



U.S. Citizenship  
and Immigration  
Services

(b)(6)

DATE: **APR 05 2013** OFFICE: TEXAS 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)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a self-described race team/sales/parts dealer. It seeks to employ the beneficiary permanently in the United States as a logistician. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.<sup>1</sup> Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on December 3, 2007.<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on November 22, 2010.

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:

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<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

***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 logistician provides:

Analyze and coordinate automobile racing team equipment needs; ensure team equipment is readily available; ensure access of team manager, chief engineer, race engineers to race equipment; oversee maintenance/running capabilities of team trucks/trailers to ensure they are in good working order; ensure team is in conformity with state/federal gov't regulations re: interstate transportation of same; analyze/document site specific recommendations; provide strategic planning for future racing needs; establish, manage & maintain inventory and logistic partnerships, carrier contracts and vendor compliance systems; utilize computer systems re: storage and retrieval.

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: Bachelor's.

4-B. Major Field Study: Business Administration.

6. Is experience in the job offered required for the job?

The petitioner checked "yes" to this question.

6-A. If Yes, number of months experience required:

36 months.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

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

[Blank].

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

The petitioner checked "no" to this question.

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

[Blank].

8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:

[Blank].

8-C. If applicable, indicate the number of years experience acceptable in question 8:

[Blank].

9. Is a foreign educational equivalent acceptable?

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

6. Is experience in the job offered required for the job?

The petitioner listed "yes" and listed 36 months of experience was required.

10. Is experience in an alternate occupation acceptable?

The petitioner checked "no."

14. Specific skills or other requirements: [Blank].

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See 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).

As set forth above, the proffered position requires a Bachelor's degree in Business Administration and three years of experience in the job offered of logistician.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was "Bachelor's." He listed the institution where he received his Bachelor's degree, as "educational equivalent of a BBA through education and experience" and the year completed as 2000. He listed the address of the conferring institution as "[REDACTED]"

In support of the beneficiary's educational qualifications, the petitioner submitted his resume. The resume lists two educational entries. The first is [REDACTED] and the second is [REDACTED]. The beneficiary's attendance dates are not listed on the resume. Copies of degrees or transcripts from the two colleges are also not included in the record. The petitioner additionally submitted an experience only credential evaluation dated July 15, 2003, from Dr. [REDACTED] from the [REDACTED]. The evaluation considers the beneficiary's experience letters from prior employers, and resume to include his business experience from 1987 to 2003.<sup>4</sup> The evaluation considers the sixteen years of experience including thirteen years of experience as a sole proprietor and three years as a logistics manager as the equivalent to a U.S. degree of Bachelor of Business Administration awarded by a regionally accredited college or university in the United States.

The evaluation relies on experience alone and concludes:

[The beneficiary] has completed sixteen years of documented professional work experience in the field of business. In accordance with the BCIS [USCIS] three-for-one formula, and based on a minimum of 120 undergraduate semester credit hours needed to obtain a Bachelor's degree at a regionally accredited college or university in the United States, [the beneficiary's] work experience is the equivalent of 160 semester credit hours.<sup>5</sup> In summary, [the beneficiary's] sixteen years of professional work experience in the field of business is equivalent to a U.S. degree of Bachelor of Business Administration awarded by a regionally accredited college or university in the United States.

The director denied the petition on December 9, 2011. He determined that,

In order for the beneficiary to qualify as a member of the professions, the beneficiary must possess a United States baccalaureate degree or a foreign equivalent degree and be accompanied by evidence that the alien is a member of the professions.

The director cited to the pertinent regulation, 8 C.F.R. § 204.5(l)(3)(ii)(c), that states, "[i]f 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

<sup>4</sup> The beneficiary's resume lists experience dating back to 1984.

<sup>5</sup> This formula applies to H-1B petitions but not the immigrant visa category.

is a member of the professions.” The director further determined that the beneficiary did not have the required Bachelor’s degree in Business Administration as of the December 3, 2007 priority date. The director also determined that the beneficiary’s work experience could not be accepted as a U.S. Bachelor’s degree or its foreign equivalent in Business Administration because the ETA Form 9089 does not indicate that the petitioner will accept a suitable combination of education and/or experience in lieu of the listed educational requirement.

On appeal, with regard to the beneficiary’s qualifying academic credentials, counsel submitted no additional documentation, but asserts that the director erred in determining that the beneficiary did not possess the minimum requirements for the position of a Bachelor’s degree in business administration, because the petitioner asserts that it stated on ETA Form 9089 that it would accept an educational equivalent and the beneficiary possessed the equivalent of a Bachelor’s degree in business administration based upon experience. Counsel also asserts that the format of the ETA Form 9089 does not allow for the petitioner to state that it will accept an equivalent to a Bachelor’s degree in business administration based upon experience only.

DOL assigned the code of 13-1081.00 to the proffered position for a logistician. According to DOL’s public online database at <http://www.onetonline.org/link/summary/13-1081.00> (accessed March 7, 2013) and its description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Four requiring “considerable preparation needed” for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 7.0 to < 8.0 to the occupation, which means that “most of these occupations require a four-year bachelor's degree, but some do not.” However, the labor certification as certified requires a Bachelor’s degree in Business Administration and 3 years of experience. The petitioner filed the I-140 petition for a professional.

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

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

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign

equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

On May 23, 2011, the director issued a Request for Evidence (RFE) to the petitioner. In this request, the director noted that, based on the terms of the certified labor certification, a Bachelor's degree is needed for the position and that no alternate combination of education and experience is acceptable for the position. The director requested that the petitioner submit documentation and explain how the beneficiary qualifies for this position.

In response to the RFE, counsel submitted the beneficiary's credential evaluation report, resume and experience letters. On appeal, counsel asserts that it intended the language "Bachelor's degree in Business Administration" to include degree equivalency based upon experience because [the petitioner] drafted the labor certification intending to offer the position to [the beneficiary] if no other US workers were qualified for the position."

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

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

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

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>6</sup> *Id.*

<sup>6</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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).<sup>7</sup>

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

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<sup>7</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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

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

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

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, professional experience will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a single-source “foreign equivalent degree.” In order to have the education equating to a bachelor’s degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree.

On appeal, the petitioner cites to *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) and asserts that it considered “equivalent education.” That inquiry is not relevant here. The petitioner selected the “professional” box on Form I-140. Therefore, the petitioner must demonstrate that the labor certification requires a Bachelor’s degree and that the beneficiary meets the requirements of the labor certification. As set forth above, the professional category requires a bachelor’s degree.<sup>8</sup>

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Id.* at \*11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Id.* at \*14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at \*17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated on the ETA 9089 and does not include alternatives to a four-year bachelor’s degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at \*7. Thus, the court concluded that where the plain language of those requirements does not support the

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<sup>8</sup> A different Form I-140 was used at the time *Grace Korean* was decided that allowed the petitioner to apply for a worker as either a “professional or skilled” worker on the same petition. That is no longer the case. Here, the petitioner selected professional. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification once the decision has been rendered. 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).

petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree).

In this matter, the petitioner selected "professional" only on Form I-140. Whether the labor certification states any equivalency is irrelevant. To qualify for the professional category as filed, the petitioner must establish that the beneficiary has a four-year Bachelor's degree and that the beneficiary meets the requirements of the certified labor certification.

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 *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a

potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

As noted by the director, the credential evaluation in the record does not find that the beneficiary has the foreign equivalent of the required Bachelor’s degree. The evaluation used an equivalence to determine that three years of the beneficiary’s experience equaled one year of college to conclude that the beneficiary had achieved the equivalent of a U.S. four-year Bachelor’s degree in Business Administration, but that regulatory-prescribed equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). 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. 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 petitioner filed the petition for a professional requiring a Bachelor’s degree. The beneficiary does not have a Bachelor’s degree and does not meet the terms of the labor certification to be classified as a professional.<sup>9</sup>

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

Additionally, in any further filings, the petitioner must submit its tax returns, annual reports, or audited financial statements to establish its ability to pay the beneficiary’s proffered wage of \$39,000 from the December 3, 2007 priority date onward.<sup>10</sup>

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<sup>9</sup> The ETA Form 9089 does not provide that the minimum academic requirements of a Bachelor degree in Business Administration might be met through a combination of other education and experience to include sixteen years of experience or some other formula other than that explicitly stated on the ETA Form 9089, and the petitioner did not file the I-140 petition for a skilled worker.

<sup>10</sup> The petitioner submitted the 2007, 2008 and 2009 Forms W-2 showing that the petitioner paid the beneficiary \$58,219, \$70,017.48 and \$48,717.54 in wages, respectively, as well as one paystub for 2010 showing \$1,255 in wages paid from 10/13/2010 to 10/19/2010. The paystub lists the beneficiary’s 2010 “year to date” salary as \$52,710. However, the record lacks the evidence prescribed by regulation. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.* While

Beyond the director's decision, the petitioner has also failed to establish that the beneficiary is qualified for the position offered. The beneficiary must 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). 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).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (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: three years of experience in the position offered, logistician, with the following duties in H.11.:

Analyze and coordinate automobile racing team equipment needs; ensure team equipment is readily available; ensure access of team manager, chief engineer, race engineers to race equipment; oversee maintenance/running capabilities of team trucks/trailers to ensure they are in good working order; ensure team is in

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additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation. The petitioner would need to submit the required evidence in any future filings.

conformity with state/federal gov't regulations re: interstate transportation of same; analyze/document site specific recommendations; provide strategic planning for future racing needs; establish, manage & maintain inventory and logistic partnerships, carrier contracts and vendor compliance systems; utilize computer systems re: storage and retrieval.

The petitioner does not allow for experience in any alternate position.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as: (1) a logistician with the petitioner in Pompano Beach, Florida from June 22, 2005 to April 15, 2008; (2) a logistician with [REDACTED] in the United Kingdom from May 1, 2004 to November 1, 2004; (3) a logistician with [REDACTED] in United Kingdom from March 1, 2004 to April 30, 2004; (4) a logistician with [REDACTED] in Indianapolis, Indian from August 18, 2003 to November 1, 2003; (5) a logistician with [REDACTED] from February 1, 2001 to June 30, 2003. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.<sup>11</sup> Specifically, the petitioner indicates that questions J.19 and J.20, which ask

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<sup>11</sup> 20 C.F.R. § 656.17 (2009) states:

*(h) Job duties and requirements.*

(1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation . . . . .

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(ii) 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.

(i) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 36 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not

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(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

substantially comparable<sup>12</sup> and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1 that his most recent position with the petitioner was as a logistician, and the job duties are nearly identical to the job duties of the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

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

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The petitioner requires three years of experience in the proffered position, yet it is unclear from the record of proceeding that the beneficiary has three years of qualifying employment experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A) after consideration of the educational evaluation.

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(l)(3)(ii)(A). With the filing of the Form I-140 petition on November 22, 2010, the petitioner submitted five experience letters. The first letter, dated, July 11, 2003, from [REDACTED], Chartered Certified Accountant, on his letterhead, states that the

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<sup>12</sup> A definition of "substantially comparable" is found at 20 C.F.R. § 656.17(i):

(5) For purposes of this paragraph (i):

...  
(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

beneficiary was a sole proprietor from June 1987 to June 2000.<sup>13</sup> It states that the beneficiary had “executive and managerial decision making responsibilities over all aspects of his Fabrication Business.” None of the job duties of the proffered position listed on the ETA Form 9089 are also listed by Mr. [REDACTED] as duties the beneficiary specifically performed while operating his business. There is no regulatory prescribed evidence in the record of proceeding demonstrating that the beneficiary gained experience with [REDACTED]. The four other experience letters in the record include: (1) a letter from [REDACTED], Team Manager on [REDACTED] letterhead, dated December 10, 2004, stating that the beneficiary was employed as a team logistician between May 3, 2004 to November 1, 2004; (2) a letter from [REDACTED], Team Manager, [REDACTED] dated November 5, 2003, stating that the beneficiary was employed as a logistician from August 18, 2003 for the 2003 racing season. No employment end date is specified; (3) a letter from [REDACTED], Team Manager, [REDACTED], dated January 31, 2008, stating that the beneficiary was employed as the logistics manager from February 1, 2001 through and including June 30, 2003. The credential evaluation specifically notes only one experience letter, from the [REDACTED] Chartered Certified Accountant, and two positions—as a sole proprietor and as a logistics manager for [REDACTED]. The AAO notes that that the credential evaluation, dated July 15, 2003, predates the remaining positions.

Further, the educational evaluation addressed above uses all of the beneficiary’s experience from June 1987 to June 2003 to conclude that the beneficiary has the equivalent of a U.S. Bachelor’s degree. The same experience cannot then be double counted to show that the beneficiary has the required three years of experience in the position offered. The remaining experience, from July 2003 until the beneficiary’s work with the petitioner in June 2005, is less than three years and is insufficient to establish that the beneficiary has the three years of required experience. Therefore, the petitioner has failed to establish that the beneficiary has the experience required for the position offered.

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.

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<sup>13</sup> This experience was not listed on the certified labor certification. 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.