

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

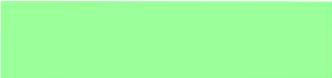
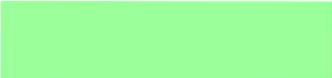
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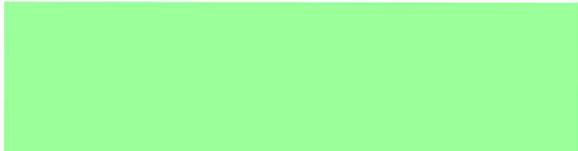
OFFICE: NEBRASKA SERVICE CENTER

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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider.<sup>1</sup> The motion will be granted and the AAO's decision will be affirmed.

The petitioner describes its operations as the research, development, sale and manufacture of pharmaceuticals. It seeks to permanently employ the beneficiary in the United States as a supervisor, solid oral dosage manufacturing. The petitioner requests classification of the beneficiary 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)

The AAO's decision dismissing the appeal concludes that the petitioner failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary did not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Additionally, a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. Further, a party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. The record shows that the motion is properly filed, timely, makes a specific allegation of error in law or fact, and will be reopened. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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<sup>1</sup> The AAO only exercises appellate jurisdiction over matters that were specifically listed at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). For instance, in the event that a petitioner disagrees with an AAO decision, the petitioner can file a motion to reopen or a motion to reconsider in accordance with 8 C.F.R. § 103.5. In this matter, the petitioner did not check box D ("I am filing a motion to reopen a decision"), box E ("I am filing a motion to reconsider a decision"), or box F ("I am filing a motion to reopen and a motion to reconsider a decision") on the Form I-290B, Notice of Appeal or Motion. While counsel indicated that he was filing a motion to reopen or in the alternative a motion to reconsider in his appellate statement, counsel checked box A ("I am filing an appeal. My brief and/or additional evidence is attached"), instead. Therefore, the appeal is improperly filed and should be rejected on this basis pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1). However, we will accept the filing as a motion to reopen and reconsider.

On motion counsel asserts that the Nebraska Service Center (director) and the AAO erred in concluding that the petitioner's labor certification and recruitment did not adequately reflect that a combination of degrees and experience was acceptable. Counsel asserts that the ETA Form 9089, Application for Permanent Employment Certification, does not provide an area to explain that the petitioner would accept a "Foreign Academic Equivalent". Moreover counsel states that the Department of Labor (DOL) failed to explain how a petitioner could clearly indicate on the ETA Form 9089 that it would accept a combination of education degrees and/or experience. Further, counsel avers that the AAO cannot add its own requirement of a single source foreign degree. Moreover, counsel states that the petitioner provided enough evidence to establish it would accept a combination of lesser degrees and/or work experience, which would allow for an alternate combination of education to be found equivalent to a degree. The record contains numerous educational evaluations establishing that the beneficiary possesses a U.S. Bachelor's degree in science based on a combination of foreign educational degrees.

As noted in the AAO July 2012 decision, 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 United States Immigration and Citizenship Services (USCIS) to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The alien had a three-year degree and membership in the Institute of Chartered Accountants of India (ICAI). USCIS had concluded that the alien did not qualify for EB-2 or EB-3 (due to the specific job requirements on the labor certification). The court upheld the USCIS determinations on EB-2 and EB-3 as a professional but reversed USCIS in the EB-3 skilled worker classification.

In reaching its conclusions, the federal district court in *Snapnames.com, Inc.* 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. In professional and advanced degree professional cases, however, where the alien is statutorily required to hold a bachelor's degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at \*17, 19. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at \*7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.*

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

Upon review of the motion and record at hand, we find that the ETA Form 9089 and the petitioner’s documentation of its recruiting efforts clearly sought a worker who possessed a U.S. Bachelor’s degree or its foreign equivalent. Further, the approved ETA Form 9089 clearly indicates that the petitioner did not intend to allow for an applicant to qualify for the job opportunity based on an alternate combination of degrees and experience.<sup>2</sup> Counsel’s argument that the ETA Form 9089 does not provide an area for the petitioner to clearly define its education requirements is unfounded. Based on the plain language reading of the ETA Form 9089, question H. 8, 8-A, and 8-B, clearly provides the petitioner an opportunity to explain its alternate education requirements. In this matter, the petitioner signed the ETA Form 9089 on September 14, 2006, that it would not accept an alternate combination of education and experience to a U.S. Bachelor’s degree or its foreign degree equivalent. Further, a review of the documentation reflecting the petitioner’s recruitments efforts clearly provides that the petitioner sought workers with a U.S. Bachelor’s degree or its foreign equivalent and not a worker possessing a combination of education degrees found equivalent to a U.S. Bachelor’s degree. The job postings and the notice of postings do not define nor attempt to clarify that the requirements of a foreign academic equivalent could be met with a combination of lesser degrees and/or work experience. Thus we find that the petitioner has not provided evidence establishing that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date.

Next, counsel asserts, that the petition is approvable for a “Skilled Worker” based on the education requirements of the petitioner as outlined above. However, again, the petitioner has not provided independent objective evidence establishing that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date.

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the required education is clearly and unambiguously stated on the labor certification and does not include the language “or equivalent” or any other alternatives to a four-year bachelor’s degree.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor’s degree or a foreign equivalent degree from a college or university as of the priority date. The

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<sup>2</sup> The petitioner answered “No”, to question H.8. on the ETA Form 9089. If the petitioner sought a combination of education equivalent to a U.S. Bachelor’s degree, it should have answered, “Yes” to H.8., and then provided an explanation in question H.8-A. and H.8-B.

petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motion to reopen is granted and the decision of the AAO dated July 16, 2012 is affirmed. The petition is denied.