



U.S. Citizenship
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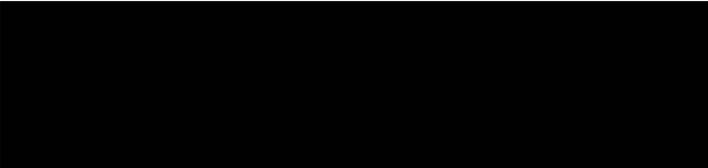


FILE: LIN 06 155 53805 Office: NEBRASKA SERVICE CENTER Date: DEC 01 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 an accounting and auditing firm. It seeks to employ the beneficiary permanently in the United States as a accountant. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.¹ Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

On appeal, the petitioner, through counsel, submits additional evidence and asserts that the petitioner has established that the beneficiary meets the required level of education as stated on the ETA Form 9089.

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).²

The record shows that the appeal is properly filed and timely. 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.

At the outset, it is noted that the AAO issued a notice of intent to deny on May 27, 2009, relevant to the beneficiary's educational credentials, the petitioner's recruitment efforts, the beneficiary's relationship to the petitioning entity and the petitioner's continuing ability to pay the proffered wage. The petitioner failed to respond to this notice of intent to deny and failed to submit the requested information relevant to these issues. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² The submission of additional evidence on appeal is allowed by the instructions to 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 (BIA 1988).

Additionally, for the reasons explained below, the petition will be denied. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO 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*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, at 1002 n. 9.

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.

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 its continuing financial ability to pay the proffered wage. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977); 8 C.F.R. § 204.5(g)(2). Here, the ETA Form 9089 was accepted for processing on September 10, 2005, which establishes the petition's priority date.³ The proffered wage is stated as \$69,909 per year. The Immigrant Petition for Alien Worker (Form I-140) was filed on May 1, 2006.

On Part 5 of the I-140, the petitioner claims that it was established in 2002, reports an annual gross income of \$375,000, a net annual income of \$48,490 and currently employs four employees. Other documentation reflects that it is structured as a limited liability company. The beneficiary signed the ETA Form 9089 in 2004. Although on Part K of the ETA 9089, the beneficiary does not indicate that he has worked for the petitioning business, a letter, dated January 15, 2007, signed by [REDACTED] who is identified as the petitioner's vice-president, reflects that the petitioner has employed the beneficiary since October 2004.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in

³ 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.

training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's.

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

n/a

4-B. Major Field Study: Accounting.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

7-A. If Yes, specify the major field of study:

n/a

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

8-A. If yes, specify the alternate level of education required:

n/a

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Experience: 120 months in the position offered

11. Job duties: Setting up internal control systems for churches
Auditing of Church Organization.
Installation and training in Power Church software.

Writing audit software programs, supervision of subordinates, using VISIO to draw diagrams with narratives.

Internal audit and preparation of financial statement.

Supervision of billing, customers account analysis, account reconciliation, aging of account receivable, bank reconciliation, cash posting, cash management/cash flow, costflow, cost process and journal entry.

14. Specific skills or other requirements:

Proficiency in the use Power Church software.

Proficiency in Microsoft office tools.

Ability to use Visio.

Good knowledge of excel, power point and oracle financial.

Ability to use ACL Audit. Ability to use Computer assisted audit software/language command.

Excellent verbal and communication skill.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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).

As set forth above, the proffered position requires Bachelor's degree in accounting and 120 months (10 years) of experience in the job offered as an accountant.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was "other." He listed the institution of study where that education was obtained as Institute of Chartered Accountants of Nigeria, and the year completed as 1992. The beneficiary did not claim that he had a bachelor's degree. However, he listed on the ETA Form 9089 that he was a certified public accountant.⁴

In support of the beneficiary's educational qualifications, the petitioner submitted two copies of a Certificate of Membership in The Institute of Chartered Accountants of Nigeria. The initial document is not dated. The document submitted on appeal is dated September 2, 1993. The

⁴ It is unclear where the beneficiary is licensed. Electronic records for the state of Texas, where the beneficiary resides, do not reflect that he is currently licensed as a CPA. *See* <http://www.tsbpa.state.tx.us/cacros/OD007.ndm/Detail?> (Accessed 10/22/09).

petitioner does not explain this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Both documents indicate that the beneficiary has been admitted as an associate of the Institute. A copy of a letter, dated March 25, 2004, from O.A. Adepte, director of Student Affairs, lists three professional examinations completed by the beneficiary and affirms that the beneficiary successfully completed the Institute's professional examinations held in November 1984, May 1988 and in May 1992.

The petitioner submitted two credential evaluations from HR Analytical Services. The earliest evaluation is dated June 14, 2004 and is signed by [REDACTED] As indicated in the Notice of Intent to Deny, this evaluation states that:

Admission to the Associate Member status of the Institute of Chartered Accountants of Nigeria requires a minimum of a Bachelor of Science degree, a Higher National Diploma (HND), or completion of coursework set by the Institute. Holders of bachelor's degrees and HNDs enjoy limited exemptions from admission requirements, whereas candidates who do not hold these qualifications must satisfy strict coursework and examination requirements at three major levels: Foundation, Professional I, and Professional II.

The evaluation concludes that the beneficiary has the equivalent of a Bachelor of Science degree in Accounting from an accredited post-secondary institution in the United States. The evaluation dated June 30, 2007, is signed by [REDACTED] It is almost identical in form and language to the earlier evaluation and similarly determines that the beneficiary has the U.S. equivalent of a Bachelor of Science degree in Accounting. Both evaluations rely on the certificate completed and do not state that the beneficiary was enrolled in, or completed a bachelor's degree at an institution of higher learning.

The director denied the petition on April 10, 2007. He determined that the beneficiary's credentials could not be accepted as the equivalent to a U.S. baccalaureate degree in accounting.

On appeal, with regard to the beneficiary's qualifying academic credentials, in addition to the documentation previously submitted, counsel provides a copy of a letter from an individual identified as [REDACTED] dated September 7, 2005, addressed to the Texas State Board of Public Accountancy. [REDACTED] states that he is an admissions officer of the University of Texas at Austin. He then states that the beneficiary has earned the equivalent of a bachelor's degree, but subsequently states that the applicant's study yields only 90 semester hours of academic study. The typical bachelor's degree in the United States represents 120 semester hours of academic study. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582,

591-592 (BIA 1988). Additionally, this letter does not evidence that the beneficiary has one single source bachelor's degree from an institution of higher learning required to meet the terms of the labor certification as drafted.

DOL assigned the code of 13-2011.01, accountant, to the proffered position. According to DOL's public online database at <http://online.onetcenter.org/link/summary/13-2011.01> (accessed November 4, 2009) 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 Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not."⁵ Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

Based on both the stated minimum requirements described on the ETA Form 9089, including the requirement that the applicant must have 120 months or ten years of experience in the job offered, the standardized occupational requirements as set forth above, and the expansive job duties of the certified position, as well as the petitioner's request for classification as a professional reflected on Part I, a, 1 of the labor certification, the petition must be considered under the professional category.

The regulation at 8 C.F.R. § 204.5(l)(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 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.

⁵ <http://online.onetcenter.org/link/summary/> (accessed November 4, 2009).

The above regulation uses 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.

In the AAO's notice of intent to deny, the AAO noted that the petitioner did not specify on the ETA Form 9089 that the minimum academic requirements of a bachelor's in accounting degree might be met through a combination of lesser degrees and/or a quantifiable amount of work experience. The AAO noted that the labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a single-source U.S. bachelor's degree or its foreign equivalent degree when the labor market test was conducted. The AAO further noted that as the beneficiary's certificate of associate membership in the Institute of Chartered Accountants of Nigeria was based on something other than completion of a bachelor's degree, the petitioner would either need to demonstrate that the beneficiary has other education, which is a U.S. bachelor's degree in accounting or an equivalent foreign degree based on one course of study. The AAO further requested evidence that the petitioner used such a defined equivalency in the petitioner's labor market test of otherwise available qualified U.S. workers. As noted above, the petitioner failed to respond to the notice of intent to deny.

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:

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).⁶ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).⁷

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or 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

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

⁷ 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.* § 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).

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).

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, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. 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 single-source "foreign equivalent degree." In order to have experience and 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.

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, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA 9089 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS 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, USCIS "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). In this matter, the ETA Form 9089 does not specify an equivalency to the requirement of a Bachelor's degree in accounting.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *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, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must

demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). 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 divine the employer’s intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(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.) Moreover, 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 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. Significantly, 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 if 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.

Regarding the evaluations, it is noted that they do not state, nor does the petitioner claim that the beneficiary has a bachelor’s degree or a HND. The record reflects that the beneficiary completed the Foundation Exam in 1984, the Professional Exam in May 1988 and the Professional Exam II in 1992. The certificate of associate membership does not represent a bachelor’s degree or a foreign equivalent bachelor’s degree but a certificate based on the completion of a series of studies and exams. Whether it is also based on a number of years of experience remains unclear, but as the record currently stands, it may not be concluded that it is a foreign equivalent degree. USCIS 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). Additionally, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate.

The ETA Form 9089 does not provide that the minimum academic requirements of Bachelor’s degree in Accounting might be met through some other formula other than that explicitly stated on

the ETA Form 9089. As the petitioner failed to respond to the notice of intent to deny, it is unknown if the petitioner's recruitment efforts pursuant to its test of the labor market or correspondence with DOL advised if the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

As noted in the AAO's intent to deny, the petitioner failed to establish its continuing ability to pay the proffered wage of \$69,909 per year. The petitioner was advised that as the audited financial statement covering the petitioner's financial status for 2005 was prepared by an individual sharing the same surname as the beneficiary,⁸ that it should submit independent objective confirmation of the petitioner's ability to pay the proffered wage. As the petitioner failed to respond to the notice of intent to deny, it remains unclear what blood or familial relationship exists between these two individuals and whether the petitioner may have misrepresented the accuracy of its denial of such a relationship in Section C.9 of the ETA Form 9089 when it answered "no" to the question of whether the employer is a closely held corporation in which the alien has an ownership interest or is there a familial relationship between the alien and the owner, stockholders, partners, corporate officers, incorporators, and the alien. It is noted that according to public records, [REDACTED] is also a manager of the petitioner.⁹

The petitioner has not established that the beneficiary satisfied the minimum level of education stated on the labor certification. Further the petitioner failed to demonstrate that it has had a continuing financial ability to pay the proffered wage. The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁸The person signing the 2005 audited financial statement is [REDACTED]

The beneficiary is [REDACTED]

⁹ See <http://ecpa.cpa.state.tx.us/coa/servlet/cpa.app.coa.CoaOfficer>. (Accessed 04/21/09). It is further noted that the Statements on Auditing Standards (SAS) which are issued to provide guidance pursuant to generally accepted auditing standards (GAAS) and generally accepted accounting principles (GAAP) provide that independent auditors should not only be independent in fact, they should avoid situations that may lead outsiders to doubt their independence. See *SAS No. 1, section 220.03*; also *Barron's Accounting Handbook* 318-319 (3rd ed. 2000). In this case, the audit submitted by Mr. Awe does not represent an audit prepared by someone who is independent in fact.