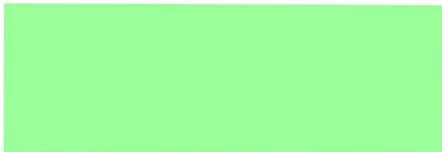


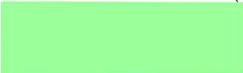
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090

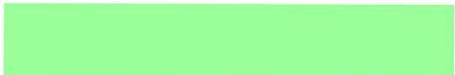


U.S. Citizenship  
and Immigration  
Services

(b)(6)

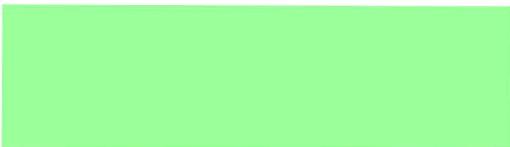


DATE: **APR 09 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

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

The petitioner's business is truck sales and rentals. The petitioner seeks to employ the beneficiary permanently in the United States as an office assistant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).<sup>1</sup> As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

In denying the petition the director found that [REDACTED] the institution that awarded the beneficiary a "Bachelor of Science in Mechanical Engineering" (B.S.) in 2004, is not a regionally accredited institution in the United States. Therefore, the beneficiary's degree did not qualify him for classification as a professional and he did not meet the job requirements on the labor certification. The director also found that the beneficiary did not qualify for classification as a skilled worker.

On appeal, counsel states that [REDACTED] is a United States institution and as such, the petitioner does not have to demonstrate that the beneficiary's degree is the equivalent of a United States baccalaureate degree obtained from a regionally accredited college in the United States. Counsel states that the term professional worker under 8 C.F.R. § 204.5(l)(3)(ii)(C) does not require that the beneficiary's degree be from an accredited institution. Counsel states that the ETA Form 9089 requires a bachelor's degree in any field or a foreign educational equivalent, and that under *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), United States Citizenship & Immigration Services (USCIS) may not impose additional requirements onto the labor certification. Counsel asserts that the beneficiary meets the educational requirement in the labor certification for classification as a professional under section 203(b)(3) of the Act.

The issue on appeal is whether the beneficiary's educational credential from [REDACTED] qualifies him for classification as a professional under section 203(b)(3) of the Act. The AAO will also alternatively consider whether the beneficiary may be classified as a skilled worker under section 203(b)(3) of the Act.

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>

<sup>1</sup> Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. 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.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B,

At the outset, it is important to discuss the respective roles of the DOL and 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.

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*,<sup>3</sup> 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful 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

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which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

<sup>3</sup> The Immigration and Naturalization Service (INS) is the predecessor agency to USCIS.

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

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, 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 whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the ETA Form 9089 was accepted for processing by the DOL on January 30, 2008 and was certified by the DOL on March 14, 2008. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).<sup>5</sup> The AAO will first consider whether the petition may be approved in the professional classification.

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).

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<sup>5</sup> Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

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.

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(1)(3)(ii)(C). 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.

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.

The Form 9089 lists the following requirements for the proffered position:

- H.4. Education: Bachelor's degree in any field.
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

On the Form ETA 9089 signed by the beneficiary on July 31, 2008, the beneficiary indicates that he possesses a bachelor's degree completed in 2004 in mechanical engineering from [REDACTED] in the United States.<sup>6</sup> The record contains a copy of the beneficiary's [REDACTED] diploma and transcripts. Also of record are the beneficiary's transcripts and diploma from [REDACTED] in the Philippines indicating that the beneficiary obtained a Bachelor of Science in Mechanical Engineering March 24, 1985. This documentation was submitted in support of a Form I-129 Petition for Nonimmigrant Worker (H-1B) filed on the beneficiary's behalf in 2002. The petitioner did not list the

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<sup>6</sup> The beneficiary was 46 years old when [REDACTED] awarded him the degree in mechanical engineering.

beneficiary's Philippine degree on the Form 9089 in this case and did not submit an educational evaluation to establish educational equivalency for the course of study completed at [REDACTED]. There is no explanation of record indicating why the beneficiary received two Bachelor of Science degrees in Mechanical Engineering, or why the petitioner failed in this case to present the degree from [REDACTED] or why the degree from [REDACTED] does not include any reference to the first mechanical engineering degree from [REDACTED]. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

A United States baccalaureate degree is generally found to require four years of education. See *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) of the Act, as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Immigration Act of 1990 Act added section 203(b)(3)(A) to the Act, 8 U.S.C. §1153(b)(3)(A), which provides:

Visas shall be made available . . . to (ii) qualified immigrants who hold baccalaureate degrees and who are members of the professions...

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3) of the Act as a professional with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. 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 "foreign equivalent degree."<sup>7</sup> See 8 C.F.R. § 204.5(1)(2).

Documentation submitted with the Form I-140 immigrant visa petition filed on October 2, 2009 included academic records from [REDACTED] showing that the beneficiary was awarded a "Bachelor of Science in Mechanical Engineering" from that institution on September 11, 2004. The location of the university is not identified on the transcripts or the diploma. The beneficiary's transcript from [REDACTED] does not indicate when he took his first course, or how long the curriculum took to complete. The transcripts indicate the completion of six semesters but do not

<sup>7</sup> Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

indicate the dates of the beneficiary's enrollment in each semester.<sup>8</sup>

The transcript also does not indicate that the beneficiary was given credit for any work experience or education that the beneficiary may have had prior to his acceptance into the program at [REDACTED].<sup>9</sup> Thus the AAO is unable to determine from the record that the beneficiary obtained four full years of education before receiving his degree.

In a Notice of Intent to Deny (NOID) issued on January 12, 2010 the director requested the petitioner to submit documentation to establish that the beneficiary qualifies for the position and that he holds a degree or a foreign equivalent degree from a regionally accredited institution in the United States. In response to the NOID counsel for the petitioner stated that accreditation is not required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), which only requires that the foreign worker hold a baccalaureate degree and be a member of the professions. Counsel indicated that USCIS cannot add any requirement to the Form ETA 9089 labor certification application.

The director denied the petition on February 24, 2010, finding that because [REDACTED] is not accredited by a regional accreditation body approved by the United States Department of Education (ED), the beneficiary could not be found to have obtained a baccalaureate degree in any field as required by the labor certification. The director stated that the beneficiary did not qualify as a skilled worker, as without a recognized degree the beneficiary did not meet the requirements of the labor certification. The director further indicated that the record included information that the beneficiary attended [REDACTED] in the Philippines but that there was no evidence that the beneficiary obtained a degree. The AAO withdraws the latter finding of the director, as the record contains a copy of a diploma issued to the beneficiary from [REDACTED] in Mechanical Engineering in 1985. The petitioner did not, however, submit an educational evaluation of the beneficiary's credentials from [REDACTED]. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, in this case, the credentials have not been evaluated and, as such the credentials will not be considered. The AAO agrees with the director that the beneficiary did not meet the job requirements on the labor certification and was ineligible for classification as a professional or skilled worker under section 203(b)(3) of the Act.

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<sup>8</sup> The fact that the coursework was completed in six semesters suggests that the course of study at [REDACTED] was 2-3 years maximum. The record indicates that the beneficiary entered the United States in December, 2001 and received the degree in September, 2004, less than 3 years later.

<sup>9</sup> The [REDACTED] website indicates that a bachelor's degree from the University takes from 2-4 years of online study. The website states that university credit may be given for previous work experience or coursework; the beneficiary's transcript does not indicate any such credits were given to him by the university. On the website, although mechanical engineering is listed as one of the "most enrolled" degrees at [REDACTED] the mechanical engineering degree does not appear under "available majors" for either the bachelor's or master's degree programs. [REDACTED] website does not identify an address or phone number, and does not name any dean, professor or other instructor. See, [http://www.\[REDACTED\]](http://www.[REDACTED]) (accessed March 6, 2013). *Matter of Ho*, 19 I&N Dec. at 591.

On appeal counsel again asserts that there is no regulatory requirement that the bachelor's degree must be obtained from a regional accrediting body recognized by the ED. Counsel states that the quality of the beneficiary's degree from [REDACTED] is not relevant.<sup>10</sup> The AAO does not agree. While the regulatory language of 8 C.F.R. § 204.5(1)(2) does not specifically state that a degree must come from an accredited college or university to qualify as an "degree," that requirement is implicit in the regulation. As stated by the U.S. Department of Education on its website:

The U.S. Department of Education does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking national recognition . . . must meet the Secretary's procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* . . . . The Secretary . . . makes the final determination regarding recognition.

The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.

. . . [T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.

. . . Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

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<sup>10</sup> In a decision dated August 31, 2012 in a class action lawsuit in the United States District Court for the [REDACTED] case no. [REDACTED], the court ordered [REDACTED], [REDACTED] and others to pay \$22.7 million in damages. The plaintiffs established that [REDACTED] sold false credentials to students. As part of the settlement [REDACTED] was ordered to shut down its websites at [REDACTED] and [REDACTED]. See, [http://www.\[REDACTED\]](http://www.[REDACTED]) (accessed March 6, 2013). This federal court decision calls into question whether the beneficiary's United States baccalaureate degree was legitimately obtained and is thus highly relevant. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

[www.ed.gov/print/admins/finaid/accred/accreditation.html](http://www.ed.gov/print/admins/finaid/accred/accreditation.html) (accessed March 6, 2013).

The ED's purpose in ascertaining the accreditation status of United States colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

Presidents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions . . . .

CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.

Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community . . . . The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.

[www.chea.org/pdf/Recognition\\_Policy-June\\_28\\_2010-FINAL.pdf](http://www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf) (accessed March 6, 2013).

The ED and CHEA recognize six regional associations – covering the entire United States and its outlying possessions – that accredit U.S. colleges and universities. [REDACTED] does not appear in the database of accredited universities. See, <http://ope.ed.gov/accreditation> (accessed March 6, 2013).

Accreditation of a college or university by a regional accrediting body recognized by the ED and CHEA assures the integrity of the baccalaureate degree. As stated on their respective websites, accreditation is intended “to assure academic quality and accountability” (CHEA) and to provide “a reasonable assurance of quality and acceptance by employers of . . . degrees” awarded by the accredited institutions (ED). Further, accreditation guarantees that a school's degrees will be recognized and honored nationwide.

As noted above, “professional” is defined in 8 C.F.R. § 204.5(l)(2) as “a qualified alien who holds at least a United States baccalaureate degree” (or a foreign equivalent degree). The modifier “United

States” to describe the baccalaureate degree implies that the degree issued by a United States educational institution must be honored nationwide. Such nationwide recognition is assured through accreditation by a regional accrediting agency approved by the ED and CHEA. Without such accreditation, the beneficiary’s “Bachelor of Science in Mechanical Engineering” from [REDACTED] cannot be deemed to have nationwide recognition. Therefore, it does not qualify as a United States baccalaureate degree within the meaning of 8 C.F.R. § 204.5(1)(2).

This conclusion is supported by federal case law. In *Philip Tang v. District Director of the U.S. Immigration and Naturalization Service (Tang v. INS)*,<sup>11</sup> 298 F. Supp. 413 (D.C. Cal. 1969) the district court agreed with the INS that a bachelor of science in electronic engineering from Pacific States University in California, an institution that was not accredited by the regional accrediting association, did not entitle the alien to a third preference visa because his degree was not equivalent to a bachelor’s degree from an accredited college or university in the United States. See 298 F.Supp. at 417, 419. The district court’s decision was affirmed without further discussion by the U.S. Court of Appeals for the Ninth Circuit in a *per curiam* ruling. See *Tang v. INS*, 433 F.2d 1311 (9<sup>th</sup> Cir. 1970).

As noted above, in this case, Part H, lines 4 and 4-B of the labor certification state that a bachelor’s degree in any field is required to qualify for the proffered position. Line 9 states that a “foreign educational equivalent” is acceptable. No training or experience is required.

As previously discussed, the beneficiary’s degree from [REDACTED], though called a “Bachelor of Science in Mechanical Engineering,” does not qualify as a United States baccalaureate degree as per 8 C.F.R. § 204.5(1)(3) because it was not awarded by an educational institution that has been accredited by a regional accrediting agency recognized by the ED. Nor does the beneficiary have a foreign educational equivalent to a baccalaureate degree in any field; no evidence was submitted to establish that the beneficiary’s degree from [REDACTED] is equivalent to a baccalaureate degree in the United States. As the beneficiary does not fulfill the educational requirements in Part H of the labor certification, the beneficiary does not qualify for the job offered.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a United States baccalaureate degree or a foreign equivalent degree. Therefore, the AAO determines that the beneficiary is not eligible for preference visa classification as a professional under section 203(b)(3)(A)(ii) of the Act. Thus, the petition cannot be approved.

The AAO will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. See also 8 C.F.R. § 204.5(1)(2).

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<sup>11</sup> INS is the predecessor agency to USCIS.

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

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and that the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

The terms of the labor certification require a four-year bachelor's degree in any field or a foreign equivalent degree. The beneficiary does not possess such a degree in satisfaction of the regulation at 8 C.F.R. § 204.5(l)(2). The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.

The beneficiary does not have a "United States baccalaureate degree or its foreign equivalent" within the meaning of 8 C.F.R. § 204.5(k)(3), and thus does not qualify for preference visa classification under section 203(b)(3) of the Act. Nor does the beneficiary meet the job requirements on the labor certification. For these reasons, considered both together and as separate grounds for denial, the petition may not be approved.

Beyond the decision of the director, the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>12</sup> If the petitioner's net income or net current assets is

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<sup>12</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*,

not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the labor certification was filed on January 30, 2008. The record contains a summary of a 2006 tax return and a copy of an Internal Revenue Service form W-2 issued by the petitioner to the beneficiary in 2007. The record does not contain any evidence of the petitioner's ability to pay the proffered wage as of the priority date. Further, the petitioner failed to establish that factors similar to *Sonogawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income and net current assets.

Accordingly, after considering the totality of the circumstances, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.