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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 17 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

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, Texas Service Center, 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 describes itself as an information technology company. It seeks to employ the beneficiary permanently in the United States as a computer programmer. The petitioner requests classification of 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), 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 March 25, 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 foreign equivalent as required by the terms of the labor certification and for classification as a professional. The director also concluded that the petitioner did not establish its continuing ability to pay the proffered wage.

The issues in this case are: (1) whether the beneficiary possesses a bachelor's degree or foreign equivalent to qualify as a professional worker; (2) whether the instant petition may be adjudicated under the skilled worker category in the alternative;[1] and (3) whether the petitioner has the ability to pay the proffered wage from the priority date onward.

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]

The director found that the petitioner had not established its ability to pay the beneficiary's proffered wage. On appeal, the petitioner has overcome this ground for denial. Even though the petitioner did

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[1] On appeal, counsel's brief states, "the beneficiary has satisfied either the 'professional' or 'skilled worker' I-140 category." As counsel has raised the issue of whether the beneficiary's qualifications "satisfy" these classifications, the AAO will address this issue as well.

[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).

not provide evidence of its ability to pay the beneficiary's proffered wage for 2009 and 2010 in the record before the director, the petitioner submitted sufficient evidence of this on appeal. Therefore, the petitioner has established its ability to pay the beneficiary's proffered wage for 2008, 2009, and 2010, and the director's decision regarding ability to pay is withdrawn.

The director also found that the beneficiary did not possess a U.S. bachelor's degree or foreign degree equivalent as required by the terms of the labor certification and for classification as a professional. 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 labor certification in this matter is certified by the DOL. 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-
>
> > (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 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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> . . .

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

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

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. 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).

> 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.

In the instant case, the petitioner requests classification of the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), which 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" to include, but is 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 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. Michael 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 foreign equivalent degree).

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

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.

On the ETA Form 9089, regarding the minimum level of education and experience required for the proffered position in this matter, Part H reflects the following requirements:

H.4 Education: Other.
H.4.A. If Other is indicated in question 4, specify the education required: "Bachelor or equivalent."
H.4-B. Major Field of Study: "Computer Information Systems."
H.5. Training: None required.
H.6. Experience in the job offered: 12 months.
H.7. Alternate field of study: "Computer Science or Engineering or Equivalent"
H.8. Is there an alternate combination of education and experience that is acceptable? "No."

In this case, the job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position is a bachelor's degree or equivalent in Computer Information Systems and that 12 months of experience in the job is required. Accordingly, the job offer portion of the ETA Form 9089 requires a bachelor's degree, or the foreign equivalent thereof, and the petitioner requested classification as a professional worker. The director provided the petitioner an opportunity to clarify whether it intended to request classification as a skilled worker based upon the beneficiary's qualifications, but the petitioner stated that it intended to request classification in the professional worker category. The petitioner later attempted to request that the position be considered under the skilled worker classification[4] on appeal. The AAO will not consider a petition in a different visa classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Therefore, the AAO will not consider the instant petition in the skilled worker category.

In the instant case, the labor certification states that the beneficiary possesses an "AA Equivalent"

[4] Section 203(b)(3)(A)(i) of 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.

degree in "Computer Information Systems" from , South Korea, completed in 1999.

The record contains a copy of the beneficiary's certificate of graduation and transcripts from , South Korea, issued in 1999. The record also contains an enrollment certificate from the which states that the beneficiary earned 87 credits[5] towards a Computer Science major and that he was enrolled on March 2, 2000. The beneficiary's transcripts in the record state that the beneficiary earned 15 credits for five courses taken from 2001 to 2002, which it states occurred during the beneficiary's 3rd and 4th years of college.[6]

The record contains an evaluation by dated August 1, 2005, which states that the beneficiary's diploma from is "substantially similar" to "two years of academic studies leading to a Bachelor's degree from an accredited institution of higher education in the United States." The evaluation indicates that the entry requirements for this program are high school graduation and an entrance examination. The evaluation also states that the beneficiary completed 15 credits of academic coursework at the . The evaluator notes that the entry requirements for this program are only high school graduation and an entrance examination; the evaluation does not conclude that this program is a continuation of the beneficiary's studies from . In order to conclude that the beneficiary possessed the "academic equivalent" of a bachelor's degree in Computer Information Systems, the evaluator found that the beneficiary "completed the equivalent of one year and six months of university-level academic training in Computer Information Systems" based on the beneficiary's work experience. The evaluator used an equivalency of three years of work experience for one year of education to conclude that the beneficiary's five years of work experience in addition to his education constitutes the equivalent of a bachelor's degree. However, the rule to equate three years of experience for one year of education applies only to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). Part H.8. of the labor certification states that there is not an alternate combination of education and experience that is acceptable.

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[5] The record does not indicate the means by which the arrived at the 87 credits figure; the beneficiary's transcript from indicates he earned 81 credits, and the transcript from the indicates he earned 15 credits.

[6] It is unclear why the transcripts from the list the beneficiary's 3rd and 4th "college year" as being 2001 and 2002 when the enrollment certificate states the beneficiary was admitted on March 2, 2000. Doubt cast on any aspect of the petitioner's evidence may 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* The petitioner must resolve this discrepancy in any further filings.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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*, 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).

A two-year 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). There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act as a professional with anything less than a full baccalaureate degree. As discussed above, the beneficiary does not possess such a degree.

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.

At issue here is whether the beneficiary's credentials constitute the "foreign equivalent degree" to a United States baccalaureate degree. The beneficiary possesses a two year degree in Computer Science from It is unclear what level of education the beneficiary received at the The record contains an enrollment certificate from this university which states that the beneficiary earned 87 credits and an academic record that lists only five courses taken and 15 credits awarded. As noted above, the beneficiary earned 81 credits at ; the transcript from the does not indicate whether the beneficiary "transferred" credits or how the amount of 87 credits was derived. Doubt cast on any aspect of the petitioner's evidence may 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

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

The record does not demonstrate that the beneficiary qualifies for the instant position as a professional as he does not possess a bachelor's degree in "Computer Information Systems" or "Computer Science or Engineering" or the foreign equivalent thereof as required by the labor certification.

Therefore, the evidence in the record on appeal is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree.

The AAO sent the petitioner a Notice of Intent to Dismiss (NOID) on April 2, 2013, notifying the petitioner of this conclusion. In response, counsel has asserted that the "INA makes no functional difference between (i) 'skilled workers;' (ii) 'professionals; or even (iii) 'other workers.' Counsel appears to be interpreting the division of visa number availability in the Act to infer that the employment-based preference categories have "no distinction whatsoever." Counsel's assertion goes against the plain text of the statute as Section 203(b)(3) sets out three distinct levels of workers based on varying requirements for minimum levels of education, training, and experience. Counsel also asserts that the labor certification "clearly states that a bachelor degree equivalency is acceptable;" however, counsel does not define any such equivalency. Counsel also states that "bachelor degree academic/work experience equivalency is routine and long-recognized." The AAO notes that if the minimum requirements of the labor certification did not require at least a full bachelor's degree, then the labor certification would not support the requested visa preference classification, which would result in the dismissal of the appeal on that additional ground.

Also on appeal, counsel asserts that the instant petition should be considered in the alternative under the skilled worker category. In Part 2 of the Form I-140, the petitioner checked box "e," which indicates that the instant petition is being filed under the professional category, not the skilled category, box "f." The labor certification specifically states that a bachelor's degree is required, not merely two years of experience as required for "skilled worker" classification. The director issued a Request for Evidence (RFE) on July 29, 2011 which specifically asked the petitioner whether it intended to mark box "f" as a skilled worker instead of box "e" as a professional. In response to this RFE, counsel for the petitioner responded that "the position is indeed EB-3 professional." Therefore, the director only addressed instant case under the professional category in issuing his decision. As stated above, the matter may not now be considered under the skilled worker category on appeal.

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. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

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. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 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 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 12 months of experience in the job offered or 12 months of experience as a computer programmer. On the labor certification, the beneficiary claims to qualify for the offered position based on the following experience:

- As a computer programmer for the petitioner from August 16, 2004 to March 25, 2008.[7]
- As the chief of development team for [redacted] from April 1, 2004 to July 20, 2004.
- As the president/programmer for [redacted] from October 1, 2002 to March 31, 2004.
- As the chief of development team for [redacted] from March 1, 2002 to September 14, 2002.
- As the chief of development team from [redacted] from June 1, 2000 to February 28, 2002.
- As the programmer for [redacted] from May 1, 1999 to May 31, 2000.

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 AAO issued the petitioner a Notice of Intent to Dismiss (NOID), dated April 2, 2013 regarding, among other things, the discrepancies in the experience letters in the record as they relate to the evaluation relying upon the beneficiary's work experience and whether the beneficiary meets the experience qualifications for the instant position. The evaluation in the record relied upon the beneficiary's experience listed above and stated that he has at least five years

[7] The ETA Form 9089 indicates that the beneficiary does not qualify for the position offered based upon experience gained with the petitioner.

of work experience, which in addition to the beneficiary's education, constitutes the equivalent of a U.S. bachelor's degree. Accordingly, the AAO informed the petitioner that experience used in this evaluation in conjunction with the beneficiary's education towards any asserted equivalency requirements of the labor certification may not be also used to demonstrate that the beneficiary is qualified for the instant position.

In response to the AAO's NOID, counsel for the petitioner submitted the following documents:

- A chart detailing the beneficiary's work experience.
- Certificates of employment from , and a letter from one of the beneficiary's former colleagues at
- The beneficiary's high school report card, specifically highlighting his courses in Chinese and Korean.
- A Certification of History that identifies the beneficiary's past employment.

Although these letters addressed the discrepancies noted by the AAO in its NOID, the certificates appear to have the same layout, font, and title as each other, and none of the certificates are printed on the particular company's letterhead, which suggests they were not written by the signatory identified on the certificate. Doubt cast on any aspect of the petitioner's evidence may 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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.*

In the instant case, the labor certification states that the offered position requires 12 months of experience in the job offered. On the labor certification, the beneficiary claims to qualify for the offered position based on the experience listed above. It is unclear whether the beneficiary has 12 months of experience in the job offered because the above experience cannot be used to meet the asserted degree equivalency as well as the experience requirements of the labor certification. As stated above, the beneficiary's experience with the petitioner cannot be used to qualify for the instant position. *See* 20 C.F.R. § 656.17(i)(3).

Further, the record contains letters from the beneficiary's high school friends who attest to the beneficiary's employment with , but these do not constitute experience letters that meet the regulatory requirements because they were not from the beneficiary's employer.

Even without these discrepancies, 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 because the same experience may not be used both toward the evaluation and meeting the experience requirements of the labor certification. Therefore, the petitioner has also failed to establish that the beneficiary meets the experience qualifications for the offered position.

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).

In summary, after reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in "Computer Information Systems" or in the alternative, "Computer Science or Engineering or Equivalent" to qualify for classification under the professional category under section 203(b)(3)(A)(ii) of the Act. As stated above, the instant petition will not be considered under the skilled worker category as the AAO will not consider a petition in a different visa classification once the director has rendered a decision.[8] As stated above, the director's decision regarding the petitioner's ability to pay the proffered wage is withdrawn. Finally, the petitioner has not established that the beneficiary meets the experience requirements of the labor certification.

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.

[8] Form I-140 specifically stated that it was being filed in the professional category, and the petitioner confirmed that it sought classification under the professional category in response to the director's RFE, prior to the director's decision.