(b)(6)

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

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 07 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
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:

[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 (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner provides information technology consulting and product development services. It seeks to permanently employ the beneficiary in the United States as a systems analyst. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is April 28, 2008. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree or a foreign equivalent degree as required by the terms of the labor certification.

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 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the DOL certified the labor certification in this matter. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

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[1] In his April 21, 2009 decision, the director states that the petitioner requested classification of the beneficiary as a professional. The Form I-140, Immigrant Petition for Alien Worker, however, shows that the petitioner marked box "e" in Part 2, requesting classification as either a professional or skilled worker.

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

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

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[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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> . . .
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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, 1012-13 (D.C. Cir. 1983). Relying in part on *Madany*, 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.

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

> § 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), *citing Madany*, 696 F.2d at 1008. 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.*

Id. at 1009 (emphasis added). The Ninth Circuit, citing *K.R.K. Irvine*, 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).
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> 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), *citing K.R.K. Irvine,* 699 F.2d at 1006.

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

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

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

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.

Section 101(a)(32) of the Act defines the term "profession" as including, but not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the offered position is not statutorily defined as a profession, "the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation." 8 C.F.R. § 204.5(l)(3)(ii)(C).

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

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

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

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

have at least a bachelor's degree." 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

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

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

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

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

In the instant case, the labor certification states that the beneficiary possesses a bachelor's degree from the India, completed in 2000.

The record contains a copy of the beneficiary's bachelor of science diploma in zoology and transcripts from the India, issued in 1999. The record also contains a copy of the title of GNIIT in systems management and transcripts from the India, issued in 2000.

In addition, the record contains three evaluations of the beneficiary's educational credentials. The first evaluation, prepared by for on February 12, 2008, states that the beneficiary's bachelor of science degree is the equivalent of three years of study toward a U.S. bachelor of science degree in zoology, and that her GNIIT title is the equivalent of two years of U.S. bachelor's-level study in computer science. The evaluation states that, together, the bachelor's degree and the GNIIT title equal a U.S. bachelor of science degree with a dual major

in computer science and zoology. Therefore, the evaluation concludes that the beneficiary does not possess a single degree that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

The petitioner cannot rely on the beneficiary's three-year bachelor's degree, combined with her title of GNIIT in systems management, to demonstrate her qualifications for professional classification. USCIS will not generally consider a three-year bachelor's degree as a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or a single foreign equivalent degree required for classification as a professional.

Further, it appears that the beneficiary's credential from does not represent bachelor-level coursework. The American Association of Collegiate Registrars and Admissions Officers (AACRAO) has published the *P.I.E.R [Project for International Education Research] World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in an earlier 1986 publication. *See P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States,* at 43. A team of experts vetted the conclusions of these publications. On page 46, the 1997 publication states that the GNIIT title is primarily a vocational/technical qualification, and that entrance to the requires a class/Grade XII certificate.

According to its website, the offers a career program (GNIIT); an engineering technology program (Edgeineers), which "helps engineering students and engineering graduates get acquainted with high-end technologies and meet requirements across their academic lifecycle;" networking and infrastructure management programs; basic computer programs; and short-term technology programs. *See* http:/ (accessed May 16, 2013). The website does not indicate that the requires a college degree for admission to any of its programs. Further, there is no evidence that the beneficiary's admission to the was predicated upon her completion of a bachelor's degree, or that the program is in continuation of university-level study.[4] The conclusions of the AACRAO PIER report and the information on the

[4] On appeal, counsel asserts that the beneficiary's "two years of studies at are not to be considered as graduate studies, this program is simply an addition to the three years of education the Beneficiary obtained at " Counsel provides no documentary evidence to support the conclusion that the beneficiary's program of study at is in addition to her three-year bachelor of science program, or that the program of study is a university-level program. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The

website suggest that GNIIT education occurs after secondary education, but they do not provide any indication that this education is university-level study as one of the evaluators concludes.

The record also contains a May 13, 2009 evaluation by for Career Consulting International. Ms. evaluation relies on an attached expert opinion and evaluation of the same date by of Both the evaluations of Ms. and Mr. that the beneficiary's bachelor of science degree in zoology alone is the "functional equivalent" of a U.S. bachelor of science degree in computer science.

In his evaluation, Mr asserts that, because some U.S. universities admit candidates who lack undergraduate degrees in computer science to master's degree programs in computer science, and because U.S. membership in the United Nations Educational Scientific and Cultural Organization (UNESCO) purportedly binds the U.S. to recognize three-year bachelor's degrees from India as suitable for graduate admissions, the beneficiary's three-year bachelor's degree qualifies her for graduate study of computer science at a U.S. university. Mr. then extrapolates that the acceptance of foreign bachelor's degrees to qualify for U.S. graduate studies in computer science "establishes a functional equivalency" between the beneficiary's Indian bachelor's degree in zoology and a U.S. bachelor's degree in computer science.

The AAO does not find Mr. evaluation persuasive. Mr. provides no support for his conclusion that admission to a graduate program in computer science demonstrates that an undergraduate degree in zoology equates to an undergraduate degree in computer science. It is unclear from his evaluation how admission to such a graduate program of study would transform the nature and quality of the beneficiary's already completed course of undergraduate study in zoology. As the AAO noted in its notice of intent to dismiss and request for evidence, the beneficiary's transcripts from the University of do not indicate that the beneficiary took any courses in computer science or any related computer science field. In response, the petitioner has not addressed this deficiency.

USCIS may, in its discretion, consider expert testimony as advisory opinions. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). *See also 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). However, USCIS is ultimately responsible for the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may determine whether the letters support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is uncorroborated, contradicted by other information, or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998), *citing Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r

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assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

1972). The evaluations of record are not consistent and provide little support for their determinations.

The inconsistencies between Mr. evaluation and the other evidence of record, including the evalution from the casts doubt on the reliability and sufficiency of the credentials evaluations of Mr. and Ms. The petitioner must resolve any inconsistencies in the record by independent, objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent, objective evidence pointing to where the truth lies). The AAO therefore finds that the evaluations of Ms. and Mr. fail to establish that the beneficiary possesses a foreign equivalent degree of a U.S. bachelor's degree as professional classification requires. The three evaluations in the record conflict as to their conclusions regarding the equivalancy of the beneficiaries academic credentials.

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

The AAO has reviewed the AACRAO's Electronic Database for Global Education (EDGE). According to its website, the AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* The EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for the EDGE must work with a publication consultant and a liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[5] If placement recommendations are included, the council liaison works with the author to give feedback, and the publication is subject to final review by the entire Council. *Id.* USCIS considers the EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[6]

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[5] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[6] In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations

According to the EDGE, a bachelor of science degree from India is comparable to "two to three years of university study in the United States." As noted above, the beneficiary's title of GNIIT appears to represent vocational training, and the EDGE does not indicate that vocational trainings is equivalent to university study.

EDGE also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. EDGE provides that a postsecondary diploma is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree.

Therefore, based in part on the EDGE's conclusions, of which the AAO informed the petitioner in a Request for Evidence (RFE) dated November 5, 2012, the evidence in the record is insufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree.

In response to the RFE, counsel does not assert that the beneficiary possesses a single U.S. bachelor degree or a foreign equivalent degree, and instead states that the beneficiary's "studies combined '*as a reasonable combination of education*' are the equivalent of a U.S. Bachelor of Science Degree as evidenced by multiple credential evaluations."[7] (emphasis in original).

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

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

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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.* 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.

[7] As discussed above, the petitioner has provided three credentials evaluations; only one evaluation concludes that the combination of the beneficiary's studies is the equivalent to a U.S. bachelor's degree. The remaining two evaluations both concluded that the beneficiary's three-year bachelor of zoology, alone, is the equivalent to a U.S. bachelor's degree.

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

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

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

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

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

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

In the instant case, the Form ETA 9089 labor certification states the following minimum requirements for the offered position:

H.4. Education: Bachelor's degree in computer science.
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
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: 12 months as analyst programmer.
H.14. Specific skills or other requirements: "Willing to accept any reasonable combination of education and/or experience."

As discussed above, the beneficiary possesses a bachelor of science degree in zoology from the University of India, which is equivalent to three years of U.S. university study. She also has a GNIIT title in systems management, which, when combined with her bachelor's degree, Mr. of found to equate to a U.S. bachelor's degree with a dual major in zoology and computer science.

The labor certification, however, does not appear to permit a lesser degree or a combination of lesser degrees, like the beneficiary possesses.[8] The labor certification requires a bachelor's degree or a foreign equivalent degree in computer science. Moreover, the petitioner specifically indicated on the labor certification that it would not accept an alternate combination of education and experience.

The petitioner argues that its willingness "to accept any reasonable combination of education and/or experience," as stated on the labor certification, demonstrates its intent to accept less than a four-year degree for the offered position. The petitioner asserts that the beneficiary's bachelor's degree and GNIIT title are a "reasonable combination of education" equivalent to a U.S. bachelor's degree in computer science. The petitioner cites online DOL information, *Matter of Federal Insurance Co.*, 2008 PER-37 (BALCA Feb. 20, 2009) and related cases of the Board of Alien Labor Certification Appeals (BALCA) in arguing that it properly placed its alternative educational requirements on the labor certification and that the requirements were not required to appear in advertisements or recruitment materials for the offered position.

The petitioner appears to conflate the educational requirements for the offered position with the so-called "*Kellogg* language." The DOL requires the *Kellogg* language on labor certifications where the beneficiary is employed by the petitioner and only qualifies for the position under alternative experience

[8] The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

requirements. *See Matter of Francis Kellogg*, 94-INA-465 (BALCA Feb. 8, 1998) (*en banc*); 20 C.F.R. § 656.17(h)(4)(ii) (codifying holding in *Kellogg*). The *Kellogg* language specifically states, "any suitable combination of education, training, or experience is acceptable." *Id.* The DOL information and BALCA cases that the petitioner cites refer to the *Kellogg* language. However, it is unclear whether *Kellogg* applies to this case, as the petitioner is not asserting that the beneficiary qualifies for the offered position based on alternative experience requirements, but rather based on alternative education requirements.

As indicated previously, the DOL has advised that "[w]hen an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). Here, the petitioner's statement that it would accept "any reasonable combination of education" is not specific enough to indicate what alternative education will qualify for the job. The statement is also subjective, as different people may interpret the term "reasonable" differently. *See Baosu International, Inc.*, 89-INA-38 (BALCA Oct. 30, 1989) (a job requirement that can only be measured subjectively requires strict scrutiny).

The petitioner's statement on the labor certification that it will not accept an alternate combination of education and experience does not appear to allow for an alternative education requirement for the offered position. Nonetheless, the AAO's RFE permitted the petitioner to submit evidence of its intent to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.[9] Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by the regulation at 20 C.F.R. § 656.10(f), together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the labor certification filing, and all resumes received in response to the recruitment efforts.

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

The petitioner claims to submit a copy of its signed recruitment report. However, the only "recruitment report" provided is a statement contained within the petitioner's written response to the RFE; that section of the petitioner's response merely includes a list of the purported seven applicants for the offered position, with reasons for their rejections. Further, the written response to the RFE is not signed or dated. The list of purported job applicants is not a copy of the petitioner's signed recruitment report, which would have preexisted the AAO's RFE, as the AAO requested and as the regulation at 20 C.F.R. §656.10(f) requires the petitioner to retain for at least five years after the labor certification's filing. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165, *citing Matter of Treasure Craft of California*, 14 I&N Dec. at 190.

The petitioner's list of purported job applicants also does not describe the recruitment steps undertaken, as the regulation at 20 C.F.R. §656.10(f) requires of a recruitment report. Moreover, the list is unreliable evidence of the recruitment results because it is unsigned and was prepared almost five years after recruitment for the offered position began in December 2007. Doubt is cast on the veracity of the information provided in this "recruitment report" as it was created only after the AAO's RFE. *See Matter of Ho*, 19 I&N Dec. at 591 (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence in support of the petition).

The petitioner also failed to submit any of the other documentation that the AAO requested as evidence of its intent to accept an alternative to a degree during the labor certification process. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Thus, the petitioner has not demonstrated that it included its acceptance of "any reasonable combination of education" in its advertisements and recruiting materials for the offered position. The petitioner's recruiting materials therefore may have failed to notify qualified U.S. workers who lacked bachelor's degrees, but nonetheless had a "reasonable combination of education," of their eligibility for the position. *See Matter of Ron Arthur*, 02-INA-54 (BALCA Oct. 24, 2002) (an employer cannot accept an applicant who meets alternative requirements for the offered position when it never advertised the alternative requirements).

For the foregoing reasons, the petitioner has failed to establish that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's degree or a foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore, the AAO concludes that the terms of the labor certification require a four-year U.S. bachelor's degree in computer science or a single, foreign equivalent degree. As discussed previously regarding professional classification, the beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the

offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.[10]

Beyond the decision of the director, the petitioner has also failed to establish its continuing ability to pay the beneficiary's proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

USCIS records show that the petitioner has filed multiple I-140 immigrant visa petitions since 2004. Accordingly, the petitioner must establish its continuing ability to pay the combined proffered wages of all relevant beneficiaries from the priority date of the instant petition until the beneficiaries obtain lawful permanent resident status or their petitions are denied or withdrawn. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977); 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiaries the full, combined, proffered wages each year from the priority date. If the petitioner has not paid the beneficiaries the full, combined, proffered wages each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the annual differences between the combined wages paid and the combined proffered wages.[11] If the petitioner's net income or net current assets are not sufficient to demonstrate the petitioner's ability to pay the annual differences between the combined wages paid and the combined proffered wages, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg. Comm'r 1967).

In response to the AAO's RFE, the petitioner submits a chart of 25 I-140 petitions[12] it has filed since 2004, copies of its federal tax returns from 2008 through 2011, and copies of Internal Revenue

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[10] As indicated previously, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification for classification as a professional. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N at 159; *Matter of Katigbak*, 14 I&N Dec. at 49.

[11] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

[12] USCIS records show that [redacted] filed two of the petitions on the petitioner's chart. In multiple visa petitions, the petitioner indicated that it previously did business under [redacted] name. Copies of the beneficiary's 2009 payroll records also state that the petitioner does business as [redacted] Copies of the beneficiary's H-1B visa approval notices also show that [redacted] filed two H-1B petitions for her for the period from March 17, 2003 to June 11, 2008, and the beneficiary indicates on the labor certification that she has worked for the petitioner since March 1, 2005. Online records of the California Secretary of State's office, however, show that [redacted] was a separate corporation from the petitioner, established on April 13, 1999 and ultimately dissolved on an undisclosed date. *See* http://kepler.sos.ca.gov (accessed

Service (IRS) Forms W-2 Wage and Tax Statements of the I-140 beneficiaries as evidence of wages it paid them in relevant years.

Based on information in the petitioner's chart, the AAO identified beneficiaries with pending or approved petitions since the April 28, 2008 priority date and added their annual proffered wages for each year until they obtained lawful permanent resident status or their petitions were withdrawn or denied. The AAO computed that the petitioner must demonstrate its ability to pay the following annual combined proffered wages: $1,527,639 in 2008; $1,410,207 in 2009; $1,359,807 in 2010; and $1,217,307 in 2011.

The W-2 form copies show that the petitioner paid the beneficiaries the following annual combined wage amounts: $811,993.43 in 2008; $595,553.67 in 2009; $389,945.05 in 2010; and $215,919.75 in 2011. Thus, the annual differences between the combined proffered wages and the combined wages the petitioner paid to the beneficiaries is: $715,645.57 in 2008; $814,653.33 in 2009; $969,861.95 in 2010; and $1,001,387.25 in 2011.

The petitioner's federal tax returns show the following annual net income amounts: $201,341 in 2008; $144,019 in 2009; $19,787 in 2010; and $221,915 in 2011. Because none of these amounts equal or exceed the differences between the combined proffered wages and the combined wages that the petitioner paid to the beneficiaries in the relevant years, the petitioner has not demonstrated that it has sufficient net income to pay the combined proffered wages of the beneficiaries.

Similarly, the petitioner's federal tax returns show the following net current assent amounts: $285,730 in 2008; $443,004 in 2009; $355,333 in 2010; and $446,849 in 2011. Because none of these amounts equal or exceed the differences between the combined proffered wages and the combined wages that the petitioner paid to the beneficiaries in the relevant years, the petitioner has also failed to show that it has sufficient net current assets to pay the combined proffered wages of the beneficiaries.

In addition to the petitions that the petitioner identifies on its chart, USCIS records show at least five other I-140 petitions that add to the combined proffered wages of the petitioner's beneficiaries since the April 28, 2008 priority date.[13] Thus, even if the petitioner had demonstrated its ability to pay the

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May 15, 2013). USCIS records show that, since 2000, filed at least 10 I-140 petitions, including the two on the petitioner's chart. If the petitioner wants to offer job opportunities in labor certifications approved for it must establish that it is a "successor-in-interest" to *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The petitioner has not submitted any evidence in this case that it acquired the essential rights and obligations necessary to carry on business. *Id.* In this matter, the AAO therefore expresses no opinion on, and does not consider, whether the petitioner is a successor-in-interest to

[13] USCIS records show that the petitioner has filed a total of 35 I-140 petitions, including more than one petition for some beneficiaries. The petitioner's total amount of petitions does not include the 10

combined proffered wages of the beneficiaries on its chart, it still would not have established its ability to pay the combined proffered wages of all relevant beneficiaries. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

As indicated previously, USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. at 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California.

The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Unlike the petitioner in *Sonegawa*, the petitioner in the instant case has not demonstrated that it has an outstanding reputation in its industry or that temporary, uncharacteristic business losses or expenditures prevented it from otherwise demonstrating its continuing ability to pay the proffered wage. Unlike the petitioner in *Sonegawa*, which demonstrated steadily increasing gross revenues as of the adjudication of its petition, the federal tax returns of the instant petitioner show that its gross revenues have steadily dropped from 2008 through 2011. Additionally, unlike the employer in Sonegawa, the petitioner has multiple, unfulfilled proffered wage obligations. Further, the petitioner has multiple undisclosed wage obligations for which it failed to provide information despite the AAO's request. Accordingly, after considering the totality of the circumstances in this individual case in accordance with *Sonegawa*, the AAO finds that the petitioner has failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date onward.

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petitions that USCIS records show were filed by

The AAO may deny an application or 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. *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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Also beyond the director's decision, the petitioner has failed to establish the beneficiary's qualifications for the offered position. As indicated previously, 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. at 159; *see also Matter of Katigbak,* 14 I&N Dec. at 49. 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 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 at 1.

In the instant case, the labor certification states that the offered position requires a bachelor's degree in computer science or a foreign equivalent degree, plus 12 months experience in the job offered or as an analyst programmer. On the labor certification, the beneficiary claims to qualify for the offered position based on: 22 months of experience as a senior analyst/programmer for [redacted] in India, from September 4, 2000 to July 8, 2002; two months experience as a systems engineer for [redacted] in Woodland Hills, California, from July 10, 2004 to September 14, 2004; and five months experience as a network engineer for [redacted] in Cerritos, California, from September 27, 2004 to February 28, 2005.

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 letters from two of the employers identified on the labor certification. The petitioner submitted two letters on [redacted] letterhead: one dated August 9, 2002 and signed by a senior manager - human resources, stating that [redacted] employed the beneficiary as an "executive - education delivery" from September 4, 2000 to July 8, 2002; and one dated June 21, 2002 and signed by an IT director, stating that [redacted] employed the beneficiary as a "senior analyst/programmer" since August 16, 1999. A September 10, 2004 letter on the stationery of [redacted] signed by its president, invites the beneficiary to work as a network engineer for [redacted] under certain terms and conditions, with a proposed start date of September 27, 2004. The letter contains the beneficiary's signature on its bottom, dated September 27, 2004, indicating her agreement to the offer.

In addition, the record contains an April 30, 2003 letter from [redacted] of India, signed by a vice president-resources, stating that [redacted] employed the beneficiary as

an application consultant from January 28, 2003 to April 30, 2003.

The two letters from do not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) because they do not contain descriptions of the beneficiary's experience. The letters are also inconsistent. One states that the beneficiary worked as an executive - education delivery, while the other agrees with the beneficiary's statement on the labor certification that she worked for . as a senior analyst/programmer. One letter also states that the beneficiary began work for on September 4, 2000, as the labor certification indicates, while the other identifies her start date as August 16, 1999. The inconsistencies among the two letters from and the beneficiary's statements on the labor certificate cast doubt on the beneficiary's claimed employment experience with The petitioner must resolve inconsistencies in the record by independent, objective evidence. *See Matter of Ho*, 19 I&N at 591-92.

The letters on letterhead appear irrelevant, as they do not state that the beneficiary worked in the offered position of systems analyst or as an analyst programmer as the labor certification requires. Moreover, the letter on letterhead does not comply with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) because it does not contain a description of the beneficiary's experience there. Indeed, the letter does not provide the beneficiary's dates of employment or even confirm her employment there.

The letter on stationery also appears inconsistent with the beneficiary's statement on the labor certification, which did not identify as a previous employer. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (an adjustment of status applicant was found not credible where he testified to employment that he failed to state on 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.

In summary, the petitioner has failed to establish that the beneficiary, as of the petition's priority date, possessed a U.S. bachelor's degree or a foreign equivalent degree as required by the labor certification. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act. The AAO also finds that the petitioner failed to demonstrate its continuing ability to pay the beneficiary's proffered wage from the priority date onward and to establish that the beneficiary met the minimum employment experience requirements of the offered position set forth on the labor certification as of the priority date.

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.