(b)(6)

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

U.S. Citizenship and Immigration Services

DATE: SEP 0 9 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Rachel Miliano
For

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an information technology business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

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 June 4, 2006. *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 record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *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.[1] On appeal, counsel submits a brief and copies of documentation already in the record.

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-
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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

> 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).[2] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). 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.

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

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 or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).[3] The AAO will first consider whether the petition may be approved in the professional classification.

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[3] 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 Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in 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 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

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record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

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.

In the instant case, Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a bachelor's degree in information systems from [redacted] India, completed in 1991.

The record of proceeding contains a copy of a document from [redacted][4] certifying that

[4] The AAO notes that beneficiary's diploma is from [redacted] but that the institution is

the beneficiary has qualified for the award of post graduate diploma in computer studies. The record of proceeding also contains a copy of the beneficiary's Bachelor of Science diploma in mathematics from the awarded in 1984 and transcripts from the

The record contains an evaluation of the beneficiary's credentials prepared by Dr. on May 11, 1997, which does not list a university or institution affiliation. The evaluation concludes that the beneficiary's post graduate diploma from represents professional training and would not count toward a degree in the United States. The evaluation concludes that the beneficiary's Bachelor of Science degree in mathematics is equivalent to 90 semester credit hours towards a Bachelor of Science degree in mathematics from an accredited U.S. institution and that the combination of the beneficiary's education in mathematics, his computer training, and years of experience are equivalent to a Bachelor's of Science in information systems in the United States.

The record of proceeding contains an evaluation of the beneficiary's credentials prepared by for on April 23, 2009. The evaluation concludes that the beneficiary's degree from the is equivalent to a Bachelor of Science degree in computer science due, in part, to an opinion by which holds that a "functional equivalency can be maintained" between the beneficiary's Bachelor of Science degree in mathematics and a U.S. Bachelor of Science degree in computer science.

The record of proceeding contains an evaluation of the beneficiary's credentials prepared by for on April 22, 2009. The evaluation concludes that the beneficiary's degree has a "functional equivalency" to a Bachelor of Science degree in computer science, representing 120 semester credit hours from an institution of postsecondary education in the United States.

The record of proceeding contains an educational evaluation prepared by on July 10, 2007, in which he states that he formerly worked as a professor of physics at the as well as All India Radio and that Indian three-year bachelor degrees translate into 120 semester hours in the United States. He further states that the education record he has examined represents a single-source degree, which is the equivalent of a bachelor's degree in the United States.

The AAO notes that that the evaluation from Dr. contradicts the beneficiary's claim on the ETA Form 9089 that the completion of the course at is a bachelor's degree. The AAO notes that the which is located at

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listed as on the labor certification.

[5] Dr. has indicated that she has a Master's degree from the and a doctorate from but does not indicate the field in which she obtained her doctorate. According to its website, (accessed February 12, 2012) "grant[s] full degrees based on experience."

India, does not appear to be associated with the as the beneficiary claimed on the ETA Form 9089. The does not provide that address on its website. *See* (accessed November 1, 2012).

In addition, the evaluation from Dr. conflicts with the evaluations from and in that it claims that the beneficiary's degree in mathematics is equivalent to 90 semester hours towards a degree in mathematics and only 60 semester hours towards a degree in information systems. instead equate the beneficiary's degree in mathematics to 120 semester hours in the United States.

The evaluation from Dr. equates the beneficiary's employment experience with education. However, the ETA Form 9089 specifically states that no combination of education and experience may be considered. Further, Dr. describes the experience of the beneficiary with employers, None of these employers are listed on the ETA Form 9089 at section K where the beneficiary is required to list "all jobs [he] has held during the past 3 years" and to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification." The record does not contain letters of experience from any of these claimed employers.

The AAO notes that the evaluations come to different conclusions as to the beneficiary's qualifications. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The evaluation from Dr. fails to adequately describe his method used to equate work experience with education. Dr. merely states that the beneficiary's years of experience are equivalent to 60 semester hours without providing sufficient detail as to how he reached his conclusion. The beneficiary was required to have a bachelor's degree on the ETA Form 9089. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the DOL.

In regard to the evaluation prepared by she indicates that she is a member of the the and the The record does not indicate what these organizations require for membership. The AAO reviewed the websites of these associations, and none of the associations require anything other than the payment of dues.[6] The

[6] The bylaws for the accessed on February 12, 2012, at state: "Any individual interested in the purposes of the Association shall be eligible for membership." with over 10,000 members. *See* (accessed March 12, 2012). The bylaws for , downloaded from on February 12, 2012, do not

AAO was unable to confirm membership in Regardless, the payment of dues does not confer any expertise.

Ms. breaks down the beneficiary's subjects into courses and credits, concluding that the beneficiary achieved 120 "contact hours using the Carnegie Unit." However, the AAO notes that Ms. mistakenly equates passing grades with courses for which the beneficiary received a failing grade and utilizes a grading scale in which passing scores of 60 – 100 are equated with an A and failing scores from 35 to 59 are equated with grades of B and C. Ms. errors in reflecting failed courses with passing grades are noted on the table below.

Course	Mark on beneficiary's transcript	Grade equated by Ms. Danzig
English I	Fail	C
Mathematical Statistics	Fail	A
English III	Fail	C+
Mechanics I	Fail	A
Computer Programming-Form. Langu. and Automa	Fail	A

Ms. goes on at length about Carnegie Units and Indian degrees in general, concluding that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate but providing no basis for assigning credits for each individual course. The record contains insufficient evidence that the Carnegie Unit is a useful way to evaluate Indian degrees. In identifying the standards which she employs for preparing her evaluations, Ms. indicates that she adheres to the United Nations Educational, Scientific, and Cultural Organization (UNESCO) guidelines. She further indicates that for a more detailed explanation of the methodology used in the evaluation, the AAO should "reference the expert opinion letter by Professor "

The Carnegie Unit was adopted by the Carnegie Foundation for the Advancement of Teaching in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject.[8] For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.[9] This unit system was adopted at a time when high schools

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provide any specific requirements for members in Article II other than the payment of dues. Voting members must be individuals working in educational institutions, training or research facilities, organizations involved with international education, or those employed independently.

[7] *See* v (accessed March 12, 2012).

[8] The Carnegie Foundation for the Advancement of Teaching was founded in 1905 as an independent policy and research center whose motivation is "*improving teaching and learning.*" *See* http://www.carnegiefoundation.org/about-us/about-carnegie (accessed March 12, 2012).

[9] *See* http://www.carnegiefoundation.org/faqs (accessed March 12, 2012).

lacked uniformity in the courses they taught and the number of hours students spent in class. The Carnegie Unit does not apply to higher education.[10]

The record fails to provide peer-reviewed material confirming that assigning credits by lecture hour is applicable to the Indian tertiary education system. For example, if the ratio of classroom and outside study in the Indian system is different than the U.S. system, which presumes two hours of individual study time for each classroom hour, applying the U.S. credit system to Indian classroom hours would be meaningless. Robert A. Watkins, The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise" at 12, available at http://handouts.aacrao.org/am07/finished/F0345p_M_Donahue.pdf (accessed March 12, 2012), provides that the Indian system is not based on credits, but is exam based. *Id.* at 11. Thus, transfer credits from India are derived from the number of exams. *Id.* at 12. Specifically, this publication states that, in India, six exams at year's end multiplied by five equals 30 hours. *Id.*

Finally, Ms. [redacted] references a UNESCO document. The relevant language relates to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

> 'Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State and deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for inclusion in a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004) (accessed March 12, 2012, at http://unesdoc.unesco.org/images/0013/001388/138853E.pdf) provides:

> Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions

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[10] *See* http://www.suny.edu/facultysenate/TheCarnegieUnit.pdf (accessed March 12, 2012).

> and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. UGC, AICTE and AIU are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.)

Ms. references Bologna degrees in Europe in asserting that a three-year Indian degree is equivalent to a four-year U.S. degree. However, the AAO notes that such comparisons are irrelevant as the beneficiary in this case does not have a Bologna degree from Europe.

In addition, *See* World Education News & Reviews (*WENR*), "Evaluating the Bologna Degree in the U.S.," dated March/April 2004, available on the World Education Services (WES) website, http://www.wes.org/ewenr/04march/feature.htm (accessed March 12, 2012), which includes an assessment of the Bologna Process:

> "Even though the Bologna Process has resulted in shorter degree programs that are defined in terms of required credits and introduced a two-tiered (undergraduate/graduate) system, the new European bachelor's is still quite distinct from its U.S. counterpart. Based on the sample 'Bologna' bachelor's degrees we examined from Austria and Italy (see previous issue of *WENR),* it is apparent that the European degrees are more heavily concentrated in the major -or specialization -and **that the general education component which is so crucial to U.S. undergraduate education is absent.** The new degrees, awarded by traditional European institutions, are undeniably European in character" (emphasis added).

See also article by Jeannine E. Bell and Robert A. Watkins on "Strategies in Dealing with the Bologna Process," from the International Educator, dated September and October 2006. The article discusses issues with the three-year European degree and its acceptance in the U.S. for graduate school admission.

As previously noted, the record contains an evaluation from "Dr." [11] President of [redacted] According to this "university's" website, [redacted] (accessed November 1, 2012), it awards degrees based on experience. Dr. [redacted] asserts that the beneficiary's degree from the [redacted] is equivalent to a bachelor's degree awarded in the U.S.; however, the petitioner has failed to resolve the inconsistency between this claim and the ones in the evaluation prepared by Dr. [redacted] which state that the beneficiary's degree is equivalent to 90 hours towards a degree in mathematics or 60 hours towards a degree in information systems.

Dr. [redacted] goes on at length about Carnegie Units and Indian degrees in general, concluding that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate, but makes no attempt to assign credits for individual courses. Dr. [redacted]'s credibility is serious diminished, as he completely distorts an article by Leo Sweeney and Ravi Kallur. Specifically, Dr. [redacted] asserts that this article concludes that, because the United States is willing to consider three-year degrees from Israel and the European Union, "Indian bachelor degree-holders should be provided the same opportunity to pursue graduate education in the U.S." While this is the conclusion of the article, the specific means by which Indian bachelor degree holders might pursue graduate education in the United States provided in the discussion portion of the article in no way suggests that Indian three-year degrees are, in general, comparable to a U.S. baccalaureate. Specifically, the article proposes accepting a first class honors three-year degree *following* a secondary degree from a CBSE or CISCE program *or* a three-year degree *plus* a post graduate diploma from an institution that is accredited or recognized by the NAAC and/or AICTE. The record contains no evidence that the beneficiary in this matter received his secondary degree from a CBSE or CISCE program. Moreover, he completed his three-year degree in the second division, not the first division. Finally, the record lacks evidence that the beneficiary completed a post-graduate degree. Thus, Dr. [redacted]'s reliance on this article is disingenuous.

Ultimately, the record contains no evidence that the Carnegie Unit is a useful way to evaluate Indian degrees. The petitioner has submitted materials about the unit posted at "Wikipedia." Online content from "Wikipedia" is subject to the following general disclaimer:

> Wikipedia is an online open-content collaborative encyclopedia, that is, a voluntary association of individuals and groups working to develop a common resource of human knowledge. The structure of the project allows anyone with an Internet connection to alter its content. Please be advised that nothing found here has necessarily been reviewed by people with the expertise required to provide you with complete, accurate or reliable information.

See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on November 1, 2012. Reliance on *Wikipedia* is not favored by federal courts. *See Badasa v. Mukasey,* 540 F. 3d 909 (8th Cir.

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[11] Dr. [redacted] indicates he has a Doctor of Divinity, but does not indicate the school where he obtained this degree.

2008). Moreover, the petitioner has not demonstrated that the use of this system produces consistent results, as would be expected of a workable system.

Dr. relies on an article he coauthored with Dr. The record contains no evidence that this article was published in a peer-reviewed publication or anywhere other than the Internet. The article includes British colleges that accept three-year degrees for admission to graduate school but concedes that "a number of other universities" would not accept three-year degrees for admission to graduate school. Similarly, the article lists some U.S. universities that accept three-year degrees for admission to graduate school but acknowledges that others do not. In fact, the article concedes:

> None of the members of N.A.C.E.S. who were approached were willing to grant equivalency to a bachelor's degree from a regionally accredited institution in the United States, although we heard anecdotally that one, W.E.S. had been interested in doing so.
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> In this process, we encountered a number of the objections to equivalency that have already been discussed.
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> James Frey, Ed.D., President of Educational Credential Evaluators, Inc., commented thus,
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> "Contrary to your statement, a degree from a three-year "Bologna Process" bachelor's degree program in Europe will NOT be accepted as a degree by the majority of universities in the United States. Similarly, the majority do not accept a bachelor's degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI."
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> International Education Consultants of Delaware, Inc., raise similar objections to those raised by ECE.,
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> "The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute the an [sic] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year US Bachelor's degree.
>
> The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly from Year 12 of your education. In the US, there are no degree programs entered from a stage lower than Year 12, and there are no 3-

year degree programs. Without the additional advanced standing year, there's no equivalency.

These materials do not examine whether those few U.S. institutions that may accept a three-year degree for graduate admission do so on the condition that the holder of a three-year degree complete extra credits.

Finally, Dr. relies on a UNESCO document, which as noted above is not applicable to degree determinations in the U.S.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). The evaluations of record are not consistent and provide little support for their determination as to the number of credits.

The evaluation prepared by states that, "the educational record I have examined represents a single-source degree which is the equivalent of a bachelor's degree in the United States system." Mr. fails to name the beneficiary or his educational institution and instead makes a general claim that Indian bachelor degrees translate to 120 semester credit hours. Absent a detailed analysis of the beneficiary's education credentials, this evaluation fails to demonstrate that the beneficiary meets the educational requirements of the labor certification.

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

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600

institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[12] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[13]

According to EDGE, a three-year Bachelor of Science degree from India is comparable to "three years of university study in the United States."

The AAO has also reviewed AACRAO's Project for International Education Research (PIER) publications: the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). The notes that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual.

One of the PIER publications reveals that a year-for-year analysis is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at 180 explicitly states that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The chart that follows states that 12 years of primary and secondary education followed by a three-

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

[13] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." This information seriously undermines the evaluations submitted, both of which attempt to assign credits hours for the beneficiary's three-year baccalaureate that are close to or beyond the 120 credits typically required for a U.S. baccalaureate.

EDGE further discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor's degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate diploma following a three-year bachelor's degree represents attainment of a level of education comparable to a bachelor's degree in the United States. However, the "Advice to Author Notes" section states:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The evidence in the record on appeal did not establish that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor's degree was required for admission into the program of study.

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in information systems. The AAO informed the petitioner of EDGE's conclusions in a Notice of Intent to Deny and Notice of Derogatory Information (NOID/NDI) dated June 3, 2013.

In response to the NOID/NDI, counsel contends that the AAO ignores the fact that a U.S. Bachelor's degree typically requires a student to possess a minimum of 120 semester units to qualify for a degree. However, counsel fails to address the inconsistencies between the education evaluations discussed above as to the number of credit hours the beneficiary's education represents. As stated above, the beneficiary's Bachelors of Science may only represent up to 90 credit hours, not 120 hours. Counsel fails to address the fact that the beneficiary's transcripts reflect failing grades in multiple classes.

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

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

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

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

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

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

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

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

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

H.4. Education: Bachelor's degree in information systems.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months required.
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: None accepted.
H.14. Specific skills or other requirements: None.

As is discussed above, the beneficiary possesses a Bachelor's of Science degree from which represents attainment of three years towards a U.S. bachelor's degree.

The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.[14] Nonetheless, the AAO's NOID/NDI permitted the petitioner to submit any 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 the DOL and to potentially qualified U.S. workers.[15] Specifically, the AAO requested that the petitioner provide

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

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

a 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 NOID/NDI, counsel submits a copy of a March 3, 2006, prevailing wage determination for a computer software engineer-applications, letters from regarding recruitment efforts and print-outs from the website. Counsel also submits a declaration from human resources manager for the petitioner, stating that the petitioner was aware that the beneficiary only held a three-year degree and that it considered this degree to be the functional equivalent to a U.S. bachelor's degree and that no applicants were rejected on this basis.

While counsel contends that this documentation evidences the petitioner's intent to accept something other than the foreign equivalent of a bachelor's degree in the U.S., the prevailing wage determination does not reflect that anything other than a bachelor's degree would be accepted for the proffered position. The letters from indicating that the exhaustive review of databases of professionals and a posting of the job opening on their website from October 5, 2006 to October 19, 2006, resulted in no responses from qualified U.S. workers does not reflect the education and experience requirements used for those searches and postings. Further, the letters reflect that the recruitment was for the position of "systems application engineer," not for the proffered position, and occurred after the labor certification in the instant case was certified. While the print-outs from submitted by counsel reflect that the petitioner advertised for a "programmer analyst" with no requirements other than two (2) years of experience in the proffered position, the print-outs are not related to the instant labor certification and were placed on September 14, 2005 and October 13, 2005.[16] Even if the AAO were to accept this as evidence that the petitioner's intent included a "bachelors or equivalent" for the instant labor certification, as discussed below, the term "or equivalent" in recruitment is insufficient notice of the petitioner's intent to DOL and potentially qualified U.S. workers.

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

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in information systems or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational

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U.S. workers available to perform the offered position. *See Id.* at 14.

[16] The recruitment period indicated on the labor certification occurred from February 2006 to April 2006.

requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.[17]

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, 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" relates 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.[18] In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded 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* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean,* the required education is clearly and unambiguously stated on the labor certification and does not include the language "or equivalent" or any other alternatives to a four-year bachelor's degree.

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 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

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[17] In addition, for classification as a professional, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification. 8 C.F.R. § 103.2(b)(1), (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).

[18] In *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *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. *See* section 103(a) of the Act.

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.

Beyond the decision of the director,[19] the evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. As is discussed above, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the June 4, 2006 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The labor certification states that the offered position requires 24 months of experience in the job offered of programmer analyst.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as: 1) a programmer analyst with California from July 7, 2004 to June 1, 2006; 2) a programmer analyst with the petitioner in California from September 26, 2002 to July 6, 2004; and 3) a programmer analyst with in Florida from July 20, 1998 to April 3, 2001. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (ii) *Other documentation*—
>
> > (A) *General.* 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 the experience of the alien.

The record contains an experience letter dated July 17, 2002, from director, on Letterhead, stating that the company has employed the beneficiary as a software consultant since July 2001. At sections J, K, and L of the ETA Form 9089, the beneficiary set forth his credentials and then signed his name on August 10, 2006, under a declaration that the contents of the form are true and correct under penalty of perjury. At section K where the beneficiary is required to list "all jobs [he] has held during the past 3 years" and to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification," the beneficiary did not list this claimed employment with Further, the letter fails to state whether the beneficiary's employment as a consultant was full-time or part-time, and the letter fails to list the beneficiary's duties there. In *Matter of Leung,* 16

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[19] 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).

I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's labor certification, lessens the credibility of the evidence and facts asserted.

The record of proceeding contains three experience letters submitted in support of a subsequently filed Form I-140 submitted by another petitioner, which was also signed by the Vice President of the petitioner in the instant case. These letters consist of: 1) an experience letter dated May 15, 2005, from CEO on letterhead stating that the company employed the beneficiary as a software engineer from July 28, 2003 to April 1, 2005; 2) an experience letter dated September 2, 2009, from director on letterhead stating that the company employed the beneficiary as a software engineer from July 15, 2001 to August 30, 2002; and 3) an experience letter dated May 17, 2000, from vice president on letterhead stating that the company has employed the beneficiary as a software engineer since August 1998.

The AAO notes that the dates of employment provided on the experience letter from , CEO of do not match those set forth by the beneficiary on the labor certification. The labor certification states that the beneficiary was employed by from July 7, 2004 to June 1, 2006, whereas the experience letter states that the beneficiary's employment lasted from July 28, 2003 to April 1, 2005. Further, the record of proceeding contains a Form G-325A, Biographic Information, signed by the beneficiary under penalty of perjury on June 1, 2007, which states that the beneficiary was employed by from July 2004 to March 2005. In addition, the dates of employment stated on the letter from CEO of overlap with the dates of employment with the petitioner as set forth on the labor certification which state that the beneficiary was working for the petitioner 40 hours per week until July 6, 2004.

As previously noted, the claimed employment with was not set forth on the labor certification by the beneficiary, and thus raises doubts as to whether the employment took place as stated on this experience letter dated September 2, 2009, or the previous one dated July 17, 2002.

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." *Matter of Ho.* at 591-92.

In response to the NOID/NDI, counsel states that the inconsistencies between the experience letters and the labor certification and Form G-325A are a result of sloppy work performed by the petitioner's prior counsel. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. 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). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). As the experience letters submitted in the instant case create unresolved inconsistencies with other evidence in the record, the AAO does not find the experience letters to be persuasive.

Therefore, the evidence in the record is not sufficient to establish that the beneficiary possessed the 24 months of experience in the job offered of programmer analyst by the priority date as required by the terms of the labor certification.

Beyond the decision of the director, the petitioner must also demonstrate that it has been able to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, the petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. *Id.* The beneficiary has not yet obtained lawful permanent residence. The record of proceeding does not contain the petitioner's federal tax returns or other regulatory-prescribed evidence. In response to the NOID/NDI, counsel failed to submit the required annual reports, federal tax returns, or audited financial statements for the petitioner. The petitioner's failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.