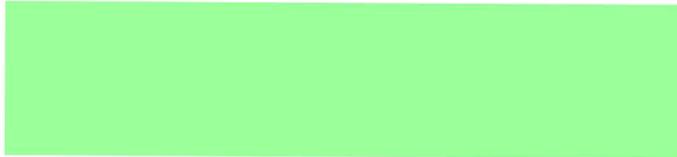


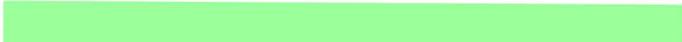
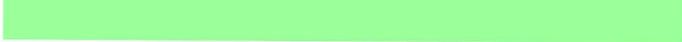


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: JUN 12 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)

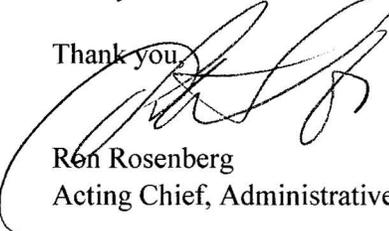
ON BEHALF OF PETITIONER:



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 an interior/antique furniture design company. It seeks to permanently employ the beneficiary in the United States as an interior designer. 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 March 14, 2005. *See* 8 C.F.R. § 204.5(d).

The director's July 22, 2009 decision denying the petition concludes that the petitioner failed to show that the petition was approvable under a professional classification because the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent to satisfy the minimum requirements of the proffered job as set forth in the labor certification. Further, the director held that, even if the petition was considered under the skilled worker category, the petitioner had not defined equivalent and the petition "would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree."

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-

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).

(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).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.

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

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 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

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

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

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

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	8
High school	4

College	4
College Degree Required	BACHELOR OF ARTS OR EQUIV.
Major Field of Study	INTERIOR DESIGN

Experience:

Job Offered	2
(or)	
Related Occupation	NONE

Block 15:

Other Special Requirements NONE

As set forth above, the position offered requires a minimum of four years of college and a Bachelor of Arts degree, or its equivalent, in Interior Design, and two years of experience in the job offered.

The labor certification states that the beneficiary possesses an Associate of Arts degree in Electrical Engineering from [redacted] Taiwan, completed in 1986, and a professional certificate in Interior and Environmental Design from [redacted] at Los Angeles, completed in 1996.⁴

The record contains copies of the beneficiary's graduation certificates for his electrical engineering program of study from [redacted] Taiwan, issued on July 9, 1990, and for Professional Designation in Interior and Environmental Design from [redacted] Los Angeles, [redacted] California, issued on June 18, 1996.

The record also contains three evaluations related to the beneficiary's education. The first evaluation of the beneficiary's credentials was prepared by [redacted] of [redacted] dated May 22, 1997, which found that the beneficiary's diploma for Electrical Engineering from [redacted] to be the equivalent of two years of university-level credit or an associate of applied science degree in electrical engineering technology from an accredited college or university in the United States. It further states that the beneficiary's Professional Designation in Interior and Environmental Design represents completion of a professional program (3 ½ years of university-level credit) from the continuing education division of an accredited U.S. university. The evaluation also considers the beneficiary's experience from 1988 to 1990 and from 1996 to 1997 (3 ½ years total) (employers unstated). The evaluation concludes that the combination of the beneficiary's diploma in Electrical Engineering, professional qualification in Interior and Environmental Design, and 3 ½ years of work experience all combined are the equivalent of a Bachelor's degree in Interior Design from an accredited U.S. college or university.

Another evaluation in the record, dated January 6, 2004, by [redacted], Dean of Studies at [redacted], concludes that the beneficiary's Diploma from [redacted], represents two years of university-level studies, which combined with the completion of

⁴ The transcripts designate the courses taken as, "Professional courses other than Education."

41 courses in Interior and Environmental Design at the [REDACTED], Los Angeles, is the equivalent of a Bachelor's degree in Interior Design from an accredited U.S. college or university. [REDACTED] however, provides no analysis or rationale to support her conclusion.

In contrast to these evaluations, the record contains a third evaluation by [REDACTED] dated January 7, 2004, who concludes that the beneficiary has the equivalent of an Associate of Electrical Engineering degree from an accredited college in the United States based on the beneficiary's studies at [REDACTED] and has been awarded the Professional Designation in Interior and Environmental Design by the [REDACTED] Los Angeles.⁵ [REDACTED] does not, however, conclude that the beneficiary has attained the equivalent of a U.S. Bachelor's degree based on a combination of education at [REDACTED] and the Professional Designation from [REDACTED] or based on a combination of education and experience.

The AAO issued a NOID/RFE to the petitioner and raised the referenced discrepancies in these evaluations and the remaining evidence in the record. However, the petitioner failed to address or resolve these inconsistencies in response to the AAO's NOID/RFE as required. *See Matter of Ho, infra*. 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).

None of the evaluations submitted state, and the petitioner does not contend, that the beneficiary has a single four-year bachelor's degree in the required field of study. Rather, the petitioner contends that, as an alternative to the single foreign degree equivalent, the beneficiary possessed an equivalent to a U.S. bachelor's degree based on either a combination of his formal education or a combination of his education and work experience at the time of the filing of the labor certification. However, as noted, a bachelor's degree is required for professional classification, which must be a *single* foreign degree or the foreign equivalent of a U.S. bachelor's degree. *See Snapnames.com, Inc., supra*

⁵ On appeal, the petitioner submitted a letter from the Manager of Student Relations at [REDACTED] Los Angeles, [REDACTED] dated August 5, 2009. As noted in the AAO's February 8, 2013 Notice of Intent to Deny and Request for Evidence (NOID/RFE), the letter did not indicate that the [REDACTED] was authorized to grant academic degrees. Moreover, the student relations manager stipulates that the university is authorized to grant testimonials, which consist of both degrees and certificates. She also states that the certificate program in interior design is a "post-baccalaureate certificate program" admission, which requires "evidence of a bachelor's degree." However, the [REDACTED] describes itself on its own website as a "comprehensive *continuing higher education* provider[]," and indicates on its Frequently Asked Questions webpage that a college (bachelor's) degree is not needed to enroll in a course or program. The AAO noted this discrepancy in its NOID/RFE and 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner, however, failed to address this inconsistency in its response to the AAO NOID/RFE. Additionally, as noted above, the beneficiary's transcript for the [REDACTED] program lists that he took courses in the 400-course numbering system, which the transcript indicates are "Professional courses other than Education."

(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. As set forth above, the beneficiary does not have a single four-year degree that is the equivalent of a U.S. Bachelor's degree. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The petitioner, on appeal, asserts that the petition should be considered under the skilled worker category. The AAO will 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(l)(2).

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

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

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

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and 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 four-year Bachelor’s degree in Interior Design or equivalent, plus two years of experience in the offered job. USCIS determined that labor certification did 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 petitioner, however, contends that the term “bachelor of arts or equivalent” on the labor certification cannot be construed so strictly as to require a minimum of a foreign equivalent *degree* to qualify for the proffered position. Rather, the petitioner asserts that the term is sufficiently broad to allow for a combination of education and work experience that is equivalent to a bachelor’s degree to meet the labor certification requirements.

The DOL has provided the following field guidance related to this issue: when the Form ETA 750 indicates, for example, that a “bachelor’s degree in computer science” is required, and the beneficiary has a four-year bachelor’s degree in computer science from the [redacted] “there is no requirement that the employer include ‘or equivalent’ after the degree requirement” on the Form ETA 750 or in its advertisement and recruitment efforts. *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). Further, where the Form ETA 750 indicates that a “U.S. bachelor’s degree or the equivalent” may qualify an applicant for a position, where no specific terms are set out on the Form ETA 750 or in the employer’s recruitment efforts to define the term “equivalent,” “we understand [equivalent] 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) (emphasis added). Where the Form ETA 750 indicates, for example, that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor’s degree, “the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative [to the degree] 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). State Employment Security Agencies (SESAs) should “request the employer provide the specifics of what is meant when the word ‘equivalent’ is used.” *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). Finally, 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 [U.S. Citizenship and Immigration Services (USCIS)] to accept the employer's definition." *Id.* To our knowledge, the field guidance memoranda referred to here have not been rescinded.

The petitioner did not specify on the Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees or programs of study that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test.

Although the clearly stated requirements of the position on the certified labor certification application do not include alternatives to a four-year U.S. bachelor's degree, it is the petitioner's contention during the petition process before USCIS that the actual minimum requirements do include at least what the beneficiary has achieved through his combined education and/or his combined education and experience. This creates an ambiguity concerning the actual minimum requirements of the proffered position. In part due to this ambiguity, the AAO issued the NOID/RFE to obtain evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Such intent may have been illustrated through correspondence with DOL, amendments to the labor certification application initialed by DOL and the petitioner, results of recruitment, or other forms of evidence relevant and probative to illustrate the petitioner's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

Accordingly, 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.⁶ Such evidence may establish the petitioner's intent 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

⁶ 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 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.

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, as well as any other communications with the DOL that may be probative of the petitioner's intent. The record already contained copies of three newspaper advertisements placed by the petitioner for the offered job, which advertised the offered position as requiring a "Bachelor's or equiv. in Interior Design" and two years of experience. The AAO noted in the NOID/RFE that these advertisements, on their own, were insufficient to demonstrate the petitioner's intent with respect to its educational and experience requirements for the position.

In response to the NOID/RFE, the petitioner submitted counsel's brief; a copy of the approved labor certification; the job posting notice; and previously submitted letters from the president of the petitioning company, and the beneficiary's educational and employment experience records already in the record.

The petitioner, however, failed to provide any of the remaining aforementioned documentation requested by the AAO to demonstrate the petitioner's intent, including the recruitment report or resumes submitted, which may have demonstrated that the petitioner considered applicants with a combination of education and work experience, combination of education, or something less than a full four-year bachelor's degree. 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). The assertions of counsel regarding the petitioner's intent during the recruitment process do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the petitioner did not submit all the requested documentation, the petitioner has 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 Interior Design or a foreign equivalent degree. As noted previously, the beneficiary does not possess such a bachelor's degree. Thus, the petitioner has 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.⁷

⁷ 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).

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 *14.⁸ 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, the required education stated on the labor certification in this case does include the language “or equivalent.” However, the petitioner has failed to demonstrate its intent that the minimum requirements for the proffered position allowed for an equivalent to a U.S. bachelor’s degree that could be based on a combination of education and/or a combination of education and work experience. The petitioner was afforded an opportunity to: (1) resolve the inconsistencies in the three evaluations that it submitted; and (2) demonstrate the petitioner’s intent regarding “or equivalent.” The petitioner failed to address the inconsistencies in the evaluations submitted and failed to submit the additional requested recruitment documentation or recruitment report, which would have allowed the AAO fully assess the petitioner’s intent and whether the petitioner allowed for and considered potential qualified U.S. candidates with less than a four-year bachelor’s degree. Likewise, the petitioner has failed to demonstrate that U.S. workers without a four-year bachelor’s degree were in fact put on notice that they were eligible to apply for the offered job.

As the petitioner failed to address the inconsistencies in the evaluations, it is unclear whether the petitioner can establish that the beneficiary has the equivalent of a U.S. Bachelor’s degree; whether that equivalency would be based on combined education alone, or based on combined education and work

⁸ 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.

experience; or whether the Professional Designation is appropriately equivalent to any partial bachelor's equivalency. Therefore, the petitioner has not established that the beneficiary has the equivalent of a bachelor's degree. Additionally, as the basis of the beneficiary's equivalent degree, if any, is unclear, the AAO cannot conclude that the "or equivalent" would sufficiently express the true minimum of what the petitioner was willing to accept, as the labor certification does not specify whether any equivalent could be met through solely education, or through a combination of education and work experience. Thus, the petitioner has not established that the petitioner expressed any equivalency to potential qualified U.S. citizens.

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

In 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 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 at 145 (noting that the AAO conducts appellate review on a *de novo* basis).

Thus, beyond the decision of the director, the evidence of record also 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 March 14, 2005. The proffered wage as stated on the Form ETA 750 is \$15.00 per hour, equivalent to \$31,200 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 1986, to have a gross annual income of \$1,452,370, and to currently employ 5 workers. On the Form ETA 750B, signed by the

beneficiary on March 9, 2005, the beneficiary did claim to have worked for the petitioner from September 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, 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).

Accordingly, the AAO NOID/RFE observed that the record only contained the petitioner's tax returns for 2005 and specifically notified the petitioner that it was required to provide its annual reports, federal tax returns, or audited financial statements *for each year from the priority date*. *See* 8 C.F.R. § 204.5(g)(2). Thus, the petitioner was asked to provide any of the three aforementioned financial records for each of the years that in which these records were lacking, namely 2006 through 2011. In addition, the petitioner was asked to submit Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued to the beneficiary by the petitioner for 2007 through 2011.⁹ Although the petitioner submitted the requested W-2 Forms for the beneficiary, it failed to submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. The AAO notes that from 2005 through 2010, the beneficiary's W-2 Forms indicate that he was paid above the proffered wage for each year, which suggests that petitioner may be able to demonstrate its ability to pay. However, the 2011 W-2 Form indicates the beneficiary was paid only \$25,600 in wages, which is less than the proffered wage. Thus, without the petitioner's annual report, federal tax return or audited financial statement for 2011, the AAO is unable to determine whether the petitioner has the ability to pay the beneficiary the balance of the proffered wage remaining after deducting the wages paid to the beneficiary, utilizing the petitioner's net income or net current assets for that year. Additionally, as indicated, the petitioner failed to send, and the record lacks, evidence pursuant to 8 C.F.R. § 204.5(g)(2), in the form of a federal tax return, annual report, or audited financial statement for 2006 through 2011. Without the petitioner's 2011 tax return, or tax returns for other years, the AAO cannot determine whether *Matter of Sonogawa* should apply. In any future filings, the petitioner must submit its annual reports, federal tax returns, or audited financial statements *for each year from the priority date* to demonstrate its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2).

Therefore, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary from the priority date onwards.

⁹ The record already contained the beneficiary's W-2 Forms for 2005 and 2006.

In conclusion, the petitioner: (1) has failed to establish that 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) has failed to establish that the terms of the labor certification require less than a U.S. bachelor's degree for the proffered position, including such as that which the beneficiary possesses, in order to qualify under the skilled worker category pursuant to section 203(b)(3)(A)(i) of the Act; and (3) has failed to establish 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.