



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **NOV 14 2014**

OFFICE: TEXAS 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 employment based visa petition was denied by the Director, Texas Service Center. The petitioner appealed. On appeal, the Administrative Appeals Office (AAO) remanded the case to the director for further investigation and entry of a new decision. The Director, Texas Service Center issued a new decision and denied the petition again and certified the decision to the AAO. The matter is now before the AAO on certification. The director's decision to deny the petition is affirmed.

The petitioner is a hearing healthcare clinic. It seeks to permanently employ the beneficiary in the United States as an audiologist 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, the petition is accompanied by an Application for Permanent Employment Certification, ETA Form 9089, certified by the U.S. Department of Labor (DOL).

The director denied the petition on November 17, 2010, concluding that the petitioner failed to establish its continuing ability to pay the proffered wage. The petitioner, through counsel, appealed this decision. On February 25, 2013, we withdrew the decision to deny the petition, and remanded the case to the director to obtain additional evidence of the beneficiary's educational credentials.

On remand, the Director, Texas Service Center issued two Notices of Intent to Deny (NOID), dated September 3, 2013 and May 15, 2014, to the petitioner. The director reviewed the response provided by the petitioner, but concluded that the petitioner failed to demonstrate that the beneficiary possesses a Master's degree or that it has established eligibility for the second preference visa classification. The director denied the petition on September 4, 2014, and certified it to this office for review.<sup>1</sup> The Notice of Certification permitted the petitioner to provide a brief or other written statement within thirty (30) days. The Notice indicated that a copy was sent to counsel. As nothing further has been received to the record by this office, this decision will be rendered on the current record as it stands.

We conduct appellate review on a *de novo* basis. Our *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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<sup>1</sup> The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

For the reasons stated below, we concur with the director's denial of the petition based on the petitioner's failure to establish that the beneficiary possesses a Master's degree as required by the ETA Form 9089 and by the second preference visa classification.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

As set forth below, the ETA Form 9089 does not require an alien with exceptional ability and does not permit an alternate master's degree educational equivalency of a baccalaureate degree plus five years of progressive experience in the specialty.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on October 20, 2009, which establishes the priority date.<sup>2</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on June 11, 2010.

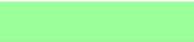
The director denied the petition on September 4, 2014, finding that the beneficiary does not have a U.S. Master's degree in Audiology and Speech Rehabilitation or Speech and Language Pathology / Audiology, or a foreign equivalent degree, as required by the terms of the labor certification.

### **Visa Classification**

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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<sup>2</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.



In general.-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 left to U.S. Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. 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.

\* \* \*

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).<sup>4</sup>

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

<sup>4</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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.* §

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for 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)[5] of the ...[Act]... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d at 1309.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, qualifications, 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." *Rosedale Linden Park Company v. Smith*, 595 F. Supp.

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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 (9<sup>th</sup> Cir. 1984).

829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *See Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to infer the employer's intentions through some sort of reverse engineering of the labor certification.

#### **ETA Form 9089**

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's in Audiology & Speech Rehabilitation
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7-A Alternate field of study: Speech and Language Pathology / Audiology.
- 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: New York State audiology license.

As set forth above, the proffered position requires a Master's degree in Audiology & Speech Rehabilitation or Speech and Language Pathology / Audiology or a foreign equivalent degree, as well as a New York license to be an audiologist.

That the beneficiary possesses the necessary licensure in New York as set forth in H.14 is not an issue. The petitioner must establish, however, that the beneficiary not only is a member of the professions holding an advanced degree, but also satisfied all of the educational, training, experience and any other requirements of the offered position as of 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'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the job offer portion of the ETA Form 9089 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). 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. Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006).

### Beneficiary's Credentials

Part J of the labor certification signed by the beneficiary and the petitioner, states that the beneficiary's highest level of education related to the offered position is a Master's degree in Speech and Language Pathology and Audiology from [REDACTED] Argentina completed in 2003.

The record of proceeding contains a copy of the beneficiary's diploma and transcripts from the [REDACTED] indicating that the beneficiary received a "Licenciada en Fonoaudiologia" on July 16, 2004, following the completion of a five-year course of study from 1997 to 2002 and a final research paper on November 21, 2003.

The record contains a copy of the beneficiary's certificate issued by [REDACTED] on December 6, 2006.<sup>5</sup> The record additionally contains a copy of the beneficiary's New York license as an audiologist with an expiration date of December 31, 2011.

The record also contains three evaluations of the beneficiary's credentials:

1. [REDACTED] of The [REDACTED] dated August 17, 2004, was submitted to the initial underlying record. It concluded that the phonoaudiology program at the [REDACTED] consists of "bachelor's and graduate-level studies leading to the completion of a master's-level degree."

As indicated in our decision of February 25, 2013, the beneficiary's transcript contains two 'graduation' entries. A copy of her first diploma was provided in response to the director's May 15, 2014 NOID. The diploma was issued on June 23, 2001, and stated that on July 31, 2000, the beneficiary "completed the corresponding studies in order to obtain the title of Phonoaudiologist." The second diploma states that the beneficiary, on November 21, 2003, graduated with her "Licenciada en Fonoaudiologia," which was awarded on July 16, 2004. As noted in our previous decision, "there is little support that the beneficiary's degrees from [REDACTED] are equivalent to a bachelor's degree and a master's degree, respectively, from a U.S. university," as the beneficiary's second diploma represented her first professional license degree.

2. [REDACTED] evaluation, dated October 27, 2011, presents a summary of the beneficiary's classes given with U.S. semester credits and states the U.S. equivalency as a

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<sup>5</sup> An audiologist ultimately seeking admission based on an approved immigrant petition must present a certificate from a credentialing organization listed at 8 C.F.R. § 212.15(e). 8 C.F.R. §§212.15(a)(1), (c). The provisions at 8 C.F.R. § 212.15(f)(1)(i) and (iii) require that approved credentialing organizations for health care workers verify "[t]hat the alien's education, training, license, and experience are comparable with that required for an American health care worker of the same type" and "[t]hat the alien's education, training, license, and experience meet all applicable statutory and regulatory requirements for admission into the United States." As stated above, the latter verification, however, is not binding on the Department of Homeland Security (DHS). 8 C.F.R. § 212.15(f)(1)(iii).

“Bachelor’s and master’s degree from a regionally accredited institution.” There is no author or author’s credentials designated, no explanation of how U.S. semester credits are comparable to the beneficiary’s studies in Argentina, and no analysis of how the U.S. equivalency was reached.

3. A letter, dated June 6, 2014, from Professor [REDACTED] indicates that that he views the beneficiary’s five-year program at [REDACTED] as a combined bachelor’s and master’s program. Although he refers to the program as an integrated program of bachelor’s and master’s studies and the beneficiary’s “License Degree in Phonoaudiology” as a master’s level degree, there is no indication on the transcripts that this accurately reflects that the beneficiary was enrolled in a combined bachelor’s and master’s program. Nor does Professor [REDACTED] specify resources he relied upon to reach the conclusion that the beneficiary’s “Licenciada en Fonoaudiologia” represents a Master’s degree.<sup>7</sup>

As stated in our previous decision and in the director’s decision on certification, we have consulted the website maintained by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). Founded in 1910, AACRAO is a nonprofit, voluntary, professional association of approximately 10,000 members who represent approximately 2,500 institutions across the world.<sup>8</sup> It has provided enrollment services for over 100 years. *Id* EDGE is the online website maintained by AACRAO to reference a country’s educational system. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>9</sup>

According to the EDGE overview of the Argentinian educational system, higher education in Argentina “includes short undergraduate programs (*carreras cortas*), professional first degrees (*licenciatura or titulo profesional*), and graduate programs through studies leading to the degrees of *especialista, maestria, and doctorado*.”

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<sup>6</sup> Professor [REDACTED] letter is on [REDACTED] letterhead. There is no indication that this opinion of the beneficiary’s credentials was officially authorized by the college.

<sup>7</sup> It is observed that the initial certified English translation of the beneficiary’s “Licenciada en Fonoaudiologia” that the petitioner provided to the record contained the following language: “N.of the T.: A Licensee is a type of University degree which may be considered equivalent to a bachelor’s degree and which is obtained after having successfully completed a 5-year period of study...” It is unclear from whom or where this statement originated.

<sup>8</sup> See <http://consulting.aacrao.org/about/> (accessed October 22, 2014).

<sup>9</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. In *Sunshine Rehab Services, Inc. v. USCIS*, 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. See also *Viraj, LLC v. Holder*, No. 2:12-CV-00127-RWS, 2013 WL 1943431 (N.D. Ga. May 18, 2013).

As indicated in our previous decision:

In the section related to Argentina's educational system, EDGE states that a *Licenciado(a)* is usually a five-year first degree program that represents a level of education comparable to a bachelor's degree in the United States. EDGE also has an entry for *Licenciado(a) superior*-which it describes as a post-*Licenciada superior* graduate program of one to two years that represents a level of education comparable to one to two years of graduate study in the United States.

Further, as noted by the director, EDGE additionally indicates that Argentina offers master's degrees referred to as *Magister, Maestria, Maestria en...*, or *Magister scientiae*. The entry requirement for a *Magister, Maestria, Maestria en...*, or a *Magister scientiae* program is a *licenciado(a)* or *titulo* degree.

The ETA Form 9089 requires an actual Master's degree or a foreign equivalent degree. In response to the director's September 3, 2013 and May 5, 2014 NOID, counsel asserts that the credential evaluations as provided above establish that the beneficiary's *Licenciada en Fonoaudiologia* is the U.S. equivalent of a Master's degree. Counsel also asserts that the New York licensure requirements in audiology, or other federal agencies, or the beneficiary's membership in the [REDACTED] should be held to be determinative that the beneficiary possesses the U.S. equivalent of a Master's degree. We are not persuaded by this assertion. The state licensing requirements are solely a determination that an individual is eligible to be a registered audiologist. Additionally, there is no evidence presented that shows how any of these educational determinations have been made. Moreover, it is noted that the WES evaluation, which was provided by the petitioner to this record was also sent to the [REDACTED] according to a notation on the evaluation. As indicated above, we do not find this evaluation probative of the U.S. equivalency of the beneficiary's credentials. Counsel has not demonstrated that a state issuance of a license or recognition by another agency or a professional society is binding on USCIS or meets the regulatory definition of an advanced degree required by the second preference visa classification. The petitioner presented no diploma from Argentina indicating that the beneficiary possesses a Master's degree in representing 1-2 years of *graduate* study. (Emphasis added).

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is no presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony

may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).<sup>10</sup>

Based upon all of the information above, it is found that the beneficiary has the U.S. equivalent of a Bachelor's degree in audiology from [REDACTED] representing a five-year undergraduate program but not representing the U.S. equivalent of a Master's degree (or even an Argentinian Master's degree). As noted in our previous decision and as set forth in the director's denial, and after considering all the evidence and evaluations, we find the EDGE evaluation of a U.S. equivalency of the beneficiary's *Licenciada en Fonoaudiologia* to be a reliable, peer-reviewed source of information about foreign credential equivalencies.

The beneficiary does not have a United States Master's degree in Audiology & Speech Rehabilitation or Speech and Language Pathology / Audiology or a foreign equivalent advanced degree, and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act, and does not meet the terms of the certified labor certification.

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 director's denial is affirmed. The appeal is dismissed.

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<sup>10</sup> In addition, it should be noted that length of study does not necessarily translate to an advanced degree determination. For example, an individual could complete five or six years of a bachelor's level education, but the additional coursework, if only at the bachelor's level, will not translate to the equivalent of a bachelor's and a Master's degree. Instead, the additional coursework would represent only additional bachelor's level courses.