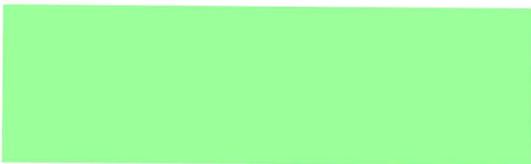


(b)(6)

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



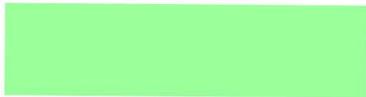
DATE: JUN 27 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE:



PETITIONER:  
BENEFICIARY:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

  
Ron Rosenberg  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), denied the employment-based immigrant visa petition. The petitioner filed a motion to reconsider the director's decision which was dismissed by the director. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a medical device manufacturer. It seeks to permanently employ the beneficiary in the United States as a Sr. Certified Clinical Technician. 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 December 6, 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.<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.<sup>2</sup> 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:

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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).

<sup>2</sup> The AAO notes that counsel, in response to the AAO's Notice of Derogatory Information and Request For Evidence (NDI/RFE) regarding the lack of special requirements in Part A, Item 15 on the ETA 750A, states: "It is not the duty of the US Citizenship and Immigration Services to adjudicate such matters but to give due deference to the Department of Labor."

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

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

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

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

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

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

*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

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

domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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

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

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

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

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

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

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

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).<sup>4</sup> The AAO will first consider whether the petition may be approved in the professional classification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(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(1)(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(1)(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).

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<sup>4</sup> Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

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

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

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

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

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 a bachelor's degree in biology and three years experience in the job offered or in the related occupation of operating room procedures. The labor certification also states that the beneficiary possesses a diploma in nursing from [REDACTED] Canada completed in 1994.

The record contains a copy of the beneficiary's diploma from the [REDACTED] in nursing issued in 1994, incomplete transcripts for a nursing program issued by an unidentified school, and a transcript from the [REDACTED] for a Bachelor of Science in Nursing (B.SC.N) (honors) program.<sup>5</sup>

The record also contains an evaluation of the beneficiary's credentials prepared by the [REDACTED] dated October 8, 2001. The evaluation concludes that the beneficiary's diploma in nursing from [REDACTED] coupled with his work experience, is equivalent to a bachelor's degree in biology from the United States. The evaluation is based upon a three-year nursing program at [REDACTED]. However, the transcript in the record only shows completion of one year of studies. Furthermore, a review of the [REDACTED] website reveals that the diploma in nursing is a two-year program.<sup>6</sup> Additionally, the evaluation states that the beneficiary worked as a certified clinical technician for [REDACTED] Canada from 1997 until 2000. However, the labor certification and experience letter state that the beneficiary was employed as a certified clinical technician from May 1997 until November 2001. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592.

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.

<sup>5</sup> The transcript, which postdates the nursing diploma from the [REDACTED] shows completion of only two courses and does not show award of a degree.

<sup>6</sup> *See* [REDACTED] (accessed June 19, 2013).

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 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>7</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>8</sup>

According to EDGE, an Ontario College Diploma from Ontario, Canada is comparable to "2 to 3 years of university 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 biology. The AAO informed the petitioner of EDGE's conclusions in a Notice of Derogatory Information and Request for Evidence (NDI/RFE) dated April 11, 2013.

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<sup>7</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>8</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

In response to the NDI/RFE, counsel states that it was the petitioner's intent to accept an alternative to a bachelor's degree by accepting five years experience in lieu of a bachelor's degree. No additional evidence was submitted to demonstrate that the beneficiary possessed the equivalent of a U.S. bachelor's degree in biology.

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. 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(l)(2).

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

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

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

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

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

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to

“examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

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

EDUCATION

Grade School: 8 years

High School: 4 years

College: 4 years

College Degree Required: Bachelor’s

Major Field of Study: Biology

TRAINING: None specified

EXPERIENCE: 3 years in the job offered or in the related occupation of operating room procedures relating

OTHER SPECIAL REQUIREMENTS: Blank

As is discussed above, the beneficiary possesses a diploma in nursing from [REDACTED] Canada which is equivalent to “2 to 3 years of university study in the United States.”

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>9</sup> In the AAO’s

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<sup>9</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.

NDI/RFE, the AAO notified the petitioner that the record contains two different copies of an ETA Form 750 with inconsistent information. The petitioner states that it never received a copy of the certified labor certification from the DOL, and thus, submitted a copy of an uncertified labor certification with the petition. The director requested a duplicate labor certification from the Department of Labor which is included in the record. The uncertified labor certification and the duplicate labor certification obtained from the DOL are different. The petitioner claims that on Part A, item 15 of the labor certification which it submitted to the DOL, it indicated that the employer will accept five years of experience in lieu of the bachelor's degree requirement. However, on the duplicate copy obtained from the DOL, there are no special requirements indicated in item 15. The record also contains a copy of a letter from the petitioner to the DOL, dated November 4, 2004, requesting a reduction in recruitment (RIR). In the letter, the petitioner stresses twice that "there are no restrictive requirements. In fact, there are no special requirements indicated in item 15 of the Form ETA 750, Part A, at all."

In response to the NDI/RFE, counsel states that it was the intent for the petitioner to accept alternative education and experience in lieu of a bachelor's degree. Counsel further states that the petitioner indicated the special requirements in Part A, item 15 on the ETA 750A. However, as stated above, the certified duplicate copy of the labor certification does not contain any alternative requirements in Part A, item 15. Part A, item 15 of the certified duplicate copy of the labor certification is blank. The only copy which contains an alternative to the bachelor's degree is the uncertified copy of the labor certification which was submitted with the petition. There is no evidence in the record suggesting that the petitioner notified the DOL or potentially qualified U.S. workers of its intent to accept an alternative to a four-year bachelor's degree.

Counsel further states that the employer's letter to the DOL regarding RIR dated November 4, 2004 was a boilerplate letter that was not changed to reflect the alternative requirements. However, a review of the four-page letter reveals that the letter has been tailored to the beneficiary, the job offered, the company, and recruitment. The letter also represents that the beneficiary meets the minimum requirements of possessing the equivalent of a bachelor's degree through his nursing diploma. The letter states:

"Please know that there are no special requirements indicated in item 15 of Form ETA 750, Part A for this position. The Alien, Mr. [REDACTED] is fully qualified for this position by virtue of his education and experience. Mr. [REDACTED] was awarded a Nursing degree from [REDACTED] Canada. Additionally, he has over 10 years of experience as a Clinical Technician and as a Nurse."

The record also contains a cover letter, dated December 1, 2004, from counsel to the DOL requesting RIR which states, "Please know that there is no combination of duties, *there are no restrictive requirements* and the wage offer is above the prevailing rate of pay." [*emphasis added.*]

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. *Matter*

of *Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592.

Nonetheless, the AAO NDI/RFE permitted the petitioner to submit any independent, objective evidence regarding its intent to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree on the labor certification, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.<sup>10</sup> In response to the AAO's NDI/RFE, counsel states that all of the recruitment evidence is attached to demonstrate that the recruitment contained the alternative requirements to a bachelor's degree. The record contains the following evidence regarding recruitment: A copy of a cover letter dated December 1, 2004 requesting RIR with certified mail receipt; a copy of the uncertified Form ETA 750A; a copy of the letter, dated November 4, 2004, from the petitioner to the DOL requesting RIR; copies of the newspaper advertisements, receipts, and order confirmation; a copy of the Notice of Job Posting; a copy of the posting on Monster.com; and a copy of the prevailing wage information from the fldatacenter.com.

The AAO notes that in the letter dated November 4, 2004 from the petitioner to the DOL regarding RIR, the petitioner states that it received thirteen resumes, however, none of the candidates were interviewed because they lacked the minimum requirements of the position. Counsel states that "all of the recruitment evidence" is attached, however, the resumes of the applicants who responded to the advertisements and the signed recruitment report required by 20 C.F.R. § 656 are not included as proof that the applicants did not possess the minimum requirements of the labor certification. And, although the advertisements for the position state that the petitioner will accept five years experience in lieu of a bachelor's degree, there is nothing in the record to indicate that the applicants who applied for the job did not meet the alternative minimum requirements. Regardless, the terms of the labor certification are clear. There are no alternative requirements listed in Part A, item 15 on the certified duplicate labor certification. Therefore, 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.

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<sup>10</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.

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in biology. 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.<sup>11</sup>

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>12</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.

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<sup>11</sup> 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).

<sup>12</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 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 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.

Beyond the decision of the director,<sup>13</sup> 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).

In the instant case, the labor certification states that the offered position requires three years experience in the job offered or in the related occupation of "Operating Room Procedures Relating." On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Sr. Clinical Technician with [REDACTED] from November 2001 until June 2004 and as a Certified Clinical Technician from May 1997 until November 2001; as a Certified Clinical Technician with [REDACTED] from October 1995 until March 1997; and as a Registered Nurse with Toronto General Hospital from June 1994 until April 1997.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains a letter from [REDACTED] President on [REDACTED] letterhead ([REDACTED] letter). The Timm letter states that the beneficiary was employed as a Senior Clinical Technician from November 1, 2001 until June 1, 2004, and as a Certified Clinical Technician from May 12, 1997 until November 1, 2001.

The record, however, contains multiple inconsistencies with respect to the beneficiary's claimed experience. On the labor certification in support of the instant petition, the beneficiary claims to have worked for [REDACTED] as a Sr. Clinical Technician from November

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<sup>13</sup> 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).

2001 until June 2004. However, on the ETA Form 9089 submitted in support of a subsequently filed I-140 by the petitioner's claimed successor-in-interest, the beneficiary claims to have worked for [REDACTED] as a Sr. Territory Manager from November 1, 2001 until June 22, 2004. Additionally, on the labor certification in support of the instant petition, the beneficiary claims to have worked for the petitioner, [REDACTED] as a Senior Clinical Technician from June 2004 until at least December 2004, the date the labor certification was accepted for processing. However, on the ETA Form 9089 filed in support of a subsequent I-140, the beneficiary claims to have worked for the petitioner, Endocare, Inc. as a Sr. Territory Manager from June 23, 2004 until November 22, 2009. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592. Therefore, the experience letter from Timm Medical Technologies, Inc. will not be considered without independent, objective evidence clarifying the inconsistencies.

The record also contains a declaration from the beneficiary dated July 12, 2007 and a copy of the beneficiary's Record of Employment (ROE) from Canada for employment with [REDACTED]. In the declaration, the beneficiary states that he worked full-time as a Certified Clinical Technician at [REDACTED] from September 12, 1995 until April 18, 1997. 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 Dec. 582, 591-592 (BIA 1988)(states that the petitioner must resolve any inconsistencies in the record by independent, objective evidence). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

Additionally, the ROE does not provide any information regarding the beneficiary's employment with [REDACTED] other than the dates of employment and verification that the beneficiary worked there. However, the regulation is clear that the beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. See 8 C.F.R. § 204.5(l)(3)(ii)(A). The ROE does not comply with the requirements of the regulation, and no other evidence is provided regarding the beneficiary's claimed experience with [REDACTED].

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Also beyond the decision of the director, [REDACTED] failed to establish that it is a successor-in-interest to the entity that filed the petition and labor certification.<sup>14</sup> A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the appellant is a different entity than the petitioner/labor certification employer, it must establish that it is a successor-in-interest to that entity. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

A valid successor relationship may be established for immigration purposes if it satisfies three conditions. First, the successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The record contains the following evidence submitted in response to the AAO's NDI/RFE: copies of articles regarding the short-form merger of the petitioner, [REDACTED] into a wholly-owned subsidiary of [REDACTED] in 2009, and the acquisition of [REDACTED] making [REDACTED] an affiliate of [REDACTED] on July 15, 2010. Although the evidence in the record includes the articles to describe and document the short-form merger of [REDACTED] and [REDACTED] as well as the acquisition of [REDACTED] the evidence does not demonstrate that [REDACTED] are valid successors-in-interest to the petitioner.

The evidence in the record does not satisfy the second and third conditions described above because it does not demonstrate that the job opportunity will be the same as originally offered and it does not demonstrate that the appellant is eligible for the immigrant visa in all respects, including whether it and the predecessor possessed the ability to pay the proffered wage for the relevant periods. Accordingly, the petition must also be denied because [REDACTED] has failed to establish that it is a successor-in-interest to the petitioner/labor certification employer and to the appellant.

To ensure that the job opportunity remains the same as originally certified, the appellant must continue to operate the same type of business as the predecessor, in the same metropolitan statistical area, and the essential business functions must remain substantially the same as before the ownership transfer. See *Matter of Dial Auto*, 19 I&N Dec. at 482. In the instant matter, the petitioner has not

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<sup>14</sup> Counsel states in the response to the AAO's RFE that "[REDACTED] has foregone the normal protocol of filing an amended I-140 to notify the Service of it being a *Successor-in-Interest* to the Endocare I-140 petition due to the fact that this matter is on appeal." The AAO notes that the instant I-140 petition was filed on September 20, 2007 and the instant appeal on February 24, 2010. Neither the director nor the AAO were informed of the merger of [REDACTED] in 2009, even though it predates both the director's decision on the motion to reconsider and the filing of the instant appeal. Additionally, the AAO was never notified of the acquisition of HealthTronics by [REDACTED] on July 15, 2010. It was not until the AAO sent an NDI/RFE regarding the issue that the petitioner admitted the successor-in-interest issues.

submitted any evidence to establish that the job opportunity remains the same as originally certified or that the successor continues to operate the same type of business as the predecessor. Additionally, the beneficiary in the instant matter is the beneficiary of another petition filed by the successor/appellant, [REDACTED]. The subsequent Form 9089 and petition were certified/approved for the position of "Sales Executive—[REDACTED]". Additionally, the beneficiary, on the ETA Form 9089 submitted in support of the subsequent petition, lists his position with HealthTronics, Inc. as "Sales Acct [REDACTED]" from November 23, 2009 until the present (the date the beneficiary signed the Form 9089, January 10, 2013). Therefore, the job opportunity as originally certified no longer exists.

In order to establish eligibility for the immigrant visa in all respects, the petitioner must support its claim with all necessary evidence, including evidence of ability to pay. The appellant must prove the predecessors' ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the petitioner must establish the successor's ability to pay the proffered wage in accordance from the date of transfer of ownership forward. 8 C.F.R. § 204.5(g)(2); *see also Matter of Dial Auto*, 19 I&N Dec. at 482.

Applying the analysis set forth above to the instant petition, the appellant has not established a valid successor relationship for immigration purposes. The appellant has not demonstrated that it is eligible for the immigrant visa in all respects, including whether it and the predecessors possessed the ability to pay the proffered wage for the relevant periods.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.<sup>15</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

The record contains the following evidence pertaining to the predecessors' and the appellant's ability to pay the proffered wage: Forms 10K for Endocare, Inc. for the years 2004 through 2006 and Forms W-2 issued to the beneficiary for the years 2007, 2008, and 2009; Forms W-2 issued to the beneficiary by [REDACTED] for the years 2010, 2011, and 2012; and Forms 10K for Endo Pharmaceuticals [REDACTED] for the years 2008 through 2012.

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<sup>15</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

According to the information in the record, Endocare, Inc. became a wholly-owned subsidiary of [REDACTED] in 2009. Therefore, [REDACTED] must show the ability to pay the proffered wage for 2009. The record does not contain federal tax returns, audited financial statements, or an annual report from [REDACTED] for 2009. Additionally, the record does not contain a Form W-2 issued to the beneficiary for 2009 from [REDACTED]

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

Also beyond the decision of the director, another issue in this case is whether a *bona fide* offer of full-time, permanent employment exists. The petitioner has the burden when asked to show that a valid employment relationship exists. See 20 C.F.R. §§ 626.20(c)(8) and 656.3. In this case, the beneficiary of the instant petition is the beneficiary of a subsequent petition filed by the appellant, [REDACTED]

In the petitioner's response to the RFE, counsel advises that [REDACTED] had filed a subsequent ETA Form 9089 and I-140 petition which were certified/approved. Therefore, according to counsel, a *bona fide* offer of employment continues to exist.

As stated above, the subsequent Form 9089 and petition were certified/approved for the position of "Sales Executive—[REDACTED]". Additionally, the beneficiary, on the ETA Form 9089 submitted in support of the subsequent position, lists his position with [REDACTED] as "Sales Acct [REDACTED]" from November 23, 2009 until the present (the date the beneficiary signed the Form 9089, January 10, 2013). The position in the instant case is Sr. Certified Clinical Technician. As the beneficiary's current position with [REDACTED] as well as the certified/approved position on the subsequent labor certification and petition is for a different position, sales executive, the petitioner has not established that a *bona fide* offer of full-time, permanent employment exists.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.