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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**

[REDACTED]

86

DATE: **AUG 13 2012** OFFICE: TEXAS SERVICE CENTER FILE: [REDACTED]

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

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

ON BEHALF OF PETITIONER:  
[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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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, Texas Service Center, denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a web-based business solution provider. It seeks to permanently employ the beneficiary in the United States as a data base administrator. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is June 12, 2003. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification and for classification as a professional.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO 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>

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

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

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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 by 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).

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 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>2</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 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.

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<sup>2</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

*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 determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).<sup>3</sup> The AAO will first consider whether the petition may be approved in the professional classification.

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<sup>3</sup> Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

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.

Section 101(a)(32) of the Act defines the term “profession” to include, but is not limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(l)(3)(i)

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor’s degree as a minimum for entry; the beneficiary possesses a U.S. bachelor’s degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor’s degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. 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

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record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

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).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the 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. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also 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." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). 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) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the beneficiary possesses a Bachelor of Science Degree in Physics from Bharathidasan University in Tiruchirappalli, India, completed in April 1990. The labor certification also states that the beneficiary possesses a Post Graduate Diploma in computer applications from Bharathidasan University in Tiruchirappalli, India, completed in April 1991.

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for the [REDACTED] on November 29, 1999. The evaluation concludes that the beneficiary's graduation from high school, in conjunction with his Post Graduate Diploma in

Computer Applications, is the equivalent to a bachelor's degree in computer science from an accredited college or university in the United States.

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on September 26, 2006. The evaluation assigns credit hour values to the individual coursework, which the evaluator stated results in a total of 120 credit hours when converted to the United States system. Furthermore, the evaluation describes the beneficiary's three-year Bachelor of Science degree in physics from Bharathidasan University in India as an equivalent in standing to a four-year Bachelor of Science Degree in physics from a regionally accredited institution of higher education in the United States.

[REDACTED] goes on at length about Carnegie Units and Indian degrees in general, concluding that the beneficiary's three-year degree (credit hours) is equivalent to a U.S. baccalaureate but makes no attempt to assign credits for individual courses. Furthermore, the beneficiary's transcript does not provide any information as to classroom hours or credits received.

The record also contains a credentials evaluation, dated September 27, 2006, from [REDACTED] for Career Consulting International (the "Danzig Evaluation"). The evaluation assigns credit hour values to the individual coursework which results in a total of 120 credit hours. The evaluation describes the beneficiary's three-year degree from Bharathidasan University in India as a Bachelor of Science degree in physics and concludes that it is the equivalent of a four-year Bachelor of Science Degree with a concentration in physics from an accredited institution of higher education in the United States.

The Danzig Evaluation makes arguments in support of its assertion that Indian three-year bachelor's degrees are equivalent to U.S. four-year bachelor's degrees. First, the Danzig Evaluation notes that the U.S. and India are both UNESCO members, and that UNESCO "clearly recommends that the 3 and 4 year degree should be treated as equivalent to a bachelor's degree by all UNESCO members." However, the Danzig Evaluation provides no evidentiary support for this claim. In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004), provides:<sup>4</sup>

Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that*

*necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. The [University Grants Commission], [All India Council for Technical Education] and [Association of Indian Universities] are developing criteria and mechanisms regarding the same.

*Id.* at 84. (Emphasis added.). Accordingly, the Danzig Evaluation's reliance on UNESCO for the proposition that a three-year Indian bachelor's degree is equivalent to a four-year U.S. bachelor's degree is misplaced.

The Danzig Evaluation notes that some U.K. and U.S. institutions of higher education will consider holders of three-year bachelor's degrees from India for entry into their master's degree programs. However, the evaluation does not address whether those institutions that accept three-year degrees from India do so subject to additional conditions, such as requiring the degree holder to complete extra credits prior to admission. Further, the fact that some U.S. graduate programs accept three-year degrees has little relevance to whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate.

The Danzig Evaluation cites an article from World Education News & Reviews (WENR), titled "Evaluating the Bologna Degree in the U.S."<sup>5</sup> WENR is a monthly newsletter published by World Education Services (WES), a credentials evaluation organization. The newsletter article includes a brief assessment of three-year Bologna degrees from Europe. The article states that U.S. bachelor's degrees are based on the completion of 120 semester credits, and are generally completed over a four-year period. According to the article, approximately half of a U.S. bachelor's degree is devoted to general studies, and the remaining credits are devoted to the student's major and related subjects. In contrast, the Bologna degrees "are more heavily concentrated in the major – or specialization – and that the general education component which is so crucial to U.S. undergraduate education is absent." The article compared a bachelor's degree in business administration from Indiana University in Bloomington, and a business administration Bologna degree from the Bocconi University in Milan, Italy. The article concludes, after assessing the requirements for admission to a Bologna degree program, its contents and structure, and the function that the credential is designed to serve in the home system, that the Bologna degree is "functionally equivalent to a U.S. bachelor's degree." However, this non-peer reviewed article from a newsletter is irrelevant as it provides no evidence for why the beneficiary's bachelor's degree from India is equivalent to a U.S. bachelor's degree.

The Danzig Evaluation states that some U.S. institutions offer three-year bachelor's degree programs. It is noted that there exists accelerated degree programs in the United States. However,

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<sup>5</sup> Accessed at [www.wes.org/eWENR/04march/Feature.htm](http://www.wes.org/eWENR/04march/Feature.htm) on July 20, 2010.

this fact provides no useful information about the degree obtained by the beneficiary in India. At issue is the actual equivalence of the specific degree the beneficiary obtained, not whether it is possible to obtain a baccalaureate in less than four years in an accelerated program in the United States. The beneficiary did not compress his studies to obtain a degree in less than four years from an institution that grants four-year degrees, and, even if this were the case, the petitioner would need to establish that the beneficiary's accelerated degree is equivalent to a four-year, 120 credit hour U.S. bachelor's degree.

In addition, the Danzig Evaluation cites a Council of Graduate Schools survey concerning the acceptance of three-year degrees from within and outside Europe. The survey allegedly shows that some U.S. graduate programs accept three-year degrees from India. The surveys do not reflect how many of the limited number of institutions that accept three-year degrees from outside of Europe do so provisionally. If the three-year Indian baccalaureate were truly a foreign equivalent degree to a U.S. baccalaureate, the vast majority of U.S. institutions would accept these degrees for graduate admission without provision. The cited survey underlines that there is not wide acceptance within the academic community of three-year degrees for admission into graduate schools. The Danzig Evaluation provides no study or report that conclusively states that Indian three-year degrees are equivalent to a U.S. bachelor's degree, or even that Indian three-year degrees are generally accepted for admission into U.S. graduate degree programs.

The final sentence of the Danzig Evaluation, at page 8, states: "It is the opinion of this evaluation agency that any failure to treat the [Indian three-year] bachelor's degree . . . as equivalent to [a U.S. four-year] bachelor's degree would be against the UNESCO recommendations and could indicate evidence of racial discrimination." This unfounded statement further undermines the credibility of the evaluation.

These evaluations of record are not reliable and provide little support for their determination as to the number of credit hours attributed to the beneficiary's three-year bachelor's degree.

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for the [REDACTED] on November 29, 2009. The evaluation concludes that the beneficiary's higher secondary course certificate, general education (high school diploma) in conjunction with his Post Graduate Diploma in Computer Applications is equivalent to a bachelor's degree in computer science from an accredited college or university in the United States. The evaluation is not accompanied by any documentation although the evaluator indicated in the evaluation that copies of such documents such as, the consolidate statement of marks listing the subjects examined and the transfer and conduct certificate, were also submitted. There is nothing in the record of proceeding that would support or substantiate the evaluation's conclusion.

The record contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on August 6, 2008. The evaluation concludes the beneficiary's Post Graduate Diploma in Computer Applications received from Bharathidasan University in 1991 is based on the satisfactory completion of high school graduation and the previous university study that led to his

Bachelor of Science Degree in Physics from Bharathidasan University in 1990. The evaluation further concludes that the beneficiary's Post Graduate Diploma represents the academic equivalent of a bachelor's degree with a double major in physics and computer science (applications) from a regionally accredited institution in the United States. Here, the evaluator failed to demonstrate that she researched and reviewed pertinent articles, publications, memos, and pertinent case precedent or that she reviewed the beneficiary's substantive course work to present accurate methodology to substantiate her conclusions. Neither did the evaluator demonstrate how and why the beneficiary's academic credentials should be assessed as being the foreign equivalent of a U.S. bachelor's degree. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The credibility of the evaluations is insufficient to conclude that the beneficiary's three-year bachelor's degree from India is equivalent to a U.S. bachelor's degree.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also, Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *see also, Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The petitioner relies on the beneficiary's two or three-year bachelor's degree combined with his post graduate diploma in computer applications for the claimed equivalency to a U.S. bachelor's degree in physics. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). 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." *See* <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* <http://edge.aacrao.org/info.php>. 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.<sup>6</sup> 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.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>7</sup>

According to EDGE, a Bachelor of Science degree from an institution of higher learning in India is comparable to "two to three years of university study in the United States."

EDGE further discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor's degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate diploma following a three-year bachelor's degree represents attainment of a level of education comparable to a bachelor's degree in the United States. However, the "Advice to Author Notes" section states:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The evidence in the record on appeal did not establish that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor's degree was required for admission into the program of study.

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<sup>6</sup> See *An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>7</sup> 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 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.

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in Physics. The AAO informed the petitioner of EDGE's conclusions in a Request for Evidence (RFE) dated April 5, 2012.

In response to the RFE, the petitioner requests that a decision be made based upon the evidence that is already a part of the record. Therefore, based upon the information provided by EDGE, it has not been established that the beneficiary's 1983 post graduate diploma was an AICTE-accredited program potentially representing a U.S. bachelor's degree equivalent, and the record does not establish that this diploma followed a three-year bachelor's degree or that, at the time of admission, that a three-year bachelor's degree was required for admission.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university. The petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The AAO will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable 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. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

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 [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional

requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by 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].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

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

EDUCATION

College: 4 years

College Degree Required: bachelor’s degree

Major Field of Study: computer science, systems analysis, computer information systems, management information systems, business administration, computer applications, computer hardware, computer engineering, electrical engineering, electronic engineering, physics, statistics or mathematics or its foreign educational equivalent

TRAINING: none

EXPERIENCE: 2 years in the job offered or 2 years in a related occupation as programmer, senior programmer, senior SQL developer, programmer analyst, system analyst, senior system analyst, software engineer, database administrator, project leader or consultant

OTHER SPECIAL REQUIREMENTS: None

As is discussed above, the record contains a copy of the beneficiary’s Bachelor of Science Degree in Physics from an institution of higher learning located in India which according to EDGE, is comparable to “two to three years of university study in the United States.”

The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.<sup>8</sup> Nonetheless, the AAO RFE permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.<sup>9</sup> Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, and the posted notice of the filing of the labor certification.

Although the petitioner did not provide any evidence in response to the AAO RFE, the record of proceeding contains copies of its job postings which stated a minimum requirement of a bachelor's degree (or equivalent) in physics (or related field of study). Therefore, the petitioner must show that the beneficiary has acquired a bachelor's degree in physics as indicated on the Form ETA 750. 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). Furthermore, as explained *supra*, it has not been established that the beneficiary has earned the

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<sup>8</sup> The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition."

(March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree."

(October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

<sup>9</sup> In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered 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 ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See id.* at 14.

foreign equivalent to a U.S. bachelor's degree in physics. Finally, it has not been established that the beneficiary may be classified as a skilled worker since the recruitment materials and the Form ETA 750 do not indicate that one may qualify for the position with a combination of education and experience deemed equivalent by some methodology to a U.S. bachelor's degree. Therefore, the evidence submitted is not sufficient to overcome the director's denial.

The record contains evaluations of the beneficiary's credentials which conclude (1) that the beneficiary's graduation from high school, in conjunction with his Post Graduate Diploma in Computer Applications, is the equivalent to a bachelor's degree in computer science from an accredited college or university in the United States (2) that the beneficiary's three-year Bachelor of Science degree in physics is an equivalent in standing to a four-year Bachelor of Science Degree in physics from a regionally accredited institution of higher education in the United States, and (3) that the beneficiary's Post Graduate Diploma represents the academic equivalent of a bachelor's degree with a double major in physics and computer science (applications) from a regionally accredited institution in the United States. The AAO noted in the RFE dated April 5, 2012 that the evaluations were inconsistent; however, to date there has been no explanation given for the inconsistencies. Furthermore, based upon the report derived from EDGE, a copy of which was provided to the petitioner by the AAO in its RFE, the beneficiary's degree is not a foreign equivalent degree to a U.S. bachelor's degree in any field of study. And it has not been established that the beneficiary's post graduate diploma was received from an accredited institution recognized by AICTE or even followed a three-year degree. Neither the petitioner's postings nor its ads indicate that it was willing to accept anything less than the education and job experience requirements indicated in the Form ETA 750. The phrase "or equivalent" found in the Form ETA 750 does not equate to less than a degree equivalent to a U.S. bachelor's degree in business from an accredited U.S. institution of higher education.

The petitioner failed to establish that that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a U.S. bachelor's or foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore it is concluded that the terms of the labor certification require a U.S. bachelor's degree in physics or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.<sup>10</sup>

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of

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<sup>10</sup> For classification as a professional, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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.<sup>11</sup> In addition, 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* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term “bachelor’s or equivalent” on the labor certification necessitated a single four-year degree).

In the instant case, the AAO provided the petitioner the opportunity to establish its intent regarding the term “or equivalent” on the labor certification and the minimum educational requirements of the labor certification. The petitioner’s failed to establish that “or equivalent” was intended to mean that the required education could be met with an alternative to a U.S. bachelor’s degree or foreign equivalent.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor’s degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2).

In determining the petitioner’s ability to pay the proffered wage, USCIS first examines whether the

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<sup>11</sup> In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded 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.” However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *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. See section 103(a) of the Act.

petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>12</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the AAO requested in the RFE that the petitioner submit a copy of its federal tax returns including all schedules and attachments, its annual reports, or audited financial statements for 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011; and any and all Forms W-2 or 1099-MISC issued to the beneficiary by you for 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, and 2011. The AAO noted that USCIS records showed that the petitioner has filed multiple immigrant and nonimmigrant petitions subsequent to the date the petitioner was established, and therefore also requested that the petitioner provide evidence to establish that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form ETA 750B job offer, the predecessor to the ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). The petitioner failed to provide such evidence. Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.

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<sup>12</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).