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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 2 7 2013 OFFICE: TEXAS SERVICE CENTER

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office 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,

for

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner has appealed that decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a marine surveying and consulting business. It seeks to permanently employ the beneficiary in the United States as a port captain. 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).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date DOL accepted the labor certification for processing, is March 23, 2005.[1] *See* 8 C.F.R. § 204.5(d).

The director denied the petition based on his conclusion that the beneficiary did not have the minimum education required to perform the offered position.

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 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-

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[1] The petition involves the substitution of the labor certification beneficiary. The substitution of beneficiaries was formerly permitted by DOL. However, on May 17, 2007, DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. *See* 72 Fed. Reg. 27904 (codified at 20 C.F.R. § 656). As the filing date of the instant petition, July 13, 2007, predates the effective date of the final rule, the requested substitution will be permitted.

[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, 1012-1013 (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

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

> 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
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> 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).
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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).

Therefore, it is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the proffered 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).[4] The AAO will first consider whether the petition may be approved in the professional classification.

In the instant case, the petitioner indicated on the ETA Form 9089 the following requirements for the proffered position:

H.4. Education: Bachelor's.
H.4-B. Maritime Transportation or equivalent.
H.5. Training: None required.
H.6. Experience in the job offered: 60 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: 60 months.
H.10-B. Acceptable alternate occupation: Shipping/Maritime.
H.14. Specific skills or other requirements: Five years of progressively more responsible shipping/maritime experience, including: commander of unrestricted tonnage ocean-going cargo vessels; port agency experience; chartering; and international communications. Certified for Quality Management System Assessment.

On the ETA Form 9089, the beneficiary indicated that he held the equivalent of a bachelor's degree in marine transportation operations, a Master Certificate of Competency issued by the

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

[4] Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of the Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification.

> 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 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.

The beneficiary does not, however, have a U.S. baccalaureate degree or an equivalent foreign degree. Instead the record reflects that he holds a Master Certificate of Competency from the which is documented by a copy of a Master's certificate issued to the beneficiary on under the Provisions of the International Convention on Standards of Training, as amended in 1995 and a revalidation of that certificate extending the beneficiary's master's license to December 19, 2010. The record also contains copies of the following certificates or licenses issued to the beneficiary:

- Certificate of Competence Granted by the Secretary of State (United Kingdom) indicating that the beneficiary is qualified for a GMDSS General Operator's License;
- a Certificate of Competency issued to the beneficiary as a GMDSS Operator in the Merchant Marine by the Government of Panama Maritime Authority on June
- Panamanian identity Cards, dated identifying the beneficiary as a Master in the Merchant Marine and as a GMDSS Operator in the Merchant Marine respectively; and
- A Barbados Officer's License of Qualification, issued to the beneficiary on which notes that he was awarded a certificate of competence by the Irish Government on

[5] The record further includes copies of training certificates issued to the beneficiary, including: Shipboard Safety Management (January 21, 2001); Safety and Quality (October 20-25, 1997); One-

Even if the AAO were to conclude that the record established the petitioner's intent to accept a degree equivalency, it would not find the beneficiary's master's license to be the equivalent of a bachelor's degree in maritime transportation, as asserted by the petitioner. The submitted credentials evaluations, which include an August 6, 2001 report prepared by , and February 20 and May 4, 2009 reports written by lack the analysis and supporting documentation necessary to support their conclusions. finds the beneficiary's master's license to be the equivalent of a bachelor's degree in marine transportation but does not state that she reviewed the beneficiary's academic studies or training to prepare her report or otherwise indicate the basis for her equivalency determination. who finds the beneficiary's studies to obtain a master's certificate are at least the equivalent of 120 U.S. credits of post-secondary studies in the United States and to be equivalent to a U.S. bachelor's degree in marine transportation operations, also fails to identify the specific academic courses and training programs he evaluated to reach his conclusions or to indicate the methodology he used in determining the beneficiary's academic credits. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

As the record does not demonstrate that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university, he 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 beneficiary is qualified as a skilled worker. 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).

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

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Day Hazardous Materials Training Program (March 9, 1995); Computer Appreciation and Planned Maintenance System (July 7-10, 1998); Commercial Knowledge (August 24-25, 1998); Ship Captain's Medical Training Course (April 4, 1987); Merchant Navy Fire Fighting Course (March 30 to April 2, 1987); Automatic Radar Plotting Aids Course (March 6, 1987); Radar Simulator Course (February 9-14, 1987); Survival at Sea (May 7-8, 1988); Proficiency in Survival Craft (July 30, 1993); Personal Safety & Social Responsibilities (July 7-29, 1999); Internal Auditor Course (January 16, 2001); and SAS Bridge Resource Management Course (August 15-18, 1998).

> 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 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.

The beneficiary does not hold a U.S. baccalaureate or foreign equivalent degree and Part H. of the ETA Form 9089 does not indicate that he may qualify for the offered position with other than a bachelor's degree. Nonetheless, on December 27, 2012, the AAO issued a Request for Evidence (RFE) to the petitioner, permitting it to submit evidence that it intended the labor certification 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 DOL and to potentially qualified U.S. workers.[6] Specifically, the AAO requested that the petitioner provide a

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[6] 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 DOL during the labor certification process and

copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

In response to the RFE, counsel contends that the petitioner indicated its willingness to accept a degree equivalency by answering yes to the question in Part H.9. of the ETA Form 9089 that asks whether a petitioner is willing to accept a foreign educational equivalent. She asserts that by foreign equivalent, the petitioner meant that it was willing to accept the beneficiary's master's license as the foreign equivalent of a U.S. bachelor's degree in maritime transportation. Counsel further claims that the petitioner's recruitment for the offered position was conducted on that basis. She indicates that the petitioner drafted the prevailing wage determination and advertisements in the present case based on a December 14, 2001 evaluation provided by which found the master's license held by the original beneficiary of the ETA Form 9089 to be the equivalent of a bachelor's degree.

Counsel further asserts that the foreign educational equivalent of a bachelor's degree is appropriately determined by the petitioner and that as the petitioner in the present case is willing to accept a master's certificate as the foreign equivalent of a U.S. bachelor's degree, USCIS should also accept it. In support of her assertions, counsel notes the decisions in *Grace Korean United Methodist Church v. Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005) and *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), which, she states, stand for the proposition that an employer is usually best suited to determine such an equivalency and that USCIS should not apply overly simplistic reasoning and formulas in considering degree equivalency. Counsel also contends that USCIS has already acknowledged that the beneficiary's master's license is the equivalent of a bachelor's degree since it has previously approved Form I-129 (Petitions for Alien Worker) petitions for other employees of the petitioner who hold master's licenses.

The AAO notes that the record contains several Forms I-797A, Notices of Action, indicating that the beneficiary has benefited from Form I-129 petitions filed on his behalf by the petitioner. However, the approval of such petitions, which relate to specialty occupations requiring the minimum of a baccalaureate degree to perform,[7] does not establish that the beneficiary holds the equivalent of a

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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.

[7] Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation requiring:

> (A) theoretical and practical application of a body of highly specialized knowledge, and

bachelor's degree for the purposes of this proceeding. In determining whether a beneficiary has the equivalent of a U.S. bachelor's degree in the adjudication of a Form I-129 petition, USCIS may consider that individual's work experience.[8] However, job experience may not be used to establish the educational equivalency required by a labor certification. Therefore, counsel's assertion that USCIS approval of Form I-129 petitions filed by the petitioner constitutes its acknowledgement of the beneficiary's degree equivalency is not persuasive.

The AAO also notes counsel's assertion that USCIS should accept the petitioner's determination of the foreign educational equivalent of a bachelor's degree, thereby following the decisions in *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005) and *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). However, *Grace Korean* is not controlling precedent in this matter. In contrast to the broad precedential authority of the case law of a U.S. Circuit Court of Appeals, the AAO is not bound to follow the published decision of a U.S. district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). Although the reasoning underlying a federal district judge's decision will be given due consideration when it is properly before the AAO, the

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(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

[8] To perform the duties of a specialty occupation, section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), requires a beneficiary to meet one of the following requirements: full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty. Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

analysis does not have to be followed as a matter of law, particularly, as in *Grace Korean,* where the case arises in another district. *Id.* at 719.

Moreover, the court in *Grace Korean* made no attempt to distinguish it holding from the previously discussed circuit court decisions that have found USCIS to have the authority to evaluate whether a beneficiary is qualified for the employment described in a labor certification. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States' immigration laws and not with the delivery of mail. *See* section 103(a) of the Act. Accordingly, *Grace Korean*, will not be followed in this matter.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" related solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, it found USCIS to have properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. The court in *Snapnames.com, Inc.* further recognized that USCIS has an independent role in determining whether the alien meets the labor certification requirements, concluding that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. See also, Maramjaya v. USCIS,* Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). Accordingly, the AAO does not find *Snapnames* to support counsel's contention that the petitioner's asserted intent overrides USCIS authority to determine whether the beneficiary is qualified to perform the duties of the offered position.

Although counsel asserts that the petitioner's intent to accept a master's license as the equivalent of a bachelor's degree is established by its answer in Part H.9. of the ETA form 9089, the AAO notes that guidance provided by DOL states that 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 Administrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). Accordingly, the AAO does not find the petitioner's willingness to accept a foreign educational equivalent in Part H.9. of the ETA

Form 9089, unaccompanied by a statement identifying a master's license as that equivalent, to demonstrate its willingness to accept a degree equivalency.

As proof that its intent to accept the equivalent of a bachelor's degree was expressed to DOL and prospective employees during the recruitment process, the petitioner has submitted copies of the Prevailing Wage Determination issued by the Louisiana Department of Labor, a copy of the SWA Order for the offered position, copies of advertisements from the the in-house posting of the offered position, a copy of the offered position's posting on , copies of the ads placed on the petitioner's website and copies of ads posted on the website of Placement Services USA. Counsel indicates that the petitioner no longer has a signed copy of the recruitment report or the resumes it received in response to its recruitment efforts and notes that an employer is only required to retain recruitment documentation for five years pursuant to 20 C.F.R. § 656.10(f).

While a review of the submitted documentation finds that the educational requirement for the offered position was consistently listed as a Bachelor of Science in Maritime Transportation or its equivalent in all filings, notices and postings by the petitioner, the AAO does not find the petitioner's use of the term "equivalent" to satisfy the DOL regulation at 20 C.F.R. § 656.17(f)(3), which requires a petitioner's recruitment for an offered position to "provide a description of the vacancy specific enough to apprise the United States workers of the job opportunity for which certification is sought." Based on the submitted evidence, the AAO cannot conclude that the presence of the term "equivalent" in the petitioner's advertisements and postings adequately informed qualified U.S. job applicants of its willingness to accept a master's license as the equivalent of a bachelor's degree or that a master's license was a requirement for the position. Accordingly, the petitioner has failed to demonstrate its intent to accept a degree equivalency for the offered position.

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 as of the priority date. The petitioner has 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.

Concerning the beneficiary's claimed qualifying experience, the AAO informed the petitioner in the RFE it issued on December 27, 2012 that it did not find the record to demonstrate that the beneficiary had possessed the five years of progressively more responsible experience required by Part H.14. of the ETA Form 9089 as of the priority date. It asked the petitioner to provide primary evidence of this experience pursuant to the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A).[9]

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[9] The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states:

> Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or

In response, the petitioner has submitted statements from two of the beneficiary's previous employers. In a January 24, 2013 statement, written on company letterhead, Hong Kong. reports that the beneficiary worked for . in Hong Kong as a Master/Port Captain from approximately October 1997 to August 2001 and that he performed all the duties of a master, including:

- Being in charge of all operations while onboard vessels;
- Being responsible for ensuring the vessel was in compliance with all company policies and international regulations;
- Overseeing all loading plans and discharge operations of several different types of cargoes;
- Overseeing cargo as it was transported to and from ships and barges, as well as the inspection of cargo spaces to ensure that goods were undamaged;
- Approving and executing the vessel's passage plans to ensure a safe voyage;
- Navigating in ice-infested waterways in the approaches to Canadian sea ports;
- Overseeing all of a vessel's staff while acting as Master/Port Captain; and
- Reporting directly to upper management.

Manual, which sets forth the responsibilities, authority and duties of a Master, as well as the company's own record of the beneficiary's maritime experience, reflecting his increasing responsibilities.

The record also contains a February 2, 2013 statement from also writing on company letterhead, states that the beneficiary was employed by his company as a Chief Officer/Master from approximately June 1988 to February 1991 and from November 1996 to June 1997. He reports that the beneficiary was promoted from the rank of Chief Officer to the rank of Master and commanded a ship as a Master for the first time on March 21, 1989.

As a Master, states, the beneficiary was responsible for performing the following duties:

- Being in charge of all operations while on each vessel and being responsible for ensuring the ship was in compliance with all company policies and international regulations;
- Supervising and approving loading plans, and discharging operations for several different types of cargoes, including overseeing cargo as it was transported to and

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the experience of the alien.

from ships and barges, and inspecting cargo spaces to ensure that goods were undamaged;

- Inspecting cargo stowage and securing and attesting the bills of lading and "Mate's Receipt" with suitable clauses to protect the owner's interest;
- Approving and executing passage plans, navigating in restricted areas where extreme caution was required;
- Approving the ship's maintenance plan and ensuring compliance of the ship's staff; and
- Handling all commercial and technical tasks, reporting on them to his company's upper management.

also provides a January 31, 2013 listing of the ships on which the beneficiary served for , with the dates of his service and his rank. The listing is signed by and is on company letterhead.

While the AAO notes the statements submitted by neither indicates that the beneficiary was employed by their companies on a full-time basis, although the beneficiary claimed full-time employment with both employers on the ETA Form 9089. Moreover, Captain states that the beneficiary's employment with began in October 1997, a start date that agrees with the information provided by the ETA Form 9089, but not with that provided by the Form ETA 750 that supported a second Form I-140 filed on the beneficiary's behalf by the petitioner on January 9, 2008. The Form ETA 750 states that the beneficiary's employment with began in August 1996. The AAO also notes that, on the ETA Form 9089, the beneficiary claimed full-time employment with the from August 1993 until August 1996 and with from November 1996 until June 1997. However, on the Form ETA 750, he indicated that he had worked full-time for from June 1996 until November 1996, and from June 1997 until October 1997, employment that is not reflected on the Form ETA 9089. Accordingly, the AAO does not find the record to establish that the beneficiary possesses the five years of progressively more responsible experience required by the ETA Form 9089. Doubt cast on any aspect of the petitioner's proof 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 on 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 addition, the AAO also finds the record to contain insufficient information to establish that the beneficiary is certified for Quality Management System Assessment, one of the specific skill requirements listed in Part H.14. of the ETA Form 9089. Although the AAO notes that the beneficiary's resume indicates that he completed a Quality Management System Assessment Course by LRQA, the record contains no documentation of the beneficiary's certification. Going on record without supporting documentation is not sufficient to meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure*

Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972)). Counsel for the petitioner asserts that his training certificates, specifically those relating to Shipboard Safety Management – Safety & Quality Management System and Safety and Quality, demonstrate that he is certified in Quality Management System Assessment. However, the record offers no evidence to support counsel's claim. Without supporting documentation, the assertions of counsel are not sufficient to meet the burden of proof in these proceedings. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has, therefore, also failed to establish that the beneficiary meets the experience and training requirements of the offered position set forth on the ETA Form 9089 as of the priority date. For this reason as well, the beneficiary does not qualify for classification as a professional or skilled worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director, the AAO also finds that the petitioner has not established its ability to pay the beneficiary the proffered wage as of the March 23, 2005 priority date.[10]

In its December 27, 2012 RFE, the AAO requested evidence of the petitioner's ability to pay the proffered wage, including its annual reports, federal tax returns or audited financial statements for the period 2007 through 2011 and any Internal Revenue Service (IRS) Form W-2 Wage and Tax Statements (Forms W-2) or Forms 1099 issued to the beneficiary from 2007 through 2012. The AAO also noted that USCIS records reflected that the petitioner had filed multiple immigrant (Form I-140, Immigrant Petition for Alien Worker) and nonimmigrant Form I-129 petitions and asked for information identifying these beneficiaries, the dates of their employment, the wages set forth in the respective labor certifications or labor condition applications, and the actual wages paid the beneficiaries, supported by copies of their IRS Forms W-2 or Forms 1099. The AAO indicated that the combined proffered and prevailing wages would be considered in assessing the petitioner's ability to pay.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the

[10] 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).

> priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements . . . . In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has been employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage during the required period, that evidence is considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Filed Nov. 10, 2011).[11] If the petitioner's net income during the required time period does not equal or exceed the proffered wage or if when added to any wages paid to the beneficiary, does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where a petitioner's net income or net current assets do not establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of the petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

In the instant case, the proffered wage listed on the ETA Form 9089 is $65,686.00. The petitioner must, therefore, establish its continuing ability to pay an annual wage of $65,686.00 from the priority date of March 23, 2005 onwards. The petitioner has submitted an IRS Form W-2 issued to the beneficiary in 2005,[12] which reports his income as follows:

- 2005: $37,100.00

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[11] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh,* 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. 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).

[12] The AAO notes that petitioner has submitted additional evidence of its ability to pay for periods prior to the 2005 priority date. These will only be considered generally.

The petitioner has also provided the beneficiary's IRS Forms W-2 for the years 2006 through 2012 issued by which it describes as its Texas office. The AAO will not, however, consider this evidence in determining the petitioner's ability to pay the proffered wage.

The IRS Forms W-2 for 2006 through 2012,[13] as well as federal tax returns for submitted in response to the RFE, reflect that has been assigned a Federal Employer Identification Number (FEIN) of while the ETA Form 9089 and Form I-140 petition filed by the petitioner show an FEIN of As no evidence in the record establishes as a successor-in-interest or a wholly-owned subsidiary of the petitioner, the AAO finds it to be a legally separate and distinct business entity whose resources cannot be considered in determining the petitioner's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.,* 17 I&N Dec. 530 (Comm. 1980). Accordingly, the record does not demonstrate the petitioner's continuing ability to pay the proffered wage based on wages paid to the beneficiary from the March 23, 2005 priority date onwards.

However, even if the submitted IRS Forms W-2 were accepted as evidence establishing that the beneficiary's annual income has equaled or exceeded the proffered wage of $65,686.00 since 2005, the record would not demonstrate the petitioner's ability to pay the proffered wage. The AAO's RFE specifically advised the petitioner that USCIS records indicated that it had filed multiple petitions on behalf of other beneficiaries. The AAO asked the petitioner to submit specific information regarding these multiple beneficiaries and evidence of its ability to pay these additional beneficiaries from the priority date of each onwards. The AAO notes that the petitioner did not submit evidence of its ability to pay the prevailing wages of the Form I-129 beneficiaries it has employed since the March 23, 2005 priority date. A review of USCIS databases finds the petitioner to have employed five H-1B workers from 2005 through 2007, one such worker in 2008, two in 2009, three in 2010-2011 and four in 2012. 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).

The AAO now turns to a consideration of whether the tax returns submitted by the petitioner for 2005 and 2006 establish its ability to pay the proffered wage in those years.[14] The petitioner's tax return for 2005 reports negative net income of $30,760.00 and net current assets of $93,202.00. In 2006, the petitioner's tax return indicates net income of $26,099.00 and negative net current assets of $44,744.00. Therefore, the record demonstrates that in 2005, the petitioner's net current assets were sufficient to cover the $28,586.00 difference between the $37,100.00 in wages paid the beneficiary and the proffered wage of $65,686.00. However, in 2006, neither the petitioner's net income, nor its net current assets were equal to or exceeded the proffered wage. Therefore, the only year in which

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[13] The Forms W-2 report the following wages for the beneficiary: 2006: $70,400.00; 2007: $81,900.00; 2008: $112,979.56; 2009: $103,050.00; 2010: $104,100.00; 2011: $107,450.00; and 2012: $98,000.00

[14] Although the record contains the petitioner's tax returns for 2002 through 2006, the only returns relevant to the petitioner's ability to pay are those for the years 2005 and 2006.

the record demonstrates the petitioner's ability to pay the proffered wage is 2005. Accordingly, the AAO will consider whether the record demonstrates that the totality of the petitioner's circumstances establish its ability to pay the beneficiary the proffered wage in subsequent years, pursuant to *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In *Sonegawa*, the petitioning entity had been in business for more than 11 years and routinely earned a gross annual income of approximately $100,000. However, during the year in which the petition was filed in this case, the petitioner's income declined significantly as a result of changing business locations and paying rent on both the old and new sites for five months. There were also significant moving costs and a period of time when the petitioner was unable to do regular business. The legacy Immigration and Naturalization Service (now USCIS) nevertheless found that the petitioner's prospects for resuming successful business operations had been established as the record demonstrated that the petitioner was a fashion designer whose work had been featured in national magazines, that she had a client list that included celebrities and individuals who appeared on lists of the best-dressed California women, and that she was a lecturer on fashion design at design and fashion shows throughout the United States, and at colleges and universities in California.

Here, the record indicates that the petitioner, incorporated in Louisiana in 1986, has been in business for more than 25 years. However, the AAO finds that the record lacks evidence to establish the petitioner's financial history or circumstances. The only financial evidence in the record that relates to the petitioner is limited to its tax returns for the period 2002 through 2006, which are insufficient to establish its financial history and, further, do not reflect steadily increasing gross revenues during these years. There is also no evidence that demonstrates the petitioner's stature within its industry or that indicates that it has experienced a significant and sustained increase in the size of its workforce during its years of operation. Therefore, based on the record, the AAO cannot find the totality of the petitioner's circumstances to establish its ability to pay the proffered wage.

Based on the evidence of record, the petitioner has not established that the beneficiary is qualified to perform the duties of the offered position or that it is able to pay the proffered wage pursuant to the regulation at 8 C.F.R. 204.5(g)(2).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for dismissal. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.