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



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



86

DATE: **SEP 28 2011** OFFICE: TEXAS 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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner seeks to permanently employ the beneficiary as an Assistant Manager, Help Desk, and to classify her as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). The Director denied the petition on the ground that the beneficiary did not have two years of “in the job” experience for the position, which is one of the requirements on the labor certification. A timely appeal was filed, along with supporting documentation, and forwarded to the AAO.

On June 8, 2011, the AAO sent a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE) to the petitioner, with a copy to counsel. The AAO indicated that, aside from the Director’s ground for denial, the AAO intended to dismiss the appeal because the record did not show that the beneficiary had the requisite educational degree for the position, which the labor certification specified should be a bachelor’s degree in computer information systems. The AAO advised the petitioner to submit additional evidence of its intent concerning the minimum educational requirement for the position during the recruitment process. The AAO also requested that additional documentation be submitted of the petitioner’s ability to pay the proffered wage during the years 2007-2010. The petitioner responded to the NOID/RFE and submitted additional documentation addressing the two issues discussed therein.

Thus, the three issues on appeal are as follows:

- (1) Does the beneficiary have the requisite two years of “in the job” experience for the position, in conformance with the labor certification?
- (2) Does the beneficiary have the requisite education for the position, in conformance with the labor certification?
- (3) Does the petitioner have the continuing ability to pay the proffered wage of the position, in conformance with the labor certification?

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

#### Ability to Pay

Taking the last issue first, the regulation at 8 C.F.R. § 204.5(g)(2) provides as follows:

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification application (ETA Form 9089, Application for Permanent Employment Certification) was accepted for processing by any office within the employment system of the Department of Labor (DOL). *See* 8 C.F.R. § 204.5(d).<sup>2</sup> In this case, the labor certification application was accepted by the DOL on April 4, 2007. As stated in Part G of the application, the minimum “offered wage” is \$46,000 per year.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, U.S. Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner’s ability to pay the proffered wage between the priority date and the present, USCIS first examines whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In this case, the petitioner states that it has employed the beneficiary in the proffered position since December 30, 2006 (before the priority date). In response to the NOID/RFE the petitioner submitted copies of the Form W-2, Wage and Tax Statements, it issued to the beneficiary for each of the years 2007-2010. They show that the beneficiary’s wages from the petitioner totaled \$54,158.36 in 2007, \$65,360.82 in 2008, \$58,476.09 in 2009, and \$60,735.37 in 2010. Since those sums were all above the minimum salary of the proffered position in the labor certification, the AAO determines that the petitioner has established its ability to pay the proffered wage through its actual compensation to the beneficiary over the years.

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<sup>2</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.

Experience

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. 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The petitioner must establish that the beneficiary possessed all the experience specified on the labor certification as of the priority date. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

The duties of the proffered position – Assistant Manager, Help Desk – are described succinctly in the ETA Form 9089 (Part H, Box 11) as follows:

Head Cisco phone management system and assist in management of computer and telephone support; supervise all call and multimedia/cross-media message-management function, other IT support staff and special projects.

In his decision denying the petition, dated April 24, 2008, the Director noted that the petitioner specified in the labor certification that two years of experience “in the job offered” are required for the proffered position of Assistant Manager, Help Desk, and that “experience in an alternate occupation” was not acceptable. The Director observed that the beneficiary worked for the petitioner in the related job of Helpdesk Technician from May 17, 2004, until her promotion to Assistant Manager, Help Desk, in December 2006,<sup>3</sup> and quoted a statement from the beneficiary's supervisor that “while the [two jobs] are in the same occupation, they are not substantially comparable in that less than 50% of the job duties overlap.” The Director concluded that the two jobs could not be considered similar, that work experience as a Helpdesk Technician does not equate to work experience as an Assistant Manager, Help Desk, and that the beneficiary thus did not have the requisite two years of experience “in the proffered job.”

On appeal counsel asserts that the Director did not properly consider the documentation of record and reiterates the petitioner's claim, in response to an earlier RFE, that the beneficiary met the experience requirement for the proffered position as set forth in the labor certification. In his appeal brief counsel states that the petitioner did not intend its requirement of two years “experience in the

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<sup>3</sup> The Director incorrectly identified the date of this promotion as December 2007, which mirrored the incorrect date repeated by the petitioner in three different documents: (1) its recruitment report to the DOL in April 2007, (2) a letter in July 2007 (which accompanied the filing of the petition), and (3) another letter in April 2008 (in response to a request for evidence). The record includes a letter from the beneficiary's supervisor, dated January 2, 2007, stating that the beneficiary's last day as a Helpdesk Technician was December 29, 2006, and that she was promoted to Assistant Manager, Help Desk on December 30, 2006. The same information was provided on the ETA Form 9089, received by the DOL on April 4, 2007, certified by the DOL on July 5, 2007, and signed by the petitioner and the applicant on July 11, 2007.

job offered” (ETA Form 9089, Part H, Item 6) to mean two years in the proffered position itself, but rather two years of experience in the same occupation – “computer support specialists” – working “with the necessary tools and technologies performing computer support job duties” to enable the employee to perform the duties of the proffered position. Counsel points to the terms of the labor certification, which describes the specific experience needed for the Assistant Manager, Help Desk position as follows (Part H, Box 14):

Two years work experience with Cisco Call Manager/Unified Messaging system, including phone conferencing, client and associated group line support, sales and travel coordinator support; demonstrated proficiency with MS Windows 2000, XP operating systems, and MS Office Suites.

Counsel also cites the beneficiary’s work experience in her previous position of Helpdesk Technician, which is described in the labor certification (Part K, Item 9, Job 2, Box 9) as follows:

Provided telephone and computer support, including set-up, installation and troubleshooting for MS Windows 2000, XP Operating Systems and MS Office Suites, and technical support for Cisco Call Manager/Unified Messaging System (coordinating and setting up client support, sales support and travel coordinator phone systems, providing phone conferencing support; setting up phone and voicemail accounts, acting as a first responder to phone and voicemail issues); hardware (desktops, laptops, PDAs, phones, monitors, and printers, etc.); and software (MS Operating Systems, MS Office Suites, Cisco VPN Client, Internet applications, and various drivers).

As indicated by the foregoing entries on the labor certification, the beneficiary’s experience as a Helpdesk Technician closely tracks the skills listed at Part H, Box 14 for the Assistant Manager, Help Desk position. The petitioner’s newspaper and internet advertisements for the position, counsel points out, consistently described the experience requirements in exactly the same language as the labor certification. In counsel’s view, the experience the beneficiary gained in her two and a half year job with the petitioner as a Helpdesk Technician gave her practical skills with the tools and technologies, and the technical proficiency to perform the duties, of Assistant Manager, Help Desk, in conformance with the requirements of the labor certification.

It is clear, however, that the beneficiary did not gain two years of “experience in the job offered” – or in a substantially comparable job – and that the labor certification does not accept experience in an alternate occupation. Part H, Box 11 clearly states that the job duties of the proffered position include being the “head” of the phone management system. Box 6 specifies that the beneficiary must have two years of work experience in that job to qualify for the position. The beneficiary does not have this experience, or experience in a substantially comparable job.

As previously noted, USCIS may not ignore a term of the labor certification. *See Matter of Sliver Dragon Restaurant*, 19 I&N Dec. at 406. It is important that the ETA Form 9089 be read as a whole. The skills listed in Part H, Box 14 are not necessarily exhaustive, especially in situations such as this where the employer is requiring two years of experience in the job offered, which includes being the head of a phone management system. 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 specified by the prospective employer. *See Rosedale Line Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984).

Accordingly, the AAO concludes that the petitioner has not established that the beneficiary has two years of experience in the job offered – assistant manager of the help desk. Although the beneficiary has over two years of experience as a helpdesk technician, this is not substantially comparable to the job offered. The ETA Form 9089 does not permit experience in an alternate occupation to substitute for experience in the job offered, which includes duties such as being “head [of the] Cisco phone managements system.” Since the beneficiary does not have this experience, she is not qualified for the proffered position. Accordingly, the petition cannot be approved.

### Education

As with the beneficiary’s work experience, the petitioner must establish that the beneficiary satisfied all of the educational requirements specified in the labor certification as of the priority date (April 4, 2007). *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In the ETA Form 9089 the petitioner specified the educational requirements for the proffered position of Assistant Manager, Help Desk. In Part H, Items 4, 7, 8, and 9, the petitioner stated that:

- the position required a bachelor’s degree in computer information systems,
- no alternative field of study was acceptable,
- no alternative combination of education and experience was acceptable, and
- a foreign educational equivalent was acceptable.

In Part J of the ETA Form 9089, the petitioner stated that the beneficiary’s highest level of education achieved relevant to the requested occupation was a bachelor’s degree in computer information systems at Lewis-Clark State College in Lewiston, Idaho, in 2003. The academic records submitted with the petition, however, were at variance with this claim. The documentation included a transcript from Lewis-Clark State College, showing five calendar years of coursework from 1999 through 2003, and two academic degrees awarded to the beneficiary by Lewis-Clark State College on December 19, 2003, including:

- a bachelor of arts in business administration, with a minor in information systems, and
- an associate of applied science in web development.

The petitioner submitted an evaluation of the beneficiary’s credentials prepared by [REDACTED] of the University of Maryland for Silvergate Evaluations Inc. on November 28, 2006, which concluded that the beneficiary’s academic record at Lewis-Clark State College, including one and a half years of coursework in computer information systems and related areas, was the “academic equivalent in the United States” to a bachelor’s degree in computer information systems.

In the NOID/RFE issued on June 8, 2011, the AAO advised the petitioner as follows:

If you intended the terms of the labor certification to include an alternative to a U.S. bachelor’s degree in computer information systems or a single foreign equivalent

degree, then please submit evidence of your claimed intent. Such evidence would be of your organization's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.

Specifically, the AAO requests that your organization provide a copy of the documentation prepared in accordance with the DOL labor certifications regulations at 20 C.F.R. § 656, including a signed recruitment report, the prevailing wage determination, all online and print recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. Please also include any other communications with the DOL that may be probative of your intent, such as correspondences or documents generated in response to an audit.

Your submission of this evidence may help establish your organization's intent regarding the minimum requirements of the proffered position and show that U.S. workers without four-year bachelor's degrees in computer information systems were in fact put on notice that they were eligible to apply for the position.

On July 7, 2011, the AAO received a response to the NOID/RFE from the petitioner's Director of Global Human Resources, [REDACTED] along with additional documentation requested in the NOID/RFE.

According to [REDACTED] the petitioner "intended to solicit resumes from, and to consider, any applicant who had a Bachelor's degree in Computer Information Systems or the educational equivalent to such a degree." As evidence thereof, [REDACTED] points to the following language in the job advertisements:

Bachelor's degree or educational equivalent (foreign degrees accepted) in Computer Information Systems.<sup>4</sup>

The above language, [REDACTED] asserts, gave notice to all potential applicants that it would be acceptable "if the applicant had completed a course or courses of study equivalent to the course of study generally associated with a Bachelor's degree in Computer Information Systems." The petitioner received six resumes, [REDACTED] indicates, copies of which were submitted with the response. The petitioner noted in the evaluation checklist for each resume and in the recruitment report for the DOL that none of the applicants had a bachelor's degree in computer information systems or the educational equivalent of such a degree. The contents of the resumes confirm these assessments.

[REDACTED] claims that the job advertisements and the evaluation checklists for the resumes show that the petitioner "was seeking an individual qualified for the position through completion of

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<sup>4</sup> While the above language appeared in most of the advertisements, one online advertisement stated simply: "Requires BS (plus two years of experience)."

educational courses equivalent to the coursework in a four-year Computer Information Systems Bachelor's program. [The petitioner] was not concerned whether such education was acquired through one or more degrees, or, for that matter, through foreign degrees." The beneficiary met this educational requirement, according to [REDACTED] because her degrees, unlike those of the six (other) applicants for the proffered position, are equivalent to a bachelor's degree in computer information systems.

In evaluating the beneficiary's educational qualifications, as with her work experience qualifications, USCIS must look to the job offer portion of the labor certification to determine the educational qualifications for the job of Assistant Manager, Help Desk. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. 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. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

Part F of the ETA Form 9089 indicates that the DOL assigned the occupational code of 15.1041.00 and the occupational title of Computer Support Specialist 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 in this case – Computer Support Specialist – 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. Some may require a bachelor's degree." See <http://www.onetonline.org/link/summary/15.1041.00> (accessed July 27, 2011). 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) provides as follows:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As the above regulation expressly states, the alien must meet the requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) provides as follows:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.<sup>5</sup>

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 previously noted, the Form ETA 9089 is certified by the DOL. With respect to 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 –

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<sup>5</sup> The third preference visa category comprises “skilled workers, professionals, and other [unskilled] workers” under section 203(b)(3) of the Act.

(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.<sup>6</sup> 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>7</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.

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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 in *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983):

[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 [fiancé or spouse of U.S. citizen and their dependents] status. That determination appears to be

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<sup>6</sup> Immigration and Naturalization Service, the predecessor organization to USCIS.

<sup>7</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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.

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.

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 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. *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 recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that USCIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” 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 recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), a case in which 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. See *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. *Id.* 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. *Id.* at 17, 19.

In the instant case, as in *Snapnames.com, Inc.*, the labor certification specified that a bachelor's degree or a "foreign educational equivalent" were acceptable. The labor certification also specified, however, that the "major field of study" in the bachelor's degree must be computer information systems. Under the terms of the labor certification, no alternate field of study was acceptable, nor any alternate combination of education or experience, which would include combining different degree programs to reach a deemed equivalence to the required degree. The bachelor's degree earned by the beneficiary at Lewis-Clark State College – a Bachelor of Arts in Business Administration – was not in the field of computer information systems. While the beneficiary's academic transcript indicated that her bachelor's degree included a "minor" in "information systems," it confirmed that her "major" was business administration. Thus, the beneficiary's bachelor's degree does meet the educational requirement of the labor certification.

The petitioner claims that the documentation it submitted from its recruitment process shows that it did not intend to restrict the proffered position to individuals with a four-year degree in computer information systems. According to the petitioner, it was seeking an individual whose college or university coursework was equivalent to a four-year bachelor's program in computer information systems, regardless of whether that educational "equivalent" was acquired in more than one degree, or in a foreign degree. The petitioner cites the standard language in its job announcements – "Bachelor's degree or educational equivalent (foreign degrees accepted) in Computer Information Systems" – as proof that it intended to consider applicants with multiple degrees or other educational qualifications "equivalent" to a U.S. bachelor's degree in that field.

The AAO does not view the petitioner's recruitment language as clarifying its intent with respect to the educational requirement for the proffered position. "Bachelor's degree or educational equivalent (emphasis added)" is ambiguous wording because it provides no guidance as to what would be considered the equivalent of a bachelor's degree in computer information systems. The job announcements did not identify any other fields of study, specific coursework or programs, or any other indicia of what would qualify as an educational equivalent. The only solid indication of what the petitioner meant by "educational equivalent" is the language in parentheses stating that a foreign degree equivalent to a U.S. bachelor's degree in computer information systems would be acceptable. Since the labor certification also specified that a "foreign educational equivalent" was acceptable, the most logical interpretation of the petitioner's recruitment language is that it was confirming the statement in the labor certification as to the acceptability of a foreign educational equivalent to a bachelor's degree in computer information systems. That type of equivalency is inapplicable in this case, however, since the beneficiary's bachelor's degree from Lewis-Clark State College is not a foreign degree.

Thus, the petitioner's recruitment language does not evidence an intent with regard to the educational requirement for the proffered position that was demonstrably different from that set forth in the labor certification. While 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. See *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). 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.* at 7. 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 case, the ETA Form 9089 does not specify any equivalency (aside from a "foreign educational equivalent") to the requirement of a bachelor's degree in computer information systems.

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 needs to 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. at 833 (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.

Furthermore, the employer's subjective intent may not be dispositive as to the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 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, 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.

The petitioner asserts that the beneficiary's two degrees – including (1) the bachelor of arts in business administration with a minor in information systems and (2) the associate of applied science in web development – are equivalent to a bachelor's degree in computer information systems. In support of this claim the petitioner submitted the aforementioned evaluation of the beneficiary's academic credentials by Silvergate Evaluations, Inc. (Silvergate) prepared by [REDACTED] of the University of Maryland. During her five calendar years of academics at Lewis-Clark State College, [REDACTED] noted, 45 or the beneficiary's 165 credit hours were earned in computer-related courses. Without much discussion of the contents of this coursework, [REDACTED] concluded that the beneficiary had attained the equivalent of a bachelor's degree in computer information systems from an accredited institution of higher education in the United States.

This evaluation is fundamentally flawed. As an initial matter, it is not an evaluation of a foreign degree equivalency because the beneficiary's degrees are from a U.S. college. Neither Silvergate, which states on page 1 of the evaluation that it "specializes in the evaluation of foreign educational credentials (emphasis added)," nor [REDACTED] who is touted on page 3 as having "extensive experience reviewing foreign academic . . . credentials (emphasis added)," has presented any evidence of their competence to evaluate the equivalency of degrees between U.S. institutions.

Moreover, the validity of any such exercise – finding one or more degrees from one U.S. college or university in a certain field of study as equivalent to a degree in another field of study from any other U.S. college or university – is highly questionable. Even if such an evaluation is defensible, the Silvergate evaluation in this case contains no substantive analysis of the beneficiary’s 45 credit hours of computer-related courses, and why the beneficiary’s two degrees, neither of which is in the field of computer information systems, are equivalent to a bachelor’s degree in that particular field. Furthermore, Silvergate’s conclusion as to the beneficiary’s bachelor’s degree equivalency is based on two degrees, not one, from Lewis-Clark State College. As the AAO has reiterated throughout this decision, there is no provision in U.S. law or regulations for equivalency to a U.S. bachelor’s degree being comprised of anything other than a single four-year degree.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service need not accept, or may give less weight, to such evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). For the myriad reasons discussed above, the AAO concludes that the Silvergate evaluation has no evidentiary weight.

Because the beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree from a college or university in the required field of study identified in the labor certification, she does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act. Accordingly, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003). As previously noted, the AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d at 145.

### Conclusion

Based on the foregoing discussion, the AAO concludes that the beneficiary does not have the requisite experience or the requisite education for the proffered position in compliance with the labor certification. The petition will be denied for both of these reasons, with each considered as an independent and alternative basis for denial.

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.