

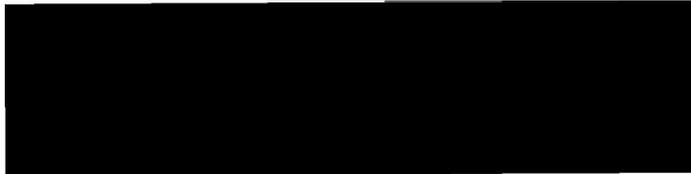
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC 06 186 52859

OFFICE: TEXAS SERVICE CENTER

Date: **OCT 03 2008**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a soccer club. It seeks to employ the beneficiary permanently in the United States as a Director of Coaching. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner had not established its continuing financial ability to pay the proffered wage and had not demonstrated that the beneficiary satisfied the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a bachelor's degree in soccer coaching and team management.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has had the financial ability to pay the proffered wage and has established that the beneficiary has the required educational credentials necessary to meet the qualifications set forth in the approved labor certification.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 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. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Although in the interests of fairness, the substantive issues will be reviewed below, however, we note that the preference petition is not eligible for approval because the ETA Form 9089, although signed by the certifying officer, is not signed by the petitioner, the petitioner's attorney, or by the beneficiary. *See* 8 C.F.R. § 204.5 (a)(2); 20 C.F.R. § 656.17 (a)(1).

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) also 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.

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. The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on November 17, 2005.¹ The proffered wage is stated as \$937.31 on a bi-weekly basis. This equates to \$24,370.06 per year.

The Immigrant Petition for Alien Worker (Form I-140) was filed on May 26, 2006. Part 5 of the petition indicates that the petitioner was established on December 4, 2001, claims a gross annual income of \$35,000, a net annual income of \$4,000, and currently employs no workers.

The ETA Form 9089 does not indicate that the beneficiary has worked for the petitioner.

Part H of the ETA Form 9089 specifies the requirements for a Director of Coaching. The proffered position requires a Bachelor's degree in soccer coaching and team management and 60 months of experience in the job offered. Part H, Item 8 indicates that the employer will not accept an alternative combination of education and experience. Part H, Item 9 reflects that a foreign educational equivalent is acceptable. Item 14 of Part H reflects specific skills or other requirements as follows:

F.I.F.A., USSF, and NSCAA licenses required.²

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is "Bachelor's."

In support of the petitioner's ability to pay the proffered wage of \$24,270.06 per year, the director issued a request for evidence on June 22, 2006. She instructed the petitioner to provide additional financial evidence of its ability to pay the proffered wage in the form of federal tax returns, copies of annual reports, or copies of audited financial statements, as well as copies of any Wage and Tax Statements issued to the beneficiary for the past two years, copies of state quarterly wage reports indicating that payroll taxes have been paid for the last two years, copies of the Form 941, indicating federal employment taxes have been paid and evidence that the petitioner is currently doing business. In response, the petitioner provided:

- 1) copies of unaudited financial statements consisting of three profit and loss statements with one dated June 2005 through April 2006, one dated June 2006 and the other covering June 2005 to

¹ 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, including a prospective U.S. employer's ability to pay the proffered wage is clear.

² F.I.F.A. is the Federation Internationale de Football Association; USSF is the United States Soccer Federation and NSCAA is the National Soccer Coaches Association of America.

- May 2006, as well as copies of three balance sheets dated April 30, 2006, May 31, 2006 and June 30, 2006, respectively;
- 2) partial copies of the beneficiary's individual 2004 and 2005 income tax returns without accompanying schedules, W-2s or Form 1099s;
 - 3) copies of online Florida corporation records indicating that the petitioner is structured as a non-profit and that as of May 2006, it retained its active status as a registered non-profit; and
 - 4) a copy of counsel's request for an extension of time to gather more documents, dated September 12, 2006, in response to the director's request for evidence

The director's denial dated November 1, 2006, was based in part on the petitioner's failure to establish its continuing ability to pay the proffered wage beginning at the priority date of November 17, 2005, noting that the petitioner had failed to provide the documentation requested and determining that the unaudited financial statements submitted were insufficient to demonstrate such ability.

On appeal, counsel submits copies of unaudited financial statements and a copy of a 2005 tax return with both exhibiting a stamp identifying them as a "preliminary draft subject to review and discussion." Counsel also submits a copy of an Internal Revenue Service (IRS) application for an extension of time to file a Form 990 for the tax year beginning June 1, 2005 and ending May 31, 2006. The extension of time requests 3 months until January 16, 2007. Counsel subsequently submits copies of these documents following a request on appeal to be permitted an additional 30 days to provide a brief and/or additional evidence. Additionally, counsel provides a copy of a letter from [REDACTED], a staff accountant of the firm of Keyes & Stange CPAs, LLC. He/she merely indicates that they are waiting for client information to complete the return and financial statements and indicates that once that is received, the documents may be finalized. Copies of online information relating to the petitioner are also submitted on appeal.

Counsel contends on appeal that the petitioner has shown that its total income from June 2005 to June 2006 was \$46,388 and thus has demonstrated its ability to pay the proffered wage of \$24,370. Counsel also asserts that the club is a not-for-profit entity and that the certified position for a director of coaching is a new position and will generate additional revenue. Counsel refers to an attached report and other evidence submitted as exhibits. It is noted that Exhibit 3 contains an undated, unsigned document identified as the petitioner's developmental program proposal which, on page 5, refers to the scheme of compensating a director of coaching and player development through fees generated under a 30/70 split with the petitioner's executive board. The coaching director is to receive the 70% split.

Counsel's contentions are not supported by the evidence or by legal authority. The AAO notes that the Department of Labor's function in determining whether the hiring of an alien for a certified position will adversely affect the wages and working conditions of similarly employed domestic U.S. workers does not impact the jurisdiction of CIS to review whether the petitioner is making a realistic job offer and to evaluate the qualifications of a beneficiary for the job. CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. See *Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984). Part of this authority includes the right to inquire into whether the employer is able to pay the alien beneficiary's wages. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

Counsel's generalized hypothesis of how the beneficiary's employment might positively affect the petitioner's business, is not supported by any specific documentation contained in the record explaining how the beneficiary's employment as a director of coaching will significantly increase profits for the petitioner. As noted above, an online document from 2004 that consists of a message from the petitioner's president describing the petitioner's structure and activities as a soccer club (counsel's appeal exhibit 4) as well as the undated unsigned program proposal (counsel's appeal exhibit 3) does little to establish the petitioner's ability to pay the proffered wage pursuant to the requirements of the regulation at 8 C.F.R. § 204.5(g)(2). This generalized hypothesis cannot be concluded to demonstrate the petitioner's continuing ability to pay the proffered wage through the evidence required by 8 C.F.R. § 204.5(g)(2).

It must be noted that the petitioner's job offer and prevailing wage determination as described on Part F of the labor certification does not include a description of a salary contingent upon the generation of fees to be divided in a 70/30 split. The petitioner's job offer must be for a permanent, full-time position and the prevailing wage is determined by the relevant state workforce agency (SWA) under their authority set forth in 20 C.F.R. § 656.40. There is no indication that such a salary determination based on a 70/30 split of fees received has been certified by the SWA.

The financial statements submitted to the record are not audited. It is noted that according to the plain language of the regulation at 8 C.F.R. § 204.5(g)(2), where a petitioner relies on financial statements as evidence of its financial condition and ability to pay the certified wage, those statements must be audited. As the statements provided to the record are restricted to information based upon the representations of management, they are not probative of the petitioner's ability to pay the certified wage of \$24,270.06 per year. Similarly, the petitioner's "preliminary draft" 2005 federal Form 990, Return of Organization Exempt From Income Tax, carries no evidentiary weight as it carries no assurance that it represents a return filed with the IRS. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is further noted that nothing further has been received to the record representing either audited financial statements or federal Form 990s that represent copies of returns filed with the IRS, which demonstrate the petitioner's continuing financial ability to pay the proffered wage as of the priority date.³ The AAO concurs

³ In determining a petitioner's ability to pay a certified wage, CIS considers whether the petitioner has employed and paid wages to a beneficiary. Copies of a beneficiary's tax returns are irrelevant if not corroborated by W-2s or Form 1099s. If there is no evidence of employment, CIS will next examine the net income figure (or net current assets) as reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. As set forth in the regulation at 8 C.F.R. § 204.5(g)(2), a petitioner may also provide either audited financial statements or annual reports as an alternative to federal tax returns, but they must show that a petitioner has sufficient net profit or net current assets to cover the proffered wage. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054 (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989)); *K.C.P. Food Co., Inc. v. Sava*, 623 F.

with the director's denial of the petition on the basis that the petitioner's failed to establish its ability to pay the proposed wage offer.

In support of the beneficiary's educational qualifications, the petitioner has submitted the following:

- 1) A copy in English of a diploma with the heading of the Argentinian Soccer Association and the 'Adolfo Pedernera' Technical School issued to "Mrs. [REDACTED]" stating that he/she has passed the subjects pertaining to the Regular Course of Soccer Instructor Course 1993, dated 12/7/93.
- 2) A copy in English of a diploma with the heading of the Argentinian Soccer Association and the 'Adolfo Pedernera' Technical School issued to "Mrs. [REDACTED]" stating that he/she has passed the subjects pertaining to the Regular Course of Head Coach; Course 1993/94, dated 12/13/94.
- 3) A grade transcript in English with under the heading of the 'Adolfo Pedernera' Technical School issued to the beneficiary stating that he/she has earned the degree of Soccer National Head Coach. The certificate is dated April 1995 and lists the classes taken in the 'soccer instructor' course (year 1993) and 'soccer instructor\course (year 1994).
- 4) A document in English that is designated as "Official Recognition of the Department of Education" that refers to a picture that is not attached and appears to recognize schools that give Head Coaches Courses in the entire country in the preparation of qualified trainers with degrees.

The petitioner further supplied various certificates representing professional/vocational training the beneficiary received, including copies of four certificates or diplomas from the National Soccer Coaches Association of America indicating that the beneficiary participated in professional training in goalkeeping on September 25, 2005; a director of coaching diploma from participation on April 21-23, 2006; a certificate related to goalkeeping on July 23, 2005, and an advanced national diploma received for participation on January 9-15, 2006.

The petitioner has also submitted an academic evaluation report issued by [REDACTED] Ed.D. of the Educational Assessment & Evaluation, Inc., dated June 22, 2000. She indicates that based on her review of only the beneficiary's academic credentials consisting of a two-year course completed during 1993-94 at the Adolfo Pedernera Technical School Buenos Aires, Argentina, she concludes that he has earned the equivalent of two years of academic credit towards a Bachelor of Science degree in Sports Studies or Physical Education from an accredited institution in the United States.

A separate evaluation report, dated June 21,2000, from [REDACTED] on a University of Georgia letterhead

determines that having reviewed the beneficiary's employment and professional experience, she states that his combined education and professional experience would be "equivalent to the skills and knowledge of a graduate of a Bachelor of Science degree in Physical Education, with a concentration in Coaching Methods, from an accredited university in the United States."

A third letter on a University of Georgia letterhead, dated August 27, 2003, from [REDACTED], indicates that it was issued in connection with the beneficiary seeking non-immigrant status. She states that the position of Director of Coaching as offered to the beneficiary by the Ormond Beach Soccer Club (not the petitioner in this case) qualifies as a specialty occupation and would require at a minimum, a baccalaureate degree (or equivalent through a combination of education and work experience) in physical education or sport studies. [REDACTED] concludes that the beneficiary possesses this combination of formal education and professional experience.

In the director's denial on November 1, 2006, she determines that the beneficiary's academic education is equivalent to two years of study in the United States and concludes that the beneficiary's experience combined with his education would not be the equivalent of a bachelor's degree. The director erroneously refers to the "three for one" formula to determine whether a beneficiary has obtained a bachelor's degree through calculating three professional years of experience equaling one year of college or university that is used in evaluating non-immigrant visa petitions, but is not permitted under relevant employment-based regulations.⁴

On appeal, counsel resubmits copies of the [REDACTED]'s letters and contends that having granted the beneficiary H-1B non-immigrant status in the past, that it is appropriate to combine the beneficiary's formal education and experience and conclude that the petition is eligible for approval.

Counsel's assertions are not persuasive. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, 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 professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS 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). CIS'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]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or

⁴ The AAO's subsequent request for evidence described the director's evaluation as under both the skilled worker and professional categories, but this is not accurate given the director's reference to the three for one formula used in reviewing non-immigrant visas seeking classification as a specialty occupation.

otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On Part I a 1 of the 9089, the petitioner indicates that the labor certification application is for a professional occupation. Part F 2 of the ETA Form 9089 indicates that the DOL assigned the occupational code of 27-2022.00, coaching, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/SOC?s=27.2022.00%2C+coaching&g=Go> (accessed August 21, 2008 under SOC title matching 27.2022.00, coaching) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Five requiring "extensive preparation" for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means that "[A] bachelor's degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)." Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience.

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

See id.

Since H 4 and H 4-B of the ETA Form 9089 require a Bachelor's degree in soccer coaching and team management and H 6 of the ETA Form 9089 requires 60 months years of experience in the job offered of Director of Coaching,⁵ which is more than the minimum required by 8 C.F.R. § 204.5(1)(3)(ii)(C), combined with the DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position must be considered as a professional occupation and not as a skilled worker, which only requires 2 years of experience.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show

⁵ We will consider 60 months of experience will be considered as five years of experience.

that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

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:

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 CIS to determine whether the alien is qualified 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). *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).⁶

⁶ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), 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: "[B]oth 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 (November 29, 1991)(emphasis added).

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, (2006 WL 3491005) (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at *14. However, the court found that it was reasonable for CIS to require a single degree for a professional. *Id.* at *10-11. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, CIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, CIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree.)

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) It is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton*

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).

v. United States, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

On July 14, 2008, the AAO issued a request for evidence to the petitioner. In this request, the AAO expressed its concerns concerning the lack of evidence showing that the beneficiary holds a four-year U.S. bachelor's degree in the required field or that he possesses a foreign equivalent degree to a U.S. baccalaureate. The AAO also requested evidence that the beneficiary possesses a USSF and NSCAA license, information delineating the entrance requirements for admission to the Adolfo Pederanera Technical School and evidence relating to the petitioner's recruitment efforts which may have indicated the petitioner's intent about the actual minimum requirements of the certified position as that intent was communicated to the DOL and to potential candidates during the labor market test.

In response to the request for evidence, counsel resubmits copies of [REDACTED] previous evaluations of June 21, 2000 where she reviews a combination of the beneficiary's formal education and his professional experience to make her determination that he has a foreign degree equivalent to a U.S. bachelor's, as well as her letter of August 27, 2003, where she offers her opinion based on the beneficiary's eligibility to receive a status in a specialty occupation which are only relevant to H1B/nonimmigrant regulations.

As noted above, Part Ia1 of the ETA Form 9089 designates the certified occupation as a professional job. The DOL occupation code for the certified job also indicates that it is a professional occupation. Part H 9 of the ETA Form 9089 does not define any specific foreign educational equivalence as an alternative to a bachelor's degree. Further, the petitioner, through counsel, affirmed in the transmittal letter dated August 1, 2008, that an equivalent degree or alternative work were not acceptable as alternatives to the degree requirement. Dr. [REDACTED] June 22, 2000, review of only the beneficiary's academic credentials consisting of a two-year course completed during 1993-94 at the Adolfo Pedernera Technical School Buenos Aires, Argentina, determined that the beneficiary earned the equivalent of two years of academic credit towards a Bachelor of Science degree in Sports Studies or Physical Education from an accredited institution in the United States. As the petitioner failed to provide information delineating the entrance requirements to this school in response to the AAO's request for evidence, we do not necessarily concur with [REDACTED]'s conclusion in this respect, but it is clear that the beneficiary's academic credentials, standing alone, do not represent a U.S. bachelor's degree in soccer coaching and team management or a foreign equivalent degree.

[REDACTED]'s other evaluations suggesting that a combination of the beneficiary's experience and academic studies represents an equivalent foreign degree to a U.S. baccalaureate does not justify approval of the immigrant petition in this matter where the certified job is for a professional position. As noted above, the formula used to equate three years of experience for one year of education applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with

other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, academic credit that may represent no more than two years toward a U.S. bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. In order to have the education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. The beneficiary was required to have a bachelor's degree on the ETA Form 9089. It is further noted that the petitioner's response (exhibits 19-37) to the AAO's request for evidence also indicate that the petitioner's recruitment efforts failed to indicate that anything less than a bachelor's degree was an acceptable substitute for the education required on the ETA Form 9089.

It is noted that the petitioner's response to the request for evidence failed to provide sufficient evidence that the beneficiary possessed the pertinent USSF and NSCAA licenses required on the ETA Form 9089. The petitioner's response included a resubmission of the various professional training certificates that are hereinabove noted, as well as a 2003 letter granting the beneficiary a waiver into the NSCAA advanced national course (exhibit 9) and a copy of a 2002 letter from "US Soccer" (exhibit 11) granting the beneficiary permission to participate in a national 'B' license course but specifically advising him that it did not constitute a USSF license. It is also concluded that the petitioner failed to provide sufficient additional evidence that the beneficiary qualified for the certified position in this regard. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The petitioner failed to demonstrate that it has had the continuing ability to pay the proffered wage and also failed to establish that the beneficiary possesses a United States baccalaureate degree or a foreign equivalent degree, as well as the required licenses set forth on the ETA Form 9089, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

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

ORDER: The appeal is dismissed.