



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: **AUG 14 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)

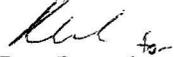
ON BEHALF OF PETITIONER:

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, 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 private school. It seeks to permanently employ the beneficiary in the United States as a “Bilingual French/English Science Teacher.” 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).¹ The priority date of the petition is May 9, 2013.²

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

- H.4. Education: Master’s degree in Physical Science, Education, or related.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 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: None accepted.
- H.14. Specific skills or other requirements: [Blank].

Part J of the labor certification states that the beneficiary possesses a Master’s degree in Physical Science from the [redacted] France, completed in 1996. The record contains certificates of the following degrees awarded to the beneficiary:

- A *Licence* degree from the [redacted] completed in 1995.
- A *Maitrise* in Science from the [redacted] completed in June 1996.

The director’s decision denying the petition concludes that the beneficiary does not have the equivalent of a U.S. master’s degree as required by the terms of the labor certification.

¹ 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).

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

On appeal, counsel for the petitioner states that the beneficiary's CAPES in Physics and Chemistry is the equivalent of a U.S. master's degree in Physics and Chemistry. Counsel further states that the beneficiary's education at the [REDACTED] where he studied in preparation for the CAPES examination is equivalent to a master's degree.

The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. The AAO conducts appellate review on a *de novo* basis.³ We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴ 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.⁵

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 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

³ 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).

⁴ 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).

⁵ 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).

(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 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:

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

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 relies on the beneficiary’s *Baccalaureat, Licence* and [REDACTED] degrees and his CAPES award as together constituting education that is the equivalent to a U.S. master’s degree. The petitioner also asserts that the CAPES alone and the [REDACTED] alone individually equate to a U.S. master’s degree.

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, 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.⁷

We acknowledge that the beneficiary's education was completed before France adopted the Bologna Accords and EDGE provides information both before and after the Bologna Accords were adopted. EDGE states that prior to the Bologna Accords, the *Licence* was a one-year program that is a prerequisite to a one-year program and that the *Licence* was a prerequisite to two-years of teacher training, which in this case represents the beneficiary's two years of study and training for the CAPES examination. EDGE does not indicate that a program is required prior to the CAPES education and examination.

According to EDGE regarding post-Bologna degrees in France, the beneficiary's degree represents attainment of a level of education comparable to a bachelor's degree in the United States. EDGE further states that this is a one-year, post-secondary program that was phased out by the L-M-D cycle (Licence-Master-Doctor) when French universities became Bologna compliant. EDGE states that the Master's degree in France is a two-year post-secondary program. EDGE also states that the beneficiary's *Certificat d'Aptitude au Professorat de l'Enseignements Secondaire* (CAPES) "represents attainment of a level of education comparable to a bachelor's degree in secondary education in the United States."

The record contains the following evidence in support of the petitioner's assertion that the beneficiary possesses the foreign equivalent of a U.S. master's degree:

- An affidavit from the head of the Education Department, certifying that the beneficiary completed the physics and chemistry curricula at the University of Montpellier in preparation for the CAPES examination from September 1996 to June 1997; and that the beneficiary took the Physics and Chemistry Teacher's Training Program from September 1998 to June 1999.
- A certificate from the France, attesting to the beneficiary's completion of the CAPES examination, dated July 17, 1997.
- A letter from the , dated October 18, 1999, stating

⁷ 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 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.

that the beneficiary passed the National Teacher's Exam (CAPES) and was granted tenure by the French Ministry of Education on September 1, 1999.

- An evaluation of the beneficiary's educational credentials prepared by [REDACTED] for [REDACTED] concluding that the beneficiary's education credentials are equivalent to a "Bachelor of Science Degree, with a dual major in Physics and Chemistry, and a Master of Science Degree in Education, with a specialization in Physics and Chemistry, from an accredited U.S. college or university." Mr. [REDACTED] also cites the [REDACTED] [REDACTED] contained in the record, dated September 2008, and concludes that the beneficiary's *Certificat d'Aptitude au Professorat de l'Enseignement Secondaire* (CAPES) is equivalent to a Master's degree in Education with a specialization in Physics and Chemistry.
- A letter from [REDACTED] the Cultural Attaché and Head of Education at the [REDACTED] [REDACTED] stating that the beneficiary's [REDACTED] was awarded before the Bologna Accords in France and is equivalent to a "Master's First Year (Master I) as defined by the Accords." Mr. [REDACTED] states that the CAPES is a professional degree awarded by the French Ministry of Education for professional teachers and that certified school teachers must hold both a master's degree and the CAPES. He further states that "the CAPES is considered equivalent to a Master 2 level diploma by the French Ministry of Education."
- A letter from [REDACTED] the Academic Director of [REDACTED] [REDACTED] dated February 26, 2014, stating that "the CAPES is the French national teacher's recruiting exam whose validation gives the candidate the right to teach junior high and high school in the French Education school system." He further states that "[t]eachers who have passed the CAPES (French National Teacher's Exam) will be given full certification status **only if they hold a master's degree (5 year university degree after high school) or an equivalent degree that is recognized and validated by the Ministry of Education.**" (Emphasis in original).
- An affidavit from [REDACTED], a member of the faculty of the [REDACTED] [REDACTED] stating that the beneficiary was a student in the Education Department of the [REDACTED] [REDACTED] which was then called [REDACTED] Mr. [REDACTED] states that the beneficiary completed the Physics and Chemistry curricula in preparation for the CAPES exam from September 1996 to June 1997 and that he completed the Physics and Chemistry Teacher's Training Program from September 1998 to June 1999.
- A letter from Mr. [REDACTED] stating that as of 2010, certified school teachers were required to hold both a master's degree and the CAPES to be able to start teaching.
- A letter from the [REDACTED] Science Department, dated March 3, 2014, stating that "the [REDACTED] is the equivalent of a Master's First Year (Master I) as defined by the

reforms implemented in the French Higher Education System so as to conform to European Community standards.”

The record contains the [REDACTED] which Mr. [REDACTED] relies upon in evaluating the beneficiary’s education credentials for [REDACTED] Mr. [REDACTED] concludes that according to this [REDACTED] report, the beneficiary’s *Certificat d’Aptitude au Professorat de l’Enseignement Secondaire* (CAPES) is equivalent to a Master’s degree in Education with a specialization in Physics and Chemistry. However, the [REDACTED] report states that the CAPES is a “Certificate of Ability for Secondary School Teaching” and is a “2-year second cycle universal program based on [the *Licence*].” This report does not state that it represents the equivalent of a master’s degree as indicated by Mr. [REDACTED]. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The letter from Mr. [REDACTED] the Cultural Attaché and Head of Education at the [REDACTED] [REDACTED] states that the beneficiary’s [REDACTED] is equivalent to a “Master’s First Year (Master I) as defined by the Accords.” Mr. [REDACTED] states that the CAPES is a professional degree awarded by the French Ministry of Education for professional teachers and that certified school teachers must hold both a master’s degree and the CAPES. He further states that “the CAPES is considered equivalent to a Master 2 level diploma by the French Ministry of Education.” However, it is unclear why the CAPES is considered to be an equivalent to a master’s degree by the French Ministry of Education when both a master’s degree and the CAPES are required for school teachers to become certified. If the CAPES is truly equivalent to a master’s degree, it is unclear why the French Ministry of Education would require a master’s degree in addition to the CAPES.

The conclusion that the CAPES is equivalent to a master’s degree also conflicts with the letters from Mr. [REDACTED] of the [REDACTED] faculty and [REDACTED] the Academic Director of [REDACTED] Mr. [REDACTED] and Mr. [REDACTED] both state that school teachers must have both a master’s degree and the CAPES, which supports the conclusion that the CAPES is not equivalent to a master’s degree, but that it is a separate credential.

The petitioner also asserts that the beneficiary’s [REDACTED] degree alone is equivalent to a U.S. master’s degree. As stated above, the beneficiary’s [REDACTED] degree was awarded before France became compliant with the Bologna degree system. EDGE states that the [REDACTED] degree is a one-year, post-secondary program that has been phased out by the L-M-D cycle and is equivalent to a level of education comparable to a bachelor’s degree in the United States. Therefore, this degree alone does not constitute the equivalent of a U.S. master’s degree to qualify the beneficiary as an advanced degree professional under the Act.

Therefore, based on the conclusions of EDGE and the evidence in the record, the petitioner has not established that the beneficiary possesses a degree that is, by itself, the foreign equivalent of a U.S. 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 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 Physical Science, Education, or related. As discussed above, the petitioner has not established that the beneficiary possesses the foreign equivalent of a U.S. master’s degree to qualify as an advanced degree professional and to meet the terms of the labor certification.

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.

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.