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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



**U.S. Citizenship  
and Immigration  
Services**



B6

FILE:



Office: NEBRASKA SERVICE CENTER

Date:

DEC 01 2010

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:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 IT consulting and solutions company. It seeks to employ the beneficiary permanently in the United States as a .Net Application Developer. an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (the DOL), accompanied the petition.<sup>1</sup> Upon reviewing the petitioner, the director determined that the petitioner failed to demonstrate that the beneficiary met the minimum academic requirements stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).<sup>2</sup> The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

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. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is April 22, 2007, which is the date

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<sup>1</sup> 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).

<sup>2</sup> 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).

the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on August 16, 2007.

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 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.

On the ETA Form 9089, the "job offer" position description for a .Net Application Developer include the design, development and testing of ASP/.NET applications. Responsibilities include study of client business process, systems analysis and design, in pertinent part.

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: Master's.
- 4-B. Major Field Study: Engineering, CIS, computer science or a related field.<sup>4</sup>
- 7. Is there an alternate field of study that is acceptable.

The petitioner checked "yes" to this question.

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<sup>3</sup> 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.

<sup>4</sup> The AAO notes that the ETA Form 9089 indicated minimum requirements of a master's degree in stipulated fields of study, with an alternate level of study indicated as a bachelor's degree, and two years of work experience. This alternative formulation is usually found on petitions filed under the EB2 visa preference for individuals with advanced degrees or their equivalent, although a bachelor's degree with five years of relevant work experience is the required alternative, not the two years of work experience stipulated on the certified ETA 9089. The alternative educational requirement in the instant petition of a bachelor's degree and two years of work experience is substantively different than the stated minimum level of education of a Master's degree indicated on the ETA Form 9089.

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

Math, sciences, business or related

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

The petitioner checked "yes" to this question.

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

Bachelor's

9. Is a foreign educational equivalent acceptable?

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

At Item 6, the petitioner stated "no" work experience was required in the position offered. At Items 8, 8-A, and 8-C, the petitioner indicates that a bachelor's degree with 24 months of work experience is also acceptable. At Item 10, the petitioner indicates that experience in an alternate occupation is acceptable and at Item 10-B, identifies the following job titles for the acceptable alternate occupation: Swr. Eng., Pmgr., Pmgr-Analyst, Developer, Analyst, Consultant, Engr.

Item 14 of Part H, specific skills or other requirements, states the following:

- (1) Knowledge through hands-on experience or advanced training/education of developing ASP/NET applications for [W]indows;
- (2) Knowledge through hands-on experience or advanced training/education in developing XML tools for data transfer from SQL Server, Oracle, Sybase, Cobol, MySQL and/or DB2 database.

Also:

\*\* Relocation Possible

\*\* In lieu of master's degree, employer will accept a bachelor's degree (or evaluated equivalent education thereof) with two years experience in the job offered or related jobs.

\*\*\* Employer will also accept any suitable combination of education, training and/or experience.<sup>5</sup>

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<sup>5</sup> The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

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).

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This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language." At the time the labor certification was filed, the DOL was denying labor certification applications containing alternative requirements if Part H. 14 of the application did not contain the *Kellogg* language.

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

Given the history of the *Kellogg* language requirement at 20 C.F.R. § 656.17(h)(4)(ii), the AAO does not interpret this phrase to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. To do so would make the actual minimum requirements of the offered position impossible to discern, it would render largely meaningless the stated primary and alternative requirements of the offered position on the labor certification, and it would potentially make any labor certification with alternative requirements ineligible for classification as an advanced degree professional.

As set forth above, the proffered position requires a master's degree in stipulated fields or four years of college culminating in a Bachelor's degree in stipulated fields and two years of work experience in identified alternate occupations.

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 a "bachelor." He listed the institution of study where that education was obtained as [REDACTED], India, and the year completed as 2002. The Form ETA 9089 also reflects the beneficiary's experience as follows:

Employer	Job Title	Period of Employment
[REDACTED]	.Net Application Developer	October 16, 2006 to date
[REDACTED]	QA Analyst	April 3, 2006 to October 15, 2006
[REDACTED]	Programmer Analyst	April 4, 2005 to March 31, 2006

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's Bachelor of Science diploma in English, Mathematics, Physics and Computer Science dated December 12, 2002 issued by [REDACTED], and a one page transcript of the beneficiary's three years of studies. The record also contains a copy of the beneficiary's Post Graduate Diploma in Computer Application and his Memorandum of Marks for two sessions held from June 2002 to May 2003 at [REDACTED]. The record also contains four certificates for further computer training undertaken by the beneficiary after his graduation from [REDACTED] at non-university training programs.

With the petition, the petitioner submitted a credentials evaluation dated April 4, 2006 written by [REDACTED] Globe Language Services. This evaluator combines the beneficiary's three years of undergraduate study and three years of the beneficiary's employment in computer science to determine that the beneficiary had the equivalent of a U.S. four-year bachelor's degree in computer science. In response to the director's NOID, the petitioner submitted a second credentials evaluation, dated March 7, 2009, prepared by [REDACTED]. In his evaluation, [REDACTED] examined the beneficiary's academic credentials from [REDACTED] and his years of bachelor's level employment experience. [REDACTED] then utilized a ratio of three years of work experience to one year of college level education to determine that the beneficiary's work experience to one year of baccalaureate level study required in connection with the attainment of a bachelor's degree.

The director denied the petition on October 28, 2009. He determined that the beneficiary's Bachelor of Science degree could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree in computer science because it was a three-year degree. The director also noted that both evaluators relied on a combination of the beneficiary's education and employment experience in their

equivalency evaluations. The director stated that the formula of three years of work experience equaling one year of university-level credit is applicable to nonimmigrant petitions, but it is not applicable to immigrant petitioners. The director cited 8 C.F.R. § 214.2(h)(4)(iii) (D)(5).

On appeal, with regard to the beneficiary's qualifying academic credentials, [REDACTED] the petitioner's general counsel, submitted a brief. [REDACTED] stated that the petitioner filed the I-140 immigrant visa petition under either the skilled worker or professional visa preference classification. He also notes that DOL had certified the Form ETA 9089 thus establishing that the primary requirements, listed at Parts H-2 and H-8, and the alternative job requirement, listed at Part H-14, are substantially equivalent. [REDACTED] also refers to the minutes of an AILA liaison meeting with the Nebraska Service Center on April 19, 2006 that refer to the Service Center's responses to questions with regard to EB3 skilled worker adjudications. [REDACTED] refers to an unpublished AAO decision in which the petitioner indicated that it would consider candidates with out a baccalaureate degree who possessed ten years of work experience. [REDACTED] states that the skilled worker classification does not require an actual degree, and that the beneficiary is qualified for the minimum requirements stated on the labor certification based on his education, experience, and training.

The AAO notes that it is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") Thus, the AAO is not bound to the claimed contents of minutes of an AILA liaison meeting.

Counsel briefly refers to a decision issued by the AAO concerning the alternative academic requirements, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). The record does not establish any relevance between the minimal facts presented and the instant petitioner's minimum educational requirements.

The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Part F of the ETA 9089 indicates that the DOL assigned the occupational code of 15-1031.00 and title .Computer Software Engineer, Applications, to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O\*NET is the current occupational classification system used by the DOL. Located online at <http://online.onetcenter.org>, O\*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O\*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.<sup>6</sup>

The O\*NET online database states that this occupation falls within Job Zone Four.<sup>7</sup>

According to the DOL, two to four years of work-related skill, knowledge, or experience are needed for Job Zone 4 occupations. The DOL assigns a standard vocational preparation (SVP) of 7 to Job Zone 4 occupations, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See [REDACTED] (accessed \*). Additionally, the 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.* Because of the requirements of the proffered position and the DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker 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

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<sup>6</sup>See <http://www.bls.gov/soc/socguide.htm>

<sup>7</sup>According to O\*NET, most of the occupations in Job Zone Four require a four-year bachelor's degree. [REDACTED] (accessed November 15, 2010).

submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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.

The regulation at 8 C.F.R. 204(5)(1)(3)(ii)(B) 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.

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

As noted above, the Form ETA 9089 in this matter is certified by the DOL. Thus, at the outset, it is useful to discuss the DOL's role in this process. 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.

Contrary to counsel's assertion on appeal, it is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a

determination as to whether the position and the alien are qualified for a specific immigrant classification. 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).<sup>8</sup> *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 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from the 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

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<sup>8</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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 (9<sup>th</sup> Cir. 1984).

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of United States Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation 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.)

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 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).

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 1289m 1295 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress' narrow requirement in 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 a member of the professions 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 degree, we would not consider education earned at an institution other than a college or university.

The petitioner in this matter relies on the beneficiary's combined education and work experience to reach the "equivalent" of a degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification.

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.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," from a college or university in the required field of study listed on the certified labor certification, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that United States Citizenship and Immigration Services (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." 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*, 437 F. Supp. 2d at 1179 (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).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 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. *Snapnames.com, Inc.* 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. *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 USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at \*17, 19.

In the instant case, like the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is not clearly stated on the Form ETA 9089. As discussed previously, the ETA Form 9089 indicated minimum requirements of a master's degree in stipulated fields of study, with an alternate level of study indicated as a bachelor's degree, and two years of work experience. This alternative formulation is usually found on petitions filed under the EB2 visa preference for individuals with advanced degrees or their equivalent, although a bachelor's degree with five years of relevant work experience is the required alternative, not the two years of work experience stipulated on the certified ETA 9089. The alternative educational requirement in the instant petition of a bachelor's degree and two years of work experience is substantively different than the stated minimum level of education of a Master's degree indicated on the ETA Form 9089.<sup>9</sup>

Further the petitioner included in Section 14 the Kellogg language that suggests that any suitable combination of education and work experience is acceptable. As previously discussed, this is language based on the EB2 regulations under PERM, and is not applicable to the petitioner's EB3 professional/skilled worker classification, and any indicated alternatives to a four-year bachelor's degree.

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<sup>9</sup> The petitioner also indicated on Section H, 14 that in lieu of a master's degree, it would accept a bachelor's degree (or evaluated equivalent education thereof) with two years' experience in the job offered or related jobs. This minimum requirement again is appropriate for an EB2 visa preference petition, rather than the professional/skilled worker classification. Further, this wording does not suggest that the petitioner would accept less than the foreign degree equivalent to a four-year U.S. baccalaureate degree in computer science. Thus, the wording of the certified Form ETA 9089 does not clarify the petitioner's intent.

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 Form ETA 9089 does not specify an equivalency to the requirement of a four-year bachelor's degree.

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 about the beneficiary's qualifications. *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 the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

On August 23, 2010, the AAO issued a request for evidence to the petitioner. In this request, the AAO noted that it had reviewed the [REDACTED] created by the [REDACTED]. [REDACTED] according to its website, [REDACTED], 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."

The AAO stated that while [REDACTED] confirmed 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. The AAO also noted that [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, provide:

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.

The AAO noted that the record did not contain any evidence that the beneficiary held a four-year U.S. bachelor's degree or its foreign equivalent in one of the required fields, or that the Post Graduate Diploma from Hi-Tech Computer Academy is a postgraduate diploma issued by an accredited Indian university or institution that requires a three year bachelor's degree for entrance. The AAO requested further evidence as to the beneficiary's qualifications.

The AAO also noted that, in Section 14 of the ETA Form 9089, the petitioner had written, "in lieu of master's degree, employer will accept a bachelor's degree (or evaluated equivalent education therefore ) with two years experience in the job offered or related jobs." The AAO noted that the record did not contain any evidence that the petitioner actually used this criterion of evaluated equivalent education credentials in its labor market test. 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 DOL. The AAO further noted that the petitioner had employed the beneficiary since May 15, 2006 under the H-1B status, and requested further objective evidence to resolve the inconsistency between current the nonimmigrant H-1B professional position and the presently sought skilled worker classification for the immigrant petition.

The AAO also identified an additional ground of ineligibility in its comments on the petitioner's ability to pay the proffered wages of multiple beneficiaries for whom it had filed either I-140 petitions or I-129 petitions during the relevant period of time. The petitioner was provided 45 days to provide further evidence. To date, the petitioner has not responded to the AAO RFE.

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).

As noted by the director, the two evaluations found in the record used an equivalence to determine that three years of experience equaled one year of college to conclude that the beneficiary had achieved the equivalent of a U.S. four-year bachelor's degree in computer science, but that regulatory-prescribed equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Further, as noted above, [REDACTED] confirms that a three-year Bachelor of Science is equivalent to three years of U.S. university study. 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). The AAO gives no weight to either academic evaluation submitted to the record.

The ETA Form 9089 does not provide that the minimum academic requirements of a master's degree or a four year Bachelor of Science degree in stipulated fields and two years of work experience might be met through three years of college or some other formula other than that explicitly stated on the ETA Form 9089. The petitioner submitted no notice(s) of Internet and newspaper advertisements, to establish that it advised any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. Thus, the alien does not qualify as a skilled worker as s/he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process.

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. For this reason alone, the petition must be denied.

With regard to the additional ground of ineligibility raised in its RFE, the AAO will briefly discuss whether the petitioner established its ability to pay the proffered wage.

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

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent

residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date in the instant case is April 22, 2007, and therefore, your organization must establish the ability to pay the beneficiary the proffered wage from that date. Your organization did not submit its tax returns and therefore, the AAO cannot determine whether your organization established its ability to pay the proffered wage from the priority date in 2007 to the present.

Here, the Form ETA 750 was accepted on April 22, 2007. The proffered wage as stated on the Form ETA 750 is \$60,000 per year. As evidence of its ability to pay the proffered wage, the petitioner submitted its financial statements for periods ending March 31, 2005 and March 31, 2006, accompanied by an Independent Auditor's Report prepared by [REDACTED]

[REDACTED] In the notes to the financial statements, the auditors stated that in 2006 the petitioner elected to be structured as an S Corporation. The auditors in their report note that the 2005 statements of income, retained earnings and cash flow were reviewed by the auditors, rather than audited. With regard to the 2006 financial figures, the petitioner's statement of Income and Retained Earnings for the year ending March 31, 2006 indicates net income of \$3,906,941. The record contains no further information as to the petitioner's business structure.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation as of 2006. On the petition, the petitioner claimed to have been established in 1996 and to currently employ 800 workers. The petitioner claims a gross annual income of \$71,000,000. In its RFE, the AAO noted that in a cover letter dated August 15, 2007, [REDACTED] the petitioner's CFO, notes that in fiscal year 2002, sales were almost \$7,400,000, in fiscal year 2003, revenue exceeded \$18,000,000, in fiscal year 2004, the petitioner's revenues exceeded \$38,000,000; and that in 2005, the petitioner's revenue is \$56,000,000.

The AAO noted that the petitioner submits no evidence, such as federal tax returns, for the relevant period of time, to further substantiate these assertions. The assertions of the petitioner or of counsel, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The only evidence submitted to the record to date, the audited 2006 financial report, while indicating consultant salaries of \$31,444,420, shows the petitioner's net income as \$3,906,941.<sup>10</sup>

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in

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<sup>10</sup> While this level of net income is significant, the AAO notes that within the context of multiple petitions filed by the petitioner, this figure may not be sufficient to establish your organization's ability to pay the proffered wage.

evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted four pay stubs from 2007 that indicates the petitioner paid the beneficiary an hourly wage of \$28.8462 with year-to-date wages of \$33,403.95 as of July 13, 2007. The petitioner also submitted the beneficiary's W-2 Form for tax year 2006 that indicated the petitioner paid the beneficiary \$9,923.11 in 2006. Thus the petitioner has not established that it employed and paid the beneficiary the full proffered wage of \$60,000 in 2007 or subsequently

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.<sup>11</sup> A corporation's year-end current assets are shown

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<sup>11</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist

on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The only evidence submitted to the record with regard to the petitioner's ability to pay the proffered wage is its audited financial statement for fiscal year 2006, with stated net income of \$3,906,941 contained in an independent Auditors' Report. Although the petitioner states that its gross income in other relevant tax years has been significant, these assertions on their own are not sufficient to establish the petitioner's ability to either pay the difference between the beneficiary's actual wages and the proffered wage or the entire proffered wage. Based on the lack of further evidence described at 8 C.F.R. § 204.5(g)(2), the AAO cannot further examine the petitioner's net income or net current assets. Thus, the petitioner cannot establish its ability to pay the proffered wage as of the 2007 priority date or subsequently.

In its RFE, the AAO also noted that the petitioner has filed multiple petitions, stating that USCIS computer records indicated that the petitioner had filed some 3,681 petitions, predominantly I-129 H-1B petitions as of July 2010. In 2010 alone, the petitioner had filed 203 petitions, while during tax year 2009, the petitioner filed some 353 petitions. The AAO stated that the petitioner would need to demonstrate its ability to pay the proffered wage for each I-140 beneficiary from the priority date until the beneficiary obtains permanent residence. *See* 8 C.F.R. § 204.5(g)(2). Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

For example, with regard to the 353 new petitions filed in 2009, if all I-129 or I-140 beneficiaries were paid wages similar to those proffered to the beneficiary, the petitioner would require an additional \$21,180,000 in new income to pay for these new employees. With regard to the additional new 203 petitions filed from January to July 2010, the petitioner would require an additional \$12,180,000 in new revenue to pay wages similar to the \$60,000 salary offered to the beneficiary.<sup>12</sup>

The AAO in its RFE requested further evidence of the petitioner's ability to pay both the beneficiary's wages in 2007 and onward, as well as the wages of pending or approved I-140 and I-129 petitions.

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of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>12</sup> This sum represents approximately 203 new petitions filed in 2010 multiplied by the proffered wage of \$60,000.

As stated previously the petitioner did not respond to the AAO's RFE. Thus, the petitioner's ability to pay the proffered wage is not resolved by the record, and is an additional reason to deny the petition.

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

**ORDER:** The appeal is dismissed.