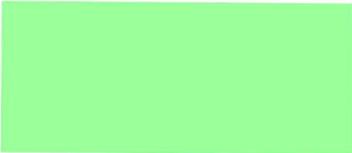




U.S. Citizenship
and Immigration
Services

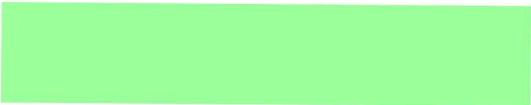
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DATE: JUN 27 2013 OFFICE: TEXAS SERVICE CENTER

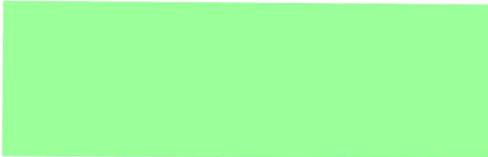


IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner filed a motion to reopen the director's decision, which the director granted, however, the director found that on motion the petitioner did not overcome the original grounds for denial. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

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

The petition is accompanied by an ETA Form 9089, Application for Permanent 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 May 30, 2008. See 8 C.F.R. § 204.5(d).

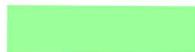
The director's November 12, 2010, decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree or a foreign equivalent degree as required by the terms of the labor certification. The petitioner's motion to reopen (MTR) the director's decision was granted, however, the director ultimately dismissed the motion, concluding that the petitioner on motion did not establish that beneficiary possessed the minimum education as required by the terms of the labor certification. In response to the instant appeal, the AAO issued a Request for Evidence (RFE) to the petitioner. This decision incorporates the petitioner's response to the RFE.

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. Counsel has raised the issue of the roles of each agency in that 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:

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).



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).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

² 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).

Counsel states, "USCIS and the AAO have jurisdiction to determine whether the Beneficiary has the education required by the Labor Certification. However, it is DOL that decides what the Labor Certification form actually means and what equivalency is required and acceptable." Counsel continues and asserts that, because the petitioner's labor certification was the subject of an audit by DOL, and DOL later granted the labor certification, the granting of the labor certification defines the terms of the labor certification. As such, counsel contends that the AAO is "precluded from re-defining the ETA Form 9089's own terms in order to preclude the Petitioner from accepting a combination of education and experience." Counsel's statement conflates the agencies roles, suggesting that DOL has made a qualitative and quantitative assessment of the petitioner's "intent behind the statement 'alternate

combination of education and experience³ and the acceptability of the evaluation from [the petitioner's academic credential evaluator] in light of that intent." Counsel cites generally to *Castaneda-Gonzalez v. INS*, 564 F.2d 417, to support this assertion. However, *Castaneda-Gonzalez* is distinguishable, as that case was decided under then section 212 of the Act, and the present matter falls under section 203 of the Act. See generally *Singh v. Attorney General*, 510 F.Supp. 351 (D.D.C.1980) (discussing that the decision in *Castaneda-Gonzalez* was limited to a consideration of section 212(a)(14) and was not considered under the preference system imposed by section 203(a), which now applies to beneficiaries of employment-based immigrant visas). More importantly, as discussed above, courts have reiterated that approval of the labor certification is not an endorsement by DOL that the beneficiary is qualified, or not qualified, to perform the duties of that job. *K.R.K. Irvine, Inc.*, 699 F.2d at 1009.

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

In the instant case, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).⁴ 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.

³ In question H.8, which asks, "is there an alternate combination of education and experience that is acceptable," the petitioner responded affirmatively. The petitioner then indicated in H.8-A. that the alternate acceptable level of education is a Bachelor's degree, and in H.8-C. that the alternate acceptable number of years of experience is six (6) years. As discussed below, these alternate acceptable requirements appear to be substantially the same as the primary requirements provided by the petitioner, which stated that the minimum requirements for the position offered were the combination of a Bachelor's degree and 72 months of experience in the position offered.

⁴ On appeal, counsel advocates that the AAO "approve the I-140 petition ... pursuant to Immigration and Nationality Act (INA) § 203(b)(3)(A)(i)(I) [*sic*]."

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:

- H.4. Education: Bachelor’s degree in “Computer Applications.”
- H.5. Training: None required.
- H.6. Experience in the job offered: 72 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: Accepted.
- H.8-A. Alternate acceptable level of education: Bachelor’s degree.
- H.8-C. Alternate acceptable amount of experience: 6 years.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 72 months in “any occupation with similar job duties in sign industry.”
- H.14. Specific skills or other requirements: “Willing to travel.”

A review of the plain language of the petitioner's minimum requirements suggest that both the primary education and experience required, a Bachelor's degree in Computer Applications and 72 months of experience in the position offered, are the same as the stated acceptable alternative combination of education and experience, which is a bachelor's degree and 6 years of experience in the position offered. The AAO notes that the petitioner has stated on the labor certification that in lieu of the required 72 months of experience in the position offered, one may also be qualified for the position through 72 months of experience in any occupation with similar job duties only if those duties were performed in the sign industry. Thus, the petitioner's primary and alternative requirements both state that the minimum education required is a bachelor's degree, and both state that the minimum experience required is 72 months (6 years) of experience in the position offered or the alternate acceptable occupation.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is not a traditional degree, as the petitioner selected "other" and described that degree as a "PGDCA" with a major field of study of "computer applications" from [REDACTED] completed in 1990.

The record of proceeding contains a copy of the beneficiary's academic credentials, as follows:

1. Eighth School Leaving Certificate (E.S.L.C.), [REDACTED] India, awarded for completion of the examination, on May 24, 1982.
2. Higher Secondary Course Certificate, [REDACTED], awarded on June 14, 1984.
3. Bachelor of Commerce from [REDACTED] India, awarded after examination in November 1987.
4. Transcripts from [REDACTED] and courses taken from April 1985 to November 1987.
5. Certificate in "Communications, Public Relations and Graphic Arts Management" from [REDACTED] College of Business Administration, [REDACTED] awarded on June 9, 1989, for courses taken during "1988-1989." The record does not contain a transcript for this credential.⁵
6. "Diploma Certificate" for a "Post Graduate Diploma in Computer Applications" from [REDACTED] India, awarded on July 10, 1990, for courses taken from July 1, 1989, to June 30, 1990. The record does not contain a transcript for this credential.⁶
7. Certificate from the [REDACTED] awarded on August 3, 1996, for courses taken between March 11, 1995, and June 5, 1995. The record does not contain a transcript for this

⁵ The AAO's RFE requested a copy of the transcript for this certificate; however, the petitioner did not submit this evidence in its response. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

⁶ The AAO's RFE requested a copy of the transcript for this diploma; however, the petitioner did not submit this evidence in its response. See 8 C.F.R. § 103.2(b)(14).

credential.⁷

The record also contains an evaluation of the beneficiary's credentials prepared by [REDACTED] on March 16, 2005. The [REDACTED] evaluation concludes that the beneficiary's Bachelor of Commerce degree from [REDACTED] University in 1987 is equivalent to a three-year program of post-secondary academic studies in Business Administration. The evaluation concludes that the beneficiary's post-graduate diploma in Computer Applications from the [REDACTED] in 1990 is equivalent to one year of training and studies in Computer Science. The evaluation provides no conclusion on the type of education or the equivalency of the beneficiary's [REDACTED] or certificate from the [REDACTED] the evaluator does indicate that those credentials were reviewed in combination with the beneficiary's Bachelor of Commerce degree and post-graduate diploma. In conclusion, the evaluator states:

[the beneficiary's] education and over six years of professional experience are equivalent to an individual with a **Bachelor degree in Business Administration with a specialization in Graphic Design & Computer Science** awarded by a regionally accredited college or university in the United States.

(Emphasis in original). The evaluation includes a dedicated section in which the evaluator analyzes the beneficiary's work experience⁸ and provides a conclusion as to its academic equivalency, determining that the beneficiary's "six years of professional work experience ... are equivalent to two years of post secondary undergraduate education in [REDACTED]"

⁷ The AAO's RFE requested a copy of the transcript for this certificate; however, the petitioner did not submit this evidence in its response. *See* 8 C.F.R. § 103.2(b)(14).

⁸ The AAO notes that while the evaluator indicates that his analysis of the beneficiary's credentials included experience letters and the beneficiary's resume, the evaluator did not provide or otherwise identify the documents, or their sources, that were reviewed in regards to the beneficiary's experience. The evaluation does not indicate which years of the beneficiary's experience were relied on in his evaluation. Therefore, it is unclear whether the petitioner seeks to rely on the same work experience to meet both the education and the experience requirements. The petitioner may not rely on the same experience to meet both of these requirements. The AAO notes that the petitioner has provided both an undated resume for the beneficiary, and experience letters, however, neither the letters nor the resume bear any indication that they were utilized by the evaluator. The AAO notified the petitioner of this issue in the RFE, however, the petitioner has not addressed this issue in its response. In the RFE, the AAO specifically alerted the petitioner that failure to respond to the RFE would result in dismissal since the AAO could not substantively adjudicate the appeal without the information requested. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

⁹ The [REDACTED] evaluation equates three years of experience for one year of education, relying on a USCIS "three-for-one formula," but that equivalence applies to non-immigrant petitions only, and not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The [REDACTED] evaluation relies on a combination of the beneficiary's Bachelor of Commerce degree, certificates, and work experience, in order to conclude that the beneficiary's "education and over six years of professional experience are" equivalent to a U.S. awarded bachelor's degree. Thus, the record contains an evaluation that states that the beneficiary obtained a Bachelor of Commerce, and has, in combination with additional certifications and employment experiences, an educational background equivalent to that of an individual with a Bachelor degree in Business Administration with a specialization in Graphic Design and Computer Science from an accredited university in the United States. The evaluation does not conclude that the beneficiary has a foreign equivalent degree, or even the equivalent of a Bachelor's degree, in the required field of study of computer applications. The petitioner did not designate any alternate field of study in H.7.

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 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." <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.¹⁰ 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.¹¹

¹⁰ *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.

¹¹ 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.

According to EDGE, a Bachelor of Commerce degree from India is comparable to “two to three years of university study in the United States.” The beneficiary’s transcripts indicate he took examinations from April 1985 to November 1987. The beneficiary appears to have received education comparable to up to three years of study in the United States.

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

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

The AAO notified the petitioner in a Request for Evidence (RFE), dated December 19, 2012, that the record does not contain any evidence establishing that the beneficiary’s diploma certificate from [REDACTED] was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor’s degree was required for admission into the program of study. The AAO also notified the petitioner that the record does not contain a transcript for this diploma, however, the petitioner did not provide the transcript in its response. The petitioner did not provide any evidence to establish that the beneficiary’s program was offered by an accredited, degree granting institution of higher education. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Similarly, the AAO notified the petitioner that the record does not contain any evidence that beneficiary’s certificates from [REDACTED] were issued by an accredited university or institution of education. The AAO also notified the

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.

petitioner that the record does not contain transcripts for these certificates. Again, the petitioner did not respond to the AAO's RFE with evidence pertaining to this issue.

As there is no evidence in the record documenting that the beneficiary's certificates or diploma were issued by an accredited university or institution, it is concluded that the beneficiary's certificates are not postgraduate diplomas issued by an accredited university or institution of education.

EDGE also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. EDGE provides that a postsecondary diploma is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree. As nothing establishes that the beneficiary's certificates were issued by an accredited entity, the academic value, if any, cannot be assessed.

Counsel's brief, and the evaluation provided by the petitioner, indicate that the petitioner asserts that the beneficiary's three-year bachelor's degree combined with his certificates, diploma, and his work experience, are equivalent to a U.S. bachelor's degree in computer applications. 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.

Therefore, based on the conclusions of both the petitioner's evaluation and EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. Bachelor's degree in Computer Applications. The AAO informed the petitioner of EDGE's conclusions in the RFE dated December 19, 2012.

The AAO also notified the petitioner that 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.¹² Nonetheless, the AAO RFE permitted the petitioner to submit any evidence that it

¹² 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

intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.¹³ 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.¹⁴

The petitioner did not provide a signed recruitment report, which was required by 20 C.F.R. § 656.17(g). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

In response to the AAO's RFE, the petitioner provided:

- An audit notification letter, dated September 10, 2008, from DOL, which, in addition to requesting documentation of the petitioner's recruitment efforts, requested documentation of the beneficiary's education, and, "if applicable, an equivalency evaluation."
- The petitioner's response to DOL, dated October 7, 2008, which indicates the petitioner provided an evaluation of the beneficiary's credentials.

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.

¹³ 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.

¹⁴ The AAO notes that counsel's brief states, "[i]n fact, the AAO has requested copies of the recruitment for the ETA Form 9089, Labor Certification even though it was previously submitted to [USCIS]." Prior to the AAO's RFE, the record of proceeding contained copies of an internal job posting, newspaper and online advertisements placed by the petitioner. Prior to the petitioner's response to the AAO's RFE, the record did not contain the petitioner's recruitment report, correspondence to or from DOL, Virginia job order or the related advertisement, posting notice, prevailing wage determination, or copies of resumes received in response to the petitioner's recruitment.

- A prevailing wage determination stating that the educational requirements include: 8 years of grade school, 4 years of high school, and four years of college; a “B.S. or equivalent” degree with a major of “Computer Applications;” and 6 years of experience in the position offered,¹⁵ or 6 years of experience in the related occupation of “industrial designers.”
- Two undated newspaper advertisements listing the minimum education accepted to be a “B.S. degree or equiv. w/Comp. Appl. Knowledge & min. 6 yrs. Exp. in sign ind.”
- An online advertisement with signindustry.com, indicating a posting date of December 21, 2007, listing minimum requirements of “B.S. degree in Eng. or equivalent is req’d for all positions” and “Min. 6 yrs exp. in Signage Ind.” It appears that in this advertisement the petitioner is requiring a degree in engineering, or equivalent. The advertisement on this website does not state what, if any, alternate combinations of education and experience would be acceptable. Similarly, the newspaper advertisements and the prevailing wage determination above do not state what, if any, alternate combinations of education and/or experience would be an acceptable alternative to the required Bachelor’s degree.
- An online advertisement with signweb.com, indicating a posting date of December 21, 2007, listing a minimum education required of “B.S. degree in Eng. or equivalent is req’d for all positions” and “Min. 6 yrs exp. in Signage Ind.” It appears that in this advertisement the petitioner is requiring a degree in engineering, or equivalent. The advertisement on this website does not state what, if any, alternate combinations of education and experience would be acceptable.
- An advertisement on the petitioner’s website, with a start date of December 21, 2007, and an end date of January 21, 2008, listing the following minimum requirements: “Min. 6 yrs exp. in Signage Ind. B.S. degree in Eng. or equivalent is req’d for this position.” It appears that in this advertisement the petitioner is requiring a degree in engineering, or equivalent. The advertisement on its own website does not state what, if any, alternate combinations of education and experience would be acceptable.
- A copy of the advertisement from the job order placed the Virginia Workforce Connection from March 3, 2008, to April 8, 2008. One section of the job order, which appears to contain pre-filled education levels, indicates the minimum acceptable qualifications required to be a bachelor’s degree, and 72 months of experience. A second section, titled “Special Skills (degrees, certifications, software, etc.),” contains a narrative in which the petitioner indicated minimum requirements of a “B.S. degree or equivalent with Computer Applications major, use multi CAM 3D CNC Router, Gerber Dimension Routing Tables, Flatbed Scanners, Gerber Odyssey Plotters, Graphtec Plotters, Film jet 300 printer for Screen Printing films, etc.” The petitioner did not specify what, if any, alternate combinations of education and experience would be acceptable in the space provided for a narrative of the acceptable job requirements.
- A job order report from the Virginia Workforce Connection, printed September 19, 2008, including an “applicant information” report indicating one applicant applied from the job order.

¹⁵ The position offered listed on the prevailing wage determination has a job title of “designers,” however, the job duties appear to be similar to those listed on the labor certification.

- An internal “notice of job offer” with posting dates of December 21, 2007, to January 15, 2008, indicating the minimum education required to be a “Bachelor’s degree or equivalent in Computer Applications and six years of relevant experience in the offered position with all similar duties, and besides must be willing to travel.”¹⁶ The petitioner did not specify what, if any, alternate combinations of education and experience would be acceptable in the space provided on this internal notice.
- A “notice of job posting,” with posting dates of March 3, 2008, to April 3, 2008, indicating the minimum education required to be a “B.S. degree or Equivalent with Computer Application knowledge and minimum 6 years of experience in Sign Industry.” The notice does not state what, if any, alternate combinations of education and experience would be acceptable.

An analysis of the foregoing documentation indicates that the type of degree described in the recruitment, a bachelor’s, does not vary between the petitioner’s recruitment materials, however, the major field of study varies from “computer applications” to engineering to simply the “knowledge” of computer applications. It is unclear if these advertisements would have advised qualified U.S. workers that the petitioner would accept experience in lieu of the stated bachelor’s degree in engineering or computer applications. DOL has promulgated requirements for advertisements:¹⁷ (1) they must provide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which labor certification was sought; (2) they may not contain job requirements or duties which exceed the job requirements or duties listed on the labor certification; and (3) they may not contain terms and conditions of employment that are less favorable than those offered to the beneficiary. 20 C.F.R. §§ 656.17(f)(3), (6), (7). The purpose of these requirements is to prevent employers from requiring different qualifications of U.S. workers than they require of the beneficiary named on the labor certification. See *Your Employment Service Inc.*, 2009-PER-151 (Oct. 30, 2009) (citing *ERF Inc., d/b/a Bayside Motor Inn*, 89-INA-105 (Feb. 14, 1990)). These regulations seek to prevent an employer from treating the named beneficiary more favorably than it would a U.S. worker. *Id.* In order to conduct good faith recruitment, the job requirements as stated on the labor certification and in its advertisements must represent the petitioner’s actual minimum requirements for the job opportunity. 20 C.F.R. § 656.17(i)(1); see *Alexandria City Public Schools*, 2010-PER-00933 (finding advertisements inconsistent with the labor certification to be sufficient grounds to uphold denial of labor certification).

¹⁶ This notice states that it was posted “in a conspicuous place where it can be seen by all employees, on the company bulletin board of [REDACTED]” While the address listed is the same street address as the petitioner, it is unclear from the record what connection the petitioner has to [REDACTED]

¹⁷ While the text at 20 C.F.R. § 656.17(f) specifically states that regulation applies to “newspaper advertisements,” the same regulation has been held to apply to all additional forms of advertisement conducted by the employer. See *Credit Suisse Securities (USA) LLC*, 2010-PER-00103 (BALCA, Oct. 19, 2010) (finding that “all advertisements placed by employers in fulfillment of the additional recruitment steps must comply with the advertisement content requirements listed in § 656.17(f)”; see also *Jesus Covenant Church*, 2008-PER-200 (BALCA, Sept. 14, 2009).

To that end, the petitioner must provide apprise potential U.S. workers of its true requirements for the position offered. 20 C.F.R. § 656.17(f)(3) (the petitioner must “[p]rovide a description of the vacancy specific enough to apprise the U.S. workers of the job opportunity for which certification is sought”). The employer fails to carry out this duty even by conducting recruitment with lesser requirements than those listed on the labor certification. *See Pixar*, 2011-PER-00637 (March 29, 2012) (denial of labor certification upheld where employer advertised requiring only a high school diploma, when labor certification required a bachelor’s degree); *BNP Paribas*, 2010-PER-00930 (BALCA, Aug. 12, 2011) (finding that a regulatory required posting notice inconsistent with the ETA Form 9089 does not accurately apprise U.S. workers of the opportunity).

The evidence provided does not indicate that the petitioner would accept experience in lieu of education, or in combination with another level of education instead of a Bachelor’s degree. While the petitioner did provide the DOL with the beneficiary’s academic credentials, and an evaluation thereof; however, as discussed above, “[i]t does not appear that DOL’s role extends to determining if the alien is qualified for the job.” *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1008. Further, “[t]he 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.” *Id.* at 1009. As detailed above, the labor certification does not state any equivalencies that the petitioner would find acceptable. 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 face of the labor certification, prepared by the petitioner, and the recruitment, prepared by the petitioner, do not indicate any equivalency that would be acceptable to the petitioner. The primary requirements stated on the labor certification included a bachelor’s degree and 72 months of experience; the alternate acceptable combination of education and experience as stated on the labor certification was a bachelor’s degree and 6 years of experience. Neither the labor certification nor the petitioner’s recruitment indicate whether the petitioner would accept experience in lieu of the required education, or that it would accept a combination of experience and education less than a bachelor’s degree.¹⁸ While the petitioner’s evaluation states that the evaluator relies on a “three-for-one” formula in making his determination, there is no evidence that this purportedly acceptable equivalency was expressed during the petitioner’s recruitment to potentially qualified U.S. workers.¹⁹ The AAO notified the petitioner of this issue in its RFE.

¹⁸ As discussed above, the ETA Form 9089 provides a dedicated section, Part H.8., to define an alternate acceptable combination of education and experience, which the petitioner completed with substantially the same requirements as primary requirements.

¹⁹ The AAO notes that this equivalency, which relates to nonimmigrant visas before USCIS, has not been accepted by DOL. *See Matter Of Telcordia Technologies, Inc.*, 2011-PER-02631 at 4 (BALCA Feb. 6, 2013) (dismissing the three-for-one formula by stating, “there is nothing in the PERM regulations, regulatory history, or the Field Memorandum to support a finding that three years of experience without a degree is the equivalent of one year of college/university level credit.”). DOL regulations provide for use of the specific vocational preparation (SVP) system, as specified in 20 C.F.R. § 656.3, and not a three-for-one formula.

The AAO's RFE also notified the petitioner that the single evaluation in the record indicates that the beneficiary might only qualify if a combination of a lesser degree and experience were acceptable. In response to the AAO's RFE, counsel notes the evaluator's conclusion and states:

The "language" of the ETA Form 9089 in Box H.8 allow the Beneficiary to qualify based on a combination of education and experience. USCIS must examine the certified job offer – not the recruitment – exactly as it is completed by the prospective employer. ... This LC was completed with the Petitioner stating that it would accept an "alternate combination of education and experience." The evaluation from [REDACTED] combines education and experience and there is nothing in the Labor Certification or in the law that the AAO has actually cited to in order to establish that the Beneficiary cannot meet the requirement in Box H.8 with his credentials in Exhibit D.

Because the primary job requirements and alternate requirements appear, on their face, substantially similar, it is unclear whether the labor certification put the DOL or qualified U.S. workers on notice that the petitioner was in fact willing to accept other combinations of education, training, or experience. It appears that counsel's contention is that the beneficiary qualifies for the position by meeting the "requirements in Box H.8 with his credentials." Part H.8. of ETA Form 9089 relates to the alternate acceptable combination of education and experience. The regulations at 20 C.F.R. § 656.17(h)(4)(ii) state:

If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

The petitioner did not state on the labor certification that it would accept any suitable combination of education, training, or experience.

The petitioner's recruitment materials are unclear as to what alternate combination of education, training, or experience would be acceptable. Three of the petitioner's advertisements indicate that the petitioner required a Bachelor's Degree in Engineering, or its equivalent; and two print advertisements and the petitioner's internal job notice indicate the petitioner required a Bachelor's degree, or equivalent, with Computer Applications "knowledge." None of the petitioner's seven advertisements appear to provide notice of any acceptable combinations of education, training, or experience to replace the bachelor's degree requirement. However, the petitioner's sole evaluation relies on a combination of education, the beneficiary's three-year degree, and experience, using an unrelated formula of three years of experience for one year of education, to conclude that the beneficiary possesses a bachelor's degree. The record does not document that the petitioner expressed this acceptable equivalency on the labor certification, or apprised U.S. workers of it during the petitioner's recruitment. 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)). The record also does not document that the petitioner would accept any suitable combination of education, training, or experience. *Id.* Recent cases continue to find that failing to notify U.S. workers that the petitioner would accept lesser requirements than those specified on the labor certification is a violation of existing regulations. *See IBM Corp.*, 2011-PER-01111 (BALCA, June 7, 2012) (advertisements which list the employer's more stringent requirements, a bachelor's degree and years of experience, rather than the employer's more permissive primary requirements, years of university-level education combined with and years of experience, do not provide a description of the vacancy specific enough to apprise U.S. workers of the job opportunity for which certification is sought as required by 20 C.F.R. § 656.17(f)(3)).

In this matter, as discussed above, the petitioner's field of study required for the position varies from one advertisement to another. However, none of the advertisements document that the petitioner is willing to accept less than a full four-year Bachelor's degree, or state what, if any, equivalent to a Bachelor's degree it would permit. Therefore, it appears that these advertisements would be insufficient to apprise U.S. workers with less than a full bachelor's degree that they may qualify for the position, potentially resulting in the qualified U.S. workers failing to apply for a position for which they believe they do not qualify.

Further, the petitioner did not provide a copy of its signed recruitment report, as requested by the AAO to potentially evidence that the petitioner considered workers with less than a four-year Bachelor's degree.²⁰ The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner failed to establish that that the terms of the labor certification are ambiguous and that the petitioner intended the labor certification to require less than a four-year U.S. bachelor's or foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore, it is concluded that the terms of the labor certification require a four-year U.S. Bachelor's degree in Computer Applications or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.²¹

²⁰ The employer is required to retain copies of applications for permanent employment certification and all supporting documentation for a minimum of five years from the date of filing the ETA Form 9089. 20 C.F.R. § 656.10(f).

²¹ 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). As set forth above, the beneficiary does not have a four-year Bachelor's degree to meet the terms of the labor certification, or to qualify as a

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 14.²² 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.

professional. 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.

²² 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. Here, the labor certification does not state any equivalent, it states only a Bachelor’s degree.

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.²³ 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).

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.

However, even if the petitioner could establish that the beneficiary’s education based on an equivalent would meet the terms of the labor certification, which it has not, the petitioner has not established that the beneficiary has the required experience for the position offered.

Therefore, the AAO finds beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971). In evaluating the beneficiary’s qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). As is discussed above, the petitioner must demonstrate that the beneficiary possessed all of the requirements stated on the labor certification as of the May 30, 2008, 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 72 months (six years) of experience in the position offered, graphic designer, or 72 months of experience in “any occupation with similar job duties in sign industry.”

²³ The petitioner’s advertisements state “bach or equiv.” As they advertise with either Engineering or Computer Applications, it appears that the petitioner may have been willing to accept an equivalent field of study to Computer Applications. However, without the petitioner’s recruitment report, this cannot be fully assessed.

Part K of the labor certification states that the beneficiary qualifies for the offered position based on experience as a graphic designer with [REDACTED] from April 2, 1992, to December 7, 2005. The beneficiary also listed employment with the petitioner. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

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

The record contains an experience letter, dated September 27, 2005, from the Managing Director on [REDACTED] letterhead stating that the company employed the beneficiary as a Computer Graphic Artist from April 2, 1992, until the date of the letter. However, this letter does not provide a description of the beneficiary's job duties, therefore, the letter does not meet the regulatory requirements. Also, the letter provides conflicting job titles for the beneficiary, indicating his employment was as a "Computer Graphic Artist" as well as a "Visualizer / Computer Graphic Designer." The letter states that the beneficiary was "promoted to the position of Senior Visualizer" and that the beneficiary "managed the studio." It is unclear from the record whether these are similar or dissimilar occupations, as the writer failed to provide descriptions of the beneficiary's tasks and job duties. The letter also does not indicate whether the beneficiary was employed full-time or part-time for each position, therefore, the AAO is unable to determine whether the beneficiary possessed the 72 months of experience in the position offered as required on the labor certification as of the priority date, or "any occupation with similar job duties in the sign industry." Further, the letter indicates that the beneficiary's employment was "on time limit contracts" from hiring to the writing of the letter, which appears to indicate that the beneficiary's employment may have been part-time.

The record also contains a letter, dated January 30, 2000, from the Production Director at [REDACTED]. This letter does not provide a description of the beneficiary's duties, therefore, it does not meet the regulatory requirements. Further, the letter does not indicate the beneficiary's dates of employment, therefore, the AAO is unable to determine whether the beneficiary possessed the 72 months of experience in the position offered, or "any occupation with similar job duties in the sign industry," as required on the labor certification as of the priority date.

In its RFE, the AAO notified the petitioner that the two experience letters discussed above were insufficient to document whether the beneficiary possessed the required experience in the position offered or the alternate acceptable position.

In response to the AAO's RFE, the petitioner has provided an additional letter, dated September 14, 2011, from the Human Resources Manager, [REDACTED]. This letter confirms that the beneficiary was employed from April 2, 1992, to December 7, 2005, as a "Computer Graphic Artist." As was the case with the 2005 letter, this letter does not indicate whether the beneficiary's employment was full-time or part-time, preventing the AAO from determining the extent of his employment. Further, this letter does not indicate that the beneficiary was employed in any of the additional job titles mentioned in the 2005 letter. The letter also does not confirm or explain why the 2005 letter indicated that the beneficiary "managed the studio." Most importantly, this letter appears to have been written by the beneficiary, as the letter states (in bold lettering), "[t]he following are *my* duties and responsibilities during *my* tenure of *my* employment with [REDACTED]" (italics added). The repeated use of the personal pronoun, "my," casts doubt on the authenticity of the letter, and suggests that it was written by the beneficiary rather than by someone with knowledge of the beneficiary's purported employment. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), states:

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

Further, the 2011 letter conflicts with the information provided in the 2005 letter, including the position(s) held by the beneficiary during his purported employment. In addition, the letter does not clarify whether the beneficiary was employed full-time, or on a part-time or contract basis under the "time limit contracts" of his employment. *Matter of Ho*, 19 I&N at 591-92, states:

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.

Further, as discussed above, the petitioner appears to be relying on at least a portion of this experience (six years as stated by the evaluator) in order to establish that the beneficiary has the equivalent of a bachelor's degree. However, there is no evidence to document what experience and specific years would be apportioned to education, versus work experience, preventing the AAO from determining if the beneficiary would have sufficient full-time experience to satisfy both the minimum education and experience requirements as specified on the labor certification. The AAO notified the petitioner of this issue in its RFE, however, the petitioner did not address this issue in its response. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14). Therefore, based on the inconsistencies between the 2005 and 2011 letters, and the deficiencies with the 2011 letter, these letters cannot be considered credible evidence to establish of the beneficiary's purported experience.

In its RFE, the AAO also notified the petitioner that affidavits in the record were insufficient to document whether the beneficiary possessed the required experience in the position offered or the alternate acceptable position.

The record contains an affidavit from the beneficiary, dated October 22, 2010, and two affidavits from co-workers at [REDACTED], both dated October 22, 2010. The AAO notes that counsel has asserted that these affidavits are sufficient to document the beneficiary's purported experience, in lieu of the regulatory required evidence. However, the AAO does not find these affidavits credible. The affidavit provided by the beneficiary does provide a summary of his position, and provides a numbered list of 10 duties and responsibilities. However, the affidavit does not document the unavailability of the primary evidence, which would be an experience letter from the beneficiary's employer.²⁴ Further, the two additional affidavits contain a nearly verbatim²⁵ recitation of the position summary and the 10 duties and responsibilities as provided on the beneficiary's affidavit. Again, this suggests that the affidavits were prepared by the beneficiary, rather than being prepared by an individual with personal knowledge of the beneficiary's experience, which casts doubt on the statements' credibility. *Matter of Ho*, 19 I&N at 591. Additionally, each affidavit is signed and dated on the same date. While each document is signed as a sworn statement, none of the documents are signed before a notary public. Therefore, the AAO does not find these affidavits to be credible, as they appear to have all been written by the same individual, and they provide no reasonable basis on which to determine whether or not the beneficiary possessed the 72 months of experience in the position offered as required by the labor certification. Further, the AAO notes that the two persons signing these affidavits were also employed by the petitioner at the time of affidavits were signed. This casts doubt on the credibility of the statements, as these two persons were the beneficiary's coworkers, and may have a personal or professional motive in attesting to the statements on the affidavit. *Id.* Therefore, these affidavits do not appear to be credible and provide no evidentiary weight. Further, the affidavits cannot be considered as tertiary evidence as the petitioner has not established that primary evidence is unavailable. 8 C.F.R. § 103.2(b)(2)(i) (“[t]he non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document ... does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence”). The petitioner failed to establish that it could not obtain a letter from the purported employer documenting the beneficiary's claimed experience, therefore, even if credible, these affidavits could not be accepted as tertiary evidence of the beneficiary's experience.

The record also contains several printed awards and letters issued by Awal Plastics to the beneficiary. However, these items cannot take the place of regulatory required evidence. Further, even if the AAO were to consider these documents, they do not document the beneficiary's job title, or provide a description of the beneficiary's job duties, or confirm that the beneficiary possessed 72

²⁴ In its RFE, the AAO notified the petitioner that the beneficiary's prior employer, [REDACTED] LLC, appears to continue to operate in [REDACTED] under the same management. *See generally* [http://\[REDACTED\]](http://[REDACTED]) (indicating that writers of the beneficiary's experience letters still maintain management positions at the company) (accessed June 26, 2013).

²⁵ While the affidavits from the beneficiary's two co-workers appear to contain identical job descriptions, including grammar and formatting, the beneficiary's affidavit varies slightly in that the sequence of the list items are different, however, their content, wording, grammar, and formatting are otherwise the same.

months of experience in the position offered.

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 and has the required experience for the offered position.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (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).

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.