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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: [REDACTED]
LIN 07 140 52481

Office: NEBRASKA SERVICE CENTER

Date: FEB 18 2010

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents pertaining to this case have been returned to the office that originally decided your case. Any further inquiry about your case must be made to that office.

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The petitioner appealed to the Administrative Appeals Office (AAO), and the appeal was dismissed on September 28, 2009. The petitioner then filed a motion to reopen and motion to reconsider the AAO's decision. The motions to reopen and reconsider are granted. The AAO's September 28, 2009 decision dismissing the appeal is hereby affirmed.

The petitioner is a public accounting firm specializing in litigation. It seeks to employ the beneficiary permanently in the United States as an accountant ("Litigation Staff Accountant"). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The AAO similarly concluded that the petitioner failed to establish that the beneficiary met the educational requirements of the certified labor certification. Specifically, the labor certification requires that the beneficiary have a bachelor's degree or foreign equivalent degree. The petitioner failed to document that the beneficiary has a single-source four-year bachelor's degree or foreign equivalent degree issued by a college or institution as required by the regulation for a professional under section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act). Additionally, as the petitioner specifically required a bachelor's degree on ETA Form 9089, and did not specify any equivalent, the petitioner failed to demonstrate that the beneficiary had the necessary education to meet the labor certification requirements, and could not be approved under the skilled worker category.

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

The proffered position requires a Bachelor's degree in Accounting, and one year of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.¹

The petitioner filed a motion to reopen and a motion to reconsider the decision. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons

¹ Section 101(a)(32) of the Act provides: "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." This section does not include accountants.

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. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

In the petitioner's motion to reopen, it asserts the following new facts to be considered: the petitioner's recruitment results in attempting to find a qualified worker in the United States; the resumes received in response to recruitment; the petitioner's sworn declaration regarding ETA Form 9089; and that ETA Form 9089 is newly revised with instructions not available at the time that it filed the labor certification. In support of its motion to reconsider, the petitioner cites two recent non-precedent Board of Alien Labor Certification (BALCA) cases;² *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986); *Snapnames v. Chertoff*, (2006 WL 3491005); *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), and *Hoosier Care v. Chertoff*, 482 F3d 987 (7th Cir. 2007). As the petitioner cites to new facts and submits supporting documentary evidence and cites to precedent in *Matter of Silver Dragon*, we will accept the filing as a motion to reopen and a motion to reconsider.

Specifically, the petitioner challenges the AAO's determination that the petitioner requires a bachelor's degree or foreign equivalent *degree* as a term of its job offer. Instead, the petitioner asserts that it requires a bachelor degree or equivalent *education*. The petitioner asserts that the beneficiary met the primary qualifications of the labor certification, since it asserts that its response to "H.9" on the ETA Form 9089 would encompass the beneficiary's academic credentials. Further, as the petitioner asserts that the beneficiary met the position's requirements, it claims it was not required to list any alternate combinations of education. Additionally, the petitioner asserts that the ETA Form 9089 was vaguely drafted, as exhibited by the form's recent revision with new instructions.

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

² 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, BALCA 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).

business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, Part H. 11 states the position's "job duties:"

Review and analyze financial statements and income tax returns for individuals, corporations, partnerships, estates and trusts and various other financial documents; prepared schedules detailing community property assets and liabilities, cash flow available for support, tracings of separate and community property ownership in various properties and assets, marital life style analysis; calculations involving community and separate property ownership in stock options, Pereira and Van Camp calculations, business valuation reports and declarations to submit to California Superior Court for proceedings related to Family Law; Attend meetings with other accountants on opposing matters, attorneys, clients, partners and associates in order to facilitate settlement and/or progression of various matters; and Index files and document productions pertaining to forensic litigation matters involving Family Law proceedings and civil court matters.

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:

The petitioner selected "Bachelor's." The form would have allowed the petitioner to designate: "none," "high school," "Associate's," "Bachelor's," "Master's," "Doctorate," or "Other."

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

None specified.

4-B. Major Field Study: Accounting.

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

The petitioner checked "yes" to this question.

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

Finance or Auditing.

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

The petitioner checked "no" to this question.

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

The petitioner left this blank, as it responded no to question 8.

8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:

The petitioner left this blank, as it responded no to question 8.

8-C. If applicable, indicate the number of years of experience acceptable in question 8.

The petitioner left this blank, as it responded no to question 8.

9. Is a foreign educational equivalent acceptable?

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

6. Is experience in the job offered required for the job? 6.A. If Yes, number of months experience required:

The petitioner checked "yes," and that 12 months of experience was required.

10. Is experience in an alternate occupation acceptable? 10.A. If Yes, number of months experience in alternate occupation required:

The petitioner checked "no," indicating that experience in an alternate occupation is not acceptable.

14. Specific skills or other requirements: None listed.

In its motion to reopen, the petitioner asserts that the information in part I.a.1. on the ETA Form 9089 is relevant. I.a.1. relates to recruitment and asks, "Is this application for a professional occupation, other than a college or university teacher? Professional occupations are those for which a bachelor's degree (or equivalent) is normally required." The petitioner checked "yes" to I.a.1.

Additionally, the petitioner asserts that part J. on the ETA Form 9089 "Alien information" is relevant. The petitioner indicated in J.11. "Education: highest level achieved relevant to the requested occupation," that the beneficiary had a "Bachelor's." The petitioner could have selected "none," "high school," "Associate's," "Bachelor's," "Master's," "Doctorate," or "Other." The petitioner indicated that the beneficiary completed the education specified in part J.11. [a bachelor's] at the Canadian Institute of Chartered Accountants (ICABC), Vancouver, British Columbia, in 2000, and her major field of study was accounting.

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).

The petitioner asserts that in reading the terms "bachelor education" in part H, "bachelor degree (or equivalent)" in part I, recruitment, and "foreign educational equivalent"³ in part J, that the beneficiary would qualify under the primary requirements of the job offer which include a bachelor's degree or equivalent education, and therefore, the petitioner was not required to complete H.8 or H.14 to designate any alternate combinations of education and experience.

The petitioner defined the primary job requirements on the ETA Form 9089 as a bachelor's degree in accounting, or in an alternate designated field of finance or auditing. Qualifying individuals must additionally have twelve months of experience in the position offered as a litigation staff accountant. "Foreign educational equivalent" as it appears in H.9. reflects the petitioner's willingness to accept a foreign *degree* determined to be the foreign equivalent of a bachelor's degree based on completion of one program of study for which a foreign degree equivalent to a U.S. bachelor's degree was issued by a college or university. "Foreign educational equivalent" does not express, state, or define the petitioner's willingness to accept a combination of educational programs and/or experience determined to be the equivalent of a U.S. bachelor's degree since that preference would be set forth at H.8, but that part was left blank in the case at hand.

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. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). 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 "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.

³ The words "foreign educational equivalent" do not appear in part J, only in part H.9. Part J. indicates that the beneficiary has a bachelor's degree issued by the Canadian Institute of Chartered Accountants.

For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.)

The petitioner’s response to parts H.4. and H.9. reflect that it requires a four-year single-source bachelor’s degree or foreign equivalent *degree* granted by an official college or university, and not that it would allow for “other” based on any sort of combined education. In part J the petitioner also indicated that the beneficiary had a bachelor’s degree. DOL certified the labor certification based on the petitioner’s requirement of a bachelor’s degree and the petitioner’s representation that the beneficiary had a bachelor’s degree. Despite the petitioner’s assertion that H and J should be read in combination with I.a.1., that it was completing recruitment for a professional with a bachelor’s or equivalent, responding “yes” to I.a.1. is insufficient to express its intent to require the equivalent of a bachelor’s degree.

DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job.” *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep’t. of Labor’s Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep’t. of Labor’s Empl. & Training Administration, Interpretation of “Equivalent Degree,” 2 (June 13, 1994). DOL’s certification of job requirements stating that “a certain amount and kind of experience is the equivalent of a college degree does in no way bind [United States Citizenship and Immigration Services (USCIS)] to accept the employer’s definition” and SESAs should “request that employers provide the specifics of what is meant when the word ‘equivalent’ is used.” *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). DOL has also stated that “[w]hen the term equivalent is used in conjunction with a degree, we understand this to mean the employer is willing to accept an equivalent foreign degree.” *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To the AAO’s knowledge, these field guidance memoranda have not been rescinded.

The petitioner did not state anywhere on the ETA Form 9089 that an equivalence to a single-source bachelor’s degree would be accepted, or that the beneficiary had an equivalent degree. Additionally, the petitioner’s ads failed to adequately put applicants on notice of the required education and experience for the position offered, for reasons that will be discussed below.

The primary educational requirement can only be read that the petitioner would accept a four-year single source bachelor’s degree or foreign equivalent degree issued by a college or university.

As noted in the prior AAO’s decision, the beneficiary does not have a four-year single source bachelor’s degree or foreign equivalent degree from a college or university. Instead, the beneficiary has a “diploma” completed at Camoson College. She then took courses and examinations at the Canadian Institute of Chartered Accountants in British Columbia (ICABC).

In determining whether the beneficiary's degree or diplomas individually would be a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO).⁴ AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides that a College diploma or Associate's degree awarded in British Columbia, Canada represents the attainment of a level of education comparable to two years of university study in the United States and is awarded upon completion of a two or three-year program at a college or community college. It does not, however, suggest that a three-year diploma from the province of British Columbia may be deemed a foreign equivalent degree to a U.S. baccalaureate.

EDGE also states that a credential from the Institute of Chartered Accountants of British Columbia "represents attainment of a vocational/non-academic qualification. Admission and placement should not be based on this credential alone." EDGE additionally states that:

In order to apply for licensure an applicant must demonstrate competencies through a combination of:

- Their university education prior to registering as a CA student;
- A period of work experience in a CA Training Office; and
- Professional education delivered through the profession's four regional delivery systems.

The credential is awarded upon successful completion of a series of examinations.

However, the petitioner asserts that the beneficiary's membership in ICABC is a single source equivalent to a bachelor's degree. Specifically, the petitioner submitted an evaluation from [REDACTED] Hofstra University, which has been in the record from the case's inception and was previously considered by the AAO. The evaluation states the following, in pertinent part:

⁴ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

In order to qualify as a Chartered Accountant and a Member of the Institute of Chartered Accountants of British Columbia, an individual must complete the equivalent of bachelor's-level academic qualifications, pass qualifying examinations, and complete professional experience as an articled clerk in the accounting profession Following university studies, candidates must complete an intensive specialized educational program at the Institute including classes in advanced accounting, taxation, insurance, and written communications. Further, candidates must complete three years of professional training in the public practice of Accounting The completion by a candidate of the foregoing requirements, and the qualification as a Chartered Accountant, is equivalent to the fulfillment of a Bachelor of Science Degree in Accounting at an accredited US college or university.

The qualification of [the beneficiary] as a Chartered Accountant, standing alone, represents the fulfillment of the equivalent of a Bachelor of Science in Accounting. While it is noteworthy that the candidate's studies at The Institute of Chartered Accountants of British Columbia were preceded by her completion of a three-year post-secondary program in Accounting and Business,⁵ these prior studies do not diminish the significance of her studies in qualifying as a Chartered Accountant as a single-source foreign equivalent to a U.S. bachelor's degree in Accounting.

The ICABC website states:

Provincial legislation known as the Accountants (Chartered) Act allows the Institute to train, govern, and regulate its members. All [Chartered accountants] (CAs) are held accountable by a strictly enforced code of professional conduct and must meet continuing professional development requirements on a yearly basis.

In addition, the ICABC licenses all public practice CA firms and reviews these firms at least once every four years to ensure ongoing compliance with standards and regulations. We also require that CA firms carry professional liability insurance.

See <http://www.ica.bc.ca/kb.php3> (accessed January 20, 2010).

Additionally, to gain certification:

⁵ Additionally, [REDACTED] assesses the beneficiary's studies at Camoson College as the equivalent of three-years of bachelor's level studies in accounting at an accredited U.S. college or university. This information conflicts with EDGE. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 592 (BIA 1988).

All CAs must have a university degree or equivalent to apply to the Institute's CA School of Business (CASB). CASB provides them with a rigorous academic program that covers assurance, taxation, advanced accounting, and written communications. At the same time, CA students are employed at an approved CA Training Office where they must spend a minimum of three years-this is known as the "articling" period. Most CAs identify the articling phase as the most valuable and unique part of their training since it gives them exposure to a wide variety of businesses and organizations or departments, locations, functions, and projects, and introduces them to the high standards of business practice, behaviours, and ethics they will be expected to emulate throughout their careers.

See <http://www.ica.bc.ca/kb.php3> (accessed January 20, 2010).

The beneficiary's transcripts for ICABC identify her "basis for registration" as "Mature applicant," so that she was allowed to apply without having a bachelor's degree.

The petitioner also submitted a letter from the ICABC registrar, dated September 24, 2007, to explain the beneficiary's credentials. The letter states that the beneficiary became a CA member on February 27, 2001, and that she was a CA student from August 1, 1997 to February 26, 2001. During that time period, the beneficiary took Professional Practice 1, Professional Practice 2, Communications Workshop, Professional Practice 3, and Uniform Final Exam. The registrar states that the Professional Practice 1 course had over 150 hours of classroom instruction; Professional Practice 2 was internet based, and that it could be considered "equivalent to nearly two courses" of a graduate level program; and Professional Practice 3 was a preparatory course for the Uniform Final Exam (UFE). The UFE is a national exam of 16 hours over the course of four days. The beneficiary's transcript reflects that she took Professional Practice 1 three times.

With regards to the Spieler evaluation, he states that he has authority to grant college-level credit for Hofstra University based on various factors, but he never states that he has granted credit for the ICABC program of study in question. If the evaluator has granted credits based on the ICABC program, then we would assume that he has granted credits partially based on work experience.

In describing the ICABC, the evaluator compares it to the American Institute of Certified Public Accountants ("AICPA")⁶ in the U.S. AICPA provides Continuing Professional Education courses,

⁶ The AICPA website states:

The AICPA strives to improve the quality of accounting education, promote the accounting profession to young people, and nurture key competencies in students who may be embarking on a career in the field. High caliber financial literacy education also equips students entering other fields with critical skills that can be applied in their professional and personal lives.

but such courses would unlikely result in academic credits, but instead serve to satisfy state licensing board continuing education requirements.

While the evaluator states that a candidate must have a bachelor's degree to enter the ICABC training program for the CA program, he never explains that the beneficiary was able to enter the program without a bachelor's degree. The beneficiary's transcripts reflect that she was accepted into ICABC on the basis of her status as a mature applicant rather than based on receipt or completion of any bachelor's degree.

states that, "The educational programs of [ICABC] are viewed within Canada and among the international educational community as comparable to university programs." He does not offer any proof in support of this statement, or cite any official source in confirmation.

continues in his evaluation, "The academic requirements of the Institute and the studies comprising the Chartered Accountants qualifying program are considered to be equivalent to bachelor's programs in Accounting at U.S. colleges and universities." Similarly, he offers no support for this statement, which may be disputed as the program consists of only three Professional Practice modules and one Communications Workshop. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

With respect to the ICABC letter, the registrar states that the Professional Practice module 1 contains approximately 120 contact hours (or 8 semester hours), Professional Practice 2 is internet-based but has two-weekend visits with an instructor of 48 hours total (3 semester hours), and Professional Practice 3 contained 150 hours of instruction (10 semester hours). The registrar's letter does not address the Communications Workshop, but we could assume the course might result in approximately 3 semester hours. Based on the registrar's estimate, this would result in a formula of 10 hours + 8 hours + 3 hours + 3 hours for a total of 24 semester hours. Accordingly, it is unclear how Dr. Spieler concludes that this would result in 120 semester hours of equivalency to reach a single-source bachelor's degree equivalence determination.

The Accounting Education Center offers resources for high school, college, and post-graduate business and accounting educators. Teachers can utilize or build on these authoritative tools as they design classroom curricula.

See <http://ceae.aicpa.org/Resources/Education+and+Curriculum+Development/> (accessed January 21, 2010). The AICPA website indicates that it offers resources to develop courses of study, but nothing indicates that it offers courses to obtain credit.

It should also be noted that the third module, Professional Practice 3, is a preparatory course for the UFE in Canada. The petitioner has not persuasively established that any U.S. institution would assess or grant any academic transfer credit for courses entitled Professional Practice 1, 2, and 3. 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); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Based on the foregoing, the Spieler evaluation submitted is not in accord with other information.

EDGE states that ICABC membership is not equivalent to a bachelor's degree, but instead represents the "attainment of a vocational/non-academic qualification." Neither is the beneficiary's diploma which is equivalent to a two-year program of study in the U.S. As the beneficiary's ICABC credential is based on a combination of education and experience, the credential would not be considered a four-year single source bachelor's degree issued by a college or university. Therefore, the beneficiary does not meet the requirements of the certified labor certification. 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. at 406. The petitioner failed to state any alternate requirements on ETA Form 9089. Additionally, the beneficiary's academic credentials are not equivalent to a bachelor's degree even if the petitioner had defined alternative requirements.⁷

The petitioner asserts that the beneficiary qualifies based on the primary requirements of the labor certification and therefore it did not have to complete any alternate requirements in part H.8 or H.14. As addressed above, the beneficiary's "credential" cannot be considered a four-year single source

⁷ As noted in the prior AAO decision, the petitioner asserts that the CA credential is accepted under the North American Free Trade Agreement (NAFTA) to meet the requirements of a nonimmigrant TN visa based on 8 C.F.R. § 214.6:

(b) *Definitions.* As used in this section, the terms: *Business activities at a professional level* means those undertakings which require that, for successful completion, the individual has a least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

Appendix 1603.D.1 allows an Accountant to qualify for admission based on a Baccalaureate or Licenciatura Degree. The category also allows for entry "with appropriate credentials" such as a C.P.A., C.A., C.G.A., or C.M.A.

While "appropriate credentials" are accepted, the regulation cannot be read to state that a C.A. credential is the foreign academic equivalent of a bachelor's degree based on a single-source four-year program of study at a college or university. Regardless, that provision relates to non-immigrant visa petitions which and is distinguishable from the regulations governing immigrant visa petitions.

bachelor's degree or a foreign equivalent degree to qualify her for the position offered as certified. As the petitioner failed to state any alternate requirements, the beneficiary may not meet the requirements through any designated alternative.

The petitioner further argues that part H.8 instructions for the ETA Form 9089 do not indicate that part H.8 should be used for "establishing an education equivalent to a bachelor's degree" and only includes directions for experience combined with education. In support, they attach instructions from the Department of Labor on how to complete ETA Form 9089.⁸ Part H.4. states "select the minimum level of education required to adequately perform the duties of the job being offered." Part H.8. states:

Select *Yes* or *No* to indicate if there is an alternate combination of education and experience in the job offered that will be accepted in lieu of minimum education requirement identified in question 4 of this section. For example, if the requirement is bachelor's + 2 years of experience but the employer will accept a masters + 1 year experience an alternate combination of education and experience exists.

As the petitioner was willing to accept a credential other than a bachelor's degree, the petitioner was required to tick the "other" box in H.8 designating that it was willing to accept education and experience evaluated to be the equivalent of a bachelor's degree in combination with one year of experience in the position offered. As the beneficiary was employed with the petitioner, and would then qualify through the alternate requirements, the petitioner should have completed H.14 and designated that it was willing to accept any alternate combination of education, training and experience.⁹ See 20 C.F.R. § 656.17(h)(4), which states:

- (i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and
- (ii) 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.

⁸ Specifically, the petitioner attached "draft" instructions dated December 27, 2004, reprinted in the David Stanton Manual on Labor Certification, 3rd Ed.

⁹ Additionally, we note that the instructions submitted do not state in part I.1. that responding "yes" that recruitment was for a professional position would allow the petitioner to state any preference or intent to hire a candidate with the equivalent of a bachelor's degree based on any defined or undefined equivalency.

The petitioner further asserts that the ETA Form 9089 is newly revised, which therefore “prove[s] Form ambiguity” and that the new form includes “four pages of instruction concerning education.” The petitioner asserts that “equity” favors reversal since USCIS advisory guidance was not available until after the petitioner’s ETA Form 9089 was approved.

The “USCIS advisory guidance” that the petitioner refers to is an “AILA Liaison Committee Meeting at NSC [Nebraska Service Center], April 12, 2007.” The committee posed questions related to how varying educational requirements might be phrased on labor certifications to meet the advanced degree and professional categories. 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, liaison Service Center notes 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 AAO’s authority over a service center is similar to that of a court of appeals and a district court. The Administrative Appeals Office is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff’d.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g. *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Both USCIS and DOL frequently revise forms for a variety of reasons to include new fees, to reflect changes in regulations, or other factors. See USCIS website listing each form with its revision date: <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=db029c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextchannel=db029c7755cb9010VgnVCM10000045f3d6a1RCRD> (accessed January 15, 2010). Additionally, a visa petition may not be approved based on speculation of future eligibility or after the petitioner becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner filed the labor certification on December 18, 2006 when the prior version of ETA Form 9089 and instructions were controlling. Nothing bars the petitioner from filing a new labor certification using the new ETA Form 9089 if it prefers the format of that form.¹⁰

The petitioner cites to two non-precedent BALCA cases and asserts that “the petitioner’s Form I-140 cannot be denied based on an ambiguous ETA 9089 Form.” Specifically, the petitioner cites *Federal Insurance Co.*, 2008-PER-37 (Feb. 20, 2009) and *KPIT Infosystems, Inc.*, 2009-PER-00075 (Feb. 25, 2009), in support of its claim that the labor certification cannot be denied based on the

¹⁰ Nothing in the record indicates that the petitioner was required to file ETA Form 9089 on December 18, 2006 in order to preclude any expiring nonimmigrant status, or to ensure that the beneficiary did not exceed the maximum allowed time in her nonimmigrant status.

petitioner's failure to include "Kellogg" language¹¹ on the ETA Form 9089. The petitioner first asserts that it was not required to list the *Kellogg* language since the beneficiary qualified on the primary requirements. As noted above, the petitioner is incorrect in this assertion. The petitioner then asserts that the AAO should not deny the petition based on the "instructional ambiguity" that led to the *Federal* decision.

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, BALCA 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). Additionally, the labor certification has been certified in the instant matter and its validity is not the question before us. USCIS may not ignore a term of the labor certification, and must read the terms of the labor certification as certified. *See Matter of Silver Dragon*, 19 I&N Dec. at 406. The AAO cannot read or interpret the ETA Form 9089 other than how it was certified. We cannot add alternatives to the bachelor's degree specified in part H. of the job offer based on the petitioner's post-certification argument that DOL's instructions were ambiguous. We have no jurisdiction over DOL's process, but we have clear precedent instructions to take the terms of the labor certification as they are. Additionally, none of the evidence in the record contains a document that demonstrates that a college or university issued the beneficiary a bachelor's degree to meet the stated job offer terms of the certified labor certification.

The petitioner asserts that USCIS must give deference to the employer's intent and cites to *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006); *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005); and *Hoosier Care v. Chertoff*, 482 F.3d 987 (7th Cir. 2007).¹²

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 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

¹¹ *See Matter of Kellogg, et al*, 94-INA-465 (BALCA Feb. 2, 1998)(enbanc). *Kellogg* determined that alternative job requirements are not acceptable unless the employer is willing to accept any suitable combination of education, training, and experience. Additionally, alternative experience should be in a substantially equivalent occupation to the primary experience required. *See also* 20 C.F.R. § 656.17(h)(4)(i), (ii) requiring the foregoing language in the application.

¹² The petitioner does not discuss the relevance, if any, of *Hoosier Care*. Counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case.

labor certification.”¹³ In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the AAO is not required to follow the analysis 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. *But see 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).

The petitioner again asserts that by checking I.a.1. on the ETA Form 9089 it was recruiting for a professional and because that portion of the form states “bachelor (or equivalent),” that expressed its intent to accept an equivalent. In support, the petitioner submits an affidavit, as well as the labor certification recruitment results, and the resumes of the individuals that responded.

¹³ We note, however, that *Grace Korean* was decided based on a labor certification filed in 1996, which would have used a different, prior Form ETA (Form ETA 750). That form did not address the issue of alternate combinations of education and/or experience. The new form, ETA Form 9089, has been revised and now specifically allows the petitioner to address the level of alternate education that the petitioner requires. The petitioner did not list that it would accept any alternate combinations of education and/or experience or attempt to define equivalent as the form allows.

The petitioner's affidavit, executed by [REDACTED] one of the petitioner's partners, states that in 2006 it started recruitment for the position of Litigation Staff Accountant, and that the position has always been difficult to fill. Further, since the position is difficult to fill, it frequently uses a headhunter to fill the position. The affidavit states that candidates were required to have a least one year of experience in the position offered "and education at a bachelor level or equivalent, including foreign equivalent education. [But] we did not specify a degree requirement." She further states that U.S. applicants with bachelor's level education, master level education and professional designations such as CPA, CMA, and MBA were considered qualified for the position. Further, she stated that those credentials would indicate a bachelor's level or higher education, above the petitioner's minimum requirements. [REDACTED] further stated:

We represented the position requirements as best we could to conform to the check box style of the form ETA 9089. The instructions for the ETA 9089 did not contain any specific instructions requiring us to write in the words "employer will accept any suitable combination of education, training or experience" in order to consider educational equivalency.

Our intent at the recruitment phase was to open up the pool of U.S. applicants so that we could find a litigation staff accountant with at least one year of experience. The attainment of a "degree" was not required. There was no box to indicate that this was not a requirement.

We did not reject any U.S. worker for lack of a bachelor "degree" or for combining educational programs, graduating from a three year program or for combining degrees, diplomas, or professional credentials. We received only two resumes. Both applicants did not meet the one year experience requirement.

The petitioner asserts that ETA Form 9089 part H.14 was not designed as a "catch all" box for educational equivalency. The instructions for H.14 state, "enter the job related requirements. Examples are shorthand and typing speeds, specific foreign language proficiency, and test results. Document business necessity for a foreign language requirement." However, part H.14 allows extra space and the petitioner could have set forth, expanded on, or clarified any defined educational equivalency in this part or on a separate addendum to the form altogether. Nothing in the instructions bars the petitioner from doing so.

The petitioner further asserts that its due process was denied as the "AAO ignored the instructional ambiguity discussed in *Federal*."¹⁴

¹⁴ As noted above, *Federal* is a non-precedent case. See 8 C.F.R. § 103.3(c). Further, we note that the decision in *Federal* is in direct conflict with the regulations at 20 C.F.R. § 656.17(h)(4)(i), (ii).

Although the petitioner argues that its due process was violated, it has not shown that any violation of the regulations resulted in “substantial prejudice” to the petitioner. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien “must make an initial showing of substantial prejudice” to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decision indicates that the director properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. The petitioner has not demonstrated any error by the director or the AAO in conducting its review of the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. *See also Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975). Accordingly, the petitioner's claim is without merit.

The petitioner additionally submitted a copy of its recruitment report. The report indicated that two individuals responded; both were interviewed by telephone; and both lacked experience in the job offered. One resume reflects that the candidate had a bachelor's degree in Economics and experience as an audit and accounting clerk. The second resume reflects that the candidate had a bachelor's degree in accounting and had substantial experience as an accountant, accounting manager, and as a human resources manager.

As addressed in the AAO's prior decision, the petitioner's newspaper ads failed to state any educational or experience requirements to adequately convey the position's requirements. Similarly, the posting notice fails to state the position's requirements. The regulation 20 C.F.R. § 656.17(f)(3) requires that the recruitment “provide a description of the vacancy specific enough to apprise the United States workers of the job opportunity for which certification is sought.” A copy of a placement notice from Spectrum Search Associates, a recruitment firm that the petitioner used, states the requirements as “3 to 7 years of current Local or Big 4 CPA firm experience; CPA license,” and that the position requires “NO PRIOR LITIGATION EXPERIENCE NECESSARY.” (Emphasis in the original). Spectrum Search additionally ran the ad on the Careerbuilder.com website and similarly listed the foregoing requirements with an additional designation that the required education was a “4 year degree.”¹⁵

Despite the petitioner's assertion that it intended to accept candidates with degrees other than a bachelor's degree, we cannot conclude that the petitioner's advertisements adequately expressed the requirements of the position to qualified U.S. applicants, or that the applicants could reasonably know the requirements of the position.

¹⁵ We note that the date on the Careerbuilder print out is October 31, 2007, so that it appears to have been submitted as a sample of the employer's intent, rather than as part of the recruitment for the beneficiary's labor certification, which was filed prior to that date. Although, as a statement of intent, the Careerbuilder ad clearly states the petitioner's desire for candidates with four-year bachelor's degrees.

Additionally, if the Spectrum Search posting is considered part of the petitioner's recruitment,¹⁶ then the petitioner rejected candidates based on having no experience in the job offered. This presents an issue as the Spectrum posting states that no prior litigation experience is necessary. See 20 C.F.R. § 656.17(g) *Recruitment report*:

- (1) The employer must prepare a recruitment report signed by the employer or the employer's representative noted in § 656.10(b)(2)(ii) describing the recruitment steps undertaken, and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections . . .
- (2) A U.S. worker is able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.

If the petitioner considered that "no prior litigation experience" was necessary, but rather wanted the candidate to have accounting experience, than pursuant to 20 C.F.R. § 656.17(g), the U.S. candidates may have been able to "acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training."

20 C.F.R. § 656.17 outlines the basic labor certification process.

(a) Filing applications. (1) Except as otherwise provided by §§ 656.15, 656.16, and 656.18, an employer who desires to apply for a labor certification on behalf of an alien must file a completed Department of Labor *Application for Permanent Employment Certification* form (ETA Form 9089). The application must be filed with an ETA application processing center.

(3) Documentation supporting the application for labor certification should not be filed with the application, however in the event the Certifying Officer notifies the

¹⁶ ETA Form 9089 states that the petitioner listed the position with a private employment firm from August 15, 2006 to September 14, 2006. Whether the record contains the exact ad used, or is only a sample ad is unclear. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 592 (BIA 1988).

employer that its application is to be audited, the employer must furnish required supporting documentation prior to a final determination.

(b) *Processing.* (1) Applications are screened and are certified, are denied, or are selected for audit.

(2) Employers will be notified if their applications have been selected for audit by the issuance of an audit letter under § 656.20.

20 C.F.R. § 656.2(c)(1) discusses the “Role of the Department of Labor.”

The permanent labor certification role of the Department of Labor under the Act derives from section 212(a)(5)(A) (8 U.S.C. 1182(a)(5)(A)), which provides that any alien who seeks admission or status as an immigrant for the purpose of employment under paragraph (2) or (3) of section 203(b) of the Act may not be admitted unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(i) There are not sufficient United States workers who are able, willing, qualified, 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.

(2) This certification is referred to in this part 656 as a “labor certification.”

From the information contained in the record, we cannot conclude that the petitioner’s job requirements were clearly stated to conform with 20 C.F.R. § 656.17(f)(3). Further, we cannot conclude that the advertised requirements demonstrate the petitioner’s intent about the actual minimum requirements of the job offered since they differ from the requirements on the labor certification. Nothing in the record indicates that DOL audited the file and reviewed the petitioner’s recruitment. As such, in the absence of an audit, the petitioner would only have filed the ETA Form 9089 online without submitting the supporting recruitment materials, and DOL would have relied on the petitioner’s representations regarding the minimum requirements and that the beneficiary met the minimum requirements.

While the AAO has considered evidence about the petitioner’s intent, that consideration still does not allow USCIS to ignore the terms of the labor certification as they are certified. While the AAO has enough information in the record to proceed with its decision, pursuant to its consultation authority in section 204(b) of the Act, the AAO shall refer the matter to DOL for its review of whether the certified ETA Form 9089 recruitment conducted and recruitment report conform to the pertinent sections of 20 C.F.R. § 656 set forth above and support the petitioner’s appellate and motion claims concerning its actual minimum requirements.

The petitioner concludes that it required a bachelor's degree on the labor certification, that the beneficiary has the required education, and that she did not "merely pass an exam" to obtain the Chartered Accountant title.

The petitioner requires a four-year single-source bachelor's degree issued by a college or university. The petitioner also represented that the beneficiary had a bachelor's degree issued by the ICABC. As noted in the petitioner's evaluation submitted, the petitioner's Chartered Accountant title and membership was the result of completing coursework, examinations, and a practical work requirement. As such the title conferred is not a four-year single source bachelor's degree issued by a college or university that would qualify her for the labor certification requirements as drafted. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Matter of Silver Dragon*, 19 I&N Dec. at 406.

The petitioner failed to designate that the degree requirement could be met through any alternate combination of education and experience in either parts H.8 or H.14 of the ETA Form 9089. Therefore, even if the petitioner could show that the beneficiary had the equivalent of a bachelor's degree, which based on the information set forth above, we dispute, the beneficiary would not qualify under the stated terms of the certified labor certification. EDGE states that the beneficiary's ICABC credential is a "vocational/non-academic qualification," and would not be the equivalent of a bachelor's degree. Accordingly, as noted in the prior AAO decision, even if the petition were analyzed under the skilled worker category, the beneficiary does not meet the terms of the labor certification, and could not be approved as a skilled worker.¹⁷ The terms of the labor certification here, as discussed above, requires a four-year bachelor's degree, rather than any defined equivalent, which the beneficiary does not have. As a result, the beneficiary cannot be classified as a "skilled worker" under the terms of this labor certification.

Additionally, as the beneficiary's qualifications, the petitioner's "stated intent" and labor certification ads fail to match the terms of the certified labor certification, the AAO intends to refer the labor certification to DOL for closer inspection in accordance with the procedures set forth in section 204(b) of the Act and 20 C.F.R. § 656.

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.

Nothing contained within this decision should be taken to infer that the AAO is discounting the effort necessary on the part of the beneficiary to obtain the education she has worked to attain or the level of achievement she has accomplished. Under the law as written, however, the applicant has not provided sufficient information necessary to rule in the beneficiary's favor, or to convince this

¹⁷ See 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

appellate body that proper recruitment failed to discover a qualified applicant in the United States. The AAO is more than aware of the effort necessary to hire qualified individuals into competitive positions, and the often difficult work involved in finding qualified workers in the United States. The AAO intentionally delayed resolution of this matter by several days in order to review the record again in its entirety and make the correct determination in this case.

ORDER: The motion is granted. The AAO's September 28, 2009 decision is affirmed. The appeal remains dismissed and the petition remains denied.