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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: OFFICE: NEBRASKA SERVICE CENTER

FILE:

JAN 14 2014

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

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 is a church. It seeks to permanently employ the beneficiary in the United States as an editor. 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). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor accompanied the petition. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 26, 2012. *See* 8 C.F.R. § 204.5(d).

The director determined that the petitioner failed to demonstrate that the beneficiary had the education required by the terms of the labor certification and that the petitioner failed to demonstrate the ability to pay the proffered wage from the priority date onwards. On appeal, the petitioner submitted evidence of its ability to pay the proffered wage,<sup>1</sup> so the only remaining issue is whether the beneficiary has the qualifications required by the terms of the labor certification.

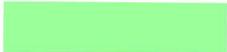
The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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

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<sup>1</sup> The petitioner must establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In determining the petitioner's ability to pay the proffered wage, United States Citizenship and Immigration Services (USCIS) first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage. If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). On appeal, the petitioner submitted audited financial statements for 2012. That statement indicates that the petitioner has sufficient net current assets to pay the proffered wage to the beneficiary.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, 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).



Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or aliens of exceptional ability, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

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).<sup>3</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.

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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

<sup>3</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

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:

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.

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 an 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 regulation at 8 C.F.R. § 204.5(k)(4)(i) states, in part:

The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

In the instant case, Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

- H.4. Education: Master's (Publishing or related).

- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.8. Alternate combination of education and experience: Accepted.
- H.8-A. Other education accepted: Bachelor's
- H.8-C. Number of years experience acceptable: 5 years.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: Accepted.
- H.10-B. Alternate acceptable occupation: publication related position.
- H.14. Specific skills or other requirements: None

The labor certification states that the beneficiary qualifies for the position based on a 2008 bachelor's degree in Biblical Studies from [REDACTED]. The beneficiary submitted a Bachelor of Arts degree, awarded on May 31, 2008 from [REDACTED].

The director noted in his decision that [REDACTED] was unaccredited at the time the beneficiary received his degree. Specifically, the director noted that the U.S. Department of Education (DOE) did not accredit [REDACTED] until April 4, 2012.

The AAO will not consider a degree from an unaccredited college or university to satisfy the definition of an advanced degree. As stated by the DOE on its website:

The [DOE] does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking [recognition must meet the] procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* . . . .

The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.

[T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.

. . . Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

<http://www2.ed.gov/print/admins/finaid/accred/accreditation.html> (accessed December 16, 2012).

The DOE's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

Presidents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions . . . .

CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.

Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community . . . . The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.

[http://www.chea.org/pdf/Recognition\\_Policy-June\\_28\\_2010-FINAL.pdf](http://www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf) (accessed December 16, 2013).

The DOE recognizes the Transnational Association of Christian Colleges and Schools, Accreditation Commission, which accredits "Christian postsecondary institutions in the United States that offer certificates, diplomas, and associate, baccalaureate, and graduate degrees, including institutions that offer distance education." The website indicates that [REDACTED] was pre-accredited on November 4, 2008 and accorded full accreditation on April 4, 2012. See [REDACTED] (accessed December 16, 2013). It is noted that the beneficiary's degree was awarded prior to both pre-accreditation and accreditation.

The State of California acknowledges the qualitative difference between accredited and unaccredited educational institutions. The California Postsecondary Education Commission (CPEC), the state's planning and coordinating body for higher education from 1974 to 2011,<sup>4</sup> includes the following language regarding the "benefits associated with accreditation" on its website:

Both the federal government and the states use accreditation as an indication of the quality of education offered by American schools and colleges.

At the federal level, colleges and universities must be accredited by an agency recognized by the United States Secretary of Education in order for it or its students to receive federal funds.

At the state level, California allows colleges and universities that are accredited by the Western Association of Schools and Colleges (the recognized regional accrediting agency for California) to grant degrees without the review and approval of the Bureau for Private Postsecondary Education (BPPE). A list of approved institutions is available at the California Bureau for Private Postsecondary Education (BPPE).

In some states, it can be illegal to use a degree from an institution that is not accredited by a nationally recognized accrediting agency, unless approved by the state licensing agency. This helps prevent the possibility of fraud . . . .

[http://www.cpec.ca.gov/x\\_collegeguide\\_old/accreditation.asp](http://www.cpec.ca.gov/x_collegeguide_old/accreditation.asp) (accessed December 16, 2013).

Accreditation is intended "to assure academic quality and accountability" (CHEA) and to provide "a reasonable assurance of quality and acceptance by employers of . . . degrees" awarded by the accredited institutions (DOE). Moreover, the imprimatur of a regional accrediting agency guarantees that a school's degrees will be recognized and honored nationwide.

The Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act – also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any **United States academic or professional degree** . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] **United States baccalaureate degree**" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a **United States doctorate**" (or a foreign equivalent degree). (Emphases added.) Similarly, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a **United States baccalaureate degree**" (or a foreign equivalent degree). (Emphasis added.) The repeated usage of the modifier "United States" to describe the different levels of (non-foreign) degrees makes clear the intention of the rulemakers that the regulations apply to degrees issued by

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<sup>4</sup> The CPEC ceased operations on November 18, 2011, after its funding was eliminated. See <http://www.cpec.ca.gov> (accessed December 16, 2013).

U.S. educational institutions that are recognized and honored on a nationwide basis. The only way to assure nationwide recognition for its degrees is for the educational institution to secure accreditation by a regional accrediting agency approved by the DOE and CHEA.

As previously discussed, the school that issued the beneficiary's degree – [REDACTED] in [REDACTED] – was not accredited at the time the beneficiary earned his degree. Accordingly, the beneficiary's Bachelor of Arts from [REDACTED] cannot be deemed to have nationwide recognition. Therefore, it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

On appeal, counsel states that [REDACTED] is currently accredited and that the degree program undertaken by the beneficiary has not changed in the time from when the beneficiary studied to accreditation and that the accreditation “grandfathers in” previous degrees. According to counsel, therefore, the beneficiary’s Bachelor of Arts in Biblical studies should be accepted by USCIS as a valid degree.

In a notice of intent to deny (NOID) issued on July 1, 2013, the Director noted that [REDACTED] was not accredited by the DOE when the beneficiary received his degree. In response to the NOID, counsel for the petitioner submitted an evaluation from [REDACTED] of the [REDACTED]. Dr. [REDACTED] concluded that the beneficiary’s work experience is equivalent to a U.S. baccalaureate degree.<sup>5</sup> The regulation at 8 C.F.R. § 204.5(k)(2) requires a baccalaureate or higher degree to qualify for the immigrant category. The regulation does not provide for any sort of degree equivalency for this immigrant category. As a result, this evaluation does not demonstrate that the beneficiary has a bachelor’s degree and that she might qualify as an advanced degree professional with five years of progressively responsible work experience pursuant to the regulations.

On appeal, the petitioner submitted a letter from Dr. [REDACTED] with [REDACTED] stating that the school initiated the accreditation process in 2007 and, as such, the programs that were accredited were in place when the beneficiary undertook his studies. Dr. [REDACTED] cites the 2013 Edition of the Transnational Association of Christian Colleges and Schools (TRACS) Accreditation Manual which indicates that a school may receive pre-accreditation status when the school “is in basic compliance with the Standards and Criteria, has been evaluated by an on-site peer team, and in the professional judgment of the evaluation team and the Accreditation Commission, the instruction provides quality instruction and student services.” Dr. [REDACTED] further explains that accreditation is awarded after a history of appropriate action has been taken and once its graduates’ outcome can be seen. Dr. [REDACTED] states that this is the reason that students who graduated during the pre-accreditation process are then “grandfathered” into having a degree from an

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<sup>5</sup> Her conclusion was based on three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The labor certification here does not provide that the degree requirement may be met with a three for one experience to education equivalency.

accredited school. Dr. [REDACTED] states that all degree holders from the initial application in 2007 forward should be considered to have received a degree from an accredited institution, including the beneficiary.<sup>6</sup>

As stated above, the beneficiary earned his degree on May 31, 2008. The pre-accreditation status was not received until November 2008, which was after the beneficiary's degree was awarded. Dr. [REDACTED] states that the school applied for pre-accreditation status in 2007. However, until November 2008, no action was taken by TRACS to guarantee or review any of [REDACTED] programs. As stated above, the imprimatur of a regional accrediting agency guarantees that a school's degrees will be recognized and honored nationwide. Without the accreditation, the petitioner cannot demonstrate that the beneficiary's degree would or should be recognized and honored nationwide. The unaccredited degree is insufficient to establish eligibility under the immigrant visa category listed on the petition.

Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act and 8 C.F.R. § 204.5(k)(2). Thus, the petition cannot be approved.

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 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).

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification – "Job Opportunity Information" – describes the terms

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<sup>6</sup> The letter from Dr. [REDACTED] states that grandfathering is not required, but is up to the receiving institution whether or not it will accept a degree as accredited when the accreditation was after the date of the degree.

and conditions of the job offered. In this case, Part H, lines 4 and 4-B of the labor certification state that the minimum educational requirement to qualify for the proffered position is a master's degree in publishing or a related field. Lines 8A-C states that a Bachelor's degree may be accepted in combination with 5 years of experience in a publication related position. Line 9 states that a "foreign educational equivalent" is acceptable.

The beneficiary does not meet the above requirements. As previously discussed, the beneficiary's degree from [REDACTED] though called a Bachelor of Arts, does not qualify as a U.S. baccalaureate degree because it was not awarded by an educational institution that has been accredited by a regional accrediting agency recognized by the DOE. Nor does the beneficiary have a foreign educational equivalent to a bachelor's degree. In addition, even if the degree from [REDACTED] could be considered a degree from an accredited institution, a conclusion we do not reach, the degree is in Biblical studies, not the required area of study: publishing. The record does not establish that the beneficiary's degree in Biblical studies and work experience are the equivalent to a Master's degree in publishing or a related field. For this reason as well, the petition cannot be approved.

The beneficiary does not have an "advanced degree" within the meaning of 8 C.F.R. § 204.5(k)(2), and thus is not eligible for preference visa classification under section 203(b)(2) of the Act. Nor does the beneficiary meet the educational requirements on the labor certification to qualify for the job offered.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.