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



U.S. Citizenship  
and Immigration  
Services



B6.

DATE: **AUG 16 2012** OFFICE: NEBRASKA SERVICE CENTER

FILE

IN RE: Petitioner:   
Beneficiary:

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

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the 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, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID / RFE) to which the petitioner responded in a timely manner. The appeal will be dismissed.

The petitioner describes itself as a computer software development and marketing company. It seeks to employ the beneficiary permanently in the United States as a program manager. As required by statute, a Form ETA 750.<sup>1</sup> Application for Alien Employment Certification approved by the Department of Labor (the DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The priority date of the petition is March 24, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on January 19, 2007.

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

<sup>2</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 the regulation 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).

<sup>3</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.

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

Coordinates program development of computer software applications, systems or services from design through product release, working with other engineers, under limited supervision. Writes functional specifications and applies principles and techniques of computer science, engineering and / or mathematical analysis. May be assigned to various projects that utilize the required skills. Utilizes C#, VB, and ASP high-level programming languages.

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

Block 14:

Grade School: # of years not listed

High School: # of years not listed

College: # of years not listed

College Degree Required: Bachelor's or equivalent\*

Major Field of Study: C.S., Eng., Math, Physics, Information Systems,  
Business\*\*

Training: # of years not listed

Experience:

Job Offered: one year in the job offered  
(or)

Related Occupation: one year as Computer software designer,  
Programmer, or Project Manager\*\*\*

Block 15:

Other Special Requirements:

- \* Will accept an educational equivalency evaluation prepared by a qualified evaluation service or in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D).
- \*\* Language/Literature, or a related field. Information Technology is a related field.
- \*\*\* One year of work experience in designing, implementing and testing computer software; and designing and implementing software utilizing a high-level programming language. Experience may be

gained concurrently. Compensation package includes benefits and may include bonuses and stock grants.

As set forth above, the proffered position requires a bachelor's degree in Computer Science, English, Math, Physics, Information Systems, Business, Language / Literature, Information Technology, or a related degree plus one year of experience in the job offered or the related occupation of computer software designer, programmer, or project manager.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma and transcript from the New Brunswick Community College, Canada, completed in 1996. The petitioner additionally submitted a credentials evaluation prepared by Professor [REDACTED] of Princeton University, Computer Science Department, on November 27, 2002 and by Professor [REDACTED] Medgar Evers College of the City University of New York, Professor of Computer Information Systems, on December 2, 2002. The evaluations conclude that the beneficiary's diploma in multimedia learning technology from the New Brunswick Community College plus his six years of experience in information technology is equivalent to a bachelor of science degree in information technology from an accredited institution of higher education in the United States.

The director denied the petition on March 17, 2008. He determined that the beneficiary's degree could not be accepted as a foreign equivalent degree to a U.S. bachelor's degree because it was based on two years of studies plus six years of experience and the ETA 750 does not indicate that either a combination of lesser degrees or fewer than four years of post graduate certificates from non-degree awarding institutions would be acceptable to meet the educational requirement of a bachelor's degree.

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

Part A of the Form ETA 750 indicates that the DOL assigned the occupational code of 189.117-030 with accompanying job title project director, 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. The DOL assigns a standard vocational preparation (SVP) of 8.0 and above to the occupation, which means that "[A] bachelor's degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)." Additionally, the DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience.

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

*See id.*

The petitioner made no entries in the education blocks on the ETA 750 that call for the number of years of required education. The petitioner did indicate that a bachelor's degree in Computer Science, English, Math, Physics, Information Systems, Business, Language / Literature, Information Technology, or a related degree plus one year of experience in the job offered or the related occupation of computer software designer, programmer, or project manager, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(1)(3)(ii)(C). Thus, combined with the DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position may be considered as a professional occupation.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

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

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

On May 3, 2012, the AAO issued a NOID / RFE to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond the academic studies at New Brunswick Community College, Canada. The AAO also noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree in Computer Science, English, Math, Physics, Information Systems, Business, Language / Literature, Information Technology, or a related field might be met through a combination of lesser degrees and/or a quantifiable amount of work experience. The AAO further advised that according to the Fifth Edition (2003) of the American Association of Collegiate Registrars and Admissions Officer (AACRAO) *Foreign Educational Credentials Required*, a bachelor's degree in multimedia learning technology from the New Brunswick Community College, Canada is equivalent to one to three years of undergraduate study in the United States and that the

labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a four-year U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience when the labor market test was conducted.

In response to the NOID / RFE, counsel submitted another evaluation of the beneficiary's credentials prepared by Associate Professor [REDACTED] of the Department of Computer Systems Technology of The New York City College of Technology on May 30, 2012. This opinion lists the Electronic Database for Global Education (EDGE) created by AACRAO in the references and confirms that the beneficiary's diploma from New Brunswick, Canada is "equivalent of two years of study toward a bachelor of science degree in Information technology, multimedia studies, or a related field from an accredited U.S. college." The evaluation concludes that the beneficiary's diploma in multimedia learning technology from the New Brunswick Community College plus his six years of experience in information technology (using the equivalency ratio of three years of work experience to one year of university level education) is equivalent to a bachelor of science degree in information technology from an accredited institution of higher education in the United States.

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to United States Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful

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

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).<sup>5</sup>

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).

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

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<sup>5</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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).

specifically, a two or three year bachelor's degree will not be considered to be the "foreign equivalent degree" to a U. S. baccalaureate degree. A U. S. 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 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 U.S. baccalaureate degree.

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* 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 court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at \*17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated on the ETA 750 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at \*7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In the present case, the Form ETA 750 does not specify an equivalency to the requirement of a bachelor's degree in Computer Science, English, Math, Physics, Information Systems, Business, Language / Literature or a related degree.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v.*

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

For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) 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. 1289, 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 member of the profession 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, we could not consider education earned at an institution other than a college or university.

Moreover, as advised in the request for evidence issued to the petitioner by this office, the AAO has reviewed EDGE. 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." <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

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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

EDGE, a diploma from New Brunswick, Canada is comparable to “one to three years of university study in the United States.”

As the Form ETA 750 did not indicate what methodology is to be used to determine whether a candidate for the position has earned the "equivalent" to a U.S. bachelor's degree, and given that the evaluations in the record upon which the petitioner is relying to qualify the beneficiary for the benefit sought equate three years of work experience to one year of university education, it appears that the petitioner is attempting to utilize the regulation pertaining to degree equivalency in the H-1B nonimmigrant visa category. However, this is not clear, and neither USCIS nor prospective applicants for the position could realistically be expected to guess what methodology the petitioner intended to use to evaluate candidates claiming to have earned the "equivalent" to a U.S. bachelor's degree. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Regardless, assuming *arguendo* that the petitioner intended to apply the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D), this regulation states in pertinent part:

(D) Equivalence to completion of a college degree. For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

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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.

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

In the present case, utilizing the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D), the petitioner has not

established that the beneficiary has earned the equivalent to a U.S. bachelor's degree in Computer Science, English, Math, Physics, Information Systems, Business, Language / Literature, Information Technology, or a related field. The evaluations submitted do not comply with 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) as there is no evidence that the evaluators are officials with authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university. The evaluations do not comply with 8 C.F.R. § 214.2(h)(4)(iii)(D)(2) because the evaluations are not the result of a recognized college-level equivalency examination. The evaluations do not comply with 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) because the petitioner has not established that Professor ██████████ Professor ██████████ and Associate Professor ██████████ are reliable evaluators who specialize in evaluating foreign educational credentials. The evaluations do not comply with 8 C.F.R. § 214.2(h)(4)(iii)(D)(4) because the evaluations are not certifications or registrations from a nationally-recognized professional association or society for the specialty. Finally, the evaluations do not comply with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) because, as explained above, they fail to establish that the beneficiary's education is equivalent to a U.S. bachelor's degree in Computer Science, English, Math, Physics, Information Systems, Business, Language / Literature, Information Technology, or a related field.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). *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).

Accordingly, as the three evaluations submitted do not comply with 8 C.F.R. § 214.2(h)(4)(iii)(D), the petitioner has not established that it is more likely than not that the beneficiary has earned the equivalent of a bachelor's degree through a combination of education and experience. Moreover, the three evaluations in the record used the rule to equate three years of experience for one year of education, but that equivalence formula applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the DOL. Because that was not done, the director's decision to deny the petition must be affirmed.

Furthermore, the Form ETA 750 does not provide that the minimum academic requirements of a bachelor's degree in bachelor's degree in Computer Science, English, Math, Physics, Information Systems, Business, Language / Literature, Information Technology, or a related field might be met through two years of college or some other formula other than that explicitly stated on the Form ETA 750. In response to the NOID/RFE, counsel submitted documentation supporting the labor certification: a signed supplemental documentation that included the recruitment report, all online and print recruitment, and the posted notice. However, this documentation fails to advise any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency that includes employment experience. The

petitioner has not submitted any other evidence of its intention to accept an equivalency including experience.

In addition, the recruitment report submitted by the petitioner does not provide the information required by the regulations. *See* 20 C.F.R. §656.21(j)(1) (2004). It fails: to identify each recruitment source by name; to state the names and addresses of the U.S. workers interviewed for the job opportunity and job title of the person who interviewed each worker; and to explain with specificity the lawful job-related reasons for not hiring each U.S. worker interviewed. It also does not include all resumes received in response to the recruitment efforts, even though these were specifically requested in the NOID/RFE. Instead, the petitioner submitted a declaration from [REDACTED] for the petitioner stating that “[his] staff was unable to locate the resumes of the 83 applicants who were rejected for the occupation of program manager in Redmond, Washington, during the month of October 2004.” He also states that the petitioner’s resume database currently captures resumes submitted since January 1, 2005. The ETA 750 A in this case was accepted by DOL on March 24, 2005. The regulations governing the recruitment efforts for the ETA 750 A require that within the immediately preceding six months, the employer made good faith efforts to recruit U.S. workers. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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

Lastly, counsel argues that the education requirements as stated in this labor certification meet the standard for consideration as a skilled worker.<sup>8</sup> Although counsel is correct that post secondary education may be included in the two years of training or experience required for consideration as a “skilled worker,” the terms of the labor certification here, as discussed above, require the receipt of a bachelor’s degree, which the beneficiary does not have. The regulation 8 C.F.R. § 204(5)(1)(3)(ii)(B) states the following:

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

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<sup>8</sup> Counsel’s reliance on the American Immigration Lawyers Association (AILA) minutes is misplaced. Counsel does not provide a published citation relating to the use of total assets or depreciation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of United States Citizenship and Immigration Services (USCIS), formerly the Service or INS, are binding on all USCIS employees in the administration of the Immigration and Nationality Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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

The above regulation requires that the alien meet the requirements of the labor certification. Even if the petition qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification, and the petition would be denied on that basis as well. See 8 C.F.R. § 204.5(1)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification). As a result, the beneficiary cannot be classified as a "skilled worker" under the terms of this labor certification.

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.