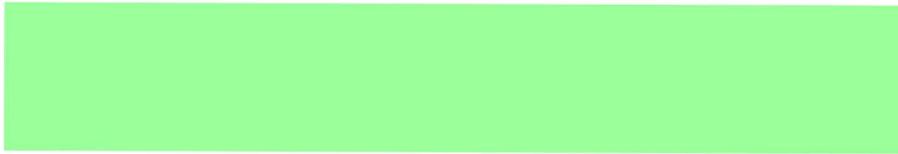


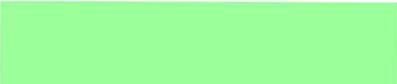
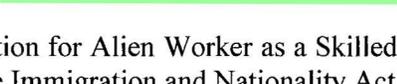


U.S. Citizenship
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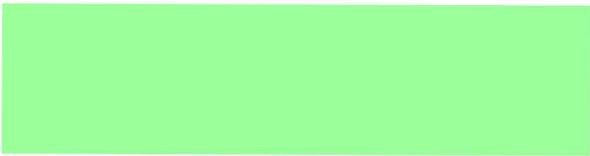


DATE: JUN 06 2013 OFFICE: NEBRASKA SERVICE CENTER FILE: 

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 Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a software development company. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 7, 2005. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification.

The record shows that the appeal is properly filed 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.

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.¹

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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, 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).

(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).² *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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

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

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

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

² Based on revisions to the Act, the current citation is section 212(a)(5)(A) of the Act.

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 professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).³ The AAO will first consider whether the petition may be approved in the professional classification.

³ 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. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational 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)

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.

As is noted above, in order to be classified as a professional, the beneficiary must possess at least a U.S. bachelor’s degree or a foreign equivalent degree from a college or university. 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). It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the Service), responded to criticism that the regulation required an alien to

assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

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

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a *single* foreign degree or its equivalent is required. See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree) (emphasis added).

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.

In the instant case, the minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflects the following requirements:

Block 14:
Education (number of years)

Grade school

ALL

High school	ALL
College	ALL
College Degree Required	BACHELOR'S
Major Field of Study	COMPUTER INFORMATION

Experience:

Job Offered	4 (PROGRAMMER ANALYST)
(or)	
Related Occupation	4 (PROGRAMMER)

Block 15:

Other Special Requirements NONE

As set forth above, the proffered position requires a minimum of a Bachelor's degree in Computer Information and four years of experience in the job offered as a programmer analyst, or four years in a related occupation as a programmer, to qualify for the position.

The labor certification states that the beneficiary possesses a Bachelor's degree in Computer Information System from [REDACTED] Brazil, completed in 1993.

The record contains a copy of the beneficiary's diploma⁴ for the title of Technologist in Data Processing and transcripts from [REDACTED] Brazil, issued in 1993.

The record also contains an evaluation of the beneficiary's educational credentials prepared by Dr. [REDACTED] for the Knowledge Company on April 14, 1999. The evaluation states that the beneficiary's "*Diploma de Tecnólogo em Processamento de Dados* from the [REDACTED] is equivalent to a bachelor's degree in Computer Information Systems offered by an accredited university in the United States."

The record further includes evaluations of the beneficiary's academic qualifications from "Dr." [REDACTED] president of [REDACTED] and of [REDACTED] and from [REDACTED] director of [REDACTED] and a professor at [REDACTED]

⁴ The translation of the diploma for the title of Technologist in Data Processing does not appear to be an accurate translation of the document and thus, does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

the [REDACTED] According to this university's website, [REDACTED] (accessed May 13, 2013), it awards degrees based on experience. Both evaluations concluded that the beneficiary's diploma is the equivalent of a U.S. Bachelor's degree in Computer Information Systems, although [REDACTED] characterized the degree as only "functionally equivalent" to a bachelor's degree. [REDACTED] did not define the term functional or explain why he qualified "bachelor's," but functional would appear to designate the beneficiary's degree as different from, or less than, a bachelor's degree.

On February 19, 2013, the AAO issued a Notice of Intent to Dismiss and Request for Evidence (NOID/RFE), which partially noted the following with regard to the [REDACTED] evaluations:

Ms. [REDACTED] enumerates the beneficiary's subjects and identifies the credit value for each course, concluding that the beneficiary achieved 2,115 classroom hours and 141 semester credit hours. The credit value attributed to each course as well as the value for classroom hours and semester credit hours are taken directly from the translation of the beneficiary's academic transcript. Ms. [REDACTED] does not provide any discussion of the value of a credit hour in Brazil or an assessment regarding how the Brazilian semester credit hour compares with credit hours which are earned in an accredited college or university in the United States. Ms. [REDACTED] simply adds the number of credit hours identified on the translation of the beneficiary's academic transcripts and concludes that since it exceeds 120 semester credit hours, the beneficiary earned the equivalent of a bachelor's degree in the United States. She failed to discuss the requirements of the beneficiary's academic program and how such requirements compare with a baccalaureate program at an accredited college or university in the United States. Ms. [REDACTED] also failed to discuss the coursework which the beneficiary completed and whether all of the coursework was undertaken to fulfill the requirements of the beneficiary's academic program or whether some of the courses fell outside of the required curriculum. Ms. [REDACTED] seems to base her conclusion on the assumption that degrees are awarded simply based upon the total number of credit hours earned rather than completion of a specific required curriculum. She has not explained that the beneficiary completed a bachelor's curriculum or a curriculum which is deemed to be equivalent to a bachelor's curriculum as offered at an accredited college or university in the United States.

In addressing the beneficiary's academic qualifications, Dr. [REDACTED] reiterates the assertions of Ms. [REDACTED] to wit, the beneficiary completed a total of 2,115 classroom hours and 141 credit hours. Dr. [REDACTED] further asserts that, because of the credit hour total of this degree, it is clear that the system under which it has been awarded is one in which instruction is more intensive than comparable programs in the United States. However, such an assertion assumes that all of the courses which the beneficiary completed were required for the academic program which the beneficiary completed. Again, Dr. [REDACTED] fails to address the specific curriculum or requirements for the *Tecnólogo em Processamento de Dados* and provides no discussion related to the

courses which the beneficiary completed. He further makes no attempt to assign credits for individual courses completed by the beneficiary. Rather, Dr. [REDACTED] takes the total credit hours reflected on the translation of the beneficiary's academic transcripts and assumes that the credits correspond to credit hours in accredited colleges and universities in the United States.

The remainder of Dr. [REDACTED] evaluation consists of a general discussion of bachelor degree programs and his assertion that baccalaureate programs in the United States no longer necessarily require four years of education.

The petitioner subsequently submitted an evaluation by [REDACTED] president of [REDACTED] [REDACTED] which concludes that the beneficiary's education is only equal to three years of U.S. undergraduate education. A separate experience evaluation considers the beneficiary's experience from October 1999 to April 2002 as a senior programmer and from February 2003 to December 2004 as a programmer analyst,⁵ and found that the beneficiary's combined education and four years of work experience would be the equivalent of a U.S. Bachelor's in Information Technology awarded by a regional accredited U.S. college or university. This conflicts with the other three evaluations that the petitioner submitted, which find that the beneficiary's degree alone is the foreign equivalent of a U.S. Bachelor's degree. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and that 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, 591-592 (BIA 1988). See *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO's NOID/RFE, set forth in detail inconsistencies identified in the record between the evaluations and the remaining evidence in the record, which will not be duplicated in its entirety here. The AAO also indicated that it had reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).⁶ EDGE states that a Title of Technologist (*Título Tecnólogo*) in the Brazilian

⁵ The petitioner cannot rely on the same experience to show that the beneficiary meets both the education and experience requirements on the labor certification.

⁶ As noted in the NOID/RFE, according to its website, 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." See <http://www.aacrao.org/About-AACRAO.aspx> (accessed May 13, 2013). 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." See <http://edge.aacrao.org/info.php> (accessed May 13, 2013). 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. See "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), which is available for download at:

educational system “represents attainment of a level of education comparable to two to three years of university study in the United States.” The AAO stated that this information was inconsistent with the evaluations of the beneficiary’s credentials, noting that it was incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and that 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, 591-592 (BIA 1988).

The AAO explained in the NOID/RFE that EDGE did not equate the beneficiary’s credentials to a U.S. baccalaureate degree. Further, the AAO noted that the evidence in the record of proceeding at that time did not support a determination that the petitioner intended the actual minimum requirements of the proffered position to include alternatives to a bachelor’s degree, such as the credentials held by the beneficiary, since the petitioner did not state any equivalent on the Form ETA 750. The AAO requested that the petitioner send evidence of its recruitment and its recruitment report if it claimed the intended minimum requirements were less than a bachelor’s degree.

In its March 20, 2013 response to the NOID/RFE, the petitioner failed to address the inconsistencies in the record between the petitioner’s evaluations and other evidence in the record that indicate that the beneficiary’s credentials did not equate to a U.S. baccalaureate degree. Additionally, the petitioner submitted the Bligh evaluation, referenced above, which further conflicted with the other evaluations previously submitted by the petitioner, as the Bligh evaluation stated that the beneficiary’s education was only equivalent to three years of U.S. undergraduate study rather than the foreign equivalent of a U.S. Bachelor’s degree. *See Matter of Ho, supra* (stating that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). In the NOID/RFE, the AAO specifically alerted the petitioner that failure to respond to the NOID/RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. 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). As the petitioner failed to resolve the inconsistencies in the evaluations, and failed submit requested evidence, based on the conclusions of EDGE and after reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a single foreign degree equivalent from a college or university that is equivalent to a U.S. baccalaureate degree.

However, the petitioner, in response to the NOID/RFE, asserts that, as an alternative to the single foreign degree equivalent, the beneficiary possesses an equivalent to a U.S. bachelor’s degree based on a combination of his formal education and work experience at the time of the filing of the labor certification. As noted above, the petitioner submitted a new evaluation by [REDACTED] in support of this claim that the petitioner intended the terms of the labor certification to require credentials, such as the beneficiary’s, as an alternative to an actual U.S. bachelor’s degree. However, as

http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx. 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.* at 11-12.

noted, where a bachelor's degree is required for professional classification, a *single* foreign degree or its equivalent of a U.S. bachelor's degree, is required. *See Snapnames.com, Inc., supra* (holding that where the beneficiary is statutorily required to hold a baccalaureate degree in professional or advanced degree professional cases, a *single* foreign degree or its equivalent is required) (emphasis added); *see also Maramjaya, supra* (for professional classification, the beneficiary must possess a *single* four-year U.S. bachelor's degree or foreign equivalent degree) (emphasis added). A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

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).

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). 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 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, as is discussed above, the minimum requirements for the proffered job as set forth on the labor certification is a bachelor’s degree and four years of experience in the offered job, or four years in the designated related occupation. The labor certification 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.

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. In this case, the Form ETA 750 does not state that an equivalent to a Bachelor’s degree is acceptable.

Nonetheless, the AAO NOID/RFE permitted the petitioner to submit any 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.⁷ Such evidence may establish the petitioner’s intent

⁷ 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

regarding the actual minimum requirements of the offered job position and show whether U.S. workers without a four-year bachelor's degree were in fact put on notice that they were eligible to apply for the position. Thus, 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.

The petitioner, however, failed to provide any of the aforementioned documentation in support of its claim. As noted previously, 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). Further, the Form ETA 750 failed to state any equivalent.

The petitioner failed to establish 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 foreign equivalent degree, 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 minimum of a four-year U.S. Bachelor's degree in Computer Information or a foreign equivalent degree. As noted previously, the beneficiary does not possess such a degree. Thus, the petitioner also failed to establish that the beneficiary meets 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 skilled worker under section 203(b)(3)(A)(i) of the Act.⁸

We note again 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 *14.⁹ In

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 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.

⁸ In addition, for classification as a professional, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification. 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).

⁹ In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or.

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 and does not include the language "or equivalent" or any other alternatives to a 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, and therefore, has 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.¹⁰ The petitioner has also failed to show that the underlying terms of the labor certification support classification of the offered job position under the skilled worker category. 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 addition, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial

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, the Form ETA 750 fails to state any equivalent, or "bachelor's or equivalent," and only states "Bachelor's."

¹⁰ Additionally, if the petitioner relies on the [redacted] experience evaluation, then the petitioner has also failed to demonstrate that the beneficiary has the requisite four years of experience. The [redacted] evaluation considers all of the beneficiary's documented experience from October 1999 to April 2002 as a senior programmer and from February 2003 to December 2004 as a programmer analyst (totaling approximately four and half years) to conclude that the beneficiary has the equivalent of a U.S. Bachelor's degree based on a combination of education and experience. However, the petitioner cannot use that same experience to show that the beneficiary meets both the education and the four years of work experience required on the labor certification, and would also, therefore, fail to establish that the beneficiary has the experience required for the position offered.

in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Thus, beyond the decision of the director, the evidence of record fails to establish the petitioner's ability to pay the beneficiary 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 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 Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, as previously noted, the Form ETA 750 was accepted on February 7, 2005. The proffered wage as stated on the Form ETA 750 is \$80,000 per year.

The evidence in the record of proceeding indicates that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$5,154,735, and to currently employ 20 workers. According to the tax returns in the record, the petitioner's fiscal year is from June 1 to May 31. On the Form ETA 750B, signed by the beneficiary on November 3, 2006, the beneficiary did claim to have worked for the petitioner from December 2004 to the signature date on that form.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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 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 Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date of February 7, 2005 onwards. The record contains the beneficiary's Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, for each year from 2005 through 2008, which show that the petitioner paid the beneficiary the following in each of those years:

<u>Tax Year</u>	<u>Paid Wages</u>	<u>Proffered Wage (\$80,000)</u> <u>Less Paid Wages</u>
2005	\$63,442.27	\$16,557.73
2006	\$71,398.71	\$ 8,601.29
2007	\$72,309.66	\$ 7,690.34
2008	\$64,338.56	\$15,661.44

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. 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). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash

expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. “[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner’s ability to pay. Plaintiffs’ argument that these figures should be revised by the court by adding back depreciation is without support.” *Chi-Feng Chang* at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. The record before the director closed on April 20, 2009, with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2008 federal income tax return was not yet due. Therefore, the petitioner’s income tax return for 2007 is the most recent return available. The petitioner’s tax returns demonstrate its net income for 2005 through 2007, as shown in the table below.

- In 2005, the Form 1120 stated net income of \$80,184.
- In 2006, the Form 1120 stated net income of \$51,811.
- In 2007, the Form 1120 stated net income of \$61,250.

Therefore, for the years 2005 through 2007, it would appear that the petitioner had sufficient net income to pay beneficiary the balance of the proffered wage remaining after deducting the beneficiary’s paid wages for each year. However, as noted by the AAO in the NOID/RFE, according to USCIS records, the petitioner has filed multiple petitions for multiple beneficiaries. Thus, it is required to demonstrate that it has the ability to pay the proffered wages to each of those beneficiaries. *See Matter of Great Wall, supra*. The AAO NOID/RFE requested specific information for each of the employment based petitions that were filed by the petitioner in order to determine whether the petitioner has the ability to pay the full proffered wage to all the beneficiaries of those petitions. The petitioner failed to submit the requested evidence and information in its response, and instead, requested an extension of time to submit the evidence.

Pursuant to the regulation at 8 C.F.R. § 103.2(b)(8)(iv), the maximum response time period provided in a Notice of Intent to Deny may not exceed thirty days and no additional time to respond to a notice of intent to deny may be granted. Thus, the AAO may not grant an extension of time by regulation. Moreover, nearly two months have passed since the AAO's receipt of the petitioner's partial response and request for an extension, and the AAO has yet to receive any further evidence from the petitioner as of the date of this decision related to this material inquiry. Accordingly, the AAO concludes that the petitioner has failed to also submit this requested evidence, precluding another material line of inquiry, which, therefore, serves as an additional ground for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The AAO notes that if the net income the petitioner demonstrates it had available during the relevant period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.¹¹ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2005 through 2007, as shown in the table below.

- In 2005, the Form 1120 stated net current assets (liabilities) of (\$1,662,611).
- In 2006, the Form 1120 stated net current assets (liabilities) of (\$1,318,232).
- In 2007, the Form 1120 stated net current assets (liabilities) of (\$851,079).

Therefore, for the years 2005 through 2007, the record indicates that the petitioner did not have sufficient net current assets to pay the proffered wages of the instant beneficiary or the additional sponsored workers during that time.

Furthermore, the AAO observes that the petitioner's fiscal year runs from June 1 to May 31. Thus, the petitioner's 2005 tax return covers only the period from June 1, 2005 through May 31, 2006, and does not cover the February 7, 2005 priority date. The petitioner has not provided its 2004 tax returns which would go towards establishing the petitioner's ability to pay from the priority date through May 31, 2005. As noted, the petitioner must demonstrate its continuing ability to pay the proffered wage from the *priority date* and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Thus, the petitioner's failure to provide a complete annual report, federal tax return, or audited financial statement for each year from the priority date is sufficient

¹¹According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation at 8 C.F.R. § 204.5(g)(2).

The AAO notes that USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). However, here, without the petitioner's response relating to its other sponsored workers, the AAO cannot conclude that *Sonogawa* should apply. Additionally, the AAO notes that the petitioner's tax returns reflect substantially negative net current assets for each year referenced above.

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

In conclusion, the petitioner has failed to establish that: (1) the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university, such that the beneficiary meets the minimum educational requirements of the offered position set forth on the labor certification to qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act; (2) that the proffered position or the beneficiary could be classified as a skilled worker category under section 203(b)(3)(A)(i) of the Act, because the terms of the labor certification require a minimum of a U.S. bachelor's degree or the foreign equivalent thereof for the proffered position, which the beneficiary does not have; and (3) that the petitioner had the continuing ability to pay the beneficiary the proffered wage from the priority date onward.

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.