



U.S. Citizenship  
and Immigration  
Services

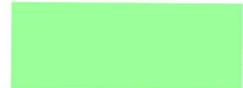
(b)(6)



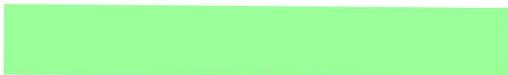
DATE: **NOV 21 2014**

OFFICE: NEBRASKA SERVICE CENTER

FILE:

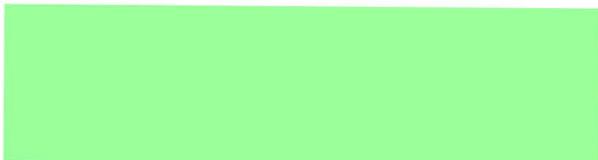


IN RE: Petitioner:  
Beneficiary:



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 preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development services firm. It seeks to employ the beneficiary permanently in the United States as a senior programmer analyst 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 ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

The record shows that the appeal is properly filed, timely 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 director's April 30, 2014 denial found that the job offer portion of the labor certification is not consistent with the minimum requirements for classification as a professional holding an advanced degree. Specifically, the proffered position's minimum education and experience requirements did not meet the standard for classification as an advanced degree professional because section H.14 of the labor certification stated that the petitioner would accept a "combination of lesser degrees, diplomas, and/or professional certificates if they were determined by a certified independent credentials evaluator to be equivalent to a degree earned by an accredited college or university."

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

### **Plain Language of the Labor Certification**

Here, the Form I-140 was filed on December 19, 2013. On Part 2.1.d. of the Immigrant Petition for Alien Worker (Form I-140), the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. The priority date of the petition is March 14, 2013, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

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

---

<sup>1</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 the regulation at 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, 766 (BIA 1988). On the Form I-290B, Notice of Appeal or Motion, the petitioner indicated that it would not be filing any additional evidence and/or a brief.

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.* 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an 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 of an alien of exceptional ability."

When a beneficiary relies on a bachelor's degree (and five years of progressive experience) for qualification as an advanced degree professional, the degree must be a single U.S. bachelor's (or foreign equivalent) degree. The Joint Explanatory Statement of the Committee of Conference, 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 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, U.S. Citizenship and Immigration Services (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>2</sup> In order to have experience and education equating to an advanced degree under section

<sup>2</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.

203(b)(2) of the Act, the beneficiary must have a single degree that is a “foreign equivalent degree” to a United States baccalaureate degree. *See* 8 C.F.R. § 204.5(k)(2). In addition, a three-year bachelor’s degree will generally not be considered to be the “foreign equivalent” of a United States baccalaureate degree. *See Matter of Shah*, 17 I&N Dec. 244 (Reg’l. Comm’r. 1977).<sup>3</sup> *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor’s degree or foreign equivalent degree); *see also Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010) (the beneficiary’s three-year bachelor’s degree was not the foreign equivalent of a U.S. bachelor’s degree).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master’s degree in computer science.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: CIS, engineering, math, electri., science, business, management, technology or related.
- H.8. Alternate combination of education and experience: Bachelor’s degree plus 5 years of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 60 months as a software engineer, principal applications engineer, programmer or related.
- H.14. Specific skills or other requirements: \*Position requires extended travel and/or relocation to project sites/locations throughout the United States \*\*In lieu of a Master's Degree, employer is willing to accept the equivalent to a US Bachelor's Degree with five (5) years of prior progressive professional experience in the position offered or a related position; furthermore, employer is willing to accept any suitable combination of work experience, education and training that is equivalent to the actual minimum requirements of the position and shows demonstrable ability in the required skill sets. \*\*\*Employer defines a foreign educational equivalent in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Bachelor’s Degree.

The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

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.

---

<sup>3</sup> In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg* that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc). The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

Previously, the DOL was denying labor certification applications containing alternative requirements in Part H, Question 14, if the application did not contain the *Kellogg* language. However, two BALCA decisions significantly weakened this requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the *Kellogg* language on the labor certification application violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements.

On appeal, counsel states that BALCA cases as well as DOL and Service policy confuse the issue of what language is required on the labor certification to ensure full articulation of a labor certification's primary and alternative requirements. However, counsel does not contend that the petitioner's language used in section H.14 was identical to or meant to serve as "*Kellogg* language."

Counsel asserts that the director failed to read the labor certification in its totality and that the minimum requirements for the position are clearly established to be the equivalent of a U.S. bachelor's degree and five (5) years of experience. Counsel contends that the petitioner's H.14 statement "in lieu of a Master's Degree, employer is willing to accept the equivalent to a US Bachelor's Degree with five (5) years of prior progressive professional experience" sets forth "the bar" or true minimum requirement for the proffered position and that any further details must be logically read in accordance with this statement. Alternatively counsel contends that the requirements of the labor certification are at least ambiguous and that a request for further evidence (RFE) should have been issued in this case.

Counsel does not cite any authority for the assertion that an RFE is required where there is ambiguity on an ETA Form 9089. In evaluating a beneficiary's qualifications, we must look to the job offer portion of the labor certification to determine the required qualifications for the position and cannot ignore a term of the labor certification or 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). We interpret 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" and our interpretation of the job's requirements 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. *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). The language used by the petitioner in section H.14 and a reading of the labor certification as a whole indicates that the additional paragraph of “Employer defines a foreign educational equivalent in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Bachelor’s Degree” qualifies the minimum requirements of the labor certification to include a combination of degrees less than an advanced degree. Specifically, the statement defines what the petitioner considers to be a “foreign educational equivalent” to a U.S. bachelor’s degree. As such, there is no ambiguity within the labor certification’s language regarding the minimum requirements.

Counsel contends that because the sentence includes the term “academic equivalent” the plain language of the sentence necessitates a formal education. However, the full language of the paragraph states that “a combination of lesser degrees, diplomas and/or professional certificates” which are determined to be the “academic equivalent” of a bachelor’s degree is acceptable to the petitioner. We have discussed above that such a combination of lesser degrees is not permissible when an immigrant visa category requires a U.S. bachelor’s degree or foreign equivalent as the minimum. *See Snapnames.com, Inc. Supra*. In the instant case, the plain language of the labor certification is that the petitioner would accept educational credentials less than a U.S. bachelor’s degree or foreign equivalent degree. As such, the minimum requirements of the labor certification are less than those required for the advanced degree professional category. Whether the petitioner included such language in its recruitment does not alter the fact that the minimum requirements of the labor certification on its face do not meet the minimum requirements for the advanced degree professional category.

### **Ability to Pay Proffered Wage**

Beyond the decision of the director,<sup>4</sup> the petitioner has not established its ability to pay the proffered wage. The regulation at 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.

---

<sup>4</sup> We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

The priority date of the labor certification is March 14, 2013 and the proffered wage as stated on the ETA Form 9089 is \$96,013.00 per year. The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 2002 and to currently employ 32 U.S. workers. The record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2013.

In any future filings, the petitioner must submit its 2013 tax returns, annual report or audited financial statement.

The record contains a copy of the beneficiary's December 13, 2013 paystub printed from an online payroll portal. However, we are unable to verify that the petitioner paid the instant beneficiary the amount reflected on the pay stub as the document does not contain the beneficiary's Social Security Number (SSN) and the employer's Federal Employment Identification Number (FEIN). In any future filings the petitioner should submit Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, or Forms 1099-Misc, Miscellaneous Income, issued to the instant beneficiary.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage to the beneficiary beginning on the priority date.

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). The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.