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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: **APR 08 2014** OFFICE: NEBRASKA SERVICE CENTER FILE [REDACTED]

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:

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the immigrant visa petition. Upon a subsequent motion to reconsider the director affirmed his decision to deny the petition and the Administrative Appeals Office (AAO) summarily dismissed the appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted, the previous decision of the director will be affirmed, and the petition will remain denied.

The petitioner describes itself as a health care business. It seeks to permanently employ the beneficiary in the United States as a speech language pathologist. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ On March 12, 2013, the director denied the petition because the petitioner failed to establish that the beneficiary met the minimum educational requirements stated on the labor certification. The director granted a motion to reconsider and on May 16, 2013, the director affirmed his decision to deny the petition.

On November 27, 2013, the AAO summarily dismissed the appeal pursuant to 8 C.F.R. § 103.3(a)(1)(v), as the appeal failed to identify specifically any erroneous conclusion of law or statement of fact. The record did not contain referenced correspondence from the petitioner more than five months past the filing of the Form I-290B.

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 motion. A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director does not identify all of the grounds for denial in the initial decision.² On motion, counsel submits a brief, tracking records and copies of Form I-290B instructions.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(2) Requirements for motion to reopen.

A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . .

On motion, counsel states that the petitioner submitted additional documentation to the record no later than August 1, 2013 and provides copies of tracking records to support counsel's assertion. Counsel asserts that the brief and additional evidence in support of the appeal were submitted directly to the Nebraska Service Center (NSC). Although the instructions to Form I-290B state that a

¹ Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

² *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).

brief and evidence not submitted with the Form I-290B must be submitted directly to the AAO, counsel asserts that the Form instructions were confusing when read with the instructions on the U.S. Citizenship & Immigration Services (USCIS) website. Counsel asserts that the supporting documents were delivered to the NSC on August 1, 2013 and not returned. Although the record does not include the documents received by the NSC on August 1, 2013, the motion contains a copy of a brief dated May 29, 2013, which contends that the director erred in concluding that the petitioner failed to establish that the beneficiary met the minimum requirements of the instant labor certification. Therefore, the petitioner's motion qualifies for reopening.

At issue in this case is whether the beneficiary possesses an advanced degree as required by the terms of the labor certification and the requested preference classification.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).³ The priority date of the petition is May 4, 2011.⁴

Part H of the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree in Audiology/Speech Language Pathology or related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: None 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: License in Speech Language Pathology required.

Part J of the labor certification states that the beneficiary possesses a Master's degree in Audiology and Speech Language Pathology from [REDACTED] completed in 2007. The record contains a copy of the beneficiary's Master of Science in audiology and speech language pathology diploma and transcripts from [REDACTED] and transcripts from [REDACTED] issued in 2007. The record also contains a copy of the beneficiary's Bachelor of Science in Speech and Hearing diploma and transcripts from [REDACTED] issued in November 2000.

³ See section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); see also 8 C.F.R. § 204.5(a)(2).

⁴ The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

⁵ Affiliated with [REDACTED]

The record contains a June 3, 2010 academic transcript from [REDACTED] reflecting that the beneficiary earned 3.0 semester hours in Social Communication Issues in Spring 2010. The record contains a May 25, 2010 academic transcript from the [REDACTED] at [REDACTED], reflecting that the beneficiary earned 3.0 semester hours in Voice Disorders in Spring 2009-2010. The record contains an August 24, 2009 academic transcript from [REDACTED] reflecting that the beneficiary earned a total of 9.0 semester hours in Neuroanatomy Speech/Swallow/Lang, Neuropathology Lang and Cognition, and Neuropathology of Swallow & Speech in 2009.

The record also contains a course-by-course evaluation dated February 18, 2008, of the beneficiary's educational credentials prepared by [REDACTED]. The evaluation states that the beneficiary's Bachelor of Science in Speech and Hearing is equivalent to completion of three years of undergraduate work in the United States. The evaluation states that the beneficiary's provisional certificate for the Master of Science in Audiology and Speech Language Pathology, is equivalent to a Bachelor's degree in Communication Sciences and Disorders and a Master's degree in Speech-Language Pathology and Audiology in the United States.

The record contains an evaluation dated August 22, 2009, of the beneficiary's educational credentials prepared by the [REDACTED]. The evaluation states that the beneficiary's Bachelor's degree and Master's degree may be considered comparable in level to a Master of Science degree in Audiology and Speech Language Pathology awarded by a regionally accredited college/university in the United States.

Part K of the labor certification states that the beneficiary possesses the following employment experience:

- Speech Pathologist/Audiologist with [REDACTED] from December 1, 2000 to March 31, 2002.
- Lecturer with [REDACTED], [REDACTED] India, from April 1, 2002 to December 22, 2004.
- Audiologist/Speech Language Pathologist with [REDACTED], [REDACTED] India, from July 16, 2007 to November 30, 2007.
- Speech Language Pathologist with [REDACTED] India, from January 9, 2008 to October 8, 2008.
- Speech Language Pathologist with the petitioner from December 14, 2008 to May 4, 2011, the date on which the labor certification was submitted.

The record contains an October 8, 2008 experience letter from [REDACTED], Assistant General Manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a Speech Language Pathologist and Audiologist from January 9, 2008, until October 8, 2008, the date of the letter.

The record contains a December 19, 2007 certificate from Dr. [REDACTED], Executive Director, on [REDACTED] letterhead stating that the company employed the beneficiary as an Audiologist and Speech Language Pathologist from July 16, 2007 to November 30, 2007.

The record contains a December 22, 2004 experience letter from Dr. [REDACTED] Project Director, on [REDACTED] letterhead stating that the company employed the beneficiary as a Lecturer in Speech Pathology from April 1, 2002 to December 22, 2004, the date of the letter.

The record contains a March 31, 2002 experience certificate from Bro. [REDACTED] Director, on [REDACTED] letterhead stating that the hospital employed the beneficiary as an Audiologist and Speech Pathologist from December 1, 2000 to March 31, 2002.

The director's decision denying the petition states that the beneficiary's Bachelor of Science degree and Master of Science degree are not equivalent to a Master of Science degree in the United States. The director found that, even though the beneficiary holds a speech language license in the State of California, the International Institute of California (IIC) evaluated the beneficiary to hold the equivalent of a U.S. Master's degree in Audiology and Speech Language Pathology and the beneficiary had been successfully screened by the [REDACTED] program, these opinions were not in accordance with information provided by Electronic Database for Global Education (EDGE) and the petitioner had not demonstrated that the beneficiary met the minimum requirements at the time the labor certification was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The director's decision granting the motion to reopen and affirming his prior decision finds that counsel's assertion that the beneficiary's California State license in speech pathology necessitates the beneficiary's possession of a master's degree or its equivalent is incorrect. The director states that, while the licensure requires a finding that an applicant must possess a master's degree in speech language pathology or "qualifications deemed equivalent by the board," Title 16 of the California Code of Regulations, section 1399.152(a) defines "qualification deemed equivalent by the board" to include "in lieu of a master's degree an applicant may present evidence of completion of at least 30 semester units acceptable toward a master's degree while registered as a graduate student in a degree program in speech language pathology and/or audiology." As such, the licensing board did not necessarily find the beneficiary's master's degree to be equivalent to a U.S. master's degree.

II. LAW AND ANALYSIS

The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁶ *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.

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

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

Eligibility for the Classification Sought

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, the petitioner relied on the beneficiary's three-year Bachelor of Science degree from [REDACTED] India, followed by a Master of Science degree from [REDACTED] India as being equivalent to a U.S. master's degree.

As is noted above, the record contains evaluations of the beneficiary's educational credentials prepared by ECE and IIC stating that the beneficiary's Bachelor's degree and Master's degree may

be considered comparable in level to a Master of Science degree in Audiology and Speech Language Pathology in the United States.⁷

The AAO has reviewed 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>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁸

According to EDGE, the beneficiary's three-year Bachelor of Science is comparable to three years of university study in the United States, and her Master of Science is comparable to a bachelor's degree in the United States.

In the appeal brief submitted with the motion, counsel contends that, because the California licensing board granted the beneficiary a license, it found that the beneficiary's education is equivalent to a U.S. master's degree. Counsel contends that, contrary to the director's findings, the licensing board did not

⁷ 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).

⁸ In *Confluence International, 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 beneficiary'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. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary'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 required a degree and did not allow for the combination of education and experience.

grant the beneficiary her license based on the Title 16 section 1399.152(a) exception regarding qualifications deemed equivalent to a master's degree because she was not a graduate student in a degree program in speech language pathology and/or audiology. Counsel asserts that the licensing board directed the beneficiary to engage in "coursework" to cure the deficiency between her Indian master's degree and a U.S. master's degree. Counsel contends that that the AAO should find the beneficiary's Indian education combined with her completion of 14 semester hours in the United States to be the equivalent of a master's degree in the United States.

Counsel's assertions are unpersuasive. While counsel contends that the board found the beneficiary's education to be equivalent to a U.S. master's degree, an April 14, 2008 letter from the licensing board clearly states that the board did not find the beneficiary's Indian credentials to be equivalent to a U.S. master's degree. The board stated that they were only able to identify 16 semester units in speech-language pathology of the required 30 units at the graduate level, requesting that the beneficiary provide evidence of 14 semester units to meet the 30 hour requirement. While the beneficiary's U.S. transcripts indicate that she completed those additional 14 semester units by November 1, 2010, the date on which she was issued her temporary Required Professional Experience (RPE) license, those transcripts do not reflect that the beneficiary was awarded a U.S. master's degree. The beneficiary does not hold a U.S. master's degree or a foreign equivalent degree.

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

However, as noted above, 8 C.F.R. §204.5(k)(2) defines an advanced degree as "[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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." According to EDGE, the beneficiary holds the equivalent of a U.S. bachelor's degree. As the beneficiary must possess five years of experience attained after May 2007, it would not be possible for the beneficiary to accumulate five years of experience prior to May 4, 2011. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

The Minimum Requirements of the Offered Position

The petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 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).

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. Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a Master's degree in Audiology/Speech Language Pathology or related field and a license in Speech Pathology.

For the reasons explained above, the petitioner has failed to establish that the beneficiary possesses a U.S. master's degree or the foreign equivalent of a U.S. master's degree and cannot, therefore, meet the minimum educational requirements of the instant labor certification. The labor certification does not permit an alternate combination of education and experience.

In addition, the petitioner has also failed to establish that the beneficiary held the required special skills prior to May 4, 2011, the date on which the instant labor certification was filed. While the record contains a temporary RPE license issued to the beneficiary on November 1, 2010, this license is for the sole purposes of permitting the holder to obtain the required supervised clinical experience necessary to obtain a license under section 2532.2 of the California Business and Professional Code (CBPC). Section 2532.3 of the CBPC provides a temporary license for individuals who hold an unrestricted license from another state, however, the license issued to the beneficiary was issued under section 2532.7 of the CBPC and is only an RPE license. The record reflects that the beneficiary was not issued a license in speech pathology until December 15, 2011, after the May 4, 2011 priority date.

The petitioner failed to establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must be denied for this reason.

The Ability to Pay the Proffered Wage

Beyond the decision of the director,⁹ the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

The record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2011 and 2012 and does not contain 2011 and 2012 Internal Revenue Services (IRS) Forms W-2, Wage and Tax Statements for the beneficiary. Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date. With any future filings, the petitioner must submit evidence to demonstrate its ability to pay the proffered wage from the priority date onwards.

III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary qualifies for classification as a professional holding an advanced degree. The petitioner also failed to establish that the beneficiary possessed the advanced degree and license required by the terms of the labor certification. Therefore, the beneficiary does not meet the minimum requirements of the instant labor certification. The director's decision denying the petition is affirmed.

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 motion is granted. Upon reopening, the AAO affirms the director's decision. The petition will remain denied.

⁹ 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).