

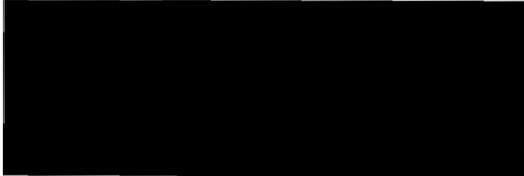
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
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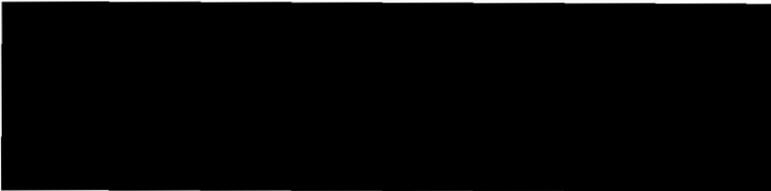
IN RE:

Petitioner:

Beneficiary:

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).

John R. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: On August 31, 2004, the director, Texas Service Center, denied the preference visa petition. The matter was previously on appeal to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. Former counsel then submitted a Motion to Reopen/Reconsider. The motion will be dismissed; however, the AAO will reopen the matter sua sponte pursuant to its authority at 8 C.F.R. § 103.5(a)(5)(ii) to examine further questions raised by the AAO in a Request for Evidence (RFE) dated May 28, 2008.

The petitioner is a marine business. It seeks to employ the beneficiary permanently in the United States as a marine technical surveyor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the beneficiary did not possess a bachelor's degree of science in marine systems as stipulated by the ETA 750. The director denied the petition accordingly.

On October 1, 2004, former counsel filed an I-290B to appeal the decision. The petitioner had indicated on appeal that it was sending additional materials to the record in support of the appeal; however the AAO received no further materials within 30 days and sent a fax to former counsel¹ with regard to whether the petitioner had submitted additional materials. The AAO received no further response from former counsel and on February 3, 2006, adjudicated the appeal based on the record as then constituted. The AAO dismissed the appeal because the petitioner had not established that the beneficiary was qualified for the proffered position since he did not possess a bachelor's degree in marine systems, and because the petitioner had not established its ability to continuously pay the proffered wage as of the 1999 priority date. The AAO also determined that the petitioner had not submitted a letter of work verification from Denholm Sip Management Ltd, Glasgow, United Kingdom to verify the beneficiary's ten years of relevant work experience noted on the ETA 750, Part B, that would have fulfilled the stipulated three years of relevant work experience noted on the ETA 750, Part A.

In correspondence to the AAO dated February 2, 2006, former counsel indicated that he had suffered a heart attack, his partnership had been dissolved, and he had been unable to respond timely to the AAO dismissal. Former counsel then filed a Motion to Reopen/Reconsider with the Vermont Service Center, noting that the AAO had raised an additional ground of denial,² and that the AAO decision

¹ [REDACTED]

² 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). *See also Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990):

The APA provides that, on review of an ALJ decision, the agency shall have "all the powers which it would have in making the initial decision...." 5 U.S.C. § 557(b) (1982).

failed to consider the correct standard for determining the beneficiary's eligibility for the employment-based visa petition. Former counsel also indicated that he was filing a brief within 30 days. To date, the AAO has received no further evidence.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. On motion, counsel submitted no additional evidence as to the beneficiary's qualifications, the petitioner's ability to pay the proffered wage, or explanation as to the lack of a letter of work verification from Denholm Ship Management Ltd. Former counsel merely asserts that the AAO raised a new ground for denial and that the decision failed to consider the correct standard for determining the beneficiary's eligibility for the employment based visa petition. Former counsel also stated that he would file a brief within 30 days, but failed to submit any additional documentation. The AAO issued a RFE that will be described more fully further in this proceeding. In it the AAO noted that the petitioner had not submitted any further evidence in support of the motion filed by former counsel, and requested a copy of any such evidence submitted in support of the motion. However, in its response to the AAO's RFE, current counsel did not submit any further evidence as to former counsel's submission of evidence with regard to the beneficiary's educational qualifications, the petitioner's ability to pay the proffered wage or the petitioner's inability to establish the requisite two years of prior work experience based on the beneficiary's previous work experience with Denholm Ship Management, Glasgow. Therefore the motion is dismissed. However, since the petitioner submits further evidence with regard to the beneficiary's qualifications for the instant petition, and comments further on the multiple filings found in the

The statute authorizes the agency to decide all issues de novo. *Containerfreight Transp. Co. v. I.C.C.*, 651 F.2d 668, 670 (9th Cir.1981).

Mester Manufacturing Co. v. INS, 900 F.2d 201, 203-04 (9th Cir. 1990):

IRCA does not establish a standard of review for administrative appeals. However, IRCA hearings are conducted in accordance with the requirements of the APA. 8 U.S.C. § 1324a(e)(3)(B) (1988). On administrative appeal or review of initial determinations under the APA, "the agency has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). In an analogous case under the Social Security Act, we have held that ALJ decisions can be reviewed de novo by the Appeals Council even though courts can only review decisions by ALJs for substantial evidence. *Razey v. Heckler*, 785 F.2d 1426, 1427-1429 (9th Cir.), *modified*, 794 F.2d 1348 (9th Cir.1986). The CAHO, therefore, properly applied a de novo standard of review to the ALJ's decision.

record, the AAO will reopen the matter sua sponte to further examine questions raised in an AAO RFE.

On May 28, 2008, the AAO issued a RFE with regard to whether the petitioner had demonstrated that the beneficiary is qualified to perform the duties of the proffered position as the petitioner had set forth on its Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification application), that is, whether the beneficiary possesses a U.S. bachelor's degree or equivalent in Marine Systems. The AAO noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree, or equivalent might be met through a combination of lesser degrees and/or a quantifiable amount of work experience, and that the labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience, or that the petitioner specified that any such combination would be acceptable during the labor market test.

The AAO noted that the documentation in the record of proceeding as currently constituted created ambiguity concerning the actual minimum requirements of the proffered position. The AAO stated that although the clearly stated requirements of the position on the certified labor certification application did not include alternatives to a U.S. bachelor's degree, the petitioner during the petition process now contended that the actual minimum requirements do include at least what the beneficiary has achieved through a combination of degrees all individually less than a bachelor's degree and/or experience. The AAO requested evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. The AAO noted that such intent may have been illustrated through correspondence with DOL, amendments to the labor certification application initialed by DOL and the petitioner, results of recruitment, or other forms of evidence relevant and probative to illustrating the petitioner's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

The AAO requested that the petitioner provide evidence that it provided, *at the time it submitted to DOL its Form ETA 750 application and attachments*, the requisite "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. Specifically, the AAO requested a complete copy of the Form ETA 750 as certified by DOL including any documentation that summarizes your organization's recruitment efforts and its explicitly expressed intent concerning the actual minimum requirements of the proffered position. The AAO also requested a copy of all supporting documents summarizing the petitioner's recruitment efforts, as well as a copy of the position posting notice, and recruitment ads placed, as previously presented to DOL, which might overcome any deficiencies or defects in the record outlined above.

The AAO also noted that in determining whether the beneficiary's degree or diplomas individually would be a foreign equivalent degree, it had reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer

(AACRAO), and noted that EDGE did not provide for the equivalency of studies in the United Kingdom.³ Regarding the beneficiary's studies in Pakistan, EDGE provides that the beneficiary's studies at Government National College, for which documentation in the record shows he received a Higher Secondary Certificate, would be comparable to "the attainment of a level of education comparable to completion of senior high school in the United States."

Additionally, the AAO noted that the petitioner had filed two subsequent labor certifications for the beneficiary based on what would appear to be the same position, although the other labor certifications filed contain discrepant minimum qualifications. The AAO noted that on November 23, 2004, the petitioner filed a second Form ETA 750 on the beneficiary's behalf for the position of Marine Surveyor and listed a pay rate of \$70,450 per year. The petitioner listed the requirements as: no degree required, and three prior years of experience required in the position of Marine Surveyor. The AAO also noted that on May 16, 2006, the petitioner filed Form ETA 9089 on behalf of the beneficiary for the position of Marine Surveyor, at a salary of \$45,700.89. Form ETA 9089 required three years of prior experience, and also did not list that a bachelor's degree was required.

The AAO noted that in total the petitioner had filed three labor certifications on the beneficiary's behalf, which had all used the same job description, a similar title, but that two of the petitions had listed different educational and experience requirements, as well as different salaries. Further, the AAO noted that the petitioner had filed several H-1B petitions on the beneficiary's behalf, which required that the beneficiary have a bachelor's degree related to the specialty occupation for the position. The AAO requested that the petitioner explain the positions' differing educational requirements, prevailing wages and, if appropriate, provide any evidence that would distinguish these positions from one another.

The AAO noted that the regulation at 8 C.F.R. § 214.2(h)(4)(C)(3)(iii) provides that H-1B petitions involving a specialty occupation require either:

- (1) a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) the degree requirement is common to the industry in parallel positions among

³ EDGE does provide information on the equivalency of studies in the United Kingdom, although the beneficiary's maritime studies at Lowestoft College in the 1990s are not specifically addressed in EDGE. The beneficiary's Certificate of Achievement from Lowestoft College notes that the beneficiary attended a Higher National Diploma (HND) course in nautical studies from September 1993 to July 1994. The beneficiary's transcript of coursework makes reference to "(Business and Technician Education Council)BTEC in combination." Under the current equivalency information outlined in EDGE, it is not clear whether this coursework would be comparable to a BTEC first certificate which indicates less than high school level graduation studies or the current BTEC Higher National Diploma which indicates education comparable to one year of university study in the United States. The beneficiary's earlier studies as listed on the certificate overlap with those for a current Chief Mate Certificate of Competency. See <http://lowestoftinternational.co.uk/maritimeCMC.asp> (accessed on November 20, 2008.)

similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

- (3) the employer normally requires a degree or its equivalent for the position; or
- (4) the nature of the specific duties is so complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher.

The AAO noted that in signing the instant Form I-140 and the Forms I-129, the petitioner certified under penalty of perjury that, in each case, the petition and the evidence submitted with it were all "true and correct." Accordingly, the AAO stated that unless the petitioner could resolve the inconsistent information provided in these filings with independent objective evidence,⁴ the AAO intended to dismiss the motion⁵ and enter a formal finding of fraud into the record, and would recommend that USCIS revoke the approval of the Form I-129 petition. The AAO noted that while the petitioner may withdraw the appeal, withdrawal would not prevent a finding that the petitioner engaged in fraud and the willful misrepresentation of material facts.

Finally, the AAO noted that the petitioner additionally indicated when it filed its appeal⁶ that the petitioner would submit additional documentation related to the appeal. To date, the AAO has not received any additional documentation. In order to complete the adjudication of the motion on its merits, the AAO requested that a copy of the additional evidence and/or brief be sent to the AAO along with the petitioner's response to the foregoing RFE, along with evidence of the date it was

⁴ The AAO noted:

The discrepancies between the Form I-129 and Form I-140 filings significantly undermine your appeal in the instant case. Specifically, the discrepancy between the baccalaureate degree requirement in the H-1B petition, and the absence of any academic requirement for the position in subsequently filed labor certifications calls into doubt the veracity of the position requirements and the *bona fides* of the position.

Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon 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).

⁵ The AAO referred to the matter as an appeal, although the petitioner submitted a motion to reopen/reconsider.

⁶ See footnote 5, above.

originally filed with this office. The AAO stated that the regulations did not allow an applicant or petitioner an open-ended or indefinite period in which to supplement a motion once it had been filed.

In response to the RFE, current counsel does not submit any further evidence with regard to the motion submitted by former counsel. Counsel does not submit the recruitment report for the proffered position, but does submit a statement with regard to the beneficiary's qualifications for H-1B eligibility and the petitioner's multiple labor filings on behalf of the beneficiary. Counsel outlines the educational qualifications for eligibility under the I-129H petition for a specialty occupation non-immigrant worker. Counsel states that section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) establishes that immigration regulations provide for substituting training for education to arrive at bachelor's degree equivalency in H-1B petitions. Counsel notes that the educational equivalency evaluations written by three different evaluators submitted to the record demonstrated that the beneficiary's education is equivalent to a U.S. bachelor's degree.⁷ Counsel states that the regulations for evaluating the qualifications of a beneficiary pursuant to a traditional labor certification are totally different in that work experience equivalency is not accepted unless the employer specifically states the equivalency in the space provided on the ETA 750, Part A. Counsel states that an individual may have the equivalent of a bachelor's degree with regard to an H-1B petition, but not with regard to the I-140 petition. Counsel states that the inconsistency exists in USCIS regulations, not in the petitioner's petitions.

With regard to the different labor certification applications filed for the beneficiary, counsel states that the extraordinary delay by the DOL and the change of systems for the labor certification application were the major reasons for the multiple filings. Counsel states that the petitioner's letter submitted in response to the AAO RFE documents that all labor certification applications were filed in accordance with the laws of the DOL. Counsel notes that the labor certification applications were filed at different times and for different offices of the petitioner which led to different prevailing wage determinations by DOL. Counsel asserts that the wages for the proffered job were assigned by DOL and the petitioner had no role in the prevailing wage decision. The terms of the job offer are determined by the petitioner, not DOL. The AAO does not find this argument convincing.

Counsel also submits a letter dated August 6, 2008 written by [REDACTED], the petitioner's vice president. In his letter [REDACTED] describes the petitioner's business operations and affiliations with industry related organizations. [REDACTED] also states that the instant petition was filed for the beneficiary in 1999, and eventually certified by DOL on May 1, 2002. While the instant petition was on appeal, [REDACTED] states that the petitioner was advised to file a new labor certification and, to open up the job opening to the maximum number of able, qualified U.S. workers, the petitioner did away with the degree requirement in the labor certification application. The AAO finds this argument convincing.⁸ [REDACTED] also stated that by the relaxation of the degree requirement the

⁷ The AAO notes that all evaluations reviewed in the record combined both the beneficiary's education, training and work experience to arrive at an equivalency to a U.S. bachelor's degree in technology. No evaluator stated that the beneficiary's education alone was the equivalent to a U.S. bachelor's degree.

⁸ However, the AAO will forward all copies of the three labor certification applications to DOL

petitioner could avoid problems encountered with the instant petition. Accordingly the petitioner's second labor certification was filed from the petitioner's office in Massachusetts on November 23, 2004. ██████ states that at that time the DOL was overwhelmed with the large number of cases filed in 2001 under section 245(i), and the processing of cases was slow. ██████ then stated when DOL came up with significant modification to the labor certification process in March 2005 under PERM, the petitioner was advised that the DOL preferred that pending applications be routed through the new system. ██████ stated that the petitioner tried the PERM processing in May 2006 with a third application in May 2006. ██████ noted that this application was approved in June 2006, and that later in 2007, the DOL also approved the petitioner's previous 2004 labor certification application.

██████ states that all prevailing DOL regulations were fully complied with during the recruitment phase in all the petitioner's filings, and that the prevailing wages were provided by DOL. ██████ concludes that the two subsequent labor certification applications were done by offices in Massachusetts and New Jersey, and filed against business needs. He also adds that there was no regulation that barred filing of multiple applications for an employer for the same position.

Counsel also submits a copy of the initial ETA 750 filed in November 3, 1999; correspondence with a date of May 20, 2001 from the New Jersey Department of Labor, Alien Labor Certification, Trenton, New Jersey that identifies the beneficiary and requests additional information for the application, and instructions on advertising for the position of Marine Surveyor; a copy of a job advertisement faxed by the *Star Ledger*, Newark, New York on June 12, 2001. This advertisement for Marine Surveyor lists no specific education or work experience for the position, but rather states "Must be willing to work FT on rotating schedule [and] have exp[erience] in performing ship/barge inspection;" a copy of an invoice from the *Star Ledger* for an advertisement for a job identified as "Help Wante (sic) Marine" that ran from June 4 to June 6, 2001; a copy of a Job Notice for a Marine Surveyor position dated June 4, 2001;⁹ and copies of the three educational equivalency evaluations previously submitted to the record.

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. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.) Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

pursuant to its consultation authority at section 204(b) of the Act.

⁹ This job posting also contains no specific educational requirement, stating only the same work experience noted in the *Star Ledger* advertisement.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on November 3, 1999.

The AAO maintains plenary power to review an appeal, and by extension, a motion 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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted in response to its RFE.¹⁰

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of marine technical surveyor. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School (blank)
 - High School (blank)
 - College X
 - College Degree Required **Bachelor of Science degree**
 - Major Field of Study Marine Systems

The applicant must also have 2 years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, need not be recited in this decision. Item 15 of Form ETA 750A does not reflect any special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part

¹⁰ The submission of additional evidence on motion is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1).

11, eliciting information on the beneficiary's schools, colleges, and university attended, the beneficiary represented that he had attended Lowestoft College, studying merchant marine, from September 1993 to July 1994, and received a Certificate of Achievement. The beneficiary also listed his general studies in Pakistan at the Government National College, Karachi, Pakistan, and at Green Wood Secondary School, Karachi, Pakistan, from June 1969 to July 1976. On Part 15, eliciting information of the beneficiary's work experience, he represented that he worked for the petitioner as a Marine Technical Surveyor from October 1998 to the day he signed the Form ETA 750, Part B on October 1, 1998. He also represented that he had worked at Denholm Ship Management Ltd, Glasgow, United Kingdom as a Marine Technical Surveyor from October 1988 to October 1998.¹¹

The petitioner did not clearly delineate four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A, but rather marked the box for required number of year with an "x." Although the Form ETA 750 in the instant petition does not clearly state four years as the required number of years for the stipulated baccalaureate degree, without the petitioner's further explanation of what the "x" represents or any evidentiary documentation, the AAO interprets the "x" to represent the four years of college. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study.

Guiding the evaluation of the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[USCIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight." With regard to the educational equivalency documents submitted to the record, the evaluation from SpanTran, accompanied by the evaluation by Dr. [REDACTED] Our Lady Land of the Lakes University evaluate the beneficiary's credentials based on his one-year course of study at Lowestoft College, his training certificates, and his work experience to arrive at their conclusions that the beneficiary possesses the equivalent of a bachelor's degree in technology [REDACTED] or a Bachelor's degree in technology with an emphasis in Marine Systems (SpanTran).

While, as current counsel correctly notes, the H-1B visa petition classification allows for the combination of education and progressively responsible work experience to equate the necessary bachelor's degree for a specialty occupation, the regulations for the employment-based petition do not allow for such equivalency. Therefore the petitioner in the instant petition cannot establish that the beneficiary has the equivalent of a bachelor's degree in marine systems based on his one year of nautical studies at Lowestoft College, his training certificates, and work experience.

¹¹ The AAO notes that based on this claimed employment, the beneficiary would have been working for Denholm Ship Management at the same time he was studying at Lowestoft College from September 1993 to July 1994.

The AAO also notes that based on the evidence submitted in response to the AAO RFE, the petitioner did not specify any specific education or combination of education and work experience that would equate to the required baccalaureate degree or foreign equivalent degree in marine systems. What is not clear from the record is why the DOL certified the labor certification application with its requirements for a bachelor's degree in marine systems and also accepted the petitioner's posted advertisements that did not include any requirements as to education or education equivalency. Since the petitioner did not submit its recruitment report for the instant petition, the AAO cannot determine whether the petitioner interviewed other applicants for the positions, and whether they had baccalaureate degrees or a combination of education and work experience found to be the equivalent of a four-year baccalaureate degree. The lack of a comprehensive submission precludes the AAO from finding in the petitioner's favor on this issue.

In the instant petition, DOL did not assign an occupational code to the position in the initial Form ETA 750, Part A. In the subsequent ETA 750 and ETA 9089 filed for the beneficiary, DOL assigned the occupational code of 53-6051-03, Freight Cargo Inspector.¹² 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/53-6051.08> (accessed July 13, 2009) and its extensive 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 "extensive preparation" for the occupation type closest to the proffered position. According to DOL, overall experience requires a minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. DOL adds that "For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified." DOL assigns a standard vocational preparation (SVP) range of seven to eight and states: "Most of these occupations require a four - year bachelor's degree, but some do not." Additionally, DOL states the following concerning the training and overall experience required for these occupations: "Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training." With regard to Job Zone examples, DOL states that "Many of these occupations involve coordinating, supervising, managing, or training others. Examples include accountants, human resource managers, computer programmers, teachers, chemists, and police detectives." *See id.*

Based on the DOL classification and assignment of educational and experiential requirements for professions such as freight and cargo inspectors, the proffered position may be examined as professional since the position requires a bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(1)(3)(ii)(C). It can also be viewed as a skilled worker since some positions may not require a bachelor's degree. Based on the fact that the petitioner required a bachelor's of science degree in marine systems with two years of relevant work experience, in the instant petition, the petitioner does appear to be filing for a professional classification. Further, in the materials submitted in response to the AAO's RFE, and with the initial petition, the petitioner did not clearly establish whether it was filing the instant petition under the employment-based professional or skilled worker classification. Therefore the AAO will comment on the requisites of both classifications in these proceedings.

¹² This code is now identified by DOL as 53-6051.08, Freight and Cargo Inspectors.

The regulations define a third preference category “professional” as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” See 8 C.F.R. § 204.5(l)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language 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. The petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary’s bachelor’s degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for “professionals,” 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, *and any other requirements of the individual labor certification*, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(Emphasis added).

Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, 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).

We are cognizant of the recent holding in *Grace Korean*, which held that USCIS is bound by the employer's definition of "bachelor or equivalent." In reaching this decision, the court 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. As stated above, the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *K.S.* 20 I&N Dec. at 719. In this matter, the court's reasoning cannot be followed as it is inconsistent with the actual practice at DOL. Regardless, that decision is easily distinguished because it involved a lesser classification, skilled workers as defined in section 203(b)(3)(A)(ii) of the Act. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree. In the instant petition, the petitioner did not indicate it would accept the equivalent of a four-year bachelor's degree on the ETA Form 750. Therefore the findings in *Grace Korean* are not dispositive in this matter.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, in the instant petition, the beneficiary must have a four-year bachelor's degree or its foreign equivalent in marine systems.

The beneficiary was required to have a bachelor's degree in marine systems on the Form ETA 750. Based on the beneficiary's educational documentation for post-secondary studies, namely, his certificate from Lowescroft College for a one-year Higher National Diploma (Nautical Sciences),¹³ he does not possess a bachelor's degree in marine systems, the field stipulated on the Form ETA 750. Thus, the petitioner has not met its burden for either the professional or skilled worker category.

Further, with regard to the beneficiary's qualifications to perform the duties of the position based on his work experience, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

¹³ Although the AAO previously stated that the EDGE web-based database did not provide for educational equivalency in the United Kingdom, the EDGE website states that a one year course in the Higher National Diploma education ladder is equivalent to one year. EDGE did not have updated information at the time of the AAO RFE.

(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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Although the record contains a letter from GulfEast Ship Management Ltd, Hong Kong, China dated July 1, 1987, describing the beneficiary's employment with this company from August 1982 to September 1983, and from January 1985 to May 1987 as a Marine Surveyor, this employment is not identified on the instant ETA Form 750.¹⁴ The record does not contain any letter of work verification from Denholm Ship Management, the beneficiary's former employer identified on the ETA 750. On motion, neither former counsel nor current counsel provides any further evidentiary documentation with regard to this issue. Thus the petitioner cannot establish that the beneficiary had the two requisite years of work experience stipulated by the ETA Form 750 as of the November 3, 1999 priority date.

Finally, as stated previously, the petitioner submits no further documentation to the record on motion to establish the petitioner's ability to pay the proffered wage as of the November 3, 1999 priority date and to the present time. In its dismissal of the petitioner's prior appeal, the AAO examined whether the petitioner had established its ability to pay the proffered wage as of the November 3, 1999 priority date based on the beneficiary's wages, the petitioner's net income or net current assets in the years 1999 to 2001. The AAO determined that the petitioner had not paid the beneficiary the proffered wage in these years and also had not submitted evidence described at 8 C.F.R. § 204.5(g)(2) with which the AAO could examine the petitioner's net income or net current assets during these years.

The AAO thus affirms the director's decision that the preponderance of the evidence does not

¹⁴ This letter appears to be submitted with a subsequent I-140 petition. However, this work experience is not listed on the instant ETA Form 750 to establish the beneficiary's prior work experience as a marine surveyor. See *Matter of Leung*, 16 I&N 12 (BIA 1976). This decision was decided on other grounds, but the court deemed the applicant's testimony concerning employment omitted from the labor certification to be not credible.

demonstrate that the petitioner has the continuing ability to pay the proffered wage as of the 1999 priority date, that the beneficiary acquired two years of experience as a marine surveyor prior to the 1999 priority date, or that the beneficiary has the educational credentials stipulated on the instant ETA Form 750. Thus the AAO confirms the director's decision and reaffirms its prior decision on these issues.

With regard to the multiple labor certification applications submitted by the petitioner on behalf of the beneficiary, the petitioner is correct that no regulations limit the number of petitions submitted on behalf of a beneficiary for the same position. However, the AAO may evaluate all filings for inconsistent information, misrepresentation of a material fact, or fraud.

ORDER: The motion is dismissed. The AAO reopens the matter and affirms its February 3, 2006 decision. The petition remains denied.