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)

DATE: AUG 2 9 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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,

Rachel Nitsio for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), 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 an information services business. It seeks to employ the beneficiary permanently in the United States as an associate programmer analyst. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box "e" at Part 2, indicating that it seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL), accompanied the petition. The priority date of the petition, which is the date DOL accepted the labor certification for processing, is June 30, 2011. *See* 8 C.F.R. § 204.5(d).

In his decision, the director denied the petition as the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent in a field of study required by the terms of the labor certification and, therefore, was not eligible for classification as a professional in the present case.

On appeal, counsel for the petitioner contends that the beneficiary does hold a degree in a field that qualifies her for the offered position. He asserts that USCIS has ignored the academic evaluations submitted by the petitioner to establish the beneficiary's qualifications.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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

Roles of DOL and USCIS in Immigrant Visa Process

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:

[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).

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

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

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[2] 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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> . . .
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> 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).[3] Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

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

[3] 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

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

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

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

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

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

> 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 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.

As set forth in the director's decision, the issues before the AAO are whether the record establishes that the beneficiary holds a U.S. bachelor's degree or foreign equivalent degree in a field of study required by the labor certification and is, therefore, qualified to perform the offered employment and eligible for classification as a professional pursuant to section 203(b)(3)(A)(ii) of the Act.

Requirements 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)(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). In evaluating the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 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).

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

H.4. Education: Minimum level required: Bachelor's.

H.4-B. Major Field of Study: Science or Management Information Systems.

H.7.	Is an alternate field of study acceptable? The petitioner checked "yes" in response to this question.
H.7-A.	If yes, specify the major field of study: Computer Science/Software.
8.	Is an alternate combination of education and experience acceptable? The petitioner checked "no" in response to this question.
H.9.	Is a foreign educational equivalent acceptable? The petitioner checked "yes" in response to this question.
H.6.	Is experience in the job offered required? The petitioner checked "yes" in response to this question.
H.6-A.	If yes, number of months experience required: 12.
H.10	Is experience in an alternate occupation acceptable: The petitioner checked "yes" in response to this question.
H.10-A.	If yes, number of months experience required: 12.
H.10-B.	Job title of acceptable alternate occupation: Software developer/programmer.
H.14.	Specific skills or other requirements: Applicants with any suitable combination of education, training or experience are acceptable.

Therefore, to meet the requirements of the labor certification, the beneficiary, as of the priority date, must hold a U.S. baccalaureate degree or a foreign equivalent degree in science, management information systems, or computer science/software and have 12 months of experience as an associate programmer analyst or a software developer/programmer. The petitioner specifically indicates that a combination of education and experience will not satisfy the requirements of the offered position.

Beneficiary Qualifications

In the instant case, the petitioner seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A). The regulation at 8 C.F.R. § 204.5(l)(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.

In Part J of the labor certification, the beneficiary indicated that her highest level of achieved education relating to the offered position is a master's degree in clothing and textiles science. She listed the institution where that education was obtained as the and 2000 as the year in which she completed her degree requirements.

The record documents the education the beneficiary received in including a 1992 issued by issued by the dated March 19, 1994; a certificate issued by the which reflects that the beneficiary completed graduation requirements for a bachelor's degree in home science (rural) as of September 1997; and a second certificate issued by that reflects the beneficiary had completed the graduation requirements for a master's degree in home science in the field of textiles and clothing in May 2000. Academic transcripts accompany all certificates.

The record also contains the beneficiary's academic transcripts from the and where the beneficiary studied in 2001 and 2002 respectively, as well as computer training certificates issued to the beneficiary and certificates she received for her educational achievements in math, science, English and essay writing in

To establish that the beneficiary's has the equivalent of a U.S. baccalaureate degree that qualifies her for the offered position, the petitioner, on appeal, submitted two evaluations of the beneficiary's educational credentials, each of which finds that, when combined, the beneficiary's degrees and academic coursework in the United States provide her with the foreign equivalent of a U.S. bachelor's degree with a minor in computer science. In a September 12, 2012 report, Ph.D. of concludes that the beneficiary's degrees from and her completion of 25 credit units toward a bachelor's degree in computer science at the and 12 credit units in computer science and related areas at are the equivalent of a bachelor's degree with a minor concentration in computer science. A September 14, 2012 evaluation prepared by Professor reviews the credits accumulated by the beneficiary at for her bachelor's and master's degrees in home science, which, he states, total 157 and satisfy the requirements for a four-year baccalaureate degree in textile science and design at an accredited U.S. college or university. Professor further finds the beneficiary to have completed bachelor's-level studies in computer science at the in 2001 and graduate-level studies concentrated in the field of computer science, at in 2002-2003, for a total of 37 credit units, providing her with a minor in computer science.

However, as discussed by the AAO in the Notice of Intent to Dismiss (NOID) issued to the petitioner on June 14, 2013, the degree requirement at 8 C.F.R. § 204.5(l)(3)(ii)(C) cannot be satisfied by combining the beneficiary's degrees in home science with her computer science studies in the United States. Accordingly, the AAO informed the petitioner that it did not find the record to establish that the beneficiary held the foreign equivalent of a U.S. bachelor's degree in science, management information systems, or computer science/software and invited the petitioner to rebut its findings.[4]

In response, the petitioner now submits two additional academic evaluations, which find the beneficiary's degrees to be a foreign degree that is equivalent to a U.S. Bachelor of Science degree. A July 8, 2013 report from the and signed by finds the beneficiary's completion of bachelor's and master's degree requirements at to provide her with the equivalent of a Bachelor of Science, without a defined major, from an institution of postsecondary education in the United States.[5] A second evaluation, dated July 9, 2013 and signed by also concludes that based on the coursework she completed at the beneficiary holds the equivalent of a Bachelor of Science, without a defined major, from a regionally-accredited college or university in the United States.

Based on these most recent evaluations, counsel contends that the beneficiary is qualified for the offered employment as her degree in home science is a form of scientific degree and, therefore, is the equivalent of a U.S. baccalaureate degree in science. He indicates that the petitioner wishes to withdraw the previous evaluation provided by "to prevent any conflict" with the conclusions reached in the reports prepared by the

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[4] In the June 14, 2013 NOID, the AAO also asked the petitioner to provide evidence of its intent regarding the minimum requirements of the offered position, as expressed to DOL and potentially qualified U.S. workers. In response, the petitioner provides copies of the ETA Form 9141, Application for Prevailing Wage Determination, dated June 30, 2011; its PERM Recruitment Report; Applicant Screening/Interview Guides; and its online and print advertisements for the offered position, which indicate that, throughout the labor certification process, the petitioner consistently indicated that the offered position required the minimum of a bachelor's degree and one year of experience.

[5] The evaluation is supplemented with copies of notes from a meeting between the American Immigration Lawyers Association (AILA) and the USCIS Nebraska Service Center, dated April 12, 2007; and the "General introduction to the standard-setting instruments of UNESCO," at http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed August 27, 2013).

[6] The record does not contain a credentials evaluation prepared by Accordingly, counsel's request does not appear to relate to the instant case.

The AAO notes the credentials evaluations provided by the which find the beneficiary's master's degree to qualify her for the offered position of associate programmer analyst. However, USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

In the present case, the evaluations from and are inconsistent with those previously provided by of and Professor both of whom concluded that the beneficiary's bachelor's and master's degrees from provided her with the equivalent of a U.S. bachelor's degree in a field specified by the ETA Form 9089 only when combined with her computer science studies in the United States. Dr. found the beneficiary's bachelor's and master's degrees to reflect her area of concentration as home science and Professor review of the coursework completed by the beneficiary at led him to similarly conclude that she had satisfied the credit requirements for a four-year bachelor's degree in textile science and design at an accredited U.S. college or university.

The AAO also notes that neither the evaluation prepared by the nor that drafted by indicate the reasoning that led the evaluators to conclude that the beneficiary's bachelor's degree in home science (rural) and her master's degree in home science (textiles and clothing) was the equivalent of a U.S. Bachelor of Science degree without a defined major. Moreover, the AAO finds that a Bachelor of Science degree is not, as counsel asserts, proof of a degree in a scientific field of study.

As previously discussed, the ETA Form 9089 requires a bachelor's degree in one of the following fields: science, management information systems, or computer science/software. Therefore, the beneficiary may satisfy the requirements of the labor certification with a bachelor's degree in science, but not with a Bachelor of Science degree, unless that bachelor of science degree is in science, management information systems or computer science/software. The AAO notes that while Bachelor of Science degrees are issued in scientific fields, they may also be awarded to individuals majoring in such subjects as advertising, education, law and business administration. Accordingly, as the academic evaluations submitted in response to the NOID do not find the beneficiary to hold a foreign degree that is the equivalent of a U.S. bachelor's degree in science, management information systems or computer science/software, they do not support the petitioner's claim that she is qualified to perform the duties of the offered position.

The petitioner has failed to establish that the beneficiary holds a U.S. bachelor's degree or foreign equivalent degree in one of the fields of study required by the labor certification. Therefore, the record does not demonstrate that she is qualified to perform the duties of the offered employment or

that she is eligible for classification as a professional pursuant to section 203(b)(3)(A)(ii) of the Act in the present matter.

The appeal will be dismissed for the above stated reasons. 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.