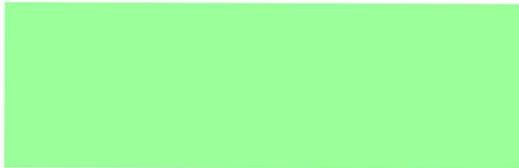




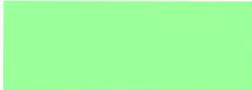
U.S. Citizenship  
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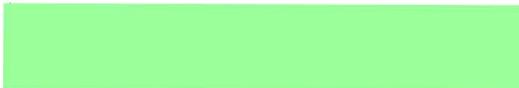


DATE: JUN 17 2013

OFFICE: TEXAS SERVICE CENTER

FILE: 

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Texas 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 skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).

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 June 28, 2002. 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.<sup>1</sup>

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

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 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).<sup>2</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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

*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:

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<sup>2</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(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(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, the labor certification states that the offered position has the following minimum requirements:

**EDUCATION**

College: Four years.

College Degree Required: “BS.”

Major Field of Study: “Comp Sciec/Math/Equi.”

**TRAINING:** None Required.

**EXPERIENCE:** Two years in the job offered.

**OTHER SPECIAL REQUIREMENTS:** None.

In the instant case, the labor certification, Form ETA 750 Part B, Section 11, which requests information on the beneficiary’s education, is blank, and therefore does not state whether the

beneficiary possesses any qualifying education.

The record contains a copy of the beneficiary's Bachelor of Science diploma, and transcripts, from the [REDACTED], India, issued in 1992. The diploma states the beneficiary's major field of study to be "Chemistry (Major)." The record also contains a copy of the beneficiary's "Professional Diploma in Software Technology and Systems Management," and transcripts, from [REDACTED] India, issued in 1999.

The petitioner provided four evaluations of the beneficiary's academic credentials. In its Request for Evidence (RFE), dated November 16, 2012, the AAO analyzed each evaluation and informed the petitioner that, as the evaluations arrived at differing conclusions<sup>3</sup> as to the beneficiary's credentials,

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<sup>3</sup> An evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED], dated August 28, 2009, concludes that the beneficiary's three-year Bachelor of Science degree from the [REDACTED] alone is equivalent to a four-year "US Bachelor of Science Degree with a Concentration in Computer Science." The evaluator did not indicate any basis for her conclusion that the beneficiary's three-year degree in chemistry was equivalent to a four-year U.S. bachelor's degree in computer science.

An evaluation from [REDACTED] for [REDACTED] dated August 25, 2009, concludes that the beneficiary's bachelor's degree in chemistry has "functional parity" with a concentration in computer science, by finding "an additional equivalency between [the beneficiary's] degree with coursework in mathematics and physics and a concentration in computer science." [REDACTED] makes this conclusion by stating that the "first generation of professionals in computer science ... were graduates in theoretical physics or mathematics." [REDACTED] further speculates that the admission requirements for a master's program in computer science, which might admit students with bachelor's degrees in other disciplines, justify the conclusion that the beneficiary's degree in chemistry is equivalent to a degree in computer science. [REDACTED] conclusion that the admission requirements for post-graduate study can demonstrate the equivalency of two disparate undergraduate degrees is not sufficiently established; the degree requirement at issue is for an offer of employment, which presumes a minimum level of education, set by the petitioner, in a specific subject matter, determined by the petitioner, so that the employee may perform in the position upon hiring. [REDACTED] argument is not persuasive, as the admission requirements for postgraduate studies may be generalized, as the purpose of those programs is the student's further education in a specific subject matter, and the postgraduate student has the opportunity to take additional courses after admission to ensure their competency in the program's subject matter area prior to completing the postgraduate degree. This evaluation did not provide a credible basis to demonstrate that the beneficiary's three-year Bachelor of Science with a major in chemistry meets the positions' minimum requirements.

An evaluation from [REDACTED] dated July 10, 2007, did not indicate what documents were reviewed, or what sources were relied on in making the evaluation, or what credentials were reviewed, and does not indicate the beneficiary by name. The evaluation does not conclude that the beneficiary's education equates to any individual area of study. Therefore, this evaluation did not provide a credible basis for its conclusion.

the evaluations did not provide a credible basis to conclude that the beneficiary's three-year Bachelor of Science in Chemistry satisfied the minimum requirements for the position offered as stated on the labor certification, which included a four-year Bachelor's of Science in computer science, math, or an equivalent field of study.

On appeal, the petitioner relies on the beneficiary's three-year bachelor's degree combined with the diploma from [REDACTED] as being equivalent to a U.S. bachelor's degree. 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.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, 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>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* <http://edge.aacrao.org/info.php>. Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.<sup>4</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>5</sup>

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An evaluation prepared by [REDACTED] for [REDACTED] dated August 30, 2006, concludes that the combination of the beneficiary's Bachelor of Science from the [REDACTED] and the beneficiary's Professional Diploma from [REDACTED] were equivalent to a U.S. awarded "Bachelor of Science degree in Computer Information Systems." This evaluation diverges from the other evaluations in the record, in that it asserts that a combination of the beneficiary's academic credentials are required to meet the minimum requirements for the position offered, whereas the evaluations discussed above suggest that the beneficiary's undergraduate degree in chemistry alone is the foreign degree equivalent to a U.S. Bachelor's degree in computer science.

<sup>4</sup> *See An Author's Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/Libraries/Publications\\_Documents/GUIDE\\_TO\\_CREATING\\_INTERNATIONAL\\_PUBLICATIONS\\_1.sflb.ashx](http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx).

<sup>5</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations

According to EDGE, a three-year Bachelor of Science degree from India is comparable to “three years of university study in the United States.”

EDGE further discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor's degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate diploma following a three-year bachelor's degree represents attainment of a level of education comparable to a bachelor's degree in the United States. However, the “Advice to Author Notes” section states:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

In the instant case, the record does not contain any evidence that would establish whether the beneficiary's diploma from [REDACTED] in Software Technology and Systems Management was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor's degree was required for admission into the program of study. The record, including the evaluations provided by the petitioner, does not document the entrance requirements for the program at [REDACTED]. The AAO notified the petitioner of this issue in its RFE; in addition, the AAO's RFE notified the petitioner that online materials published and maintained by [REDACTED] stated that [REDACTED] did not institute a “professional degree program” until its 2002-2003 academic year.<sup>6</sup> Further, [REDACTED] website indicates that completion of their “professional degree” program “gives [REDACTED] graduates] advance standing admission benefits to Semester 3 & 4 of BSc.” *Id.* This suggests that the program offered by [REDACTED] is not a post-graduate program. In response to the AAO's RFE, the petitioner did not provide any information or documentation on [REDACTED], or the diploma program, or its admission requirements.

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submitted and the information obtained from EDGE to conclude that the alien's three-year foreign “baccalaureate” and foreign “Master's” degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

<sup>6</sup> See [REDACTED] *Graduate & Postgraduate in IT Programs*,

[REDACTED] (accessed June 12, 2013).

EDGE also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. EDGE provides that a postsecondary diploma is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree.

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in computer science, math, or an equivalent. The AAO informed the petitioner of EDGE's conclusions in its RFE, and requested that the petitioner provide evidence, including any additional credentials evaluations, to document whether the beneficiary possessed the foreign equivalent of a U.S. bachelor's degree in computer science, math, or an equivalent.

In response to the RFE, counsel submits a letter from the petitioner and an affidavit from the beneficiary. The petitioner does not clarify the nature of the beneficiary's credentials, other than to state, "the Beneficiary herein amply demonstrated to us at the initial time of hire in or about April, 2001 that he had the educational equivalent of a U.S. bachelor's degree in Computer Science or Mathematics based on the evaluation of his diplomas and certificates from India."<sup>7</sup> The beneficiary's affidavit does not provide any information about his diploma or the program from

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.<sup>8</sup> Nonetheless, the AAO RFE permitted the petitioner to submit any evidence indicating that it intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree,

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<sup>7</sup> It is unclear from the petitioner's statement what, if any, evaluations the petitioner relied on at the time of the beneficiary's hire. As discussed above, each evaluation in the record postdates the beneficiary's date of hire by the petitioner. See n.3.

<sup>8</sup> The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.<sup>9</sup> Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. In addition, the AAO requested that the petitioner provide any other communications with the DOL that could be probative of the petitioner's intent, including correspondence or documents generated in response to an audit.

In response to the AAO's RFE, the petitioner provided: a copy of the recruitment instructions issued by DOL to the petitioner on May 31, 2007; a recruitment report sworn to by the petitioner on July 24, 2007; three advertisements that were published in the [REDACTED] for three days beginning on June 24, 2007; a posting from the petitioner's website; and a posting notice.<sup>10</sup> The petitioner states that its prior counsel did not provide it with "a full compliance file containing a recruitment report or copies of all advertisements." The petitioner states that it does not have copies of advertisements placed in 2002, however, the petitioner does not indicate what, if any, recruitment was performed in 2002, or what, if any, steps the petitioner took to obtain copies of the advertisement(s) it placed in 2002.<sup>11</sup> While the

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<sup>9</sup> In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of 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.

<sup>10</sup> The "Notice of Job Offer" provided from the petitioner is entirely machine-printed, including the dates of posting, which appear to have been printed on the posting notice prior to its posting. The dates of posting indicated on the face of the posting notice are April 29, 2002, to May 21, 2002. The petitioner's statement states that the response includes "a Notice of Filing" which was posted at the "job premises from June 15 - July 2, 2007." This 2007 notice of filing is not in the record.

<sup>11</sup> Item 21 on the labor certification states that the petitioner's recruitment efforts included, "advertised in the newspaper," and "notice of job offer." The petitioner indicates that its counsel in 2002 was [REDACTED], an attorney later convicted of an immigration fraud scheme. See generally [REDACTED] (accessed June 12, 2013). However, the labor certification was received by DOL on June 28, 2002, and while pending the original labor certification was updated to include different counsel as well as a new address for the beneficiary. These changes are undated. Thus, while the labor certification was pending, the petitioner obtained new counsel who represented the petitioner during future correspondence with DOL including the 2007 recruitment. The AAO notes that current counsel did not represent the petitioner during the labor certification process or during the petitioner's first I-140

AAO requested that the petitioner provide “any other communications with the DOL that may be probative of your intent,” no documentation or correspondence prior to May 2007 was provided. Counsel for the petitioner stated, “[t]he record reflects that the Department of Labor thoroughly vetted and reviewed the ETA750 submitted by [prior counsel] on the Petitioner’s behalf over several years. In fact, in December 2006, [DOL] issued a ‘Notice of Finding’ to [the petitioner].” Counsel provides a quote, purportedly from the Notice of Finding, stating, “[t]he NOF requested ‘further information to determine whether this application represents a bona fide opportunity which is open to qualified U.S. workers.’” Counsel states that the petitioner responded to this NOF and provided additional evidence, however, the record does not contain any correspondence to or from DOL in December 2006. While counsel’s statement regarding this correspondence, and ability to quote from the DOL’s letter, suggests that this material was in the petitioner’s possession, it was not provided in response to the AAO’s RFE. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). 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).

However, the petitioner did conduct recruitment pursuant to DOL instructions issued in May 2007. The three advertisements from the [redacted] state that the minimum degree required to apply for the position was a “Bach in Comp Sci.” The plain language used does not suggest that the petitioner notified qualified U.S. workers that it would accept a quantitatively lesser degree or defined equivalency. The AAO finds that these three advertisements failed to advise DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency.

The petitioner’s website posting did not list any required education for the position.<sup>12</sup> The internal posting notice from 2002, if credible, would indicate the minimum requirements for the position included a “BS Comp Science/Math/Equi,” but did not what, if any, equivalent degree would be accepted. The AAO finds that the internal posting failed to advise DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. The plain language used suggests that the petitioner is willing to accept alternative major fields of study, including computer science or math, but does not indicate that the petitioner notified qualified U.S. workers that it would accept a quantitatively lesser degree or defined equivalency.

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petitioner for this beneficiary, and has represented the petitioner in the instant I-140 petition and this appeal.

<sup>12</sup> The website posting provided is titled “Current job openings” and provides a bulleted list of positions including “Oracle Applications Programmers,” “Web Developers,” and “MS Access / Visual Basic Programmers.” The petitioner did not indicate which listing was intended to represent the offered position, programmer analyst. None of the job listings provide any education requirements, and do not state what amount of experience, if any, was required. Further, this print out does not indicate the website address, website title, or date printed. Therefore, the AAO does not find this evidence to be probative of the petitioner’s intent during the labor certification process.

In response to the AAO's RFE, counsel asserts that the petitioner "at no time intended to require that the applicant possess a single four year degree," as "[s]uch a finding would fly in the face of reason as it is clear that the Beneficiary herein does not possess [sic] a singular four year degree. Both the New York State and U.S. Department of Labor were fully aware of this fact." At the outset, the AAO notes that the labor certification signed by the petitioner and beneficiary indicates that the beneficiary did not have any relevant education; this omission casts doubt on counsel's assertion that the New York State and U.S. Department of Labor were fully aware of the beneficiary's credentials. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Further, while counsel has alleged that the DOL "thoroughly vetted and reviewed the ETA750," after correspondence to and from the petitioner in 2006, evidence of this correspondence was not provided. The AAO specifically requested evidence of the petitioner's correspondence with DOL. As noted above, 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, it is incumbent upon the petitioner to resolve the inconsistencies by independent, objective evidence. *Matter of Ho*, 19 I&N at 591-592 ("[a]ttempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice").

Counsel's assertion that the petitioner "clearly ... did not limit the application pool only to individuals with four year degrees" is not supported by the evidence. The labor certification states that the minimum requirements are four years of college education, a bachelor of science degree, and a major field of study in computer science, math, or an equivalent field of study. The advertisements prepared and placed by the petitioner and new counsel in 2007 stated that the petitioner's position was open to individuals possessing a bachelor's degree in computer science, and did not state that any equivalent degree, lesser degree, or combination of degrees would be acceptable. The AAO finds that the petitioner has not demonstrated that its intent at the time the labor certification was prepared in 2002, or at the time the petitioner placed its advertisements in 2007, was to accept a quantifiably lesser degree than a four-year U.S. bachelor's degree, or foreign degree 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 four-year U.S. bachelor's degree in computer science, math, or an equivalent field of study, or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor

certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a “B.S. or foreign equivalent.” The district court determined that “B.S. or foreign equivalent” relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word “equivalent” in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at 14.<sup>13</sup> In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner’s asserted intent, USCIS “does not err in applying the requirements as written.” *Id.* See also *Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008) (upholding USCIS interpretation that the term “bachelor’s or equivalent” on the labor certification necessitated a single four-year degree).

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the required education is clearly and unambiguously stated on the labor certification and does not include the language “or equivalent” or any other alternatives to a four-year bachelor’s degree. The petitioner plainly stated that four years of college and a bachelor’s degree were the minimum requirements for the position offered on the labor certification. The only apparent ambiguity on the face of the labor certification concerns the major field of study required, which was not the basis for the director’s decision, the AAO’s RFE, or this decision. In the instant case, the AAO provided the petitioner the opportunity to establish its intent regarding the terms of the labor certification and the minimum educational requirements of the labor certification. The petitioner failed to establish that stating a major field of study requirement of “Comp Science/Math/Equi” was intended to mean that the required education could be met with an alternative to a four-year U.S. bachelor’s degree or a foreign equivalent degree.

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<sup>13</sup> In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993) (the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

In summary, the petitioner has failed to establish that the beneficiary possessed a four-year U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

The labor certification states that the offered position requires two years of experience in the offered position, Programmer Analyst.

Part B, Item 15 of the labor certification states that the beneficiary qualifies for the offered position based on experience as a Programmer with [REDACTED] in Bombay, India, from 1996 to 2000. The beneficiary did not indicate the month that his employment began or ended. The beneficiary listed employment as a Programmer Analyst with [REDACTED] in New York from 2000 to 2001, again without indicating the month his employment began or ended. The beneficiary also listed his employment with the petitioner as a Programmer Analyst. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter, dated January 4, 2000, titled "Experience & Salary Certificate," from the General Manager of [REDACTED] on company letterhead stating that [REDACTED] employed the beneficiary as a Programmer from December 1, 1996, until January 4, 2000. The AAO's RFE notified the petitioner that this letter was insufficient to document the beneficiary's claimed experience, as the employer name on the letter varied from that claimed by the beneficiary on the labor certification, and as the letter did not

indicate whether the beneficiary was employed full-time or part-time. Further, the beneficiary's resume states that his employment with [REDACTED] continued until only October 1999. The AAO notified the petitioner that these issues cast doubt on the beneficiary's claimed employment experience, and that these inconsistencies must be overcome by independent, objective evidence. *Matter of Ho*, 19 I&N at 591-92.

In response to the AAO's RFE, the petitioner provided an affidavit from the beneficiary,<sup>14</sup> in which the beneficiary states: (1) that he was employed by [REDACTED] from December 1996 to January 2000; (2) that his employment was full-time; (3) that "[c]ontrary to the AAO's assertions, the letter from [REDACTED] clearly states, 'He was working as a **full-time employee in the company**' (emphasis in original); and (4) that the resume was prepared for a job application with [REDACTED] and was not updated when the beneficiary "submitted an updated resume to my current employer and previous counsel." The petitioner provided two letters from [REDACTED], an appointment letter dated December 1, 1996, and an "Experience & Salary Certificate" dated January 6, 2000. The appointment letter states that the beneficiary will be a full-time employee of the company. This letter predates the beneficiary's employment, and therefore cannot be considered credible evidence of his full-time employment for the period claimed. However, the January 6 experience certificate differs from the January 4 experience certificate previously in the file. Further, the beneficiary's affidavit indicates that these letters are the same letter, however, they bear different dates and minor variances in punctuation and formatting. Most importantly, however, the first paragraph of the January 4 letter is one sentence long and states the dates of the beneficiary's employment only,<sup>15</sup> whereas the January 6 letter, provided for the first time in response to the AAO's RFE, contains a similar first paragraph with additional punctuation and the addition of a second sentence, which states, "[h]e was working as a full-time employee in the company." Neither the petitioner nor the beneficiary provide an explanation as to why this company purportedly issued two experience letters within two days of each other, with similar content, except for the addition of a single sentence which addresses the issue raised by the AAO. Further, this second letter does not appear to be authentic, as the letterhead is faded and marred, yet the text in the body of the letter is clear and bright. Further, the signature on the letter appears to have been photocopied. The AAO cannot accept the January 6 letter as credible evidence. Therefore, this additional evidence does not overcome the inconsistencies in the record.

The record also contains an "experience certificate," dated April 1, 2001, from [REDACTED] indicating the beneficiary was employed from January 29, 2000, to March 2001 as a Programmer Analyst. The letter does not state whether the beneficiary's employment was full-time or part-time, or the day on which the beneficiary's employment ended. Therefore, the AAO's RFE notified the

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<sup>14</sup> The beneficiary's affidavit is self-serving and does not provide independent, objective evidence of his prior work experience. See *Matter of Ho*, 19 I&N at 591-592.

<sup>15</sup> The sentence in full states, "[t]his is to certify that [the beneficiary] was employed in [REDACTED] division of [REDACTED] Mumbai, company that is into providing software solutions for computer telephony products, during the period 1<sup>st</sup> December 1996 to 4<sup>th</sup> January 2000 as a **Programmer**." (emphasis and punctuation in original).

petitioner that this letter was insufficient to allow the AAO to determine the extent of the beneficiary's claimed experience with [REDACTED]. In response, the petitioner has provided a letter, dated April 1, 2001, from [REDACTED]. This letter states the beneficiary's employment ended March 28, 2001, and also states that the beneficiary was "working as full-time employee." Neither the petitioner nor the beneficiary provide an explanation as to why this company purportedly issued two experience letters on the same day, both with very similar content, except for the addition of the beneficiary's last day of employment and a statement that his employment was full-time. Thus, the only difference between these two letters are two additions which address the issues raised by the AAO. In addition, this second letter does not appear to be authentic, as the signatures on these two letters, which were purportedly signed the same day by the same person, contain signatures that vary significantly. The AAO cannot accept this letter as credible evidence. Therefore, this additional evidence does not overcome the inconsistencies in the record.

Therefore, the evidence in the record is not sufficient to establish that the beneficiary possessed the two years of experience in the offered position, Programmer Analyst, by the priority date as required by the terms of the labor certification. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

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 (9<sup>th</sup> 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden

**ORDER:** The appeal is dismissed.