



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: JUN 21 2012 OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

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

PETITION: Immigrant Petition for Alien Worker as a 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 with the field office or service center that originally decided your case by filing a 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, 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 is an internet sales business. It seeks to employ the beneficiary permanently in the United States as a software developer. The petitioner requests classification of the beneficiary as professional 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, approved by the U.S. Department of Labor (DOL). The priority date of the petition is June 1, 2009, which is the date the labor certification was accepted for processing by the DOL. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concluded that the beneficiary did not possess the required education set forth on the labor certification, and that the labor certification did not support the requested professional classification.

The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

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

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time 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.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

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

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*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,

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

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.

*Whether or Not the Petition can be approved in the Professional Category*

On Form I-140, the petitioner requests classification of the beneficiary as professional. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

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

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

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

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

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

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

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a 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.

As is noted above, 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). If the labor certification states that the offered position requires less than a bachelor’s degree, the petition cannot be approved in the professional classification.

The minimum requirements for the offered position are set forth at Part H of the labor certification, which states:

4. Minimum level of education required: Bachelor’s degree.
- 4-B. Major field of study: Computer Science.
6. Experience required: Three months in the job offered.
7. Is there an acceptable alternate field of study? The petitioner checked “Yes.”
- 7-A. If Yes, specify the major field of study: Information systems or closely related field.
8. Is there an acceptable alternate combination of education and experience? The petitioner checked “Yes.”
- 8-A. If Yes, specify the alternate level of education required: The petitioner checked “Other.”
- 8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: Employer will accept any suitable combination of education, training, and experience.

- 8-C. If applicable, indicate the number of years experience acceptable in question 8: 12.
9. Is a foreign educational equivalent acceptable? The petitioner checked "Yes."
10. Is experience in an alternate occupation acceptable? The petitioner checked "Yes."
- 10-A. If Yes, number of months experience in alternate occupation required: Three.
- 10-B. Identify the job title of the acceptable alternate occupation: Web developer.
14. Specific skills or other requirements: Employer will accept any suitable combination of education, training or experience. Experience which may have been obtained concurrently must include three months experience utilizing Java computer applications.

Part H.8 and H.14 of the labor certification state that the petitioner will accept "any suitable combination of education, training or experience." The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

However, two BALCA decisions have significantly weakened this requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the *Kellogg* language on the labor certification application violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements.

Given the history of the *Kellogg* language requirement at 20 C.F.R. § 656.17(h)(4)(ii), the AAO does not interpret this phrase to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification.

However, in the instant case, the petitioner does more than merely restate the *Kellogg* language. At Part H.8-C, the labor certification states that the petitioner would accept 12 years of experience as an alternative to a bachelor's degree. Therefore, the labor certification does not state that the offered position requires at least a baccalaureate degree.

In addition, on March 27, 2012, the AAO issued a request for evidence (RFE) to the petitioner. In this request, the AAO noted that the petitioner indicated on the ETA Form 9089 that the bachelor's degree requirement might also be met through a quantifiable amount of work experience. The RFE asked whether it was the petitioner's intent to require an alternative to a U.S. bachelor's degree or a single source foreign equivalent degree.

The petitioner's response to the RFE contained a letter from the petitioner dated April 9, 2012, from Director of Human Resources, [REDACTED]. The letter states that "We go on to assert in Section H, Question 8-C that an acceptable number of years of experience equivalent to a bachelor's degree would be 12 years of experience."

As confirmed by the petitioner, the labor certification states that the minimum educational requirements of the job offered can be satisfied by experience alone. Since a baccalaureate degree is not a minimum for entry into the offered position, the petition cannot be approved in the professional classification pursuant to 8 C.F.R. § 204.5(l)(3)(i). Therefore, the director correctly denied the petition on this basis.

#### *Whether or Not the Beneficiary Meets the Requirements of Offered Position*

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).

The labor certification states that the offered position requires a bachelor's degree in computer science, information systems or a related field, and three months of experience in the job offered or as a web developer utilizing Java computer applications. In the alternative to a bachelor's degree, the labor certification states that the petitioner would accept 12 years of experience.

Part H.8 and H.14 of the labor certification state that the petitioner will accept "any suitable combination of education, training or experience." As is discussed in detail above, the AAO does not interpret *Kellogg* language to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. To do so would make the actual minimum requirements of the offered position impossible to discern, it would render largely meaningless the stated primary and alternative requirements of the offered position on the labor

certification, and it would make any labor certification containing *Kellogg* language ineligible for classification as a professional or an advanced degree professional. This would be an absurd result.

As is noted above, the AAO's RFE asked the petitioner whether it intended to require an alternative to a U.S. bachelor's degree or a single source foreign equivalent degree, and, if so, to provide evidence of that intent. When the terms of a labor certification are ambiguous, the AAO may consider evidence of an organization's intent *as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.*

In response to the RFE, the petitioner submitted recruitment conducted for the position during the labor certification process. The advertisements state that the offered position requires a bachelor's degree or foreign equivalent in computer science, information systems or a closely related field and 3 months of experience. The advertisements do not state that the petitioner will accept any suitable combination of education, training or experience. In fact, the advertisements also do not state that 12 years of experience would be an acceptable to the bachelor's degree. Therefore, based on the evidence in the record, the petitioner did not establish that it intended to accept any suitable combination of education, training or experience. The petitioner's recruitment for the offered position also failed to properly apprise U.S. workers of the minimum requirements set forth on the labor certification in violation of DOL regulations.

The April 9, 2012 letter from [REDACTED] submitted in response to the AAO RFE claims that the petitioner intended to accept any suitable combination of education, training or experience equivalent to a U.S. bachelor's degree. However, this claim is undermined by the recruitment it conducted for the position during the labor certification process. The AAO considers later statements of intent submitted on appeal to be less credible than intent expressed during the labor certification process.

Therefore, based on all of the evidence in the record, the AAO concludes that the labor certification requires a U.S. bachelor's degree or foreign equivalent in computer science, information systems or closely related field (and three months of experience in the job offered or as a web developer); or 12 years of experience may be accepted in lieu of a bachelor's degree. Finally, three months of the experience must have included utilizing Java computer applications.

In support of the beneficiary's educational qualifications, the petitioner submitted copies of the beneficiary's diplomas from [REDACTED] in the Philippines. The diplomas indicate that the beneficiary was awarded a Bachelor of Arts in Economics and a Bachelor of Science in Business Management on April 10, 2000.

The petitioner also submitted a credentials evaluation, dated December 22, 2008, from [REDACTED] of [REDACTED]. The evaluation describes the beneficiary's diplomas from [REDACTED] as a Bachelor of Arts degree in Economics and Bachelor of Science degree in Business Management and concludes that the beneficiary has the equivalent of a bachelor's degree with a double major in economics and business administration with a

specialization in management from a regionally accredited college or university in the United States. Only after considering the beneficiary's resume, three certificates from computer training courses at [REDACTED] and two letters from former employers verifying more than five years of employment in the field did [REDACTED] determine that the beneficiary have the background equivalent to an individual with a bachelor's degree in computer information systems from a regionally accredited college or university in the United States.<sup>3</sup>

On appeal, counsel submitted a credentials evaluation dated December 19, 2008 signed by [REDACTED] Professor, Department of Computing Sciences, from [REDACTED]. In his evaluation, [REDACTED] states that he compared the requirements associated with a bachelor's degree in computer information systems to the beneficiary's formal education, the additional computer education courses at [REDACTED], his resume and work experience and determined that combination to be equivalent to a four-year bachelor's degree in computer information systems.

The evaluations are not sufficient to conclude that the beneficiary possesses a bachelor's degree (or foreign equivalent degree) in computer science, information systems or a related field and three months of experience, or 12 years of experience as required by the terms of the labor certification. Instead, the evaluations conclude that the beneficiary has a combination of experience (less than 12 years), unrelated bachelor degrees, and related lesser education/training, that combine to be equivalent to a bachelor's degree in computer science, information systems or a related field. As is discussed above, the labor certification does not state that such a combination is permitted.

In summary, the petitioner has failed to establish the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. In addition, the job offer portion of the labor certification does not state that the job requires the minimum of a baccalaureate degree. Therefore, the petition does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

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.

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<sup>3</sup> USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. See *id.* USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. See also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *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).

**ORDER:** The appeal is dismissed.