



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
WAC 07 275 53541

Office: TEXAS SERVICE CENTER Date:

DEC 04 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)

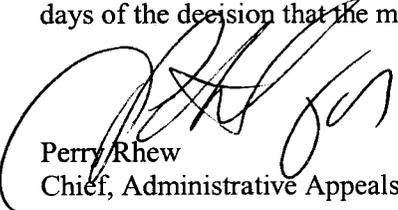
ON BEHALF OF PETITIONER:



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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
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 consulting firm. It seeks to employ the beneficiary permanently in the United States as a computer programmer. 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 beneficiary did not satisfy the minimum level of education stated on the labor certification. The director also concluded that the petitioner had failed to establish that the beneficiary had acquired the requisite three years of experience in the job offered and denied the petition accordingly.

On appeal, the petitioner, through counsel, submits additional evidence related to the beneficiary's academic credentials. Counsel contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petition should be approved. Counsel also asserts that the director erroneously failed to consider the employment verification letters submitted to the record.

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).

For the reasons discussed below, we concur with the director's denial of the petition, but would also note that various decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

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 petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the Form ETA 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 August 8, 2006. It does not indicate that the petitioner has employed the beneficiary.

Part 5 of the Immigrant Petition for Alien Worker (Form I-140) indicates that the petitioner was established on September 23, 1997, employs more than six workers, and claims a gross annual income of \$1,983,721 and a net annual income of \$121,947.

The ETA Form 9089, Part H sets forth the minimum requirements for the position of computer programmer. The proffered position requires a bachelor's degree in computer science and 36 months of experience in the job offered. Part H, Item 8 indicates that the employer will not accept an alternate combination of education and experience. Part 9 indicates that a foreign educational equivalent is acceptable and Part 10 reflects that the employer will not accept experience in an alternate occupation.

In determining whether a beneficiary is eligible for a preference immigrant visa, United States 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).

DOL assigned the occupational code of 15-1021.00, computer programmer, 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/link/summary/15-1021.00>¹ and the description of the position and requirements for the job, 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." *See* <http://online.onetcenter.org/link/summary/15-1021.00>.² 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.

¹ (Accessed 11/03/09).

² (Accessed 11/03/09).

It is noted that on Part I, a, 1. of the ETA Form 9089, the petitioner affirmed that the ETA Form 9089 is an application for a professional occupation. Additionally, correspondence from the petitioner, through counsel on appeal, indicates that the petitioner is seeking a professional classification. Together with the minimum educational and experiential requirements specified on the ETA Form 9089, the position must be classified as a professional position. Even if categorized as a skilled worker position, the petitioner must still demonstrate that the beneficiary's education and experience satisfy the terms of the labor certification.

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 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.

As noted above, the ETA Form 9089 in this matter is certified by DOL. Section 212(a)(5)(A)(i) of the Act provides:

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.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

- (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not 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). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference

status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a Bachelor's degree in Computer Science completed in 1996 from Mumbai University (India). In corroboration of the ETA Form 9089, the petitioner provided the beneficiary's Bachelor of Science degree in Mathematics and transcripts from the [REDACTED]. The third year transcript indicates that part of his major studies included computer programming as an applied component group. The petitioner also included copies of other certificates received including:

- 1) A copy of a Certificate of Excellence, dated February 12, 1999 from [REDACTED] [REDACTED] indicating that the beneficiary completed a "Masters Diploma in [REDACTED]"

On the face of the certificate, it appears to be related to Microsoft;

- 2) Six copies of Microsoft Score Reports from January to March 1999 indicating Microsoft training certifications obtained by the beneficiary.

A copy of a credentials evaluation from the [REDACTED] dated July 15, 2005 is also contained in the record. This evaluation reviews a combination of the beneficiary's degree from [REDACTED], his Microsoft certificates and work experience and concludes that it cumulatively represents the U.S. equivalent of an MS in Information Technology. This evaluation is not probative of the beneficiary's academic credentials, standing alone, because it impermissibly combines employment experience and other lesser certificates to reach a determination. The ETA Form 9089 as certified does not allow for such a combination.

In determining whether the beneficiary possessed a U.S. bachelor's degree in computer science or a foreign equivalent degree, the petitioner was advised in the AAO's request for evidence that [REDACTED] created by the American Association of [REDACTED] according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for [REDACTED] [REDACTED] is "a web-based resource for the evaluation of foreign educational credentials."

[REDACTED] provides a great deal of information about the educational system in India, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

[REDACTED] discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. [REDACTED] provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. [REDACTED] further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the [REDACTED]. Some students complete PGDs over two years on a part-time basis. When examining the

Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

In the request for evidence, the petitioner was advised that the record does not contain any evidence showing the beneficiary holds a four-year U.S. bachelor's degree in the required field, nor does the record contain any evidence showing that any of his Microsoft certificates or his [REDACTED] represented a *postgraduate* diploma issued by an accredited university or institution approved by [REDACTED] and its entrance requirement was the three-year bachelor's degree. The petitioner was requested to submit such first-hand evidence that the beneficiary possessed a postgraduate diploma.

The petitioner failed to respond to the AAO's request for evidence. 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).

As the record did not contain any evidence showing that the petitioner actually used any other defined equivalency describing its acceptance of a combination of lesser degrees, diplomas, certificates and/or work experience in the petitioner's labor market test, this evidence was also requested by the AAO.

On appeal, contending that the beneficiary's credentials fulfilled the terms of the labor certification, counsel simply submits the credential evaluation from the Center for Educational Research & Evaluation. Counsel asserts that the beneficiary has the equivalent of a bachelor's degree and is a member of the professions.

This office notes that authors for [REDACTED] must work with a publication consultant and a Council Liaison with [REDACTED] on the [REDACTED] [REDACTED] 5-6 (First ed. 2005), available for download at [REDACTED]. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12. Thus [REDACTED] represents a peer-reviewed evaluation that has been vetted by a council of experts. This office finds that the distinction drawn between a diploma representing post-secondary studies and a diploma representing post-graduate studies based on an admission requirement of an underlying three-year degree to be credible.

Further, it is noted that the petitioner failed to provide evidence that the prerequisite for admission to his diplomas or certificates was a three-year degree as advised by [REDACTED]. Based on the foregoing, with respect to the credentials evaluation submitted to the record, the AAO does not find any it to be probative that the beneficiary possesses a four-year bachelor's degree in computer science. USCIS may, in its discretion, use advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). USCIS,

however, is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

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 combination of certificates and diplomas, will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). 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. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Even if considering at most, the beneficiary's attainment of three years of undergraduate university studies represented by the beneficiary's bachelor's degree, this would not qualify as full bachelor's degree in computer science as indicated on the ETA Form 9089.

As noted above, the petitioner initially identified the proffered position to be filled by a professional position. Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act,³ the evidence related to the petitioner's intent as to the acceptable alternative requirements pertinent to the employer's recruitment efforts remains relevant. As noted above, the AAO requested information related to the petitioner's intent. The petitioner failed to respond or submit any evidence on this point.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) which found that [USCIS] "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." *Id.* At 1178. In contrast to the broad precedential authority of the case law of a United

³The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a). In reaching this decision, the court also concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification.⁴

⁴ Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." [REDACTED] has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA FORM 9089, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the

Additionally, we also note the subsequent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006). In that case, the ETA FORM 9089 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 as a "specific level of *educational background*." *Snapnames.com, Inc.* at *6. 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. *Snapnames.com, Inc.* 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. *Snapnames.com, Inc.* at *17, 19.

It is noted that in *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the Form ETA FORM 9089 described the educational requirement as Bachelor's or equivalent and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien's other credentials with his three-year diploma to meet the requirements of the ETA FORM 9089. *Id.* at *13-14. In this case, the beneficiary must possess a bachelor's degree in computer science. The petitioner failed to specify any defined equivalency on the ETA Form 9089. The beneficiary's baccalaureate education does not equate to a bachelor's degree or satisfy the requirements of the labor certification in either a professional or skilled worker category.

It is noted that that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984), USCIS is obliged to "examine the certified job offer *exactly* as it is completed by the prospective employer." (Emphasis added) USCIS' 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). The beneficiary has not completed four years of college culminating in a Bachelor's degree in computer science and does not meet the

employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in [REDACTED] did not meet that requirement, labor certification was properly denied.

terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional or as a skilled worker under 203(b)(3)(i) of the Act.

Further, the AAO concurs with the director's decision regarding the petitioner's failure to establish that the beneficiary possessed three years of work experience in the job offered as a computer programmer as of the priority date of August 8, 2006. As noted by the director, the only job claimed to be held by the beneficiary is listed on the ETA Form 9089 as employment as a computer programmer for ██████ in Mumbai, India. As stated, this employment commenced January 2, 1997 and ended June 30, 2000. As stated by the director, although the instructions on Part K of the Form ETA 9089 direct the applicant to "list all jobs the alien has held during the past 3 years . . . [and to] . . . list any other experience that qualifies the alien for the job opportunity . . .," the ICICI job was the only position listed. Moreover, although employment verification letters from employers not listed on the Form ETA 9089 were submitted, no employment letter from ██████ was provided. This additionally raises a question as to the reliability of the evidence of the beneficiary's qualifying work experience as stated on the Form ETA 9089.⁵

Moreover, as noted by the director, the dates of employment claimed by an employment verification letter submitted from ██████ states that it employed the beneficiary during an overlapping period from February 1, 1999 to January 25, 2000. On appeal, counsel merely states that it is not a conflict to have more than one job at a time. It is noted that counsel's unsupported statements in this regard do not constitute evidence. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, as noted above, the Form ETA 9089 was never signed by the beneficiary, which additionally raises doubts as to any of the statements made on his behalf on the Form ETA 9089 and constitutes an additional ground of denial of the petition.⁶ 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. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). In this matter, it may not be concluded that the petitioner has established that the beneficiary acquired three years of work experience as a computer programmer pursuant to the Form ETA 9089 and 8 C.F.R. § 204.5(l)(3)(ii)(A).

⁵ See also *Matter of Leung*, 16 I&N 12, Interim Dec. 2530 (BIA 1976)(decided on other grounds; Court noted that applicant testimony concerning employment omitted from the labor certification deemed not credible.)

⁶ The regulation at 20 C.F.R. 656.17(a)(1) provides that applications "filed and certified electronically must, upon receipt of the labor certification be signed immediately by the employer in order to be valid.

As noted in the AAO's request for evidence, the petitioner was further instructed to submit evidence of the petitioner's continuing ability to pay the proffered wage from 2006 onward, pursuant to the provisions of 8 C.F.R. § 204.5(g)(2) which provides 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

As set forth in the regulation, the petitioner is obliged to demonstrate this ability to pay the certified salary as of the priority date and continuing until the beneficiary obtains lawful permanent residence. As the petitioner failed to respond to the AAO's request for evidence pertinent to this issue, the petition will be denied on this additional basis.

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.

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.