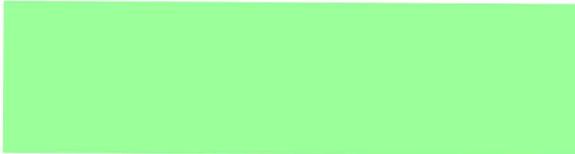




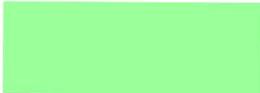
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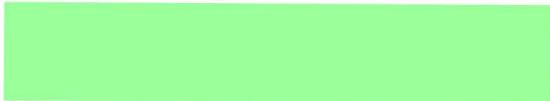


DATE: **AUG 05 2014**

OFFICE: TEXAS SERVICE CENTER

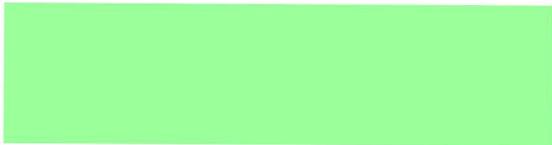
FILE: 

IN RE: Petitioner:  
Beneficiary:



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

The petitioner describes itself as a behavioral health counseling company. It seeks to permanently employ the beneficiary in the United States as a Clinical Supervisor. 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).

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).<sup>1</sup> The priority date of the petition is October 17, 2011.<sup>2</sup>

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

- H.4. Education: Master's in Social Work.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Yes, 60 months in social work/clinical supervisor/counselor.
- H.14. Specific skills or other requirements: Position requires five years of experience in Behavioral Health/Social Work. Experience must include psychological evaluation counseling for children and adolescents, developing and implementing treatment plans for Autistic, ADHD, and ODD (oppositional defiant disorder) children, preparing and presenting reports, supervising, training and evaluation counselors, and communicating and coordinating with case managers and insurers. ANY SUITABLE COMBINATION OF EDUCATION, TRAINING AND EXPERIENCE IS ACCEPTABLE.

Part J of the labor certification states that the beneficiary possesses a Master of Arts in Social Work from [REDACTED] India, completed in 2000. The record contains a copy of this

<sup>1</sup> 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).

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. See 8 C.F.R. § 204.5(d).

Master of Arts diploma and transcripts.<sup>3</sup> The record contains a copy of the beneficiary's statement of marks and Bachelor of Social Work issued in summer 1998 from [REDACTED]. The record also contains the beneficiary's diploma in mental retardation from the [REDACTED], [REDACTED] dated April 1993 and statement of marks.<sup>5</sup>

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] on March 27, 2006. The evaluation substantially relates that the beneficiary's education degrees from [REDACTED] and [REDACTED] are the equivalent of a Master of Arts degree in Social Work with a concentration in Special Education from an accredited institution of higher education in the United States.

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

- Clinical Supervisor with the petitioner in the U.S. from July 1, 2009 to present;
- Behavioral Specialist with [REDACTED] from February 1, 2009 until June 30, 2009;
- Social Worker with [REDACTED] from September 16, 2007 until January 31, 2009;
- Counselor with [REDACTED] from December 14, 2006 until September 15, 2007;
- Medical Social Service Officer with [REDACTED] in India from December 10, 2003 until December 5, 2006;
- Social Worker with [REDACTED] in India from July 14, 2000 until February 28, 2002

With the petition, the petitioner submitted the following evidence of the beneficiary's relevant experience:

- Undated letter from [REDACTED] President, [REDACTED] stating that he was the founder and formerly the vice-president of [REDACTED], a healthcare staffing company, and that he was forced to close the company due to financial circumstances associated with the recession. He states that the beneficiary worked for [REDACTED] from December 2006 – June 2009 as a social worker/counselor/behavioral specialist, for a period of 30 months. He states that in 2009 he established the petitioner, [REDACTED] and that the beneficiary has worked with his new company as clinical supervisor from 2009 until the present;
- Letter dated August 22, 2012 from [REDACTED] Supervisory Medical Social Service Officer, [REDACTED] letterhead stating that the company

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<sup>3</sup> The beneficiary's transcripts indicate that the Master of Arts was obtained after four semesters of study, or in two years, from June 1998 through April 2000.

<sup>4</sup> The statement of marks for the beneficiary's Bachelor of Arts indicates that his degree was awarded after three years of study in 1996, 1997 and 1998.

<sup>5</sup> The statement of marks for the diploma indicates that the beneficiary attended this institution for one year, in 1993.

employed the beneficiary as a Medical Social Service Officer from December 2003 until September 2006. Mr. [REDACTED] describes the duties performed by the beneficiary but does not state whether the beneficiary worked in a full-time capacity.

In response to a Request for Evidence (RFE) from the director dated August 10, 2012, the petitioner resubmitted the March 27, 2006 educational evaluation of [REDACTED] and submitted the following additional evidence of the beneficiary's experience:

- Undated letter from [REDACTED] Chief Accounts Officer, [REDACTED] stating that the company employed the beneficiary as a Social Worker from June 2000 until an unknown date;
- Letter dated February 24, 2006 from [REDACTED] Administrative Officer, [REDACTED] certifying the beneficiary's employment as an M.S.S.O. and salary of Rs. 5850/- per month from December 10, 2003 until an unknown date.

The director denied the petition on October 12, 2012, finding that the beneficiary does not possess a foreign degree equivalent to a United States Master's degree.

On appeal, the petitioner states that the beneficiary has six years of post-secondary education and therefore meets the "six-year rule" for Indian masters degrees. The petitioner asserts that the education evaluation from [REDACTED] establishes that the beneficiary has the equivalent of a Master's degree in Social Work.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.<sup>6</sup> We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>7</sup> We may deny a petition that fails to comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision.<sup>8</sup>

## II. LAW AND ANALYSIS

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

<sup>6</sup> See 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *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., *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

<sup>7</sup> The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>8</sup> 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).

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

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

(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).<sup>9</sup> *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.

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<sup>9</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

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

*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 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the legacy INS 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).

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold at least a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."<sup>10</sup> 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" of a United States baccalaureate degree. See 8 C.F.R. § 204.5(k)(2).

The beneficiary's degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the beneficiary 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 a beneficiary is an advanced degree professional is any less than the evidence required to show that the beneficiary 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. See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3<sup>rd</sup> Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory

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<sup>10</sup> Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of H-1B 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.

construction). 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).<sup>11</sup>

Therefore, if the petitioner were to assert that the beneficiary is qualified as an advanced degree professional because he or she has a bachelor's degree and five years of progressive experience, the degree would need to be a single U.S. bachelor's (or foreign equivalent) degree.

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, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

In the instant case, the petitioner relies on the beneficiary's two-year Master of Arts in Social Work from India, completed in 2000, in combination with the beneficiary's three-year Bachelor of Social Work issued in summer 1998 from as being equivalent to a United States Master's degree. The petitioner also relies on the beneficiary's one year diploma from the issued in 1993.

As is noted above, the record contains an evaluation of the beneficiary's educational credentials prepared by signed on March 27, 2006. The evaluation states that the beneficiary obtained: a diploma from the in 1993; a Bachelor of Arts in Social Work at Nagpur University in 1998; and a Master of Arts in Social Work from the in 2000. The evaluation concludes that based on the studies undertaken, the academic coursework, the number of credit units earned, the number of years of coursework, the grades earned, and the final diplomas, and on the basis of the credibility of the beneficiary has attained the equivalent of a Master of Arts degree in Social Work with a concentration in Special Education from an accredited institution of higher education in the United States. Dr. does not indicate how he arrived at his conclusion, and does not cite any specific references in his evaluation. He does not specify the number of credit hours, the length of study, or the beneficiary's grades to support his conclusion.

On appeal, counsel relies upon meeting minutes of the American Immigration Lawyers Association (AILA) and a "6 yr" rule to establish that the beneficiary's education is the equivalent of a United States Master's degree. The liaison meeting minutes are not binding on USCIS. We are bound by the Act, agency regulations, and precedent decisions of the agency and published decisions from the circuit court of appeals within the circuit where the action arose. *See N.L.R.B. v. Askkenazy Property*

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<sup>11</sup> Compare 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").

*Management Corp.* 817 F. 2d 74, 75 (9<sup>th</sup> 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 (9<sup>th</sup> 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). We note further that the petitioner's evaluator, Dr. [REDACTED] did not rely on the beneficiary's one-year diploma to reach his equivalency determination. In relying solely on the reputations of [REDACTED] and the [REDACTED], Dr. [REDACTED] implicitly excludes from his conclusion the beneficiary's coursework at the [REDACTED].<sup>2</sup> Further, the WES evaluation submitted on appeal does not attribute any academic equivalency to the beneficiary's one-year diploma from the [REDACTED]. Thus, the beneficiary completed three years of study for his Bachelor's degree, and two years of study for his Master's degree, and not six years of post-secondary academic study as argued by the petitioner's counsel.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, [www.aacrao.org](http://www.aacrao.org), 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." <http://www.aacrao.org/About-AACRAO.aspx> (accessed July 30, 2014). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed July 30, 2014). Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.<sup>13</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>14</sup>

<sup>12</sup> Eligibility for this diploma program is 10 + 2 or the equivalent of a high school education in science, arts or commerce, and lasts one year. *See*, [http://\[REDACTED\]](http://[REDACTED]) (accessed July 30, 2014). Nor is this institution on the list of accredited institutions in India. *See*, <http://www.ugc.ac.in/oldpdf/alluniversity.pdf>. It thus appears that these studies may be vocational and not academic in nature.

<sup>13</sup> *See An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>14</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree.

According to EDGE, the beneficiary's bachelor's degree most closely resembles the Bachelor of Arts/Bachelor of Commerce/Bachelor of Science/Bachelor of Computer Applications which represents attainment of a level of education comparable to two to three years of university study in the United States. Credit may be awarded on a course-by-course basis.<sup>15</sup> Further, the beneficiary's Master of Arts degree represents attainment of a level of education comparable to a bachelor's degree in the United States. Evidence in the record did not establish that the beneficiary possessed the Master's degree required for classification as an advanced degree professional and to meet the minimum educational requirements of the offered position as set forth on the labor certification. On February 11, 2014, we issued a Notice of Intent to Dismiss (NOID) attaching copies of the EDGE credentials.

In response, the petitioner submitted an article and an evaluation from WES, World Education Services. The article indicates that WES now recognizes Indian 3-year Bachelor's degrees as equivalent to United States Bachelor's degrees when the degrees have been earned in Division I and II and when the awarding institution has been accredited by India's [REDACTED] with a grade of "A" or better. The petitioner submitted a news article from Wikipedia indicating that [REDACTED] has been accredited with the highest 'A' grade by the [REDACTED]. Online content from "Wikipedia" is subject to the following general disclaimer:

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

See [http://en.wikipedia.org/wiki/Wikipedia:General\\_disclaimer](http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer), accessed on July 30, 2014.

We are not certain that the Wikipedia pronouncement of [REDACTED] A status translates into a Master's degree equivalent for the beneficiary. The petitioner also submitted a WES evaluation indicating that the beneficiary's three-year Bachelor of Social Work awarded by [REDACTED] is the equivalent of three years of undergraduate study from a regionally accredited institution in the United States. Given that WES equates the beneficiary's studies at [REDACTED] to three years of university study in the United States, it seems that the WES article is not applicable to the degree

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In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

<sup>15</sup> The beneficiary's bachelor's degree was awarded after three years of study.

from [REDACTED] It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

After stating that the beneficiary's Bachelor of Arts is equivalent to three years of undergraduate study in the United States, the WES evaluation concludes that the beneficiary's Master of Arts in Social Work is equivalent to a United States bachelor's and master's degree. The evaluation does not indicate how it arrived at the conclusion that the beneficiary's studies are the combined equivalent of a bachelor's and a master's degree in the United States with a specialization in medical and psychiatric social work. The evaluation does not refer to any standards, length of duration or credit hours required by United States institutions before awarding a Master of Arts with a concentration in medical and psychiatric social work. The WES evaluation converts the beneficiary's foreign credits to equivalent United States credits, and finds that the beneficiary has total graduate semester credits of 31.5 hours and total undergraduate semester credits of 125 hours. The evaluation's course by course analysis stating that the beneficiary has attained the equivalent of 31.5 hours of graduate semester credits is not linked to any reference that a United States institution might consider these credits to be equal to a Master's degree. The evaluation is not signed nor is the evaluator named.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *See also 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).

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.

The petitioner submits evidence on appeal that the beneficiary has received a Behavioral Specialist certification from Pennsylvania, the minimum requirements for which are a master's degree or higher.<sup>16</sup> The license was not issued until January 8, 2014, so may not be considered to have qualified the beneficiary as of the priority date, which in this case is October 17, 2011. The petitioner

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<sup>16</sup> The [REDACTED] indicates on its website that licensing requirements for Behavior Specialists, as outlined in Act 62, include: a master's or higher degree from a board-approved accredited college or university in a related field of study; completion of relevant educational and training programs, including but not limited to professional ethics, autism specific trainings, assessments training, crisis intervention, and family collaboration; at least one year of experience involving functional behavior assessments; and at least 1000 hours in direct clinical experience with individuals with behavior challenges or at least 1000 hours experience in a related field with individuals with autism spectrum disorders.

must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

The petitioner suggests that the certification from Pennsylvania is evidence that the beneficiary has a Master's degree. We disagree. The Form ETA 9089 in this case does not require a licensed Behavior Specialist. It seeks a Clinical Supervisor. The petitioner has not shown how Pennsylvania's requirements for licensing and credentialing behavior specialists are relevant in the determination of whether the beneficiary has a Master of Social Work. Further, the petitioner does not indicate what criteria Pennsylvania used to assess the beneficiary's educational credentials, or whether it allows work experience to substitute for academic coursework.<sup>17</sup> The record does not indicate whether or not the credentialing agency considered academic studies only, or allowed a combination of education and work experience. As the record does not establish how the Pennsylvania licensing authority arrived at its master's degree equivalency determination for the beneficiary, its evaluation is not determinative in these proceedings. The petitioner's January 8, 2014 license as a Behavior Specialist does not establish that the beneficiary has the educational equivalent of a Master's of Arts in Social Work, as required by the labor certification.

As noted above, EDGE provides that a Master of Arts/Business Administration/Computer Management/Commerce/Science degree in India "represents the attainment of a level of education comparable to a bachelor's degree in the United States." <http://edge.aacrao.org/country/credential/master-of-arts-or-commerce?cid=single>, (accessed July 30, 2014). Thus, we find that the beneficiary possesses a foreign education equivalent to that of a bachelor's degree in social work from an accredited U.S. college or university.

On appeal, the petitioner claims that even if the beneficiary does not have the foreign equivalent of a master's degree, he has a bachelor's degree followed by at least five years of post-baccalaureate experience in the specialty. However, the Form ETA 9089 does not allow for a combination of education and work experience. On the Form ETA 9089 in question H.8, the petitioner is asked to indicate whether it would accept an alternate combination of education and experience in lieu of a master's degree. The petitioner answered no to this question. Had the petitioner wished for USCIS

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<sup>17</sup> The website indicates that credentialing standards depend upon the type of institution that will employ the beneficiary as a licensed Behavior Specialist. There are five [REDACTED] in Pennsylvania's Medical Assistance Program and each its own process to credentialing autism and other behavioral health providers. These organizations include [REDACTED]

to consider the alternate combination of a bachelor's degree followed by at least 5 years of progressive post-baccalaureate experience in the specialty, the petitioner should have indicated yes to question H.8. In evaluating the beneficiary's qualifications, USCIS must look to 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The representation made on the certified ETA Form 9089 at question H.8., which the petitioner signed under penalty of perjury, clearly indicates that the petitioner will not accept a combination of a bachelor's degree and five years of experience. In this case, the petitioner has not established that the beneficiary has the equivalent of a United States Master's degree.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary possessed at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate. 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 beneficiary's qualifications, USCIS must look to 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). USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] 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]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

In the instant case, the labor certification states that the offered position requires five years of work experience. The petitioner has also failed to establish that the petitioner possesses the required experience for the offered position.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

As discussed above, the record contains the following evidence of the beneficiary's experience:

- Undated letter from I [REDACTED] stating the beneficiary worked for [REDACTED] from December 2006 – June 2009 as a social worker/counselor/behavioral specialist, for a period of 30 months. He states that in 2009 he established the petitioner [REDACTED], and that the beneficiary has worked with his new company as clinical supervisor from 2009 until the present;
- Letter dated August 22, 2012 from I [REDACTED] Supervisory Medical Social Service Officer, [REDACTED] letterhead stating that the company employed the beneficiary as a Medical Social Service Officer from December 2003 until September 2006. Mr. [REDACTED] describes the duties performed by the beneficiary but does not state whether the beneficiary worked in a full-time capacity.
- Undated letter from [REDACTED] Chief Accounts Officer, [REDACTED] stating that the company employed the beneficiary as a Social Worker from June 2000 until an unknown date; the letter does not state whether the beneficiary worked in a full-time capacity.
- Letter dated February 24, 2006 from [REDACTED] Administrative Officer, [REDACTED] certifying the beneficiary's employment as an M.S.S.O. and salary of Rs. 5850/- per month from December 10, 2003 until an unknown date; the letter does not state whether the beneficiary worked in a full-time capacity.

The beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.<sup>18</sup> Specifically, the petitioner indicates that

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<sup>18</sup> 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....  
(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) 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.

questions J.19 and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 60 months of experience in the job offered is required and in response to question H.10 that experience as a social

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(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

worker or counselor is also acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable<sup>19</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a Clinical Supervisor and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he/she was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Thus, we must rely on the beneficiary's experience prior to his employment with the petitioner.

On May 30, 2014, we issued a second NOID to the petitioner requesting further information about the beneficiary's work experience with Temp Solutions. We requested evidence to establish that [REDACTED] was no longer in business, and that the beneficiary was employed in a full time capacity by [REDACTED]. In response, the petitioner submitted a letter from the president of [REDACTED] stating that [REDACTED] is no longer in business, and attesting, as its former founder and vice-president, to the beneficiary's employment with [REDACTED]. The petitioner submitted a copy of [REDACTED] application for an H-1B nonimmigrant visa on behalf of the beneficiary indicating that the beneficiary would be paid \$18.50 per hour for a 40 hour work week (\$38,480 per year), and Internal Revenue Service (IRS) Forms W-2 indicating that the beneficiary earned \$35,160 in 2007, \$37,880 in 2008 and \$10,960 in 2009 from [REDACTED]. This evidence establishes that the beneficiary has 30 months of qualifying work experience.

In the NOID, we also requested evidence to establish that the beneficiary's experience with [REDACTED] was full-time. The petitioner, however, did not submit further evidence that the beneficiary's employment with [REDACTED] was full-time. The record does not establish that the beneficiary was employed on a full-time basis with either [REDACTED] or [REDACTED]. Thus, the petitioner has not established that the beneficiary has five years of work experience as required by the labor certification application.

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<sup>19</sup> A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

- ...
- (ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

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 also be denied for this reason.

Beyond the decision of the director, the petitioner has not established the ability to pay. The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on the ETA Form 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 17, 2011. The proffered wage as stated on the ETA Form 9089 is \$68,500 per year.

On the petition, the petitioner claimed to have been established in 2007, to have a gross annual income of over 1.3 million dollars, and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is the calendar year. On the ETA Form 9089, signed by the beneficiary on January 16, 2012, the beneficiary claims to have worked for the petitioner.

The petitioner must establish that his job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the

petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner demonstrated that it paid the beneficiary; \$74,252.80 in 2012; and \$69,329.90 in 2013, which is greater than the proffered wage in both years. Thus, the petitioner demonstrated that it can pay the proffered wage in 2012 and 2013.<sup>20</sup> In 2011 the beneficiary was paid \$61,891.25 which is less than the proffered wage by \$6,608.75. The petitioner's tax returns demonstrate its net income for 2011, as shown in the table below.

- In 2011, the Form 1120S stated net income of -\$74,945.

The petitioner's tax returns demonstrate its end-of-year net current assets for 2011, as shown in the table below.

- In 2011, the Form 1120S stated net current assets of -\$11,737.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage in 2011 through an examination of wages paid to the beneficiary, or its net income or net current assets.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability such as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

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<sup>20</sup> The petitioner did not submit its tax return for 2013, as it claims to have filed for an extension. In any further proceeding, the petitioner must submit a tax return, audited financial statement or annual report for 2013 as required by regulation.

In the instant case, the petitioner has not submitted evidence of extraordinary circumstances in 2011. Nor has it established its reputation in the industry, duration of business, whether the beneficiary is replacing a former employee or outsourced service, or other evidence as outlined in *Sonegawa*. The petitioner failed to establish that the beneficiary has the minimum qualifications for the position and that it has the ability to pay the proffered wage. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage. For this reason also, the petition must be denied.

### III. CONCLUSION

In summary, the petitioner failed to establish that the beneficiary possessed an advanced degree as required by the terms of the labor certification and the requested preference classification. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. 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 appeal is dismissed.