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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
LIN 06 174 51824

Office: NEBRASKA SERVICE CENTER

Date: NOV 09 2009

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a computer consulting company. It seeks to employ the beneficiary permanently in the United States as a Systems Analyst IV pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess either a United States baccalaureate degree or a foreign equivalent degree. The director denied the petition accordingly.

On appeal, counsel states that the beneficiary's education, training and experience were equivalent to a United States bachelor's degree and therefore the director erred in finding that the beneficiary did not meet the requirements of the labor certification. Counsel also states that the director erred in denying the petitioner without first issuing a request for evidence or notice of intent to deny.¹ Finally, counsel states that the director erred in failing to consider whether the beneficiary qualified for classification as an alien of exceptional ability.

The record shows that the appeal is properly filed and 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.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the

¹ The version of 8 C.F.R. § 103.2(b)(8) in force at the time the instant petition was filed required the director to request additional evidence in instances where there is no evidence of ineligibility, and initial evidence of eligibility is missing. The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO maintains plenary power to review each appeal on a *de novo* basis. *See, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The ETA Form 9089, part H, states that the position requires a Master's Degree in Computer Science/Applications and 12 months experience in the job offered. Part H.7 and H.7-A state that certain alternate fields of study are acceptable including engineering, technology, library information systems, chemistry, math and physics.³ Part H.8 states that, as an alternative to a Master's degree and one year of experience, the petitioner will accept a bachelor's degree and six years of experience. Part H.9 states that the petitioner will accept a "foreign educational equivalent."

The beneficiary possesses a Bachelor of Commerce Degree from the University of Delhi and an Advanced Diploma in Systems Management from the National Institute of Information Technology (NIIT). Thus, the issues are whether either the three-year bachelor's degree or the Advanced Diploma is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's years of experience in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 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).

³ As noted by the director, the list of acceptable alternate major fields of study in part H.7-A appears to have been cut off.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (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:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees.

But both 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 (Nov. 29, 1991) (emphasis added).

As noted above, the beneficiary in this case was awarded a Bachelor of Commerce degree by the University of Delhi in 1992. In support of the petition, the petitioner submitted an Evaluation of Academic Credentials prepared by [REDACTED] of Morningside Evaluations and Consulting. The evaluation states that the beneficiary was awarded a Bachelor of Commerce degree after completing three years of academic coursework and examinations. The evaluation does not state that the beneficiary's three-year Bachelor of Commerce degree is a foreign equivalent degree to a U.S. bachelor's degree. Instead, the evaluation concludes that the beneficiary possesses the equivalent of a Bachelor of Science degree in Computer Information Systems from an accredited institution in the United States based on the combination of the beneficiary's three-year Bachelor of Commerce degree and her advanced diploma from NIIT.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where, as here, the analysis of the beneficiary's credentials relies on a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."⁴ In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) 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." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30706 (July 5, 1991). Cf. 8 C.F.R.

⁴ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

§ 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability”).

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as the beneficiary does not have the minimum level of education required for the equivalent of an advanced degree.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] 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 INS, therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, “Job Opportunity Information,” describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.

See Madany, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* 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. *See 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 alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In this matter, as noted above, the ETA Form 9089 specifies that the position of System Analyst IV requires a master’s degree and one year of experience in the job offered or, in the alternative, a bachelor’s degree and six years of experience in the job offered. The petitioner indicated on Part H.9 of the ETA Form 9089 that it would accept a “foreign educational equivalent.” On appeal, counsel has submitted a letter from [REDACTED] of the petitioner. In the letter, Mr. [REDACTED] states:

In item of the ETA Form 9089, “is a foreign educational equivalent acceptable?”, I selected “yes.” This is because V-Soft will consider candidates with any suitable combination of foreign education experience and training as compatible with the bachelor’s degree education requirements for this position available within the company.

In short, the petitioner is claiming on appeal that by indicating that it would accept a “foreign educational equivalent” it intended to indicate that it would accept a combination of education, experience and training. This appears to go against the plain meaning of the labor certification. However, if the petitioner was, in fact, willing to accept a combination of education and experience as equivalent to a bachelor’s degree, then the AAO must find that the petitioner has failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree. 8 C.F.R. § 204.5(k)(4). As explained above, in order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor’s degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree” from a college or university, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act.

Alien of Exceptional Ability

Counsel states on appeal that the director should have considered whether the beneficiary qualified for classification as an alien of exceptional ability under INA §203(b)(2). The regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(i) **General.** Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.**

(Bold emphasis added.) Thus, if the job requirements on the ETA Form 9089 do not demonstrate that the job requires an alien of exceptional ability, the petition may not be approved in that classification. The job requirements are listed in part H of the ETA Form 9089. In this case, the job offered requires a master's degree and one year of experience in the job offered or, in the alternative, a bachelor's degree or six years of experience in the job offered. No specific skills or other requirements are listed for the position.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. Thus, a job that requires an individual of exceptional ability must require at least three of the following:

An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability

The ETA Form 9089, Part H, lines 4, 8 and 9, indicate that the job requires at least a U.S. baccalaureate or foreign educational equivalent. Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the degree required is indicative of or consistent with a degree of expertise significantly above that ordinarily encountered in the occupation of systems analyst, the occupation title identified on the ETA Form 9089, Part F, line 3.

The Occupational Outlook Handbook (OOH), prepared by the Department of Labor and available online at <http://www.bls.gov/oco/ocos287.htm> (accessed October 13, 2009 and incorporated into the record of proceedings), provides:

Education and training. When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred.

As a bachelor's degree is preferred for most systems analyst positions, the petitioner has not established that a U.S. baccalaureate or foreign educational equivalent is indicative of a degree of expertise significantly above that ordinarily encountered in the field. Thus, this job requirement cannot serve as evidence that the job requires an alien of exceptional ability.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

The occupation title for the position is listed on Part F, line 3 as "Systems Analyst IV." The petitioner indicated on the ETA Form 9089, Part H.6, that the job requires 12 months (one year) of experience in the job offered. The petitioner indicated on Parts H.8 through 8-C. that, in the alternative, it would accept a bachelor's degree and six years of experience. Thus, the job does not require 10 years of full-time experience "in the occupation."

A license to practice the profession or certification for a particular profession or occupation

There is no indication on the ETA Form 9089, and none is made on appeal, that a license or certification is required to work as a Systems Analyst IV.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

The Level III prevailing wage for the occupation, as certified on the ETA Form 9089, Part F, line 5, is \$30.72 per hour (\$63,897.60 per year). The proffered wage listed on the ETA Form 9089, Part G, is \$30.72 per hour (\$63,897.60 per year). Thus, the wage offered by the petitioner is not indicative of a job that requires an individual of exceptional ability.

Evidence of membership in professional associations

No membership requirements appear on the ETA Form 9089.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The record does not indicate that the job requires formal recognition for achievements and significant contributions to the industry or field.

In light of the above, the job does not require at least three of the factors identified as criteria for aliens of exceptional ability. As the petitioner has not demonstrated that the job requires an

individual of exceptional ability as defined at 8 C.F.R. §§ 204.5(k)(2), the petition is not approvable under that classification.

Further, the record does not establish that the beneficiary is an alien of “exceptional ability” within the meaning of the Act and relevant regulations. As stated above, the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered.” Therefore, evidence submitted to establish exceptional ability must somehow place the beneficiary above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.” Qualifications possessed by all or most workers in a given field cannot demonstrate “a degree of expertise significantly above that ordinarily encountered.”

Counsel asserts that the beneficiary satisfies four of the six criteria listed in 8 C.F.R. § 204.5(k)(3)(ii). First, counsel notes that the beneficiary possesses a degree which relates to her area of exceptional ability. However, there is nothing in the record to indicate that either the beneficiary’s Bachelor of Commerce degree from the University of Delhi or her Advanced Diploma in Systems Management from NIIT demonstrate “a degree of expertise significantly above that ordinarily encountered.”

Counsel also notes that the beneficiary has over ten years of experience as a Systems Analyst, as demonstrated by experience letters from previous employers. In addition, counsel states that the beneficiary’s former employers recognized her achievements and her significant contributions to the field. However, only one of the two experience letters in the record goes beyond a simple description of the beneficiary’s duties. The letter is from [REDACTED] of PLC Consulting Company. The letter states that the beneficiary was employed as a software engineer from March 1995 to April 2000 and states that the beneficiary “has contributed immensely to the success of the projects she worked on. She shouldered responsibility very well and worked as part of the project teams winning respect of her colleagues in the company.” The letter does not detail any achievements or significant contributions to the field made by the beneficiary, and does not demonstrate that the beneficiary had “a degree of expertise significantly above that ordinarily encountered.”

Finally, counsel states that the W-2 forms submitted in support of the I-140 petition show that the beneficiary commands a salary which demonstrates exceptional ability. The record contains a copy of the 2005 Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary. The W-2 shows that the petitioner paid the beneficiary only \$15,275.85 in 2005. The record also contains a copy of a 2005 Form W-2 issued to the beneficiary by ACE Technologies, Inc. which shows that the beneficiary was paid \$41,355.98 by ACE Technologies, inc. in 2005. Even taken together, these amounts are below the prevailing wage for systems analysts as listed on Part F.5 of the ETA Form 9089. Therefore, the record does not demonstrate that the beneficiary earned a salary demonstrating exceptional ability.

As the petitioner has not demonstrated that the beneficiary is an individual of exceptional ability as defined at 8 C.F.R. §§ 204.5(k)(3)(ii), the petition is not approvable under that classification.

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.