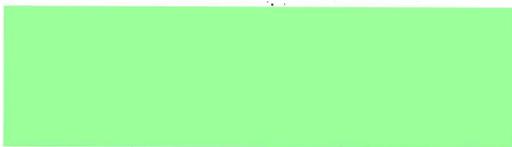
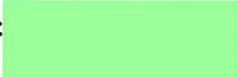


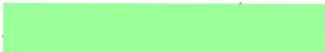


U.S. Citizenship  
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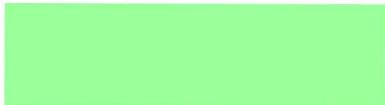


DATE: **FEB 05 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

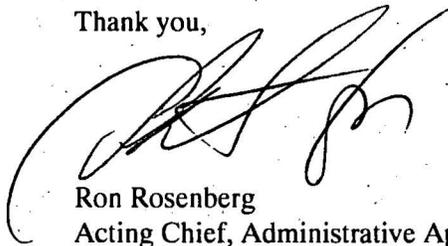


INSTRUCTIONS:

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail tobacco products company. It seeks to employ the beneficiary permanently in the United States as a purchasing manager. As required by statute, ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established: (1) that the beneficiary met the education and experience requirements of the labor certification; and (2) that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

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

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 12, 2011 denial, the issues in this case are whether the beneficiary meets the education and experience requirements of the labor certification and whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.<sup>2</sup>

#### ***The Beneficiary's Qualifications for the Job Offered***

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

<sup>2</sup> On October 22, 2012, the AAO sent the petitioner a Request for Evidence (RFE) to provide the opportunity to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in Arts or Purchasing as required by the terms of the labor certification and to demonstrate the manner in which this position was advertised. The petitioner responded to this RFE on December 10, 2012.

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

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

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

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>3</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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

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<sup>3</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

*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 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 the instant case, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). 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).

The regulation at 8 C.F.R. § 204.5(1)(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(1)(4). For a skilled worker, 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(1)(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 the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating 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 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:

- H.4. Education: Bachelor's degree.  
H.4-B. Major Field of Study: Arts.  
H.5. Training: None required.  
H.6. Experience in the job offered: 24 months.  
H.7. Alternate field of study: Purchasing.  
H.8. Is there an alternate combination of education and experience that is acceptable? No.  
H.8-A. If Yes, specify the alternate level of education required: Left blank.  
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: Left blank.  
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: Left blank.  
H.9. Is a foreign educational equivalent acceptable? Yes.  
H.10. Experience in an alternate occupation: 24 months of experience as a Market Research Analyst or Purchase Inspector.  
H.14. Specific skills or other requirements: "N/A."

The beneficiary possesses a Bachelor of Arts degree from the [REDACTED] Pakistan. The petitioner submitted an evaluation of the beneficiary's educational credentials from [REDACTED] the president of [REDACTED]. In reaching her conclusion, the evaluator relied upon the following documents:

- The beneficiary's two-year Bachelor of Arts diploma from the [REDACTED] Pakistan that the beneficiary received upon passing the Examination held in July 1986;
- A letter from the [REDACTED] regarding the beneficiary's experience in Purchasing which she states shows thirteen years and seven months of experience from November 15, 1989 to June 5, 2003.

The evaluator concluded that the beneficiary's "two years of university-level study and thirteen years and seven months of professional experience in Purchasing are equivalent to the degree, Bachelor of Arts in Purchasing, for employment purposes, from an accredited educational institute in the United States."<sup>4</sup> The AAO's RFE noted that the petitioner may not utilize the beneficiary's qualifying experience to meet both the educational and experience requirements of the labor certification and that the record did not establish that the beneficiary had 24 months of experience as a Market Research Analyst or Purchase Inspector. In response to the AAO's RFE, the petitioner states that the evaluator only used six years of the beneficiary's 13 years of [REDACTED] experience. However, it is unclear from the evaluation how the evaluator determined whether the beneficiary possessed 13 years of experience, especially in light of the fact that nothing in the record states whether the beneficiary's employment with [REDACTED] was full-time or part-time. The evaluator concluded by again referencing the beneficiary's 13 years of experience, along with the two years of university study, as being equivalent to the Bachelor of Arts degree in Purchasing. The record contains one letter from the general manager of [REDACTED] which states that the beneficiary has been serving in [REDACTED] as Purchase Inspector from

<sup>4</sup> The evaluation in the record appears to use the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5).

November 15, 1989 to June 5, 2003, the date of signature. The letter that the evaluator relied on to make this determination does not state what the beneficiary's job duties were or whether this work was part-time or full-time. In response to the AAO's RFE, the petitioner submitted the Office Order of the beneficiary's appointment to work as Purchase Inspector (PI) with [REDACTED]. The petitioner also submitted the [REDACTED] Field Manual and highlighted the duties of Purchase Inspector (Establishment) and Purchase Inspector (Stocks). It is unclear which of these positions the beneficiary held. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that the experience letters provide a description of the beneficiary's experience. The experience letter from [REDACTED] in the record does not meet this requirement and the [REDACTED] Field Manual raises additional questions regarding the beneficiary's position there as it is unclear which position the beneficiary held. Therefore, the AAO cannot fully assess the work experience to determine the complexity of the position and whether all, or certain years, of this experience would qualify as employment complex enough to consider as experience equivalent to bachelor's level studies.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, [www.aacrao.org](http://www.aacrao.org), AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." <http://www.aacrao.org/About-AACRAO.aspx> (accessed September 26, 2012). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed September 26, 2012). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.<sup>5</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>6</sup>

<sup>5</sup> See *An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>6</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

(b)(6)

EDGE states that the Bachelor of Arts from Pakistan “represents attainment of a level of education comparable to 2 to 3 years of university study in the United States.” EDGE also states that “if the Bachelor’s degree is two years of duration, then it is noted as Pass degree and if it is a three year’s degree it is noted as Honors degree.”

The petitioner did not send the beneficiary’s statement of marks to accompany this degree. Nothing shows that it was an Honours degree or based on three years of study. Based on EDGE, the copy of the degree in the record, and the evaluation submitted, the beneficiary’s studies appear to be only equivalent to two years of study. As noted by the director, the beneficiary does not have a four-year degree as required by the labor certification. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg’l Comm’r 1977).

The labor certification requires a bachelor’s degree and does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.<sup>7</sup> Counsel asserts that the petitioner expressed a degree equivalency on the ETA Form 9089 by checking “yes” to H.9., “Is a foreign educational equivalent acceptable?” The AAO RFE permitted the petitioner to submit evidence that it intended the labor certification to require an alternative to a U.S. bachelor’s degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.<sup>8</sup>

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<sup>7</sup> The DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job.” See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep’t. of Labor’s Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep’t. of Labor’s Empl. & Training Administration, Interpretation of “Equivalent Degree,” 2 (June 13, 1994). The DOL’s certification of job requirements stating that “a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer’s definition.” See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that “[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree.” See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

<sup>8</sup> In limited circumstances, USCIS may consider a petitioner’s intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer’s subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner’s intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary’s credentials. Such a result would undermine Congress’ intent to limit the issuance of

Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

In response to the AAO's RFE, the petitioner submitted its recruitment report with copies of the internal notice and advertisements it placed as well as the resumes it received, but the petitioner did not submit its advertisement placed in *El Mundo Newspaper*. The petitioner also states in its recruitment report that it received nine resumes, but in response to the AAO's RFE it submitted only eight. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The advertisements placed by the petitioner in the recruitment process that it did submit in response to the AAO's RFE do not specify that an alternate combination of education and experience as an alternative to a four-year bachelor's degree is acceptable. The advertisement placed on the [REDACTED] website states that a bachelor's degree and two years of experience are required. The advertisement placed in the [REDACTED] states that a bachelor's degree or "foreign equivalent" is required with a major in purchasing and two years of experience. The advertisement placed with Jobvertise.com states that the position requires a bachelor's degree or "foreign equivalency" with major in purchasing and two years of experience in purchasing. However, none of these advertisements state that the petitioner would accept a combination of education and experience as the equivalent of a bachelor's degree.

Additionally, of the eight resumes the petitioner submitted in response to the AAO's, one has a four-year degree and over eight years of experience in purchasing with 17 additional years of experience at two different companies purchasing all products; another applicant had 13 years of experience in purchasing and logistics planning; and another applicant had 13 years of experience in purchasing. The petitioner has not indicated whether these applicants were interviewed or why they were not qualified for the instant position, or whether the candidates were alerted that they might qualify for the position based on an unspecified combination of education and experience.

The petitioner failed to establish that that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's or the foreign equivalent thereof, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore, it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in Arts or Purchasing or the foreign equivalent thereof. The beneficiary does not possess a U.S. bachelor's degree or a foreign degree that is its U.S. equivalent. 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. The petitioner did not set forth or allow any different level of education and experience on the labor certification in section H.8., or qualify anywhere on the ETA Form 9089, or state in the placed advertisements, that it would allow for any combination of

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immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See Id.* at 14.

education and experience, or education less than a four-year bachelor's degree, as the beneficiary in this matter has. Therefore, the beneficiary does not qualify for classification as a skilled worker.

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification 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. *Snapnames.com, Inc.* 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. *Snapnames.com, Inc.* at \*14.<sup>9</sup> In addition, 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.* See also *Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008) (upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).

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 in H.4 as a Bachelor's degree in Arts and the field of study is qualified in H.7-A. to allow for an additional field of study, Purchasing. The ETA Form 9089 does not include the language "or equivalent" or allow any other alternatives to a four-year bachelor's degree in Sections H.8 or H.14, or anywhere else on the labor certification. As discussed above, the petitioner submitted evidence of its recruitment efforts conducted for this labor certification, but this fails to demonstrate any intent to accept experience or a combination of education and experience in lieu of a bachelor's degree.

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

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<sup>9</sup> In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded 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." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993) (the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act. Here, as noted above, the petitioner states only that it will accept a bachelor's degree on the ETA Form 9089. The petitioner failed to set forth any allowed equivalency in Section H.8 to allow for lesser education combined with experience or qualify the degree requirements in Section H.14, or anywhere else on the form.

(b)(6)

required by the labor certification. Therefore, the petitioner has 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.

Additionally, the petitioner has also not established that the beneficiary possessed the required experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). 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 *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience in the job offered as a Purchasing Manager, or 24 months of experience as a Market Research Analyst or Purchase Inspector. On the labor certification, the beneficiary lists the following experience:

- As a Market Research Analyst for the petitioner from July 1, 2005 to March 1, 2010 (the date of signature);<sup>10</sup>

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<sup>10</sup> 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 cannot be used to qualify the beneficiary for the certified position as having 24 months of experience as a Market Research Analyst or Purchase Inspector. The regulation at 20 C.F.R. § 656.17. 20 C.F.R. § 656.17 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

.....

(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 cannot require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- As a Market Research Analyst for [REDACTED] California from October 1, 2004 to June 30, 2005;
- As a Market Research Analyst for [REDACTED] Georgia from November 30, 2003 to September 30, 2004; and
- As a Purchase Inspector at [REDACTED] in [REDACTED], Pakistan from November 15, 1989 to June 5, 2003.

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). The record contains a letter from the general manager of PASSCO attesting to the beneficiary's employment as a Purchase Inspector from November 15, 1989 to June 5, 2003 (the date of signature).

As noted above, the letter submitted from [REDACTED] provides no job duties, and does not specify the hours worked to determine whether it was full-time or part-time employment. Without the stated job duties and evidence as to whether the employment was full-time, the beneficiary's experience cannot be established. This letter does not meet the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A). The AAO's RFE requested experience letters to overcome this deficiency. However, the petitioner did not provide any additional letters from [REDACTED]<sup>11</sup>

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(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.

....

(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.

It is unclear whether the DOL assessed the comparability of the beneficiary's position with the petitioner and whether the beneficiary can use this experience to qualify for the instant position.

<sup>11</sup> As stated above, the petitioner submitted the [REDACTED] Field Manual and highlighted the duties of Purchase Inspector (Establishment) and Purchase Inspector (Stocks), but it is unclear which of these

Further, the petitioner may not utilize the beneficiary's qualifying experience to meet both the educational and experience requirements of the labor certification. Here, the evaluation states that the beneficiary's "two years of university-level study and thirteen years and seven months of professional experience in Purchasing" are equivalent to a U.S. Bachelor's degree. As noted above, as the letter contains no job duties, the entire experience is not clearly full-time, and the evaluator did not break down or designate what years she relied on, the AAO cannot conclude how much experience was used toward the educational evaluation, and without the job duties cannot conclude that the letter meets the regulatory requirements to document the beneficiary's prior experience.

On appeal, the petitioner has submitted an additional experience letter from [REDACTED] located in [REDACTED] Pakistan, which states the beneficiary worked there as a Purchasing Manager from June 17, 1985 to September 29, 1989. However, this experience is not listed on the 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. Therefore, this experience letter alone is insufficient to demonstrate the beneficiary had 24 months of experience in the job offered or the alternate occupation as listed on the labor certification without corroborating independent objective evidence. Similarly, this letter fails to state the beneficiary's job duties in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(A) and also fails to state the author's title.

The petitioner also provided a letter, dated July 28, 2003, from [REDACTED] indicating its desire to sponsor the beneficiary for an H-1B visa. This letter predates the beneficiary's employment with that company. Therefore, it cannot document his duties and period of employment as it was written before he began employment at that company. The petitioner also provided a letter, dated April 21, 2005 from [REDACTED] indicating the beneficiary's employment will end on June 27, 2005. This letter does not indicate his job title, duties, or confirm the period of employment. Therefore, neither letter meets the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A).

Because the evidence in the record does not establish that the beneficiary possessed the required education and experience set forth on the labor certification by the priority date, the petitioner has failed to establish that the beneficiary is qualified for the offered position. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

#### ***Ability to Pay the Proffered Wage***

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be

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positions the beneficiary held. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that the experience letters provide a description of the beneficiary's experience. The experience letter from PASSCO in the record does not meet this requirement.

accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

The petitioner is a single-member limited liability company (LLC) formed under Nevada state law.<sup>12</sup> Here, the ETA Form 9089 was accepted on March 13, 2009. The proffered wage as stated on the ETA Form 9089 is \$22.79 per hour (\$47,403.20 per year).

The record indicates the petitioner is structured as an LLC and filed its tax returns on IRS Form 1040, Schedule C, as it is taxed as a sole proprietorship for federal tax purposes. An LLC, like a corporation, is a legal entity separate and distinct from its owners. The debts and obligations of the company generally are not the debts and obligations of the owners or anyone else.<sup>13</sup> On the petition, the petitioner claimed to have been established in 2005 and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, signed by the beneficiary on March 1, 2010, the beneficiary claimed to have worked for the petitioner since July 1, 2005 to March 1, 2010, the date of signature.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains

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<sup>12</sup> A limited liability company is an entity formed under state law by filing articles of organization. A limited liability company may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. See 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the petitioner, a single-member LLC, is considered to be a sole proprietorship for federal tax purposes.

<sup>13</sup> Although this general rule might be amenable to alteration pursuant to contract or otherwise, no evidence appears in the record to indicate that the general rule is inapplicable in the instant case.

lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

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>14</sup> If the petitioner's net income or net current assets is 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. Comm'r 1967).

In the instant case, the record reflects that the petitioner paid the beneficiary \$27,400 in 2009 which is less than the proffered wage. The record does not contain any W-2 Forms for 2010 and 2011, which the AAO requested in its RFE. Thus, for those years the petitioner must establish the ability to pay the difference between the proffered wage and wages paid to the beneficiary. Those amounts are:

- 2009 - \$20,003.20
- 2010 - \$47,403.20
- 2011 - \$47,403.20

However, the petitioner's net income<sup>15</sup> as listed on Line 31 of the petitioner's Form 1040, Schedule C, is \$101,627.00, \$73,430.00, and \$100,139.00 for 2009, 2010, and 2011, respectively, which exceeds the difference between the proffered wage and the wages paid to the beneficiary. As stated above, the petitioner is an LLC formed under Nevada state law, is considered to be a sole proprietorship for federal tax purposes. Because an LLC, like a corporation, is a legal entity separate and distinct from its owners, the debts and obligations of the company generally are not the debts and obligations of the owners or anyone else. The director treated the petitioner as a sole proprietor, which also files its tax returns on Form 1040, Schedule C. Sole proprietors must show that they can sustain themselves and their dependents. See *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7<sup>th</sup>

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<sup>14</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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010).

<sup>15</sup> This is listed as "net profit (or loss)" on the Form 1040, Schedule C.

Cir. 1983). However, the proper structure for the petitioner is an LLC.<sup>16</sup> The petitioner has established its ability to pay the beneficiary the proffered wage for 2009, 2010, and 2011. Accordingly, the director's decision regarding the petitioner's ability to pay the proffered wage is withdrawn.

However, as stated above, the petitioner has not established that the beneficiary possessed the education and experience requirements as stated on the labor certification, and therefore, the petitioner has not established that the beneficiary is qualified for the job 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>16</sup> Therefore, as an LLC, the director should not have required the petitioner to provide its owner's personal expenses.