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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



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

B6

[REDACTED]

FILE:

[REDACTED]

Office:

[REDACTED]

Date: APR 05 2011

IN RE:

Petitioner:

[REDACTED]

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:

[REDACTED]

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, ██████████ Service Center, denied the employment-based immigrant visa petition. The petitioner filed a motion to reconsider. Although the director granted the motion, he affirmed his previous denial of the petition. The petitioner appealed to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a manufacturer of dairy industry products. It seeks to employ the beneficiary permanently in the United States as a service desk manager. As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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.²

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 Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is March 12, 2004, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).³ The Immigrant Petition for Alien Worker (Form I-140) was filed on November 13, 2006.

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations 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).

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Validity of Certified Form ETA 750 for the Position Offered in the Immigrant Petition for Alien Worker (Form I-140)

The first issue to be considered is whether the instant Form ETA 750 is valid for the proffered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d at 145.

The regulations describe the scope of validity of approved Forms ETA 750 as follows:

(c) Scope of validity. For certifications resulting from applications filed under this part or 20 CFR part 656 in effect prior to March 28, 2005, the following applies:

(2) A permanent labor certification involving a specific job offer is valid only for the particular job opportunity, the alien named on the original application (unless a substitution was approved prior to July 16, 2007), and the area of intended employment stated on the Application for Alien Employment Certification (Form ETA 750) or the Application for Permanent Employment Certification (Form ETA 9089).

20 C.F.R. § 656.30(c)(2).

Likewise, the regulations require that an Immigrant Petition for Alien Worker (Form I-140) seeking classification of the beneficiary as a professional or skilled worker be accompanied by an individual labor certification from the DOL. 8 C.F.R. § 204.5(l)(3)(i).

In this matter, the petitioner filed a Form I-140 on November 13, 2006 seeking to employ the beneficiary as a service desk manager at a location in [REDACTED]. On page 1 of the I-140 petition, the petitioner identifies itself as [REDACTED] with a Federal Employer Identification Number (FEIN) of [REDACTED]. According to the record, the corporate entity to which this FEIN has been assigned is [REDACTED]. Accordingly, based on the record and statements made by counsel, it is more likely than not that the petitioner in this matter is [REDACTED].

However, the Form ETA 750 accompanying the petitioner's Form I-140 in accordance with the Act and regulations was not filed by the petitioner. The Form ETA 750, having a priority date of March 12, 2004, was filed by [REDACTED] FEIN [REDACTED]. Therefore, the Form ETA 750 and the I-140 petition were filed by two separate corporate entities both seeking to employ the beneficiary as a service desk manager.

On November 17, 2010, the AAO sent a Request for Evidence (RFE) to the petitioner noting this issue and requesting evidence establishing that the petitioner is entitled to use a Form ETA 750

certifying a job opportunity being offered by different corporation. In response, the petitioner submitted a letter dated December 9, 2010 in which it states, in pertinent part, the following:

In the instant case, although, there is a distinct legal status of the two businesses, [REDACTED] and [REDACTED] it is clear that the intention of the labor certification was for permanent employment with [REDACTED]. The labor certification on the ETA 750 form indicates that the place of employment was to be with [REDACTED] despite the fact that the incorrect FEIN was erroneously written on the Labor Certification.

The petitioner also cites to a decision of the DOL's Board of Alien Labor Certification Appeals (BALCA), *In the Matter of Harvest Office Services, Inc. T/A The Catalyst Group*, 2005 INA 111 (BALCA Dec. 7, 2006), and argues that "the interests of public policy" compel U.S. Citizenship and Immigration Services (USCIS) to conclude that the two corporate entities are one "company" for purposes of the petition and Form ETA 750.

Upon review, the petitioner's argument is not persuasive, and the petition shall be denied for this additional reason. See *Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d at 1043. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners, shareholders, and affiliated corporations. See *Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, a Form ETA 750 filed by, and certified for, one employer may not be used by a different petitioner to support a Form I-140.⁴ A job offered by an employer different from the filer of the Form ETA 750 is not for the "particular job opportunity" certified by the DOL. 20 C.F.R. § 656.30(c)(2). Accordingly, the petition in this matter is not accompanied by a labor certification valid for the proffered position of service desk manager for [REDACTED]

The petitioner indicates in its December 9, 2010 letter that the incorrect FEIN was written on the labor certification and that the place of employment was to be with [REDACTED]. However, 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). The only rational manner by which USCIS can be expected to interpret the meaning of terms used 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). Therefore, the labor certification clearly indicates that the prospective employer is [REDACTED] FEIN [REDACTED]. USCIS may not ignore this representation simply because the petitioner now finds it inconvenient. A petitioner may not make

⁴ See *cf. Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). As the petitioner has neither claimed nor established that it is a successor-in-interest to the entity which filed the labor certification application, the petitioner may not rely on this precedent decision to justify its use of a labor certification filed by and certified for a different business organization.

material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Furthermore, even if the AAO were to accept the petitioner's arguments regarding its intent in completing the Form ETA 750, the record does not support its claim to have intended [REDACTED] to be the employer in the labor certification. First, the copies of the recruitment advertising supplied by petitioner in response to the AAO's RFE list [REDACTED] as the prospective employer. Although the petitioner claims that the workplace in [REDACTED] is associated with [REDACTED] the letterhead of the "Ad Placement Request" in the record indicates that [REDACTED] also does business at this same address. This is confirmed by the public records of the State of [REDACTED] which indicates that both [REDACTED] and [REDACTED] maintain places of business in [REDACTED] and have active, and separate, [REDACTED] sales tax permits. *See* <https://ourcpa.cpa.state.tx.us> [REDACTED] (accessed February 9, 2011). Accordingly, the record does not support the petitioner's claim that it intended [REDACTED] and not [REDACTED] to be the employer in the Form ETA 750, even if this were relevant to the analysis.

Finally, the petitioner's reliance on the cited BALCA decision is misplaced. First, counsel does not state how the DOL precedent is binding in these proceedings. 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). Second, the particular decision relied upon by the petitioner, *In the Matter of Harvest Office Services, Inc. T/A The Catalyst Group*, 2005 INA 111 (BALCA Dec. 7, 2006), is inapposite in this situation. The decision in *Harvest Office Services, Inc.* addressed whether DOL may disregard "business structure" in determining whether an alien's work experience was gained with a different employer. *Id.* at 5. BALCA did not address, nor could it have addressed, whether an employer different from the filer of the Form ETA 750 could use that labor certification to support a subsequently filed Form I-140.⁵

Accordingly, the petition in this matter is not accompanied by a labor certification valid for the proffered position of service desk manager for [REDACTED]. The labor certification pertains to a job opportunity particular to a different employer and may not be used by the petitioner in this matter.

⁵ It is noted that DOL regulations consider entities having the same FEIN to be the same "employer" for purposes of examining whether a foreign worker gained his or her qualifying experience with the same employer filing the labor certification application. 8 C.F.R. § 656.17(i)(5)(i). Accordingly, contrary to counsel's assertions, the DOL does use FEINs to distinguish employers from one another. *See also* 8 C.F.R. § 656.3 (definition of "employer").

Whether the Beneficiary Meets the Education and Experience Requirements of the Form ETA 750

The second issue in the present matter is whether the petitioner has established that the beneficiary satisfied the minimum level of education stated on the labor certification. As noted above, 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 Dec. 158. The priority date of the petition is March 12, 2004.

The job qualifications for the certified position of service desk manager are found on Form ETA 750 Part A.⁶ Item 13 describes the job duties to be performed as follows:

Manage analysts for information systems support to users in Americas region. Responsible for global operations (support calls, system availability security and maintenance). Handle project management. Client account management, follow up on service agreements. Coordinate usage with other support centers worldwide.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:

Education (number of years)

Grade school	8
High school	4
College	4
College Degree Required	Bachelor's or equiv. based on educ+exp.
Major Field of Study	Computer Info. Systems or related field

Experience:

Job Offered 2 years

⁶ It is noted that, in support of the petition, counsel submitted a letter dated November 10, 2006 indicating that the original certified Form ETA 750 was never received by the petitioner. Accordingly, counsel requested that USCIS request a copy of the certified Form ETA 750 from the DOL. The [REDACTED] Service Center apparently did so, and the record contains a copy of the Form ETA 750 filed by [REDACTED] with a priority date of March 12, 2004 having no notes reflecting DOL certification. However, this copy conflicts materially from the copy of the Form ETA 750 submitted by the petitioner on appeal and obtained from the DOL through a Freedom of Information Act (FOIA) request on June 9, 2008. For example, the Form ETA 750 submitted in support of the petition indicates that the "college degree required" for the position is "bachelor's." However, the copy of the Form ETA 750 obtained through the FOIA request indicates that the "college degree required" is "bachelor's or equiv. based on educ+exp." Therefore, as the Form ETA 750 submitted on appeal and obtained through the FOIA request appears to more accurately reflect the job requirements, the AAO will rely on that copy in adjudicating the instant appeal.

(or)
Related Occupation 2 years (systems developer or systems administrator)

Block 15:
Other Special Requirements None

As set forth above, the proffered position requires 4 years of college. In addition, the worker must have earned a bachelor's degree in computer information systems or a related field or must be deemed to have earned the equivalent of a bachelor's degree based on a combination of education and experience.

On Part B of the labor certification, signed by the beneficiary, the beneficiary claims that he earned a "diploma" from the [REDACTED] in Computer Information Systems in 1995 after completing three years of study. The Form ETA 750B also reflects that the beneficiary has worked for the petitioner, [REDACTED] from January 1999 to the day the beneficiary signed the Form ETA 750B on March 4, 2004. He worked first as a systems analyst from January 1999 to April 2003 and thereafter as a service desk manager. Before working for the petitioner, the beneficiary claims he worked as a systems administrator for [REDACTED] from May 1995 to December 1998.

In support of the beneficiary's educational qualifications, the record contains copies of the "Program Certificate," transcript, and "Statement of Grades" for the beneficiary's program in computer and data processing engineering from the [REDACTED]. The record also contains a copy of a credentials evaluation dated May 19, 2003 from [REDACTED] of the [REDACTED]. The evaluation claims that this education is "equivalent to three years of university-level credit at an accredited college or university in the United States." The evaluation concludes that, based on a combination of this education with the beneficiary's work experience, the beneficiary has earned the equivalent of a bachelor's degree in computer information systems from an accredited college or university in the United States.

It is important to note that neither the petitioner nor the evaluator claims that the beneficiary has earned a bachelor's degree or a foreign degree equivalent. Rather, the petitioner claims that the combination of the beneficiary's education and work experience is equivalent to a U.S. bachelor's degree.

The director denied the petition on February 21, 2008 and, after receiving a motion to reconsider, affirmed this denial on April 22, 2008. Considering the petition under the skilled worker classification pursuant to section 203(b)(3)(A)(i) of the Act, the director determined that beneficiary did not meet the minimum requirements stated in the labor certification because the beneficiary has not earned a U.S. bachelor's degree or foreign equivalent degree. It is noted that the director relied on the version of the Form ETA 750 received from the DOL which indicates that a four-year

bachelor's degree in computer information systems is required for the position. As noted above, the petitioner subsequently submitted a copy of a Form ETA 750 obtained through a FOIA request which shows the minimum education requirements as four years of college and a "bachelor's or equiv. based on educ+exp."

On appeal, counsel submits the FOIA-obtained Form ETA 750 and argues that the beneficiary meets the minimum requirements of the labor certification because he has earned the equivalent of a bachelor's degree in computer information systems through a combination of education and work experience. It must be noted that counsel interprets the Form ETA 750 as requiring "4 years Bachelor's or equiv. based on educ. + exp."

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 A of the ETA 750 indicates that the DOL assigned the occupational code of 13-1111 and title management analyst, 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.⁷

In the instant case, the DOL categorized the offered position under the SOC code 13-111. The O*NET online database states that this occupation falls within Job Zone Four.⁸

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 <http://online.onetcenter.org/link/summary/13-1111.00> (accessed February 14, 2011). Additionally, the DOL states the following concerning the training and overall experience required for these occupations:

⁷ See <http://www.bls.gov/soc/socguide.htm>.

⁸ According to O*NET, most of the occupations in Job Zone Four require a four-year bachelor's degree. <http://online.onetcenter.org/help/online/zones> (accessed February 14, 2011).

A considerable amount 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 may be considered under either the professional or the skilled worker category. In this matter, counsel argues that the position should 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 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.

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.

- i. Neither the Position nor the Beneficiary May be Qualified as a Member of the Professions Pursuant to Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii)*

As noted above, the Form ETA 750 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.

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).⁹ *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.

⁹ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

§ 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from 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 adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

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

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

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

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

Therefore, it is the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of 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(l)(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 (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 (5th 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. 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 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.

- ii. *The Position May be Properly Classified as One Requiring a Skilled Worker Pursuant Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i)*

As noted above, based on the terms of the certified Form ETA 750, the proffered position requires 4 years of college. In addition, the worker must have earned a bachelor's degree in computer information systems or a related field or must be deemed to have earned the equivalent of a bachelor's degree based on a combination of education and experience. Moreover, the position requires two years of experience in the job offered or in the related occupations of systems developer or systems administrator.

Accordingly, although the position may not be classified as a professional position (*see supra*), it may be classified as a skilled worker position requiring at least two years of training or experience.

The regulation at 8 C.F.R. § 204(5)(l)(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.

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 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). 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 (RCL) (D.C. Cir. Mar. 26, 2008), 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.

Thus, the AAO issued a request for evidence (RFE) on November 17, 2010 soliciting such evidence to shed light on the meaning of the educational requirement "Bachelor's or equiv. based on educ+exp." In response, the petitioner submitted copies of recruitment material and advertisements indicating that the minimum educational requirement for the position is a bachelor's degree or equivalent based on education plus experience in a related field. The recruitment material does not specify how many years of college education are required for the position, if any.

Accordingly, it is concluded that the position may be classified as one requiring a skilled worker because it requires at least two years of training or experience, i.e., 4 years of college, either a bachelor's degree in computer information systems or a related field or the equivalent of a bachelor's degree based on a combination of education and experience, and two years of experience in either the job offered or in the related occupations of systems developer or systems administrator. However, the recruitment material does not specify what methodology is to be used in ascertaining whether a candidate has earned the "equivalent" of a bachelor's degree through a combination of education and experience.

iii. The Beneficiary Does Not Meet the Requirements of the Labor Certification

In this matter, the beneficiary does not meet the requirements of the Form ETA 750 because it has not been established that he has the equivalent of a bachelor's degree through a combination of education and experience¹⁰ and because he has not completed 4 years of college.

As noted above, the petitioner submitted an evaluation of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification. The evaluation is dated May 19, 2003 and is from [REDACTED] of the [REDACTED]. The [REDACTED] evaluation indicates that the beneficiary attended classes from 1992 to 1998 at the [REDACTED] in the computer and information engineering undergraduate program. The evaluator also notes that the beneficiary worked as a graphic designer from 1989 to 1993 and then as a systems developer and administrator from 1993 to 1999. The evaluator does not appear to consider any experience after 1999. The [REDACTED] evaluation concludes that the beneficiary's education is "equivalent to three years of university-level credit at an accredited college or university in the United States."¹¹ The evaluation concludes that, based on a

¹⁰ It was discussed previously that the beneficiary does not qualify as a member of the professions because he has not earned a U.S. bachelor's degree or a single source foreign equivalent degree.

¹¹ Moreover, as advised in the RFE issued to the petitioner by this office, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). In *Confluence Intern., Inc. v. Holder*,

combination of this education with the beneficiary's work experience, the beneficiary has earned the equivalent of a bachelor's degree in computer information systems from an accredited college or university in the United States. The evaluator used a formula equating three years of work experience to one year of university-level credit in concluding that the beneficiary has earned the equivalent of a bachelor's degree.

Upon review, the AAO concludes that the evaluation does not establish that the beneficiary has earned the equivalent to U.S. bachelor's degree in computer information systems through a combination of education and experience. 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).

As noted above, since neither the Form ETA 750 nor the recruitment material indicated what methodology is to be used to determine whether a candidate for the position has earned the "equivalent" to a U.S. bachelor's degree, and given that the single evaluation in the record upon which the petitioner is relying to qualify the beneficiary for the benefit sought purports to equate three years of work experience to one year of university education, it appears that the petitioner is attempting to utilize the regulation pertaining to degree equivalency in the H-1B nonimmigrant visa category. However, this is not clear, and neither USCIS nor prospective applicants for the position could realistically be expected to guess what methodology the petitioner intended to use to evaluate

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. 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." Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available at [www.aacrao.org/publications/guide to creating international publications.pdf](http://www.aacrao.org/publications/guide%20to%20creating%20international%20publications.pdf). If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE provides a great deal of information about the educational system in [REDACTED] and it does not suggest that the beneficiary's education may be deemed a foreign equivalent degree to a U.S. baccalaureate. Accordingly, EDGE and the record are in agreement that the beneficiary has not earned a single degree equivalent to a U.S. bachelor's degree through education alone.

candidates claiming to have earned the "equivalent" to a U.S. bachelor's degree. 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)). Regardless, assuming *arguendo* that the petitioner intended to apply the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D), the evaluation is still not persuasive in establishing that the beneficiary has earned the equivalent of a U.S. bachelor's degree.

The evaluator provides no basis for equating the beneficiary's education in [REDACTED] to three years of higher education in the United States. The beneficiary appears to have attended classes at the [REDACTED] on an intermittent basis over a period of approximately six years. Based on the transcripts, it appears that the beneficiary earned the majority of his credits during between 1992 and 1994. After 1994, the beneficiary appears to have taken only three more courses and, in 1997, enrolled in a "practical," although the meaning of this "practical," or its relationship to his contemporaneous employment (if any) is not explained by the evaluator. If this "practical" involved contemporaneous employment, which is used by the evaluator to conclude that the beneficiary has acquired the equivalent to a U.S. bachelor's degree, then the experience would have been counted twice. The AAO cannot draw conclusions with respect to the nature of the "practical" or whether the work experience was counted twice. The AAO finds that this inconsistency undermines the credibility of the evaluation.

The evaluation does not contain descriptions of the beneficiary's courses, explain the significance of any credit hour assignments, or draw any comparisons with the requirements of U.S. baccalaureate programs in computer information systems. Therefore, the evaluation does not credibly establish that the beneficiary completed in [REDACTED] the equivalent of three years of higher education in the United States.

The evaluator provides no basis for concluding that the beneficiary's work experience in [REDACTED] from 1989 to 1999 is appropriately considered in evaluating whether the beneficiary has earned the equivalent of a U.S. bachelor's degree through a combination of education and experience. The [REDACTED] evaluation indicates that the beneficiary worked for four years as a graphic designer and six years as a systems developer and administrator. In order for work experience to be used by an evaluator to determine that a worker has acquired the equivalent of a degree through this work experience, the work experience must include the theoretical and practical application of the knowledge required by the job in question and have been gained while working with others who have a degree or its equivalent. *See cf.* 8 C.F.R. § 212.4(h)(4)(iii)(D)(5). The beneficiary must also be recognized as having expertise in the relevant subject matter. *Id.* The [REDACTED] evaluation does not explain how the beneficiary's experience as a graphic designer is relevant to the theoretical or practical application of knowledge required by an occupation in computer information systems, especially since most of this experience pre-dates his computer oriented education. Moreover, the [REDACTED] evaluation does not establish that the beneficiary's work experience as a systems developer and administrator was gained while working with others who have a degree or its equivalent or that the beneficiary has been recognized as having expertise in the relevant subject matter.

Accordingly, the petitioner has not established that the beneficiary meets the educational requirements of the Form ETA 750 because it has not been established that he has acquired the equivalent of a bachelor's degree through a combination of education and experience.

Furthermore, the petitioner has not established that the beneficiary has attended four years of college as required by the labor certification. As noted above, the "college" section of Block 14 of the Form ETA 750 states "4" for the minimum number of years of college required for the position. Although counsel on appeal argues that the minimum education requirements for the position is a four-year bachelor's degree or the equivalent of a bachelor's degree earned through a combination of education and experience, this is not what the labor certification actually requires. The labor certification requires that candidates have attended four years of college. The degree requirement is a separate requirement. Once again, 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. at 833. 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).

In this matter, the beneficiary claims in the Form ETA 750B to have attended classes at the [REDACTED] from 1992 to 1995. The [REDACTED] evaluation, however, indicates that the beneficiary attended classes from 1992 to 1998. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). According to the Statement of Grades in the record, the beneficiary attended "evening classes" intermittently from 1992 to 1998 when he voluntarily withdrew from the program. It appears that he took approximately 26 courses during this six year period. At most, this sporadic course of study appears to have consisted of approximately 2.5 years of full-time study, the actual equivalency of which to a U.S. degree program is unknown. Therefore, based on the record as a whole, it cannot be concluded that the beneficiary attended college for four years, regardless of any degree requirements (or lack thereof) in the labor certification.

The beneficiary does not meet the requirements of the labor certification and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

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.