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 12 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the preference visa petition. The petitioner subsequently filed a motion to reconsider the director's decision. The director granted the petitioner's motion to reconsider and affirmed its prior decision denying the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an internet sales company. It seeks to employ the beneficiary permanently in the United States as a senior software developer. As required by statute, the petition is accompanied by labor certification application approved by the United States Department of Labor (DOL). The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding bachelor's degree or foreign equivalent and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding a bachelor's degree or foreign equivalent. 8 C.F.R. § 204.5(I)(3)(i). The director denied the petition accordingly.

On appeal, counsel asserts that the director erred in finding that the minimum requirements as stated on the petition classify the position for less than a professional. Counsel further contends that the use of the language required by 20 C.F.R. § 656.17(h)(4)(ii) does not preclude classification of the proffered position as that of a professional.

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

The AAO conducts appellate review on a *de novo* basis. The AAO's de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

As set forth in the director's June 14, 2011 denial, an issue in this case is whether the petitioner has established that the petition requires a bachelor's degree or equivalent such that the beneficiary may be found qualified for classification as a professional.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), provides that "the term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form I-140 was filed on June 3, 2010. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional.[1]

The regulation at 8 C.F.R. § 204.5(I)(3)(i) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires a minimum of a baccalaureate degree."

In this case, the labor certification indicates that the primary requirements for the proffered position are a bachelor's degree in computer information systems and twelve months of experience in the job offered. The labor certification further indicates in Part H.8 that the employer will accept an alternate combination of education and experience. In Part H.8-B and H.14, the employer indicates that any combination of education, training, or experience equivalent to a bachelor's degree will be accepted. No training is required for the proffered position. Thus, the minimum requirements for the proffered position as indicated on the labor certification are a combination of education, training, and experience, and not a single bachelor's degree. Accordingly, the job offer portion of the labor certification does not require a professional holding a bahchelor's degree or foreign equivalent, but rather the lesser alternate combination of education, training, and experience. However, the petitioner requested classification as a member of the professions holding a bachelor's degree or foreign equivalent.

The evidence submitted does not establish that the ETA Form 9089 requires a professional holding a bachelor's degree or foreign equivalent, and the appeal must be dismissed.

Beyond the decision of the director,[2] the beneficiary does not qualify as a professional.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> 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. To show that the alien is a member of the professions, the petitioner must

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[1] When USCIS revised the I-140 petition as of January 6, 2010, it separated the professional (now box "e") and skilled worker (now box "f") categories. Previously, the two categories were combined into one box (box "e").

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

In the instant case, the beneficiary possesses a Bachelor of Science in Chemistry from University issued in Moscow on June 30, 1996. The labor certification states that the offered position requires a bachelor's degree in computer information systems. In part H.7 of the labor certification, the petitioner indicates that no alternate field of study is acceptable.

The record of proceeding contains an evaluation by dated March 24, 2007. In the evaluation, Mr. states that, based on academic qualifications alone, the beneficiary possesses a Bachelor of Science in chemistry. Based on a combination of education and experience, Mr. concludes that the beneficiary has the equivalent of a bachelor's degree in computer information systems.

To qualify as a professional, the beneficiary must hold a U.S. bachelor's degree in computer information systems, or a single foreign equivalent degree. The evidence submitted does not establish that the alien holds a bachelor's degree in computer information systems or its equivalent as required. Therefore, the beneficiary does not qualify as a professional pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(C).

Also, beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986). *See also, Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires twelve months of experience in the proffered position of Senior Software Developer, including one year of prior experience in the use of Enterprise Java Beans ("EJB") and Oracle. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Java Senior Software Developer at from September 13, 2007 to November 10, 2008 and at

from February 11, 2006 to September 12, 2007.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) The record contains a letter from President and Co-Owner of dated April 15, 2010, in which he states that the beneficiary held the position of Senior Software Developer from May 2008 to November 2008. The beneficiary, however, listed his employment experience with as being from September 13, 2007 to November 10, 2008. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Aditionally, [i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

The record of proceeding also contains an experience letter from the beneficiary's direct manager at dated April 27, 2010. In the letter, Mr. verifies that the beneficiary worked as a Java Senior Software Developer. However, Mr. does not state that the beneficiary's duties included use of EJB or Oracle, contrary to the beneficiary's claim on the labor certification.

Based on the information in the record of proceeding, the beneficiary has only six months of experience with EJB and Oracle, and not twelve months as required by the labor certification.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.