allowing for a "combination of education and experience in lieu of a master's degree" and four years of experience. Part H.14 of the labor certification states that this combination may reduce to two years "for a Bachelor's degree holder in any of the specified fields." This means that the petitioner will accept a Master's degree in Industrial Engineering, Business Administration or a related field and 36 months of experience in the job offered; or, alternately, the petitioner will accept unspecified education and four years of experience or a bachelor's degree and two years of experience. In our previous decisions, we held that these minimum requirements do not meet the minimum requirements for classification of the position under the advanced degree professional category.

On motion, counsel states that the ETA Form 9089 and its instructions indicate that "block H.8-C does

not apply when 'Other' is checked in block H.8-A." The instructions[16] to the ETA Form 9089 state the following regarding Part H:

> 8-A. If the answer to question 8 is Yes, select the alternate level of education that is acceptable in combination with the number of months of experience specified in question 8-C.
> 8-B. If the answer to question 8-A is Other, enter the alternate level of education that is acceptable.
> 8-C. If the answer to question 8 is Yes, enter the number of months of experience in the job offered that is acceptable in combination with the level of education specified in question 8-A.

These instructions and the questions on the ETA Form 9089 demonstrate that if the answer to question 8 is Yes, which is the case here, the petitioner is directed to enter the amount of experience in the job offered that is acceptable in Part H.8-C as part of the alternate combination of education and experience. As stated above, the petitioner indicated in Part H.8-C that four years of experience is acceptable as part of the alternate combination of education and experience. Thus, contrary to counsel's assertions, Part H.8-C does apply and it states a requirement that is below the minimum requirements for the position offered to be classified as an advanced degree professional under section 203(b)(2) of the Act. As also stated above, the ETA Form 9089 lists the alternate requirements as "Other" (unspecified education) and four years of experience or a bachelor's degree and two years of experience. Neither of these requirements is at least a professional degree above a baccalaureate or a baccalaureate followed by at least five years of progressive experience in the specialty.[17] Therefore, the position offered does not qualify for classification as an advanced degree professional position.

The Beneficiary Does Not Meet the Minimum Requirements for Classification as an Advanced Degree Professional

The regulation at 8 C.F.R. § 204.5(k)(3), pertaining to the classification sought in this case, states:

> The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree.

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree."

[16] *See* http://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf (accessed December 1, 2014).

[17] Even if Part H.8 of the ETA Form 9089, as certified, could be interpreted to require an advanced degree, the petitioner's alternate requirement in Part H.14 states that a bachelor's degree plus two years of experience is acceptable, which is less than the requirements for an advanced degree. Therefore, the language in Part H.14 demonstrates that the petitioner is willing to accept less than an advanced degree for the proffered position and the position offered cannot be classified as an advanced degree professional position.

As stated above, the labor certification requires a Master's degree in Industrial Engineering, Business Administration or a related field and 36 months of experience in the job offered; or, alternately, unspecified education and four years of experience or a bachelor's degree and two years of experience.

In our August 15, 2013 and May 9, 2014 decisions, we determined that, beyond the decision of the director, the petitioner had failed to establish that the beneficiary possessed the experience requirements to qualify as an advanced degree professional. As stated above, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(4)(i). Therefore, even if the petitioner had required a bachelor's degree plus five years of experience for the position offered on the labor certification, it would still need to establish that the beneficiary has a bachelor's degree and five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(2). The record reflects that the beneficiary possesses a Bachelor's degree in Industrial Engineering from the however, the beneficiary's employment in the specialty, as an Industrial Engineer/Quantitative Analyst with , only covers a period of time of three years and six months, which is one year and six months short of the five years of experience required to qualify as an advanced degree professional.[18] We held in our previous decision, dated May 9, 2014, that the beneficiary's experience as president and CEO of did not constitute qualifying experience for the position offered.[19]

On motion, counsel asserts that the beneficiary possesses five years of experience in the specialty due to his experience with On motion, the petitioner has resolved the additional discrepancies we noted previously regarding the beneficiary's actual employment at The record contains an affidavit from the beneficiary, dated April 7, 2011, attesting to his experience owning and operating from September 2002 to September 2005. The record contains a copy of Form I-797, granting the beneficiary an extension of stay in E-1 non-immigrant classification from December 15, 2004 to December 14, 2006. On motion, the petitioner has also submitted evidence of the existence of such as its Certificate of Organization, a Missouri Retail Sales License, a letter from the Missouri Department of Revenue, a Missouri Business License, documentation from the IRS regarding its Employer Identification Number, and a letter from the city of Missouri, regarding its ability to conduct business there. However, these documents do not demonstrate that the beneficiary's experience as the president and CEO at qualifies him for the instant position as an "Industrial Engineer/Quantitative Analyst." The beneficiary's affidavit states that he owned and operated an importer and supplier of Turkish natural stone products, to enhance the appearance of new

[18] As noted above, however, the terms of the labor certification require four years of experience in the job offered which "reduces to 2 years for a Bachelor's degree holder in any of the specified fields" as an acceptable alternate combination of education and experience.

[19] As we noted in our prior decision, the issue of the beneficiary's experience with is not central to the main issue of the decision: namely that the labor certification, in its alternate requirements, fails to qualify as an advanced degree professional position.

homes and commercial buildings. He states that he "created a network of business clients and suppliers" and that he "developed and directed the business and conducted or directed every aspect of the operation, including business research and planning, marketing, sales, managements, and assessment." While we acknowledge the breadth of the beneficiary's experience owning and operating this does not establish that the beneficiary's experience there constitutes full-time experience as an Industrial Engineer/Quantitative Analyst. Part H.11 of the ETA Form 9089 states that the job duties of the position offered as an Industrial Engineer/Quantitative Analyst include: determining price trends for precious metals on a regular basis, building forecasting models to project price trends for various precious metals, employing statistical tools to analyze operational efficiency, and providing quantitative analyst on radio spot commercial data. The evidence in the record has not demonstrated that the beneficiary engaged in these job duties on a full-time basis as president and CEO of Therefore, this employment does not constitute qualifying experience for the position offered.

For the reasons explained above, even if the position offered met the requirements for classification under the advanced degree professional category, the petitioner has also failed to establish that the beneficiary possesses five years of post-baccalaureate experience required for the beneficiary to be classified as an advanced degree professional.

III. CONCLUSION

In summary, it is USCIS and not the DOL that has the authority to determine: (1) whether the beneficiary qualifies for classification within the category requested under the Act; (2) whether the beneficiary meets the terms of the labor certification for the classification requested under the Act; and (3) whether the position offered as stated on the labor certification meets the requirements of the classification requested under the Act.

The petitioner has not demonstrated that the position offered meets the requirements of the advanced degree professional category. In addition, the petitioner has failed to establish that the beneficiary qualifies for classification under the advanced degree professional category pursuant to section 203(b)(2) of the Act.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion is granted; the previous decision of the AAO, dated May 9, 2014 is affirmed. The petition remains denied.