

Identifying data deleted to  
prevent identity unwarranted  
invasion of personal privacy

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

**PUBLIC COPY**



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



B6

DATE: DEC 20 2011 OFFICE: NEBRASKA SERVICE CENTER

FILE:



IN RE:

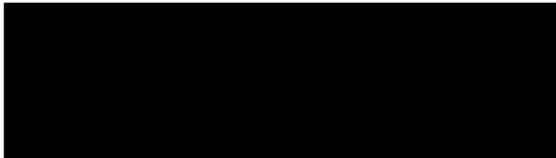
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The petitioner filed a motion to reconsider. The Director granted the motion, but denied the petition again on the merits. The petitioner subsequently filed a late appeal. The Chief, Administrative Appeals Office (AAO), rejected the appeal on the ground that it was not timely filed, but certified the Director's decision on the motion to the AAO. The Director's decision will be affirmed.

The petitioner is a hospital and medical research institute. It seeks to employ the beneficiary permanently in the United States as a "Dedicated Lab Sonographer I, Research" and to classify her as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition.

The Director determined, both in the original decision and in the decision on the motion to reconsider, that the evidence of record failed to demonstrate that the beneficiary satisfied the minimum level of education specified on the ETA Form 9089 (labor certification).

The AAO conducts its review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The procedural history in this case is documented by the record and incorporated into the AAO's decision. Further elaboration of the procedural history will be made only as necessary.

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.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is October 30, 2007, which is the date the labor certification application was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).<sup>1</sup> The ETA Form 9089 was certified by the DOL on December 11, 2007, and the Immigrant Petition for Alien Worker (Form I-140) was filed on June 5, 2009.<sup>2</sup>

---

<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

<sup>2</sup> The petitioner filed two earlier Forms I-140 on behalf of the beneficiary. The first, filed on February 8, 2008, sought to classify the beneficiary as an advanced degree professional under section 203(b)(2) of the Act. It was denied by the Director on October 7, 2008. The second Form I-140, filed on March 10, 2009, sought to classify the beneficiary as a professional under section 203(b)(3)(A)(ii) of the Act. It was denied by the Texas Service Center Director on April 10, 2009.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the labor certification application – "Job Opportunity Information" – describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089 (at H.11) the job duties of a Dedicated Lab Sonographer I, Research are described as follows:

Performs all types of cardiac ultrasound using all modalities of imaging (including intra-op and fetal studies). Performs/assists on intra-operative epicardial and transophageal echos. Acts as Cardiology representative for Sonography research. Assists physician and research study coordinators with protocols, performs cardiac ultrasound, gathers and processes data and performs statistical analysis as directed by research protocols. Performs cardiac ultrasound, ECG's, holter monitoring and other noninvasive studies as requested by the Cardiologist in all hospital and clinical settings, including satellite clinics, offers preliminary echo interpretations, prepares preliminary echo report for final review and approval by the cardiologist.

Regarding the minimum level of education and experience required for the proffered position, the petitioner specified the following requirements in Part H of the labor certification:

4. Education: Minimum level required:  
Bachelor's degree
- 4-B. Major Field Study:  
Cardiovascular Technology, Laboratory Science, or related field
6. Is experience in the job offered required?  
"No"
7. Is there an alternate field of study that is acceptable?  
"No"

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

“No”

9. Is a foreign educational equivalent acceptable?

“Yes”

10. Is experience in an alternate occupation acceptable?

“Yes”

10A. Number of months experience in alternate occupation required.

60 months

10B. Identify the job title of the acceptable alternate occupation:

Sonographer or other closely related position

14. Specific skills or other requirements:

This position requires a Bachelor's Degree or equivalent in Cardiovascular Technology, Laboratory Science or a related field, plus five years of progressively responsible experience performing cardiovascular sonography including inter-operative and fetal studies. Must have successfully completed Registry specialty exam from the American Registry of Diagnostic Medical Sonographers (ARDMS) in Pediatric Echo Examination and CPR-BLS certification.

Although the requirements exceed the O\*Net's Zone 3 classification for this type of position (see box #12 [Are the job opportunity's requirements normal for the occupation?]), the above stated educational and experiential qualifications comprise the requirement for this Dedicated Lab Sonographer I position, and are the minimum qualifications for all similarly employed workers at the institute, and throughout the industry, for a position of this nature.

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth in the labor certification, the proffered position requires a bachelor's degree in cardiovascular technology, laboratory science or a related field, plus five years of progressively responsible experience performing cardiovascular sonography, successful completion of the Registry specialty exam from the ARDMS in Pediatric Echo Examination, and CPR-BLS certification.

On the ETA Form 9089, signed by the beneficiary (Part L), the beneficiary represented in Part J – “Alien Information” – that the highest level of education she achieved related to the requested occupation was a bachelor's degree in laboratory science at Osmania University in Hyderabad, India, in 1982. The beneficiary also listed her qualifying jobs in Part K – “Alien Work Experience” – as follows:

Nov. 1985 – June 2000:

Echocardiographer at King Fahd Hospital in Al Khobar, Saudi Arabia

June 2001 – July 2003:

Echocardiographer/Lab Manager at Care Hospital in Hyderabad, India

July 2003 – July 2005

Senior Pediatric Ultrasonographer at UCSF Medical Center in San Francisco, California

Oct. 24, 2005 – present (Dec. 2007)

Dedicated Lab Sonographer at Children's Hospital and Research Center Oakland (the petitioner) in Oakland, California

As evidence of the beneficiary's educational qualifications, the petitioner submitted copies of the beneficiary's diploma and academic record from Osmania University with the original Form I-140 petition in February 2008 (seeking classification for the beneficiary as an advanced degree professional). The documentation indicates that the beneficiary was awarded a Bachelor of Science degree upon completion of a three-year course of study in 1982. The petitioner also submitted a credentials evaluation from ICETS (International Credentials Evaluation and Translation Service), apparently dated April 2, 2003, which concluded that the beneficiary's three years of study at Osmania University and more than 14 years of experience in laboratory science at King Fahd Hospital in Saudi Arabia was equivalent to a bachelor of science degree in laboratory science from a college or university in the United States. The ICETS evaluation also noted that the beneficiary's coursework in his degree program, standing alone, was comparable to the completion of three years of academic study toward a U.S. bachelor's degree.

In support of its second Form I-140 petition (seeking EB-3 classification for the beneficiary as a professional) the petitioner submitted another credentials evaluation, dated February 13, 2009, from The Trustforte Corporation (Trustforte). This evaluation concluded that the beneficiary's three years of study at Osmania University and her first six years of experience in medical laboratory technology at King Fahd Hospital in Saudi Arabia was equivalent to a bachelor of science degree in

medical laboratory technology from a college or university in the United States. Similar to the ICETS evaluation, however, the Trustfortc evaluation also concluded that the beneficiary's education, standing alone, was equivalent to only three years of study toward a U.S. bachelor's degree.

In support of its current (third) Form I-140 petition (seeking EB-3 classification for the beneficiary as a skilled worker) the petitioner submitted documentary evidence in October 2009 of another degree earned by the beneficiary. Copies of her diploma and academic transcript show that the beneficiary was awarded a Master of Science in Health Care Administration on June 10, 2006, by California State University, East Bay, in Hayward, California.

The Director denied the petition initially on October 16, 2009, finding that the beneficiary did not meet the minimum educational requirements as stated on the ETA Form 9089. The Director determined that the beneficiary's three-year degree from Osmania University in 1982 was not equivalent to a U.S. bachelor's degree in one of the fields identified on the labor certification – *i.e.* cardiovascular technology, laboratory science, or a related field – and that the labor certification does not indicate that work experience could be a component of a foreign degree equivalency. As for the beneficiary's subsequent master's degree in health care administration from California State University in 2006, the Director noted that no mention was made of this degree in the labor certification application filed by the petitioner in 2007. After speculating about the reason for the petitioner's delay in advising USCIS of this degree until after the issuance of a Request for Evidence (RFE) in the current proceeding in August 2009, the Director determined that health care administration was not a "related field" to cardiovascular technology or laboratory science in any event. Therefore, even if the beneficiary's master's degree had been mentioned on the ETA Form 9089, it was not in a field of study that would qualify the beneficiary for the proffered position under the terms of the labor certification.

The Director's second decision, issued on January 27, 2010 in response to the petitioner's motion to reconsider, affirmed the finding in the initial decision that the beneficiary did not meet the minimum educational requirements as stated on the ETA Form 9089. The Director rejected arguments by the petitioner that USCIS had misstated the petitioner's educational requirements for the proffered position, that USCIS had ignored deficiencies on the ETA Form 9089 which prevented the listing of two degrees, and that USCIS had not exercised its authority to consider what the employer intended by its use of the term "equivalent" in the labor certification process.

The petitioner filed an appeal, Form I-290B, on June 30, 2010. Unlike the earlier Form I-290B filed after the Director's initial decision, which the petitioner identified as a motion to reconsider, the second I-290B (identified as an appeal) was not filed within the 33-day period prescribed in the regulations. *See* 8 C.F.R. §§ 103.2(a)(7)(i) and 103.5a(b). An untimely appeal must be rejected. *See* 8.C.F.R. § 103.3(a)(2)(v)(B)(1). Upon review of the record, however, the AAO noted that a letter from two high-ranking doctors in the cardiology department currently employing the beneficiary, which addressed the beneficiary's qualifications for the proffered position, was overlooked by the Director in his decision of January 27, 2010. Therefore, in a decision dated August 4, 2010, the AAO rejected the petitioner's appeal as untimely filed and certified the Director's decision of January 27, 2010 to itself pursuant to 8 C.F.R. §§ 103.4(a)(4) and (5).

In its decision the AAO granted the petitioner the opportunity to file an additional brief. The petitioner proceeded to file a brief from counsel and supporting materials on October 29, 2010. The supporting materials include three items that are new, including: (1) copies of the petitioner's public recruitment for the proffered position in which the phrase "B.S. or equivalent" is used, (2) a letter from a recruiter discussing the meaning of "B.S. or equivalent" in the recruitment context, and (3) a news article on the internet discussing a shortage of sonographers in the United States.

Part F of the ETA Form 9089 indicates that the DOL assigned the occupational code of SOC 29-2032.00 and title Diagnostic Medical Sonographer 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.

The O\*NET online database states that the occupation Diagnostic Medical Sonographer falls within Job Zone Three. According to the DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. The DOL assigns a standard vocational preparation (SVP) of 6 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree." See <http://www.onetonline.org/link/summary/> (accessed November 11, 2011).<sup>3</sup> Additionally, the DOL states the following concerning the training and overall experience required for Job Zone 3 occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

*See id.* Because of the requirements of the proffered position and the DOL's standard occupational requirements, the proffered position is for a skilled worker, but might also be considered under the professional category.

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

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation

---

<sup>3</sup> Based on a survey of Diagnostic Medical Sonographers conducted by the DOL, 42% of the respondents had an associate's degree, 25% had some college but no degree, and 25% had a bachelor's degree.

designation. The minimum requirements for this classification are at least two years of training or experience.

As the above regulation makes clear, the alien must meet the requirements of the labor certification. Because the 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.

As previously noted, the ETA Form 9089 is certified by the DOL. At the outset, therefore, 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).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so

---

<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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 at 1012-1013.

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

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1008. 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 (9<sup>th</sup> Cir. 1984).

Therefore, it is the DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of 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 (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree: “[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*” 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word “degree” in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289m 1295 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress’ narrow requirement in of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education earned at an institution other than a college or university.

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. *See 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.

We are cognizant of the 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 labor certification.” Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a

matter of law. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). 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).

We also note the court 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. See *Snapnames.com, Inc.* at 17, 19.

In this case, the petitioner does not claim that the beneficiary's three-year degree from Osmania University in India, dating from 1982, is equivalent to a bachelor's degree in the United States. Both of the educational credentials evaluations submitted by the petitioner, from ICETS and Trustforte, indicate that the degree from Osmania University is equivalent to three years of study at a college or university in the United States. These evaluations are consistent with the assessment of the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),<sup>5</sup> which states that a Bachelor of Science

---

<sup>5</sup> According to its website, "AACRAO is a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." 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 for download at [www.aacrao.org/publications/guide\\_to\\_creating\\_international\\_publications.pdf](http://www.aacrao.org/publications/guide_to_creating_international_publications.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. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by

degree in India is awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate (equivalent to a high school diploma in the United States) and is comparable to 2-3 years of university study in the United States. Since the beneficiary's three-year degree from Osmania University is not a "United States baccalaureate degree or a foreign equivalent degree" from a college or university in a field of study listed on the labor certification, it does not qualify her for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

As for the beneficiary's other degree – the Master of Science in Health Care Administration from California State University in 2006 – it was not referenced on the labor certification application that the petitioner submitted to the DOL in October 2007. In Part H ("Job Opportunity Information") of the ETA Form 9089, the petitioner indicated that the minimum educational requirement was a bachelor's degree in "Cardiovascular Technology, Laboratory Science, or related field." In Part J ("Alien Information") of the ETA Form 9089, signed by the beneficiary on January 24, 2008, the beneficiary identified her "highest [educational] level achieved relevant to the requested occupation" as the (three-year) bachelor's degree in "laboratory science" from Osmania University in 1982. The beneficiary did not mention her recent master's degree from California State University in 2006.

Counsel for the petitioner asserts that the master's degree was omitted from the ETA Form 9089 because the form has no place to list multiple degrees, and because the beneficiary believed that she qualified for the proffered position based on her Indian degree and work experience. The AAO does not agree with counsel's claim that it is impossible to identify more than one degree on the form. For example, in Part H.8 and H.8-A the beneficiary was asked if "an alternate combination of education and experience" was acceptable and, if so, the "alternate level of education." The beneficiary's motivation in leaving out her master's degree cannot be determined with certainty. Though counsel maintains that it was an oversight resulting from overconfidence in the U.S. equivalence of her Indian degree and work experience, the inference could also be drawn that the beneficiary did not think the field of study in her master's degree – health care administration – is sufficiently close to cardiovascular technology or laboratory science to qualify as a "related field."

As evidence that health care administration is a related field of study to cardiovascular technology and laboratory science, counsel cites a letter from [REDACTED] and [REDACTED] dated November 10, 2009. In their letter ([REDACTED] letter), [REDACTED] and [REDACTED] stated, in pertinent part, the following:

---

AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

We confirm our expert credentials in the field of pediatric cardiology, including being involved in the hiring and supervising of dedicated lab sonographers such as [the beneficiary]. This letter will also confirm that in evaluating whether [the beneficiary] met the hospital's minimum requirements for the position of Dedicated Lab Sonographer I, Research, as of October 30, 2007, we used our sound professional and medical judgment . . . in our determination that [the beneficiary] met or exceeded the hospital's education and work experience requirements as laid out in [its] application for labor certification. [The] petitioner had the combination of education and experience which met our qualifications. We were fully aware that [the beneficiary] also had a MS degree in Health Care Administration as of October 30, 2007, which also met our educational qualification requirements. Finally, we confirm in our expert capacity as leading members of our field and as supervisors for more than 25 years overseeing the hiring and firing of sonographers, that a Master's Degree in Health Administration is a related degree to that of Laboratory Science or Cardiovascular Technology, as required for this position.

\*\*\*\*\*

. . . . For clarification, the degree in Health Care Administration is related to a bachelor's degree in Laboratory Science or Cardiovascular Technology, which degrees we listed as some of the possible related degrees in which to qualify for our position . . . . For example, a Laboratory Science degree program teaches students how to be important members of a healthcare team as they work side by side with physicians in collecting data necessary to maintain health and provide optimal care to patients. [The beneficiary] performs such duties. Similarly, a degree in Health Care Administration trains its graduates to solve problems in running programs, and make critical decisions quickly, which duties [the beneficiary] also performs in managing the research function of the department. Health Care Administration degree holders also have regular contact with patients, community members, physicians, nurses, vendors, trustees, and organizational staff. A degree in Cardiovascular Technology teaches other technical skills to perform cardiac ultrasounds . . . .

. . . . [The beneficiary], in obtaining a degree in any of these related fields, would have a foundation to perform the duties [of the proffered position – Dedicated Lab Sonographer I, Research] . . . .

While [redacted] state that "a Master's Degree in Health [Care] Administration is a related degree to that of Laboratory Science or Cardiovascular Technology," they do not claim that a degree in health care administration involves any of the technical, scientific, and medical instruction that would be included in a laboratory science or cardiovascular technology degree program. Nor do the types of skills that a health care administration degree holder would bring to the proffered position, as highlighted in the [redacted] letter, involve any of the direct medical and laboratory functions that are central to the proffered position, as described in the labor certification.

The evidence of record includes California State University's online "Program Description" of its M.S. in Health Care Administration for 2009-2010. See <http://www.csuhayward.edu/ccat/current/g->

[hca.html](#) (accessed October 7, 2009). The description of the master's degree program reads, in pertinent part, as follows:

. . . This degree is primarily designed for health care professionals who are currently in leadership/management positions [or] who aspire to leadership/management positions . . . . It is secondarily designed for students who are not currently in the health care field, but who desire a career in health care administration.

\*\*\*\*\*

Students take required courses in leadership and change in health care organizations, health care financing and budgeting, health care policy, research methods, information technology in health care, and legal and ethical issues in health care.

They also take additional courses in one of the following option areas: Management and Change in Health Care, or Administration of Healthy Communities . . . .

Students in the M.S. in Health Care Administration program acquire analytical skills needed to explore new models of health care delivery and organizational design. They also develop the leadership skills needed to discover and implement creative solutions to problems in the current health care system.

The program content described above involves little, if any, technical instruction in the field of science or medicine. Nor does it require any prior technical instruction in science or medicine, since the program is open not only to health care professionals, but also to "students who are not currently in the health care field." In fact, the program website clearly states that "no specific undergraduate major is required for admission to the program." The M.S. in Health Care Administration is designed to foster analytical skills in the broad issues of health care policy and management, not in the direct delivery of medical/health care services.

Based on the foregoing analysis, the AAO does not agree with counsel's contention that health care administration is a related field of study to cardiovascular technology or laboratory science. Entry into the master's degree program in health care administration at "Cal State" does not hinge on a background in any particular field of study. While a prior degree in a technical field such as cardiovascular technology or laboratory science may be a useful building block to a higher degree in health care administration, it is not directly "related" to health care administration any more than myriad other fields of study that program participants may have pursued. In the AAO's view, therefore, the beneficiary's M.S. in Health Care Administration was properly omitted from the labor certification. In any event, because the beneficiary's U.S. master's degree is not in a field of study related to those listed on the labor certification, it does not qualify her for preference visa classification under section 203(b)(3)(A)(ii) of the Act. The beneficiary does not meet the requirement of the labor certification.

The court in *Snapnames.com, Inc., supra*, recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language

of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, *e.g.* by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

According to counsel, the labor certification (consistent with the instant petition seeking classification of the beneficiary as a skilled worker) specifies that a combination of education and work experience equivalent to a bachelor's degree would be acceptable to qualify for the proffered position. Counsel points to the petitioner's entry in Box H.14 of the ETA Form 9089 – "Specific skills or other requirements" – which states as follows:

This position requires a Bachelor's Degree or equivalent in Cardiovascular Technology, Laboratory Science or a related field, plus five years of progressively responsible experience performing cardiovascular sonography including inter-operative and fetal studies.

In counsel's view, this language plainly states that the beneficiary would qualify for the job with either a combination of education and experience "equivalent to a bachelor's degree" in the requisite field or a "foreign educational degree equivalent." The AAO does not agree. Counsel's interpretation of the degree requirement ignores the relative clause which expressly requires five years of progressively responsible experience in the specialty in addition to a "bachelor's degree or equivalent." In counsel's strained interpretation a work element is inserted into both sides of the equation. If the petitioner truly intended that the beneficiary could qualify for the proffered position with (1) the "equivalent of a bachelor's degree" consisting of some combination of education amounting to less than a bachelor's degree and relevant work experience, PLUS (2) five additional years of work experience in the specialty, that intention should have been worded much more clearly in the labor certification. In the AAO's view, the plain language and only logical interpretation of the Box 14 language is that the job requirements consist of two distinct components – a bachelor's degree (whether U.S. or a foreign equivalent degree) and five years of experience. It is further noted that the petitioner stated unambiguously in Box H.8 of the ETA Form 9089 that no combination of education and experience would be acceptable.

Counsel asserts that the petitioner's recruitment for the proffered position during the labor certification process makes clear that it regarded the "bachelor's degree or equivalent" language in Box H.14 of the ETA Form 9089 to encompass any combination of education and experience amounting to the equivalent of a bachelor's degree. The record includes copies of the petitioner's public recruitment, including print advertisements, website listings, and jobsite postings. All of these advertisements used exactly the same language as Box H.14 of the labor certification. Accordingly, the AAO's analysis of the labor certification language in the above paragraph applies equally to the job advertisements. Adhering to the plain language of the job advertisements, the AAO interprets the educational component of the job advertisements – "bachelor's degree or equivalent" – as meaning a U.S. bachelor's degree or a foreign equivalent degree.

As further evidence of the petitioner's intent regarding the term "bachelor's degree or equivalent" counsel refers to its cover letter accompanying the petition in 2009 and two letters from the petitioner's [REDACTED] in 2009 (one accompanying the petition and the other in support of the motion to reconsider), all of which assert that any suitable combination of education, training or experience would be acceptable to meet the requirements of the labor certification. The assertions of counsel, however, do not constitute evidence. *See Matter of Obaighbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, neither counsel's letter nor the two letters from the petitioner's director of compliance were written during the labor certification process, which concluded on December 11, 2007, with the DOL's certification of the ETA Form 9089.

The employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *See Maramjaya, supra*, at 14 n. 7. 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 that 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. Since the letters from [REDACTED] to USCIS postdated the labor certification process with the DOL, they have little probative value as evidence of the petitioner's intent regarding its use of the term "bachelor's degree or equivalent" on the ETA Form 9089.

Counsel cites a letter dated October 11, 2010 from a recruiter in another company ([REDACTED] of Rearden Commerce, Inc.) stating that in her experience the term "bachelor's degree or the equivalent" is understood both by hiring companies and job applicants to mean that an applicant may have a combination of education and experience – such as three years of education and three years of experience – which will be regarded as equivalent to a bachelor's degree. This letter has no more evidentiary weight, however, than the petitioner's own assertions in this proceeding. The overriding fact is that the petitioner should have made its intentions much clearer in the labor certification, if it really meant to consider a combination of education and experience as equivalent to a bachelor's degree. For the reasons previously discussed, the only logical interpretation of the labor certification according to the plain language in Box H.14 is that the proffered position requires a U.S. bachelor's degree or a foreign equivalent degree.

Counsel also cites a letter from the President of the American Society of Echocardiography in October 2010 entitled "Cardiac Sonographers in Short Supply." The article's title may well be true, but that is irrelevant to the appeal currently before the AAO. The DOL has already reviewed the local market for sonographers pursuant to the labor certification application and has certified, in accordance with section 212(a)(5)(A)(i)(I) of the Act, that "there are not sufficient workers who are able, willing, qualified . . . and available . . . at the place where the alien is to perform such . . . labor." In its adjudication of employment-based immigrant visa petitions, however, USCIS must determine whether the beneficiary meets the qualifications for the proffered position as set forth by the employer on the labor certification. *See K.R.K. Irvine, Inc. v. Landon and Tongatapu Woodcraft Hawaii Ltd. v. Feldman, supra*. If the beneficiary does not meet the job qualifications on the underlying labor certification, the visa petition cannot be approved regardless of any shortage in the labor market for sonographers.

Finally, counsel asserts that USCIS failed to follow its own published guidance as represented by the minutes of a liaison meeting between the American Immigration Lawyers Association (AILA) and the Nebraska Service Center (NSC) on April 30, 2008. According to counsel, the NSC acknowledged that if it finds any terminology in an ETA Form 9089 unclear, it should seek clarification from the employer to determine whether *bona fide* consideration was given to U.S. workers with a combination of education, training, and experience akin to that of the beneficiary and, if so, may find that the beneficiary meets the requirements of the labor certification. The AAO does not agree with counsel's characterization of the above described meeting minutes as "published guidance" for USCIS. Contrary to counsel's implication, the minutes of the AILA/NSC liaison meeting have no binding legal effect on USCIS.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative agencies are not free to refuse to follow precedent within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") *See also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC*, 659 F.2d 452, 462 (5<sup>th</sup> Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The

agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy.” The memo notes that “policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power.” *Id.* at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

For all of the reasons discussed in this decision, the AAO concludes that the beneficiary does not qualify for the proffered position of “Dedicated Lab Sonographer I, Research” because she does not satisfy the minimum level of education specified on the ETA Form 9089 – a U.S. bachelor’s degree, or a foreign equivalent degree, in cardiovascular technology, laboratory science, or a related field. Accordingly, the immigrant visa petition cannot be approved.

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

**ORDER:** The decision certified to the AAO is affirmed. The petition is denied.