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

(b)(6)

[redacted]

DATE: FEB 1 1 2014 OFFICE: TEXAS SERVICE CENTE [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,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a non-profit long-term rehabilitation care provider. It seeks to employ the beneficiary permanently in the United States as an occupational therapist. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In pertinent part, section 203(b)(2) of the Act 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. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

As set forth below, the ETA Form 9089 does not require an alien with exceptional ability and does not permit an alternate master's degree educational equivalency of a baccalaureate degree plus five years of progressive experience in the specialty.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on July 5,

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

2012, which establishes the priority date.[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on November 19, 2012.

The director denied the petition on May 22, 2013, finding that the beneficiary does not have a U.S. Master's degree in Occupational Therapy or a foreign equivalent degree as required by the terms of the labor certification.

Visa Classification

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to U.S. Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] 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.

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[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

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

* * *

> 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).[4]

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Cpurt of Appeals for 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:

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[4] The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, has stated:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

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

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)[5] of the ...[Act]... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating: "The 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 at1309.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, qualifications, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *See Id.* at 834.. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

ETA Form 9089

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's in Occupational Therapy
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: Georgia OT License. Alien must also possess a Master's Degree or foreign equivalent degree as defined in 8 C.F.R. Section

204.5(k)(2) in Occupational Therapy. As proof that the Alien's foreign degree is equivalent to a U.S. Master's degree (U.S. Advanced Degree), Employer will accept a credentials evaluation that has been performed by an independent credentials evaluator who has provided a credible, logical and well-documented case for such an equivalency determination that is based solely on the alien's foreign degree.

As set forth above, the proffered position requires a Master's degree in Occupational Therapy or a foreign equivalent degree, as well as a Georgia license to be an occupational therapist.

That the beneficiary possesses the necessary credentials for licensure in Georgia as set forth in H.14 is not an issue. The petitioner must establish, however, that the beneficiary not only is a member of the professions holding an advanced degree, but also satisfied all of the educational, training, experience and any other requirements of the offered position as of 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'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the job offer portion of the ETA Form 9089 to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). 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. v. Chertoff*, No. CV-06-65.MO, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

Beneficiary's Credentials

Part J of the labor certification signed by the beneficiary and the petitioner, states that the beneficiary's highest level of education related to the offered position is a Master's degree in Occupational Therapy from [redacted] completed in 2004.

The record of proceeding contains a copy of the beneficiary's diploma and transcripts from [redacted], as well as evidence of the beneficiary's occupational therapy licensure in Georgia. The beneficiary's diploma states that she received a Bachelor of Science in Occupational Therapy on March 20, 2004 from [redacted]. The accompanying transcript of grades states that the beneficiary's Bachelor's degree was awarded following a five-year course of study. The transcript indicates that the final years of the program included an internship, a clinical correlation seminar, and a research paper (1st semester of final year).

The petitioner also submitted copies of two "Visa Credential Verification Certificate(s)" from 2006 and 2011 from the [redacted] stating that the beneficiary has met the requirements of section 212(a)(5)(C) of the Act and the regulation at 8 C.F.R. § 212.15, for the profession of occupational therapy. However, the regulation at 8 C.F.R. § 212.15(f)(1)(iii) also provides that such verifications are not binding on DHS. Moreover, it does not

extend to determining whether (1) the beneficiary's education satisfies the regulatory definition of "advanced degree" or (2) the beneficiary's education satisfies the minimum requirements stated on the ETA Form 9089, the issue in the instant petition. The record does not contain any evidence that Georgia, or any other state, requires a foreign-educated applicant to hold a single degree equivalent to a U.S. master's degree in occupational therapy, the education requirement listed on the ETA 9089.

The record also contains an evaluation of the beneficiary's credentials, dated March 26, 2012, prepared by sets forth her evaluation of the beneficiary's courses, a list of the U.S. credit equivalency for the courses, and determines that the cumulative number of credits equates to a U.S. Master's degree. The evaluation concludes that the beneficiary's Bachelor of Science in Occupational Therapy from is the U.S. equivalent of a Master's degree in Occupational Therapy.

The AAO issued a Notice of Intent to Dismiss (NOID) to the petitioner on October 29, 2013. The AAO notified the petitioner that it had consulted the website maintained by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO is a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions and agencies in the United States and in over 40 countries.[5] Its mission "is to serve and advance higher education by providing leadership and academic and enrollment services." *Id.* According to the login page , EDGE is a "web-based resource for the evaluation of foreign educational credentials" that contains 232 country profiles and is updated and expanded regularly as educational systems change.[6] USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[7]

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[5] *See* Dale E. Gough, Director of International Education Services, "AACRAO EDGE Login, "http://www.aacrao.org/About-AACRAO.aspx (originally accessed September 18, 2013).

[6] *See* http://edge-preview.aacrao.org (originally accessed September 18, 2013).

[7] 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.

According to EDGE, a Bachelor of Science from the Philippines represents attainment of a level of education "comparable to a bachelor's degree in the United States." Additionally, it describes the Filipino Bachelor of Science as representing:

> Four to five years beyond the high school diploma (except Law which is an advanced degree as in the USA) with four being the most common length (Architecture, Engineering, Physical Therapy and Occupational Therapy for example, are five).

As noted above, EDGE recognizes that the Filipino Bachelor of Science in Occupational Therapy may represent a five-year program of study. The AAO's NOID concluded that based on the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. Master's degree in Occupational Therapy as required by the terms of the labor certification.

As explained in the NOID and as set forth above, section 203(b)(2) of the Act provides that a Bachelor's degree followed by five years of progressive experience is considered the equivalent of a Master's degree. However, in this matter, the ETA Form 9089 does not provide for this alternate equivalency and requires an actual Master's degree or a foreign equivalent degree.

On appeal and in response to the AAO's NOID, counsel asserts that the credential evaluation provided by FIS establishes that the beneficiary's Bachelor of Science in Occupational Therapy is the U.S. equivalent of a Master's degree in Occupational Therapy. Counsel also asserts that the certification supports this determination and the state of Georgia accepted these findings in issuing a license to her. Counsel maintains that the AACRAO EDGE evaluation did not individually recognize the individual beneficiary's credentials. Counsel also submits a copy of a memo from of FIS to counsel defending the position she took with regard to the beneficiary's Bachelor's degree from as equivalent to a U.S. Master's degree; copies of e-mails from counsel's office to (author of EDGE report on Philippines) in which refers counsel's office to the USCIS; and a copy of a memorandum No. 7. Series of 1998 from the Office of the President Commission on Higher Education of the Republic of the Philippines in which the policies and standards of programs in physical therapy and occupational therapy are described, including the five-year Bachelor of Science program in occupational therapy.

The AAO does not concur with counsel's assertion that the beneficiary's Bachelor of Science in Occupational Therapy is the U.S. equivalent of a Master's degree in Occupational Therapy. It is noted that the actually offers both a Bachelor's five-year program in occupational therapy and a Master's two-year program in occupational therapy.[8] EDGE describes a "Master of Arts/Science degree gained in the Philippines as 1-2 years of graduate study usually requiring a thesis."[9] EDGE considers this degree to be the equivalent of a U.S. Master's

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[8] *See* http//www.finduniversity.ph/universitities -doctors-university/courses/occupational-t…(accessed December 16, 2013).

[9] *See* http://edge.aacraoorg/country/credential/master-of-artssciences-etc?cid=single (accessed

degree. The petitioner presented no diploma from the Philippines indicating that the beneficiary possesses a Master's degree in Occupational Therapy representing 1-2 years of *graduate* study. (Emphasis added). Rather, the beneficiary has a Bachelor of Science degree in Occupational Therapy from [redacted], representing a five-year undergraduate program but not representing the U.S. equivalent of a Master's degree (or even a Filipino Master's degree). In this, the AAO does not find the FIS credential evaluation by [redacted] to be probative of the beneficiary's U.S. educational equivalency. Nor has counsel demonstrated that the [redacted] issuance of a certificate is binding on USCIS or meets the regulatory definition of an advanced degree required by the second preference visa classification. As set forth in the NOID, the AAO finds the EDGE evaluation of a U.S. equivalency to a Bachelor of Science degree in Occupational Therapy issued in the Philippines to be a reliable, peer-reviewed source of information about foreign credential equivalencies.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 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 no 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 beneficiary does not have a United States Master's degree in Occupational Therapy or a foreign equivalent advanced degree, and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act.

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.