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

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U.S. Citizenship
and Immigration
Services

B6

[REDACTED]

File: [REDACTED] Office: NEBRASKA SERVICE CENTER Date:

MAR 04 2011

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

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a property rental and management business. It seeks to employ the beneficiary permanently in the United States as a general maintenance engineer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (the 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 director denied the petition because the petitioner did not establish that the beneficiary has an "Associate's Degree" as required by the labor certification. The director denied the petition accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).¹

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), 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 unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

On Part 2.g. of the Form I-140, the petitioner filed a petition for the preference visa classification "Any other worker (requiring less than two years of training or experience)²" that is referred to under the Act as unskilled labor. The director's decision states that the I-140 petition was filed under Section 203(b)(3)(A)(iii) of the Act above mentioned. On appeal, counsel confirms that "The I-140 petition filed for [the beneficiary] is for [the] unskilled worker [classification]." An education attainment is not a statutorily required prerequisite for an unskilled, permanent employment position. However, in this present instance, the petitioner requires education in specific fields of expertise. The petitioner has affirmatively indicated the above education requirement in the labor certification which the director followed in his decision.

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). Here, the labor certification was accepted for processing on April 30, 2001.³ The Immigrant Petition for Alien Worker (Form I-140) was filed on June 25, 2007.

¹ The submission of additional evidence on appeal is allowed by the instructions to 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).

² The petitioner does not require job experience or training for the offered position of general maintenance engineer.

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

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

On the ETA Form 9089, the "job offer" position description for a general maintenance engineer provides:

Inspect residential units for safety conditions. Prepare vacant units for rental; handle tenant concerns; supervise contractors. Work performed involves several buildings, and apartment complexes of the company. Duties may also involve electrical work, cable and electrical maintenance. May also involve planning and laying out of work repairs, repair electrical and or mechanical equipment; installing, aligning and balancing new equipment, and repairing buildings floors or stairs.

Regarding the minimum level of education, training and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements and the petitioner's responses:

H.4. Education: Minimum level required:
Answered "Associate's."

4-B. Major Field Study: Answered "Electrical."

5. Is training required in the job opportunity? Answered "No" by the petitioner.

6. Is experience in the job offered required for the job? Answered "No" by the petitioner.

7. Is there an alternate field of study that is acceptable. Answered "Yes" by the petitioner.

7-A. If Yes, specify the major field of study: Answered "Electronics, Data Comm."

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

The petitioner checked "No" to this question.

9. Is a foreign educational equivalent acceptable?

The petitioner checked "Yes" that a foreign educational equivalent would be accepted.

immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

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, 1012-1013 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The proffered position requires an associate degree in electrical, or in "electronics, data comm" as an alternate field of study. As already stated, the labor certification does not require either training or experience in the job offered. Labor certifications that accompany such unskilled worker visa petitions may require training or experience as a prerequisite for the offered job so long as it is less than two years.⁴

In the instant matter, since no training or experience is required by the labor certification, the only prerequisite remaining is the requirement of "Education: minimum level required: Associates." The petitioner must demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The beneficiary on the ETA Form 9089 represented that the highest level of education he achieved related to the requested occupation was "Associate's," which is also a requirement of the labor certification. The beneficiary listed the institution of study where that education was obtained as the University of Visayas, Cebu City, the Republic of the Philippines, and the year completed as 2000.

The petitioner submitted the following credentials evaluations:

- A credentials evaluation dated July 31, 2008, from [REDACTED] of New York, New York.
- A credentials evaluation dated July 6, 2000, from [REDACTED] San Jose, California.
- A credentials evaluation dated September 11, 2003, from [REDACTED] Bothell, Washington.

⁴ Although the petition was filed in the "Other Worker" (i.e unskilled) category and the labor certification does not require job experience, the beneficiary on the ETA Form 9089 represented that that he was employed fulltime by the [REDACTED] Cabu City, Cebu, the Republic of the Philippines, a telecommunication business, as a maintenance/cable installer from September 1, 1983, to December 30, 1999. No employment experience was stated on the labor certification from December 30, 1999, to January 23, 2001. Commencing on January 23, 2001, the beneficiary stated that he is employed by the petitioner, which is a property rental and management business, as a general maintenance engineer.

The director denied the petition on September 30, 2008 because the petitioner did not establish that the beneficiary has an associate's degree as required by the labor certification.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel submitted an undated brief; a copy of a letter dated October 11, 2008, from the University of Visayas, Cebu City, Republic of the Philippines mentioned above; the beneficiary's university transcript from the University of Visayas; three credential evaluations from

three court decisions; a copy of a page from the website http://en.wikipedia.org/wiki/Associates_degree dated October 19, 2008; the Notice of Filing Application for Labor Certification; a summary of the petitioner's recruitment report; and a letter sent to job applicants.

On November 19, 2010, the AAO issued a request for additional evidence (RFE) to the petitioner to submit, *inter alia*, evidence showing the beneficiary holds a two-year U.S. associate's degree, or a foreign equivalent degree, in one of the required fields; evidence showing that the beneficiary received a diploma or certificate issued by an accredited university or institution; evidence that the petitioner would accept a combination of education and experience, or partial attainment of a bachelor's degree, as an alternative method to meet the requirements for the proffered position; and evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements found on the certified labor certification application.

In furtherance of the above, the AAO requested a complete copy of the petitioner's recruitment efforts, including the notice of the filing, job order, advertisements in newspapers or professional journals and additional recruitment efforts for the job, and a recruitment report to establish that the petitioner intended to delineate an equivalency to the associate's degree requirement as set forth in Part H items 1-13 of the ETA Form 9089.

In response on January 3, 2011, counsel submitted a brief dated December 30, 2010, and the following documents: a "Notice of Filing of Application ..." signed by the petitioner on November 28, 2006; a letter from a petitioner dated December 29, 2010; a letter by the petitioner dated January 22, 2007, to the State of Illinois, Employment and Training Administration, Chicago, Illinois concerning the results of the recruitment process; and copies of two "tear sheets" which are the newspaper advertisements for the offered job; and a copy of a webpage accessed at <http://www.16jobs.com> ... October 6, 2006, which is an advertisement for a "General Maintenance Engineer."

Counsel also submitted letters, resumes, and letters from the petitioner to detail nine job inquiries from candidates and the petitioner's responses.

The regulation 8 C.F.R § 204.5(1)(3)(ii) states in pertinent part:

(A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

* * *

(D) Other Workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

The AAO will apply the regulatory requirements from the above provisions to the facts of the case which is the "other worker," unskilled labor classification.

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

As noted above, the Form ETA 9089 in this matter is certified by 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).⁵ *Id.* at 423. The

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

necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

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

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (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.

The AAO notes the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). ⁶There, 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. Similarly, as already stated in the context of unskilled worker petitions, there is no statutory educational requirement.

In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the Form ETA 9089 and does not include alternatives to an associate's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the ETA Form 9089 does specify a foreign educational equivalency to the requirement of an associate's degree.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, 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.*

⁶ 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.

Smith, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

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

On July 10, 2008, the director issued a request for evidence to the petitioner. In the petitioner's response, the AAO noted that there was no evidence submitted that the beneficiary ever earned a Bachelor of Science in Electrical Engineering (B.S.E.E.) or an associate's degree in electrical engineering at the University of Visayas. The AAO also noted that the petitioner did not specify on the ETA Form 9089 that an associate's degree in electrical, or in electronics, or data communications, might be met through a total of university units rather than with a degree.

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

The petitioner submitted three credential evaluations to demonstrate that the beneficiary, based upon his academic attainments, is qualified and has satisfied the minimum requirements of the labor certification:

- A credentials evaluation dated July 31, 2008, from [REDACTED] of New York, New York. The evaluation states that the beneficiary graduated high school and completed fifteen semesters of academic coursework and examinations from the University of Visayas. According to the evaluation report, the beneficiary has attained the equivalent of an Associate of Science degree in electronics engineering from an accredited institution of higher education in the United States.
- A credentials evaluation dated July 6, 2000, from the International Institute of California,

[REDACTED] San Jose, California. The evaluation states that the beneficiary earned a total of 162 units (identified by the evaluation as 108 U.S. semester credit/hours/units) from the University of Visayas. According to the evaluation report, the beneficiary has attained the equivalent of an Associates of Science (A.S.) degree in electronics and data communications awarded by regionally accredited colleges/universities in the United States.

- A credentials evaluation dated September 11, 2003, from [REDACTED] Bothell, Washington. The evaluation states that the University of Visayas official transcript demonstrates that the beneficiary attained three and one-half years of university-level credit in electrical engineering from an accredited college or university in the United States.

Also, to demonstrate the beneficiary's educational qualifications, the petitioner submitted a copy of a letter dated October 11, 2008, by [REDACTED] university registrar, from the University of Visayas, Cebu City, the Republic of the Philippines.

The letter states:

TO WHOM IT MAY CONCERN:

This is to certify that according to the records available in this Office, [the beneficiary] was officially enrolled as a third-year student and has earned one-hundred fourteen (114) units in Academic subjects in Bachelor of Science in Electrical Engineering (B.S.E.E.) at this university as of [the] Summer 1999.

This further certifies that we cannot issue a diploma in Associate in Electrical Engineering since the university is not offering the said curriculum.

This certification is issued for verification purposes.

Therefore, according to the registrar's certification, the University of Visayas has not granted the beneficiary either a Bachelor of Science in Electrical Engineering (B.S.E.E.) or an associate's degree in electrical engineering. The petitioner also submitted five pages of the beneficiary's university transcript. The beneficiary's university transcript shows he attended 23 semesters starting in 1973 beginning in a technical institute and then at the University of Visayas without attaining a degree.

We note that the petitioner has provided three differing credential evaluations without also providing any explanation or contention that the AAO should rely upon one and not the other, since there does exist disagreements among the evaluators on how to quantify the beneficiary's long vocational and academic career. There is no statement by an evaluator concerning what constitutes an associate's degree at the University of Visayas, and based upon the above letter there cannot be, since the University of Visayas "cannot issue a diploma in Associate in Electrical Engineering." Notwithstanding this statement by the university registrar, [REDACTED] opines it is fifteen semesters of academic coursework; International Institute of California, Foreign

Credential Evaluation Service opines it is a total of 162 units or 108 U.S. semester credit/hours/units from the University of Visayas; and the Foundation for International Services, Inc. opines it is the University of Visayas official transcript. All three evaluations do agree that the beneficiary never earned a degree.

The beneficiary attended a technical institute and the University of Visayas for 26 years, but presumably not fulltime. As stated, the beneficiary's university transcript shows he attended 23 semesters starting in 1973 beginning in a technical institute and later at the university. The beneficiary audited, withdrew, or failed many of his subjects, but over the years passed others. According to the university registrar, the beneficiary achieved 114 units in unspecified academic subjects which together according to the record did not earn the beneficiary either a bachelor of science or associate's degree.

According to the registrar, the beneficiary does not have a degree, equivalent or otherwise. The registrar stated that the University of Visayas "cannot issue a diploma in Associate in Electrical Engineering since the university is not offering the said curriculum." That being the case, it is not clear on what basis the above three credential evaluators could say that the beneficiary has the foreign equivalency of an associate's degree when no degree was conferred on the beneficiary by the University of Visayas. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). Under the circumstances of this case, and after reviewing the discordant opinions of the three credential evaluations (and the registrar's certification), the AAO accords only slight weight to such opinion evidence.

The ETA Form 9089 does not provide that the minimum academic requirements of an associate's degree in electrical, or in electronics or data communications, might be substituted by attending two years of college or university or by vocational education credits as counsel asserts in his brief in this matter. Related to the introduction of the above documents in the record of proceeding is the question of how the petitioner expressed its intent about its stated minimum educational requirements for the position. Although counsel also contends that this was the petitioner's intent which was included in the "Notice of Filing" posted on the jobsite,⁷ in advertisements, and in letters sent to job applicants during the recruitment phase of the labor certification process,⁸ this "formula" is not explicitly stated on the ETA Form 9089, nor is it evident in the documents submitted.

⁷ That is an additional requirement of "at least two years of college toward completing a degree in these fields."

⁸ Counsel submitted letters and resumes from job applicants with the petitioner's responses, to detail nine job inquiries and responses

USCIS can review that intent by reviewing how the position's actual minimum requirements were expressed to the DOL, advertised to U.S. workers, and whether a U.S. worker without an associate's degree would have known that his/her education⁹ would qualify them for the position.

The "Notice of Filing" generally follows the labor certification and states that there are educational requirements for the offered job described as an associate's degree in electrical, electronics or data Comm. (i.e. communications) or at least two years of college toward completing a degree in these fields. The newspaper advertisements provided the job requirements for the general maintenance engineer position. In pertinent part, the newspaper advertisements informed job applicants they required an "Assoc. Degree in Electrical or related field." The Internet advertisement indicated that the education required for the position was an "Associate Degree." There is no mention in these advertisements of an additional or alternative requirement as counsel now contends is evident. No correspondence was submitted between the DOL and the petitioner qualifying the stated minimum educational requirements for the position as stated in the labor certification. Out of the nine applicants that applied for the position only one had an associate's degree, but in "Art-Figure Drawing and Portraiture" not in the required major fields of study.

As can be seen from the above, all newspaper and Internet advertisement conform to the minimum requirements of the labor certification. The posting of the job position contains an additional requirement of "at least two years of college toward completing a degree in these fields." The petitioner speaks to this addition to the job requirements and states in his letter dated December 29, 2010:

Although somewhere in [the petitioner's] paperwork, we listed Associate Degree in related engineering field as the minimum education requirement for the position, it has always been our intention to process and accept applicants with 2 years of college work towards attaining such degree.

Based upon a review of the evidence, the AAO notes that all nine applicants were rejected for various reasons peculiar to the applicant but the petitioner's standardized letter of rejection stated that each applicant did not possess an associate degree in electrical, electronics or data communications, which requirement could be substituted with two years college education in the fields of engineering or electronics. There is no substitution allowance in the Internet-based or newspaper advertisements.

Therefore, based upon the record, the applicants who responded to the newspaper and Internet advertisements would have been made aware that they needed an "Assoc. Degree in Electrical or related field," but in their letters of rejection were subsequently informed that an additional requirement (or allowance) was "at least two years of college toward completing a degree in these fields." Clearly, any job applicants who read the ads were not informed that the petitioner's "intent"

⁹ The labor certification did not require experience in the job offered, and therefore, it also did not require an alternate combination of education and experience.

was different than the ad content which conforms to the labor certification's minimum requirements. Based upon the evidence submitted, the AAO finds that under the circumstance of this case, the labor certification minimum requirements were not followed by the petitioner in the recruitment process. The minimum academic requirement of the labor certification is an associate's degree in electrical, or in electronics or data communications, which by the evidence submitted, the beneficiary does not possess.

The beneficiary does not qualify as an unskilled worker as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of the petitioner's intent about those requirements expressed during the labor certification process. If the visa preference classification was skilled worker, the outcome would be the same, since the beneficiary's qualifications do not meet the terms of the labor certification

The beneficiary does not have a United States associate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(iii) 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.