

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

(b)(6)

DATE: JUN 18 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,


Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

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

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 13, 2004. 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 and for classification as a professional.

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

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

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

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time

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).

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).

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

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.

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the

record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

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(1)(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).

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 labor certification states that the proffered position requires three years of college education culminating in a bachelor's degree or U.S. equivalent in business administration. As the proffered position requires less than a four-year degree, the petition may not be approved in the professional classification.

The labor certification further states that the beneficiary possesses a Bachelor of Arts degree in English from [REDACTED] India, completed in 1979.

The record contains a copy of the beneficiary's Bachelor of Arts diploma showing the beneficiary's passage of English in Part I and of history, political science, and public administration in Part II (optional) and one page of the associated academic transcripts from [REDACTED].

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED] for [REDACTED] on July 16, 2003. The evaluation concludes that the beneficiary's Bachelor of Arts degree from [REDACTED], when combined with his 17 years of experience, is equivalent to a bachelor of business administration degree from an accredited institution of higher education in the United States.

In specifically addressing the beneficiary's Bachelor of Arts degree from [REDACTED], [REDACTED] states:

[The beneficiary] completed coursework in general studies and in his area of concentration, which leads to a degree from the University. General studies coursework includes courses in mathematics and the sciences, which are a requisite component of a Bachelor's degree from an institution of higher education in the United States. Additionally, [the beneficiary] completed coursework in his area of concentration, and other related areas. The courses completed and the number of credit hours earned indicate that [the beneficiary] satisfied requirements *substantially similar* to those required *toward the completion* of academic studies from an accredited institution of higher education in the United States (emphasis added).

First, [REDACTED] states that the beneficiary completed studies in "his area of concentration," without identifying the area of concentration. According to the degree certificate and the single page of the academic transcripts supplied, the beneficiary concentrated his studies in English with secondary concentration among three fields: history, political science, and public administration. However, the academic transcript shows no evidence of the beneficiary's having completed any coursework in the field of business administration. Second, [REDACTED] does not claim that the beneficiary's Bachelor of Arts degree, alone, is equivalent to a U.S. baccalaureate degree, only that the studies undertaken are "substantially similar" to those required "toward" the completion of academic studies "from an accredited institution of higher education in the United States." [REDACTED] does not discuss any of the courses in detail. Nor does he explain precisely how these courses or the program, as a whole, compare with a baccalaureate program, which a student would complete at a U.S. college or university.

[REDACTED] addresses the beneficiary's "more than seventeen years of professional training and work experience in Business Administration, and related areas." [REDACTED] assessment consists of an enumeration of the positions which the beneficiary held from 1983 through 1998,⁴ including identifying the general responsibilities associated with each position. The [REDACTED] evaluation

⁴ The experience claimed amounts to 15 years rather than 17, as asserted by [REDACTED].

then considers the combination of education and experience to be equivalent to a four-year U.S. baccalaureate degree based upon “the equivalency ratio mandated by the Bureau of Citizenship and Immigration Services of three years of work experience for one year of college training.” However, that equivalence formula applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien’s eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert’s qualifications or the relevance, reliability, and probative value of the testimony).

The petitioner relies on the beneficiary’s three-year bachelor’s degree and work experience 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.

Considering the deficiencies in [redacted] evaluation, 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.⁵ 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

⁵ *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.

information about foreign credentials equivalencies.⁶

According to EDGE, a Bachelor of Arts degree from India is “[a]warded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate (or equivalent).” In its author notes, EDGE states, “a great majority of the BA, BCom, BSc, and BBA degrees in India are awarded after three years of tertiary study beyond grade twelve. You will occasionally encounter a bachelor awarded after two years of study. These are generally older degrees that have been phased out in favor of the three-year model.” EDGE indicates “[i]t is important to carefully examine the transcript to determine the number of years of study required to receive the degree.” EDGE concludes “[t]he Bachelor of Arts/Bachelor of Commerce/Bachelor of Science represents attainment of a level of education comparable to two to three years of study in the United States.”

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 business administration. The beneficiary’s field of study is additionally in the wrong field to be able to qualify him for the proffered position. No equivalency or multiple fields were set forth on the labor certification application. The AAO informed the petitioner of EDGE’s conclusions and other deficiencies in the record in a Request for Evidence (RFE) dated July 6, 2012.

In response to the RFE, counsel submits a letter, stating that the labor certification requires only three years of college equivalent to a bachelor’s degree in the United States. Counsel claims that the beneficiary met the requirements of the position as of the priority date. The petitioner submits a May 11, 2007 letter that it sent to the DOL, indicating that it had received no other resumes in response to its job announcement for the proffered position. The petitioner provided copies of the posting notice, which stated the academic requirement of a bachelor’s degree in business administration, and copies of ads, which stated the academic requirement of a bachelor’s degree in management or the U.S. equivalent.

Counsel’s response to the RFE points to the Form ETA 750A items 14 and 15, which state that the proffered position requires a three-year bachelor’s degree. Counsel suggests that the fact that the

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

beneficiary possesses a three-year bachelor's degree confirms that the beneficiary meets the minimum academic requirements. Counsel fails to address at all the field of study as listed on the labor certification (business administration) and the field of study of the beneficiary's degree (English). The AAO does not disagree that the beneficiary does, in fact, possess a three-year bachelor's degree. However, the petitioner has failed to demonstrate that the beneficiary's degree is in a field listed on the labor certification as required for the proffered position.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university in business administration, the field required by the labor certification. The petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The AAO will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) states:

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

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(1)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(1)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in

order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

EDUCATION

Grade School: 6 years.

High School: 6 years.

College: 3 years.

College Degree Required: Bachelor or U.S. equivalent.

Major Field of Study: Business administration.

TRAINING: None Required.

EXPERIENCE: Three years in the job offered.

OTHER SPECIAL REQUIREMENTS: None.

As is discussed above, the beneficiary possesses a Bachelor of Arts degree in English from [REDACTED], India, completed in 1979, which is equivalent to two to three years of study in the United States. The credential evaluation by [REDACTED] concludes that the beneficiary's degree and work experience is equivalent to a bachelor of business administration degree.

The labor certification does not permit a combination of degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.⁷ Nonetheless, the AAO's RFE permitted the

⁷ 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

petitioner to submit any evidence that it intended the labor certification to require an alternative to a bachelor's degree in business administration, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.⁸ Specifically, the AAO requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

In response to the RFE, the petitioner submits a May 11, 2007 letter that it sent to the DOL, indicating that it had received no resumes in response to its job announcement for the proffered position. The petitioner provided copies of the posting notice, which stated the academic requirement of a bachelor's degree in "business administration," and copies of ads, which stated the academic requirement of a bachelor's degree in "management or the U.S. 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 anything other than a three-year bachelor's degree in business administration, 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 three-year bachelor's degree in business administration. 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.⁹

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.

⁸ 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.

⁹ 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).

The AAO notes 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 *14.¹⁰ 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 AAO provided the petitioner the opportunity to establish its intent regarding the term “or equivalent” on the labor certification and the minimum educational requirements of the labor certification. The petitioner failed to establish that “or equivalent” was intended to mean that the required education could be met with an alternative to a bachelor’s degree in business administration.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor’s degree in business administration 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 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.

¹⁰ 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.

Beyond the decision of the director,¹¹ the AAO noted in the RFE that the evidence in the record does not establish that the beneficiary possesses the required experience for the offered position. As is discussed above, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the September 13, 2004 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The labor certification states that the offered position requires three years of experience in the offered position and makes no allowance for experience gained in a related occupation.

Part B, Item 15 of the labor certification states that the beneficiary qualifies for the offered position based on experience as a management analyst (the proffered position) with [REDACTED] in Anaheim, California from October 2003 until at least June 2, 2004, the date upon which the beneficiary signed the labor certification. Part B, Item 15 of the labor certification also includes the beneficiary's experience as a manager of marketing/sales and purchasing with [REDACTED] in City of Industry, California from December 2000 until September 2003. Additionally, Part B, Item 15 includes the beneficiary's experience as a marketing and sales manager for [REDACTED] in Dubai, United Arab Emirates from 1996 until 2000. 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.

(B) *Skilled workers*. 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 individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *Professionals*. If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate

¹¹ 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 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The record contains one experience letter dated September 18, 2003 from [REDACTED] general manager, on [REDACTED] letterhead, stating that the company employed the beneficiary as a manager of marketing/sales/purchase division from December 2000 until the date upon which the letter was written.

However, the proffered position is that of management analyst. Form ETA 750 requires three years of experience in the job offered, performing the following duties:

Research and analyze company business and operating procedures to devise most efficient methods of accomplishing work. Plan, study of work problems and procedures, such as organization change, communications, information flow, services and cost analysis. Gathers and organizes information on problem or procedures; including present and past. Analyze data gathered, develops information and considers available solutions or alternate methods of proceeding. Research and analyze potential markets, strategy development and prepare report for management purpose.

The position for which this single experience letter attests is manager of sales/marketing/purchasing with duties that are different than those which the management analyst would be performing. Specifically, in his letter, [REDACTED] states that the beneficiary was responsible for performing the following duties:

Execute direct and channel partner sales model for advanced e-commerce. Target a broad market segment, interface international clients and vendors directly, execute, negotiate, and implement sales and purchases. Manage accounts; orchestrate post-sale and professional services and resources.

This letter does not claim that the beneficiary functioned in the role of management analyst at any time during his employment with [REDACTED] and does not claim that he performed the duties of a management analyst. Further, the petitioner provided no other experience letters to substantiate the claim that the beneficiary possesses the required three years of experience in the job offered as set forth on the labor certification.

It must further be noted that even according to Form ETA 750, the beneficiary only claims to have worked in the job offered for approximately 11 months as of the priority date. The only management analyst position included on Form ETA 750B is the one which the beneficiary occupies

while employed for the petitioner in the instant circumstance. According to Form ETA 750B, the beneficiary began working in this position in October 2003, whereas the priority date is September 13, 2004. Thus, even according to the beneficiary's claims, it would not have been possible for him to have attained the required three years of experience in the job offered as of the priority date.

20 C.F.R. § 656.21(b)(5) [2004] states:

The employer shall document that its requirements for the job opportunity, as described, represent the employer's *actual minimum requirements* for the job opportunity, and the **employer has not hired workers with less training or experience** for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer.

[Emphasis added.]

When determining whether a beneficiary has the required minimum experience for a position, experience gained by the beneficiary with the petitioner in the offered position cannot be considered. This position is supported by the Department of Labor's Board of Alien Labor Certification Appeals (BALCA). See *Delitizer Corp. of Newton*, 88-INA-482, May 9, 1990 (BALCA):

[W]here the required experience was gained by the alien while working for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

In *Delitizer*, BALCA considered whether an employer violated the regulatory requirements of 20 C.F.R. § 656.21(b)(6)¹² in requiring one year of experience where the beneficiary gained all of his experience while working for the petitioning employer. After analysis of other BALCA and pre-BALCA decisions,¹³ the Board in *Delitizer* determined that 20 C.F.R. § 656.21(b)(6) does require that employers establish "the 'dissimilarity' of the position offered for certification from the position in which the alien gained the required experience." *Delitizer Corp. of Newton*, at 4. In its decision,

¹² 20 C.F.R. § 656.21(b)(5) [2004].

¹³ See *Frank H. Spanfelner, Jr.*, 79-INA-188, May 16, 1979; *Mecta Corp.*, 82-INA-48, January 13, 1982; *Inakaya Restaurant d/b/a Robata*, 81-INA-86, December 21, 1981; *Visual Aids Electronics Corp.*, 81-INA-98, February 19, 1981; *Yale University School of Medicine*, 80-INA 155, August 13, 1980; *The Langelier Co., Inc.*, 80-INA-198, October 29, 1980; *Creative Plantings*, 87-INA-633, November 20, 1987; *Brent-Wood Products, Inc.*, 88-INA-259, February 28, 1989.

BALCA stated that Certifying Officers should consider various factors to establish that the requirement of dissimilarity under 20 C.F.R. § 656.21(b)(6) has been met, and that, while Certifying Officers must state the factors considered as a basis for their decisions, the employer bears the burden of proof in establishing that the positions are dissimilar. *Delitizer Corp. of Newton*, at 5.

In the instant case, representations made on the certified Form ETA 750 clearly indicate that the actual minimum requirements for the offered position are three years of experience in the job offered and that experience in an alternate occupation is not acceptable. As the actual minimum requirements are three years of experience, the petitioner could not hire workers with less than three years of experience for the same position. *See* 20 C.F.R. § 656.21(b)(5) [2004].¹⁴ Although the petitioner did not initially provide a letter describing the position that the beneficiary currently occupies or the duties which he performs, the beneficiary identified his position with the petitioner on Form ETA 750B and attributed the same duties to it that are articulated in Section 13 of Form ETA 750, as above explained.

Experience gained with the petitioner in the offered position may not be used by the beneficiary to qualify for the proffered position without evidence that the DOL conducted a *Delitizer* analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. Therefore, the AAO's RFE requested that the petitioner submit evidence that the DOL conducted an analysis of the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner, if such an analysis was conducted.

Alternatively, the AAO's RFE requested, if no such analysis was conducted, that the petitioner submit evidence to demonstrate the dissimilarity of the position offered and the position in which the beneficiary gained experience with the petitioner. Such evidence could have included, but was not limited to: a detailed explanation of the proposed job duties with the percentage of time to be spent on each duty, as well as the position's salary; a detailed explanation of the job duties for the beneficiary's previous/current position(s) with the percentage of time spent on each duty, as well as the position's salary; a detailed organizational chart that demonstrates the hierarchy within the petitioner's organization of the proffered position, as well as the beneficiary's previously/currently held position(s), as well as those who supervise/will supervise the beneficiary and those supervised by the beneficiary; evidence of the petitioner's organization's previous hiring practices for similar positions. The AAO notified the petitioner that, if no evidence was provided to demonstrate the dissimilarity of the position offered and the position in which the beneficiary gained experience with its organization, the labor certification could be invalidated.¹⁵ The AAO additionally requested that

¹⁴ In hiring a worker with less than the required experience for the offered position, in violation of 20 C.F.R. § 656.21(b)(5) [2004], the employer indicates that the actual minimum requirements are, in fact, not as stated on Form ETA 750. Rather, in that the worker can perform the job duties of the offered position with less than the required experience, it is evident that the actual minimum requirements for the offered position are *less* than the requirements as listed on Form ETA 750.

¹⁵ The regulation at 20 C.F.R. § 656.30(d) provides:

the petitioner submit experience letters that satisfy the regulatory requirements set forth above to establish that the beneficiary possessed the required experience to perform the offered position.

In response to the AAO's RFE, counsel submits a letter, stating that job titles may differ between occupational titles and the actual job titles within companies. Counsel claims that the petitioner has submitted an experience letter for the beneficiary, which demonstrates that the beneficiary has knowledge in performing the particular job duties of the proffered position. The AAO finds that the petitioner did not submit any new experience letter for the beneficiary, but merely resubmitted the previously discussed September 18, 2003 letter on [REDACTED] letterhead signed by general manager, [REDACTED].

Counsel claims that this letter clearly establishes that the beneficiary has over six years of qualifying experience, as it describes experience gained from 1994 to 1996, 1996 to 2000, and 2000 to 2003. Counsel asserts that the core job duties as described in the letter are "analyzing company business and operating procedures to devise most efficient methods of accomplishing work and to analyze potential markets and strategy development." 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).

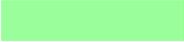
The AAO has reviewed the beneficiary's experience letter and finds that counsel's assertions are unsupported. The letter makes no mention of the beneficiary's experience in analyzing company business and operating procedures. Rather, the letter clearly describes the beneficiary's experience in managing, executing, negotiating, training, recruiting, implementing, and overseeing. These are the duties of a manager, and not a management analyst.

The evidence in the record is not sufficient to establish that the beneficiary possessed the three years of experience in the offered position, management analyst, as of the priority date as required by the terms of the labor certification.

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.

(d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

(b)(6)



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ORDER: The appeal is dismissed.