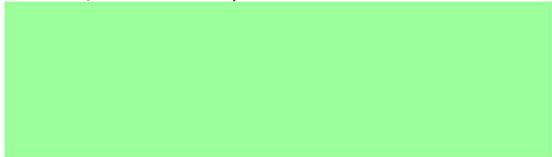




**U.S. Citizenship  
and Immigration  
Services**

(b)(6)



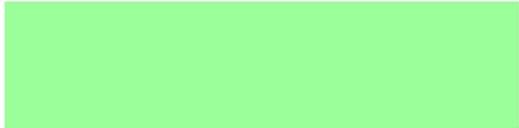
DATE: DEC 08 2012 OFFICE: NEBRASKA SERVICE CENTER

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 appeal will be dismissed.

The petitioner describes itself as a commerce export import business. It seeks to permanently employ the beneficiary in the United States as a market research analyst.<sup>1</sup> 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 an ETA Form 9089, Application for Permanent 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 November 8, 2005. *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 in business administration with a concentration in marketing or equivalent as required by the terms of the labor certification.

The record shows that the appeal is properly filed 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>2</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-

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<sup>1</sup> The Form I-140 lists the position as market research analyst, and the ETA Form 9089 lists the job title as marketing specialist.

<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 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).

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- (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the 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>3</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.

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<sup>3</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

§ 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to 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>4</sup> The AAO will first consider whether the petition may be approved in the professional classification.

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<sup>4</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.

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.

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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 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.

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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 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's degree from [REDACTED] Peru, completed in 1999.

The record contains a copy of two certificates from ESAN for having completed: 1) a course entitled

“Marketing Management and Business Strategies Markstrat,” consisting of eighteen one and one-half hour sessions; and 2) a course entitled “Sales Marketing,” consisting of sixteen one and one-half hour sessions.

The record also contains copies of education credentials which were not listed on the ETA Form 9089, including certificates from the [REDACTED] indicating attendance at the following seminars, each held over a period of three days: 1) “Financial Calculus applied to Business” in 1998; 2) “Cash Flow” in 1997; and 3) “Sales Administration” in 1997.

The record also contains copies of certificates from the [REDACTED] Social Affairs Office for attendance at the following events: 1) a round table entitled “External Debt: Mechanism of Non Conventional Payment” in 1990; 2) a forum entitled: “Tributary Reform: Analysis and Politics” in 1990; and 3) a seminar entitled “The Best of the Peruvian Marketing IV” in 2001.

The record also contains copies of the beneficiary’s diploma from the [REDACTED] Peru granting the Title of Industrial Engineering on December 20, 2003; the beneficiary’s certificate of graduation indicating the completion of the program of Industrial Engineering in 2003; and the beneficiary’s transcripts from the [REDACTED] School of Industrial Engineering, reflecting 149 credits earned over the period of 1988 to 2003.

The record also contains several evaluations of the beneficiary’s educational credentials. An evaluation prepared by [REDACTED] for [REDACTED] on March 11, 2003, states that the beneficiary has completed the equivalent of 111 semester credit hours of undergraduate study in industrial engineering and related courses and that the beneficiary has achieved through the combination of his education and work experience, the equivalent of a bachelor’s degree in business administration with a major in marketing.

The record contains an evaluation prepared by [REDACTED] for [REDACTED] Associates, Inc. on March 10, 2003, which states that the beneficiary completed the equivalent of 111.22 semester credit hours in the industrial engineering program at the [REDACTED] Peru, but left without graduating in 1996. The evaluation further states that the beneficiary’s education was continued at the School of Business Administration for Graduates, [REDACTED] from 1998 to 1999, which represents the equivalent of completion of 51 hours of non-credit bearing continuing education study in marketing, management, and related courses in a continuing education program at a regionally accredited institution of higher education in the United States.

The record also contains an evaluation prepared by [REDACTED] for [REDACTED] on June 3, 2009, which states that the beneficiary’s Title of Industrial Engineering is equivalent to a Bachelor of Science in Industrial Engineering earned at a regionally accredited institution of higher education in the United States.

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The record also contains an evaluation prepared by [REDACTED] Limited on July 29, 2009, which states that the beneficiary's Title of Industrial Engineering is "broadly comparable to a bachelor's degree as conferred in the United States," and that since a degree with a major not in business administration would be considered acceptable for admission to graduate study in business administration, the beneficiary's education is the functional equivalent of a Bachelor of Business Administration degree from an institution of postsecondary education in the United States.

The record also contains an evaluation prepared by [REDACTED] for [REDACTED] on July 30, 2009, which states that the beneficiary's academic credentials and coursework at the [REDACTED] Peru is equivalent to a Bachelor of Business Administration degree from a regionally accredited college or university in the United States. The evaluation also states that "[REDACTED] has established that in their professional opinion, a functional equivalency can be maintained between Student's Degree in Industrial Engineering and a US Bachelor of Business Administration Degree."

As the beneficiary's education at the [REDACTED] was completed in December 2003, the education credentials evaluations prepared on March 11, 2003 by [REDACTED] and on March 10, 2003, by [REDACTED] were prepared prior to the completion of the beneficiary's Title of Industrial Engineering. The evaluation from Mr. [REDACTED] states that the beneficiary has, as a result of the combination of his education and employment experiences, an educational background equivalent to that of an individual with a bachelor's degree in business administration with a major in marketing from an accredited university in the United States. 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).

This evaluation used the rule to equate three years of experience for one year of education, but that equivalence 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 ETA Form 9089. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the Department of Labor.

Further, the evidence in the record does not contain copies of any letters of experience from prior employers or other probative evidence which sufficiently demonstrates the employment experiences of the beneficiary. In addition, this evaluation relies on the assertion that the beneficiary worked at [REDACTED] as a marketing manager from September 2001 to March 2002, while the ETA Form 9089 fails to list this employer and instead lists employment with [REDACTED] from September 1, 2001 to December 15, 2002. The ETA Form 9089, section H, items 4 through

14, set forth the minimum education, training, and experience that an applicant must have for the position of marketing specialist. At sections J, K, and L of the ETA Form 9089, the beneficiary set forth his credentials and then signed his name under a declaration that the contents of the form are true and correct under penalty of perjury. At section K where the beneficiary is required to list "all jobs [he] has held during the past 3 years" and to "list any other experience that qualifies [him] for the job opportunity for which the employer is seeking certification," the beneficiary failed to list any employment with [REDACTED]. In addition, the beneficiary's resume also omits this claimed employment.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

Further, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

As the record of proceeding does not contain evidence sufficient to establish the prior work experience of the beneficiary and the evidence also contains unresolved inconsistencies regarding the beneficiary's work experience, the evidence is not persuasive that the beneficiary's education credentials and work experience are equivalent to a bachelor's degree in business administration.

The evaluation prepared by [REDACTED] notes that the beneficiary completed several courses at [REDACTED] Peru and states that [REDACTED] is a "recognized (accredited) graduate level institution of higher education." She further states that in order to be accepted by the graduate school of business administration, students must have a Bachiller and two years of professional experience or a combination of education and work experience. The AAO notes that Ms. [REDACTED] mischaracterizes the level of the beneficiary's education at [REDACTED]. According to its website available at [REDACTED] (accessed September 29, 2012), [REDACTED] does offer graduate level programs, but it also offers short programs of training under "Executive Education" and Institutional Programs" which "are characterized by their more specific content, less standardized nature and flexible duration" and "can combine a range of activities: series of lectures, seminars or workshops, courses or extensive management training programs." Although Ms. [REDACTED] references the requirements needed to be admitted into graduate programs at [REDACTED], the evidence does not demonstrate that the beneficiary was admitted into any such graduate level program, and [REDACTED]'s website does not characterize the "Executive Education" and Institutional Programs" as being part of any graduate level study. The certificates submitted by the petitioner indicate that the beneficiary attended several non-credit seminars at [REDACTED] and the evaluation notes that the courses were non-credit.

The AAO notes that the listing of a bachelor's degree on ETA Form 9089 at section J.11. as well as [REDACTED] Peru on the ETA Form 9089 at section J.14. where the

beneficiary is asked to set forth the name of the "Institution where relevant education specified in question 11 was received" appears to make the claim that the beneficiary earned a bachelor's degree in marketing and sales from this institution, which would be a misrepresentation of the beneficiary's credentials.<sup>5</sup>

The evaluation prepared by Dr. [REDACTED]<sup>6</sup> misstates the number of credits earned by the beneficiary as 159, when the total of all the credits on the transcripts are in fact 149. Further, the evaluation references as exhibits additional correspondence and research regarding educational equivalency, including excerpts from the United Nations Educational Scientific and Cultural Organization (UNESCO) regarding recognition of foreign educational qualifications. These items do not establish that the beneficiary's education is equivalent to a U.S. bachelor's degree. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications

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<sup>5</sup> Pursuant to Section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible." See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation which states that: "If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate." A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). If the petitioner pursues this matter any further, resolution of this issue should be addressed. The AAO notes that further inquiries into the facts and circumstances of the instant case may be made at a later date.

<sup>6</sup> Dr. [REDACTED] has indicated in the past that he has a "canonical diploma of [REDACTED] [REDACTED]" from [REDACTED] which he equates to a [REDACTED]. We are unable to find any reference to this institution on the Internet. In contrast, Dr. [REDACTED]'s current biography on the website of [REDACTED] states that he received his Doctorate of Divinity from [REDACTED]. We are unable to find any reference to this institution on the Internet independent of Dr. [REDACTED].

in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed September 29, 2012).

In addition, Dr. [REDACTED] states that the beneficiary's Title of Industrial Engineering is "broadly comparable to a bachelor's degree as conferred in the United States," but he fails to define what he means by "broadly comparable." The AAO notes that the labor certification specifies that the offered position requires a bachelor's degree in business administration with a concentration in marketing or equivalent. Dr. [REDACTED] asserts that: 1) the beneficiary's education in industrial engineering lasted over four years and is broadly comparable to a bachelor's degree in the U.S.; and 2) that a bachelor's degree in industrial engineering is the functional equivalent of a degree in business administration. Dr. [REDACTED] asserts that since an individual could be admitted to graduate school in business administration with a bachelor's degree which is not in business administration, degrees in business administration and other degrees in different fields are functionally equivalent. The AAO notes that the issue of equivalency between two different degrees does not rest solely on whether either could be used to gain admission to post graduate study. The nature of the coursework, the subjects studied, and the amount of study devoted to the core subjects is more relevant in determining equivalency, and the evaluations in the record fail to present a comparison of the actual courses taken by the beneficiary with those required in a business administration degree with a concentration in marketing or equivalent, as is required by the labor certification. Further, USCIS evaluates whether alien beneficiaries have the educational qualifications required by the terms of the labor certification certified by DOL accompanying the Form I-140, and the labor certification in this case does not indicate that a degree in industrial engineering would be acceptable "or equivalent" under the terms of the labor certification. The "functional equivalency" which Dr. [REDACTED] links with admission to post graduate study appears to be limited in ways not specified by the labor certification in this case.

The evaluation prepared by Dr. [REDACTED] is limited to the academic credentials and course work of the beneficiary and asserts that a "functional equivalency" can be maintained between the beneficiary's degree in industrial engineering and a bachelor's degree in business administration in the U.S. However, Dr. [REDACTED] fails to articulate any similarities between the two programs of study that lead to different degrees. She merely states that her judgment is based on "the credibility of University [REDACTED] the nature of the course work, and the related areas." Further, one section of the evaluation states that [REDACTED] has established this "functional equivalency," but Dr. [REDACTED] fails to state the relevance of this assertion in view of the fact that the evaluation is on the letterhead of [REDACTED] and not that of [REDACTED]. The AAO notes that absent any analysis which compares and contrasts the beneficiary's course of study in industrial engineering with a U.S. degree in business administration, this evaluation which equates the two is not persuasive.

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<sup>7</sup> Dr. [REDACTED] has indicated that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but does not indicate the field in which she obtained her doctorate. According to its website, <http://www.sorbon.fr/faqengl.html>, Ecole Superieure Robert de Sorbon "grant[s] full degrees based on experience."

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In addition, the AAO notes that the beneficiary's education credentials in industrial engineering are not equivalent to a bachelor's degree in industrial engineering in the U.S.

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>8</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>9</sup>

According to EDGE, education resulting in the granting of a Professional Title (Titulo Profesional), "represents further preparation for practice." EDGE further states that this title "represents certification in a field of study. Admission to an academic program should not be based on this credential alone." Thus, the beneficiary's Title of Industrial Engineering credential is not equivalent to a bachelor's degree. Further, the determinations by the education evaluators listed above that the beneficiary's claimed degree in industrial engineering is functionally equivalent to a bachelor's degree in business administration are based on the incorrect finding that the beneficiary has a bachelor's degree. A copy of the EDGE report is attached.

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<sup>8</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>9</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.

(b)(6)

Therefore, based on the conclusions of EDGE, the evidence in the record was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in business administration or equivalent.

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.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Bachelor’s.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months required.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: “Two years of Business Management & Marketing, and Industrial Machinery & equipment Experience Oriented to Import/Export Industry Required. Speak/Read/Write the English and Spanish Languages.”

As is discussed above, the beneficiary possesses a diploma from the [redacted] Peru granting the Title of Industrial Engineering on December 20, 2003, which is equivalent to “further study in preparation for practice” in the field. Although the beneficiary took non-credit courses at [redacted] Peru, the evidence in the record fails to reliably equate them with a degree in business administration. In addition, the evidence in the record fails to establish that the seminars of the [redacted] attended by the beneficiary or the events sponsored by the [redacted] resulted in education credentials which were relevant to the requirements as stated in the labor certification.

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>10</sup> Nonetheless, the

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<sup>10</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.”

AAO did consider the evidence in the record which pertained to the recruitment efforts of the petitioner and the petitioner's intent, if any, to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as it was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.<sup>11</sup>

The record of proceeding contains the posted notice of the filing of the labor certification, copies of newspaper and website advertisements for the position, the resumes received in response to the recruitment efforts, and a written summary of the qualifications of each applicant including the beneficiary.

The posting notice, classified advertisements, and website posting indicated that a bachelor's degree in business administration with a major in marketing or equivalent was required. None of the postings, advertisements, or other recruitment materials mentioned the possibility of combining education and work experience to meet the degree requirement. Of the twelve applicants for the position, eleven possessed bachelor's degrees while only one did not.

The "Recruitment Results for the Position of 'Marketing Specialist'" dated September 16, 2005, submitted by the petitioner summarizes the qualifications of each applicant for the position. The AAO notes that on this document, the petitioner disqualified two applicants in part due to them not possessing a degree in business administration with a major in marketing or equivalent. The document notes that Mr. [REDACTED] does not have the necessary degree in business administration with a major in marketing or equivalent, but a bachelor's degree in communication. The document also notes that Mr. [REDACTED] does not have the necessary degree in business administration with a major in marketing or equivalent, but a bachelor's degree in industrial and systems engineering with a minor in business. The AAO notes that the petitioner excludes these two applicants in part for lacking the necessary degree in business

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*See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (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." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

<sup>11</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.

administration with a major in marketing or equivalent, which appears to cast further doubt on the assertions put forth by the education evaluations which determined that a functional equivalency existed between a degree in business administration and other degrees.

Absent evidence in the record which demonstrates that the petitioner's intent was to open the offered position to candidates who relied on a combination of education and experience to meet the minimum requirements of the labor certification, the AAO does not find that the beneficiary meets the requirements as stated on the labor certification. The petitioner failed to establish that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year 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. The petitioner set forth the requirements of the position on ETA Form 9089 and noted at section H.8. that no alternate combination of education and experience would be accepted.

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in business administration with a concentration in marketing or equivalent 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>12</sup>

On appeal, the petitioner asserts in its statement dated August 5, 2009, that three precedent cases support its contention that the beneficiary qualifies as a member of the professions: *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966); *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967); and *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005). *Matter of Bienkowski* and *Matter of Arjani* both held that a beneficiary might be considered as qualifying as a member of the professions based on his experience and education which did not include a degree. The AAO notes that the evidence regarding the beneficiary's education and experience has been considered above and determined to be insufficient to demonstrate membership in the professions. Further, the first two decisions the petitioner refers to are over 45 years old and are inapplicable to the instant petition because for each case the court defines "professional" as it was defined in the Act from its historical context, when section 1153(a)(3) failed to define "professional" as an immigrant with a baccalaureate degree. The Act currently defines "profession" for third preference visa petitions as "immigrants who hold baccalaureate degrees." See Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Thus, *Matter of Bienkowski* and *Matter of Arjani* are irrelevant as they define third preference petition "professionals" prior to Congress amending that same statutory provision and providing the current definition given to "professionals"

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<sup>12</sup> In addition, 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).

that includes a degree requirement. *Matter of Bienkowski and Matter of Arjani* are thus distinguishable and irrelevant.

In *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), a federal district court held that United States Citizenship and Immigration Services (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.” *Id.* at 1179. Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). A judge in the same district, however, subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 \*5 (D. Or. Nov. 30, 2006).

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 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>13</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 considered the petitioner’s intent regarding the term “or equivalent” on the labor certification and the minimum educational requirements of the labor certification. The

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<sup>13</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 failed to establish that "or equivalent" was intended to mean that the required education could be met with an alternative to a four-year 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 not established that the beneficiary is qualified for the offered position. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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'r 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience in the job offered of marketing specialist. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as: a marketing manager for [REDACTED] Peru from September 1, 2001, to December 15, 2002; a marketing and sales manager for [REDACTED] Peru from January 15, 1997, to July 1, 2001; and a marketing and sales manager for [REDACTED], Peru from January 13, 1997, to December 10, 1998.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(1)(3)(ii)(A). The petitioner failed to submit the required letters of experience.

(b)(6)

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.