

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

B5

[REDACTED]

FILE: [REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 28 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,


Perry Rheu
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 manufacturer of diesel engines. It seeks to employ the beneficiary permanently in the United States as a product support engineer 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 Alien 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 have a bachelor's degree in mechanical engineering. He also determined that the description of five years of experience stipulated under special skills on the ETA Form 9089 did not establish that the required experience was progressive. Finally the director also determined that the petitioner had not established that the proffered position required an individual with an advanced degree or its equivalent, a baccalaureate degree with five years of work experience.

The record shows that the appeal¹ 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.²

The AAO will first examine whether the position requires an individual with an advanced degree, or a baccalaureate with five years of work experience. It will then examine the director's and counsel's statement with regard to the work experience stipulations on the certified ETA Form 9089. Finally it will examine whether the beneficiary is eligible and qualified for the proffered position.

Minimum Requirements of Proffered Position

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

¹ The AAO notes that the petitioner filed two Forms I-290B for the same petition, [REDACTED] received on May 8, 2008, and [REDACTED] received on May 12, 2008. The record reflects that the second appeal was submitted due to a concern by counsel that the initial appeal had been sent to the wrong United States Citizenship and Immigration Services (USCIS) office. The record reflects one appeal fee paid. The AAO has considered all materials filed on appeal.

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

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 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.*

For the reasons discussed below, we find that the director's conclusion that the minimum requirements for the position do not require an individual with an advanced degree or its equivalent is not supported by the plain language of the regulation at 8 C.F.R. § 204.5(k)(4), which is binding on us.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

(A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

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.) While the director failed to cite this regulation, it provides the legal basis for his ultimate conclusion.

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.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in mechanical engineering is the minimum level of education required. Line 6 reflects that no experience in the proffered position is necessary. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable. Section 14, specific skills or other requirements states the following "5 years experience working with diesel engine products and equipment. Any suitable combination of education, training or experience is acceptable."³

U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *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). USCIS must examine "the language of the labor certification job requirements" in order to

³ The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

At the time the labor certification was filed, the DOL was denying labor certification applications containing alternative requirements if Part H. 14 of the application did not contain the *Kellogg* language.

However, two BALCA decisions have significantly weakened this requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the *Kellogg* language on the labor certification application violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements.

determine what the job requires. *See generally 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 application form].” *Id.* at 834 (emphasis added). 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.

On appeal, counsel states that the petitioner does not have to establish that the position requires an individual with an advanced degree or its equivalent. Counsel refers to an unpublished AAO decision in the *Immigration Reporter* to support her contention that the petitioner has to demonstrate that the beneficiary had a bachelor’s degree, or a foreign equivalent degree, plus five years of progressive experience in the profession. Counsel also cites to an interoffice memorandum written by Former Acting Association Commissioner Michael Cronin and Deputy Executive Associate Commissioner William R. Yates⁴ with regard to the adjudication of the ETA 750, the predecessor to the present ETA Form 9089. Counsel notes that this memo states that former legacy INS adjudicators must examine not just what is included on the form in any consideration of the term “progressive experience,” and also provide petitioners with an opportunity to clarify issues prior to any decision.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff’d* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency’s internal guidelines “neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.”) Thus, the AAO is not bound to follow the Cronin memo.

Counsel asserts that United States Citizenship and Immigration Service (USCIS) should find that five years of progressively responsible experience was intended by the petitioner since a person working in the beneficiary’s field should have highly technical expertise with diesel engines after

⁴ Memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs, and William R. Yates, Deputy Executive Associate Commissions, Office of Field Operations, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants*, AD00-08, March 20, 2000.

obtaining a bachelor's degree in engineering. Counsel describes the positions and length of employment with a Costa Rican company and with Detroit Diesel Corporation in the U.S. and states that both positions were for engineering managerial professionals.

In the instant matter, the petitioner requires five years of specific skills experience working with diesel engine products and equipment, but does not require experience in the proffered position. In addition, the experience requirement is not described as progressive experience.

A notice provided by the legacy Immigration and Naturalization Service (INS) published in *The Federal Register* on July 3, 2000,⁵ addresses a March 20, 2000 INS interoffice memorandum that clarified the INS requirements that govern the adjudication of immigrant visa petitions filed under section 204 of the Act to classify aliens as members of the profession holding an advanced degree or its equivalent. The March 20, 2000 memorandum states that the Labor Certification Form ETA-750 did not clearly indicate whether a person with a bachelor's degree must have five years of post-baccalaureate progressive experience in the profession to meet the minimum qualifications for the job. The INS notice noted that the mere absence of the word "progressive" from Blocks 14 and 15 on the ETA-750 was not grounds for denial of the petition if the required experience was in fact progressive in nature.

In the instant matter the proffered position does qualify for the EB2 classification based on the requirement for a bachelor's degree and five years of work experience. The AAO notes, however, that counsel did not properly reflect required work experience on the Form 9089 in response to questions that specifically ask about it.

Given the history of the *Kellogg* language requirement at 20 C.F.R. § 656.17(h)(4)(ii), the AAO does not interpret this phrase to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. To do so would make the actual minimum requirements of the offered position impossible to discern, it would render largely meaningless the stated primary and alternative requirements of the offered position on the labor certification, and it would potentially make any labor certification with alternative requirements ineligible for classification as an advanced degree professional.

In the instant matter, the petitioner is not relying on alternative requirements to qualify the beneficiary for the proffered position. In Part H, line 8, of the ETA Form 9089, the petitioner accepts no alternative combination of education or experience. Its primary requirements are a bachelor's degree in mechanical engineering and five years of work experience mentioned in Section 14, as specific skills. Thus, the *Kellogg* language is not applicable to the instant petition. Moreover, the *Kellogg* language will not be read to impose an additional or lesser set of minimum requirements such that the position would not qualify as an advanced degree position.

⁵ "Opportunity to File Untimely Motion to Reconsider Decisions Denying EB-2 Immigrant Visa Petitions," *The Federal Register*, July 3, 2000 (Volume 65, Number 129) pages 41093-41097.

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).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated

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).

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, coursework that fulfils the requirements for a baccalaureate degree without the actual diploma 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 the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees or coursework, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”⁶ In order to have experience and education

⁶ 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.

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.

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, 30306 (July 5, 1991). Cf. 8 C.F.R. § 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"). The record contains no diploma, transcripts, or other official records from the University of Costa Rica to establish that the beneficiary has a bachelor's degree in mechanical engineering.

The record reflects that the beneficiary pursued university-level studies at the University of Costa Rica from 1984 to 1993 in some lower level fields of studies with primary studies done in mechanical engineering. However, the record does not establish that the beneficiary ever completed a baccalaureate degree in mechanical engineering. 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 he 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. Federal 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. In this matter, Part H, line 4, of the labor certification reflects that a bachelor of mechanical engineering degree is the minimum level of education required.

The petitioner submitted two educational equivalency reports to the record. The first, was submitted with the initial I-140 petition⁷ is dated March 25, 1998, was written by [REDACTED]. [REDACTED] determines that the beneficiary has 162 undergraduate semester credit hours based on formal and non-formal education, leading to a baccalaureate degree. He then examined the beneficiary's work experience and his membership in two professional engineering societies. Combining both the beneficiary's education, work experience, and other factors, such as level of functioning on the job, [REDACTED] states that the beneficiary possesses the skills, knowledge, and professional standing of an individual with the equivalent of a bachelor's degree in mechanical engineering.

On appeal, the petitioner submits a second educational evaluation report, dated June 2, 2008 written by [REDACTED]. The [REDACTED] examined the beneficiary's nine years of studies at the University of Costa Rica. [REDACTED] states that based on the number of years of coursework, the nature of the beneficiary's coursework, the grades attained in the

⁷ The evaluation appears to have been solicited for the beneficiary's H-1B visa petition, a non-immigrant classification that does allow a combination of education and work experience as a baccalaureate equivalent in specific instances.

course, and the hours of academic coursework, the beneficiary attained the equivalent of a bachelor of science degree in mechanical engineering from an accredited U.S. college or university.

The petitioner also submits a letter from [REDACTED] dated May 14, 2008. [REDACTED] states that the beneficiary attended the University of Costa Rica from 1984 to 1993 and studies mechanical engineering. She continues that the beneficiary in June 1993 completed all the coursework necessary to obtain a bachelor's degree in mechanical engineering. She adds that the beneficiary earned his degree and was eligible to receive a diploma for the bachelor's degree in mechanical engineering as of July 6, 2001.

As stated previously, coursework that fulfils the requirements for a baccalaureate degree without the actual diploma 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.

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 beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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.