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

U.S. Citizenship and Immigration Services

[redacted]

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DATE: DEC 2 6 2012 OFFICE: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the preference visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an aviation business. It seeks to employ the beneficiary permanently in the United States as a foreign and domestic certification specialist. As required by statute, the petition is accompanied by a labor certification application approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that the petition requires at least a bachelor's degree and, therefore, that the beneficiary cannot be found qualified for classification as a professional. The director denied the petition accordingly.

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.

As set forth in the director's August 16, 2010 denial, the single issue in this case is whether or not the petitioner has established that the petition requires at least a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree such that the beneficiary may be found qualified for classification as a professional.

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 (Acting Reg'l Comm'r 1977). Here, the Form I-140 was filed on April 16, 2010. On Part 2.e. of the Form I-140, the petitioner indicated that it was filing the petition for a professional. The ETA Form 9089 was accepted for processing on May 5, 2009.[1]

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.[2] On appeal, counsel submits a brief asserting that the beneficiary is

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[1] 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.

[2] 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

qualified for the proffered position and that the position is a professional position. Counsel also requests that the AAO consider the petition under the "skilled worker" category.

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

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a foreign and domestic certification specialist provides:

> Establish/manage an FAA approved order. Develop/maintain current, comprehensive certification packages for [redacted] and other domestic and international airworthiness approvals. Establish and manage both domestic and foreign [redacted] approving the installation of Securaplane products on type certified, civil registered aircraft. Define/coordinate resources necessary to meet established project schedules.

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

H.4. Education: Minimum level required: Other.

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

Bachelor's degree or equivalent, or any suitable combination of education,

4-B. Major Field Study: Bachelor of science.

6. Asks if experience in the job offered is required for the job: Yes.

6-A. If yes, the number of months required: 48 months in the position offered.
7. Is there an alternate field of study that is acceptable?

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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).

The petitioner checked "no" to this question.

7-A. If Yes, specify the major field of study: n/a.

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

The petitioner did not provide an answer for this question.

8-A. If yes, specify the alternate level of education required:

The petitioner did not provide an answer for this question.

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

10. Is experience in an alternate occupation acceptable?

The petitioner checked "no" to this question.

14. Specific skills or other requirements:

Bachelor's degree or equivalent, or any suitable combination of education, training or experience will be acceptable. Knowledge of United States Codes of Federal Regulations, Title 14 and domestic and international airworthiness regulations and standards.

As set forth above, the proffered position requires a bachelor of science degree or equivalent plus 48 months of experience in the job offered.

An issue on appeal in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as you have set forth in the ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089 or labor certification application), that is, whether the beneficiary possesses a bachelor of science degree or equivalent. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

The U.S. Department of Labor (DOL) has provided the following field guidance related to this issue: when the ETA Form 9089 indicates, for example, that a "bachelor's degree in computer science" is required, and the beneficiary has a four-year bachelor's degree in computer science from the University of Florence, "there is no requirement that the employer include 'or equivalent' after the degree requirement" on the ETA Form 9089 or in its advertisement and recruitment efforts. *See* [redacted] Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training

Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). Further, where the ETA Form 9089 indicates that a "U.S. bachelor's degree or the equivalent" may qualify an applicant for a position, where no specific terms are set out on the Form ETA 9089 or in the employer's recruitment efforts to define the term "equivalent," "we understand [equivalent] to mean the employer is willing to accept an equivalent foreign degree." of Labor's Empl. & Training Administration, to Where the ETA Form 9089 indicates, for example, that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor's degree, "the employer must specifically state on the ETA Form 9089, Part H as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative [to the degree] in order to qualify for the job." to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). State Employment Security Agencies (SESAs) should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." Administration, to (March 9, 1993). Finally, 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 [U.S. Citizenship and Immigration Services (USCIS)] to accept the employer's definition." *Id.* To our knowledge, the field guidance memoranda referred to here have not been rescinded.

The petitioner's ETA Form 9089 does not clearly delineate that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees, training, and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent, training, and/or quantifiable amount of work experience when you conducted the labor market test. Although the ETA Form 9089 states in Part H states that a "bachelor's degree or equivalent, or any suitable combination of education," these requirements do not clearly set forth what will be considered equivalent or alternative to the degree in order to qualify for the job.

Accordingly, the documentation in the record of proceeding as currently constituted creates ambiguity concerning the actual minimum requirements of the proffered position. It is petitioner's contention now during the petition process before USCIS that the actual minimum requirements do include at least what the beneficiary has achieved through a combination of education and/or experience. The director issued a request for evidence (RFE) on May 6, 2010 requesting

> objective, verifiable documentary evidence to establish the definition of 'equivalent' as it was defined during the occupational assessment and certification process. Such evidence may include but is not limited to, a statement from the Department of Labor explaining the interpretation of the term as certified, copies of the petitioner's recruitment documentation or evidence that no U.S. applicants for the position who possessed the same or similar qualifications as the beneficiary were disqualified from selection.

There is no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond the high school level. On the ETA Form 9089, signed by the beneficiary on April 7, 2010, he represents that he has a bachelor of science degree based on his employment experience.

The record contains an evaluation from an evaluator with dated February 9, 2004 which states that the beneficiary has, as a result of progressively more responsible employment experiences, an educational background equivalent to that of an individual with a bachelor's degree in electrical engineering technology with a specialization in avionics from an accredited university in the United States. The record also contains an evaluation from of Clarkson University dated May 28, 2010 which states that the beneficiary has, as a result of progressively more responsible employment experiences, an educational background equivalent to that of an individual with a bachelor's degree in aviation technology 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).

The evaluations in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B 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. The petitioner did not indicate in the labor certification how it would calculate the number of years of work experience equivalent to one year of university study.

The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

Under the DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). The director requested evidence that would demonstrate that U.S. workers without four years of college and without bachelor's degrees were in fact put on notice that they were eligible to apply for the proffered position, despite the stated requirements of the ETA Form 9089, and that the petitioner did not in fact exclude U.S. workers with qualifications similar to those of the beneficiary from applying

for and filling the position. The petitioner did not submit copies of any recruitment materials indicating that workers without a baccalaureate degree were eligible to apply for the position. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

On the ETA Form 9089 Part I, DOL requested "recruitment information" and DOL's regulations required the petitioner to give notice of the filing of the application for permanent employment certification,[3] to conduct required pre-filing recruitment including placing a job order and advertisements in a newspaper or professional journal,[4] and to prepare a recruitment report[5] as part of a pre-filing recruitment effort in order to allow DOL to determine whether the petitioner put forth good faith efforts to recruit U.S. workers which meet the regulatory attestations found at 20 C.F.R. §§ 656.10(c)(8) and (9).[6] In response to the director's request for evidence, the petitioner submitted a letter instead of a recruitment report. The petitioner's letter does not meet the requirements of the regulation nor does it provide information about the petitioner's intent with regards to what would constitute the equivalent of a bachelor of science degree to qualify for the proffered position.[7] The evidence in the record is not sufficient to determine that the petitioner's intent was to accept less than the requirements in the labor certification.

On appeal and in her response to the director's RFE, counsel requested that the the petition be considered under the "skilled worker" category as well. There is no provision in statute or regulation that compels USCIS to adjudicate a petition under two different visa classifications for one petition in response to a petitioner's request. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

The evidence submitted does not establish that the petition requires at least a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree such that the beneficiary may be found qualified as a professional.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

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[3] *See* 20 C.F.R. § 656.10(d).
[4] *See* 20 C.F.R. §§ 656.17(e) and (f).
[5] *See* 20 C.F.R. § 656.17(g).
[6] *See* 20 C.F.R. § 656.10(c).
[7] The petitioner also submitted advertisements published by other companies. However, these advertisements do not provide information specific to the proffered position or the petitioner's intent.