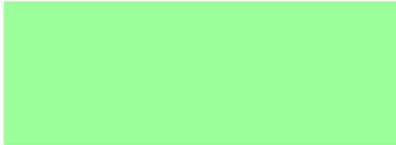




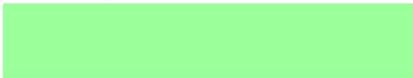
U.S. Citizenship
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Services

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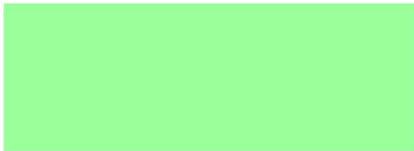
MAR 07 2013

DATE: OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:

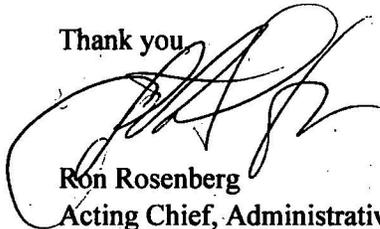


INSTRUCTIONS:

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, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a semiconductor laser manufacturer. It seeks to employ the beneficiary permanently in the United States as a scientific technician. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.¹ Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

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.²

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on December 17, 2008.³ The Immigrant Petition for Alien Worker (Form I-140) was filed on March 24, 2010.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA Form 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 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).

³ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Minimum Education, Training, and Experience Required to Perform the Job Duties.
Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the ETA Form 9089, the "job offer" position description for a scientific technician provides:

Development of new laser products and manufacturing capabilities. Develop and sustain processes for hermetic products. Operate and maintain of hermetic equipment and testers. Facilitate new product introduction and conduct sustaining engineering functions for manufacturing processes. Assemble instructions and documentation to support new product releases to manufacturing.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's.

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

[Blank].

4-B. Major Field Study: Electronics Technology.

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

7-A. If Yes, specify the major field of study:

[Blank].

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

8-A. If yes, specify the alternate level of education required:

[Blank].

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

6. Is experience in the job offered required for the job?

The petitioner listed "yes" and listed 36 months of experience was required.

10. Is experience in an alternate occupation acceptable?

The petitioner checked "no."

14. Specific skills or other requirements: [Blank].

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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*, 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).

As set forth above, the proffered position requires a Bachelor of Science degree in Electronics Technology and 3 years of experience in the job offered of scientific technician.

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was "Bachelor's." He listed the institution of study where that education was obtained as [REDACTED], and the year completed as 1999.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's Diplôme d'études Collégiales as well as the beneficiary's electronic technician certification and transcripts from [REDACTED].⁴ According to the evidence in the record,

⁴ The translation of the certification states, "[REDACTED] f [REDACTED] testifies by the presents that [the beneficiary] has followed and completed the program of studies Electronic Technician For a length of 961 hours. January 22, 1999 Ottawa (Ontario)." The translation of the certification does not comply with the terms of 8 C.F.R. § 103.2(b)(3):

Translations. Any document containing foreign language submitted to [USCIS]

beneficiary was not awarded a Bachelor's degree or a diploma upon completion of the [REDACTED] course of study. Instead, he was enrolled in non-degree, continuing education technical program. The petitioner additionally submitted a credentials evaluation dated May 27, 2005, from [REDACTED]. The evaluation describes the beneficiary's Diploma of College Studies from the [REDACTED] in Quebec, Canada as the equivalent of graduation from high school in the United States plus one year of university-level credit from a regionally accredited community college in the United States. The evaluation does not mention by name the certificate from [REDACTED] but references "a certificate and a letter verifying completion of a continuing education course in Electronics Technician." The evaluation also considers the beneficiary's resume to include his experience from 1993 to May 27, 2005. The evaluation considers the twelve years of experience including positions as "an aeronautic junior assembly technician, an electronic assembly technician, a lab equipment technician, an electronic assembly teacher, a technician, a process engineer, a substitute teacher and a manufacturing engineer."⁵

The evaluation relies on a combination of education and experience and concludes:

[i]n summary, it is the judgment of the Foundation that [the beneficiary] has the equivalent of graduation from high school in the United States plus one year of university-level credit . . . and has, as a result of his educational background and employment experience (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in electronics technology⁶

The director denied the petition on June 24, 2010. She determined that the beneficiary did not have the required Bachelor's degree in Electronics Technology as of the December 17, 2008 priority date. The director also determined that the beneficiary's diploma of collegial studies, certificates and experience could not be accepted as the foreign equivalent to a U.S. Bachelor's degree in Electronics Technology because they do not amount to a Bachelor's degree awarded by an institution outside of the U.S. for a course that is similar in complexity and length (four years) to a course of study for which an institution in the U.S. would grant a baccalaureate degree.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel submitted no additional documentation.

shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

⁵ The evaluation appears to rely solely on the beneficiary's resume without any confirmatory letters from prior employers.

⁶ This formula applies to H-1B petitions but not the immigrant visa category.

DOL assigned the code of 17-3023.01 to the proffered position. According to DOL's public online database at <http://www.onetonline.org/link/summary/17-3023.01> (accessed February 20, 2013) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Three requiring "medium preparation" for the occupation type closest to the proffered position.

DOL assigns a standard vocational preparation (SVP) range of 6.0 to < 7.0 to the occupation, which means that "Most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree."

However, the labor certification as certified requires a Bachelor's degree in Electronics Technology and 3 years of experience. The petitioner filed the I-140 petition for a professional.⁷

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

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

The above regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

On April 22, 2010, the director issued a request for evidence to the petitioner. In this request, the director noted that there was no evidence in the record of proceeding that the beneficiary obtained the required Bachelor's degree of Electronics Technology. The director also noted that the educational evidence submitted is equivalent to high-school plus one year of university study in the U.S.

⁷ The petitioner filed a subsequent I-140 petition for the beneficiary as a skilled worker with a labor certification that requires no education and three years of experience for what appears to be the same position. This calls into question the true minimum requirements of the position offered. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the request for evidence, counsel submitted the beneficiary's credential evaluation report, curriculum vitae, diploma and transcripts for [REDACTED] transcripts for [REDACTED] and diploma and transcripts for [REDACTED]. On appeal, counsel asserts that, "USCIS has disregarded the fact that the recruitment gave notice to prospective employees that an equivalency was acceptable." Counsel further asserts that "there is no binding authority for the position taken by the Nebraska Service Center [a]djudicator that a single foreign degree must equate to a U.S. bachelor's degree."

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

In general.-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 left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. 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).⁸ *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.

* * *

⁸ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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).⁹

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).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign

⁹ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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).

equivalent degree.” In order to have the education equating to a bachelor’s degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree.

On appeal, the petitioner cites to *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) and asserts that it considered “equivalent education.” That inquiry is not relevant here. The petitioner selected the “professional” box on Form I-140. Therefore, the petitioner must demonstrate that the beneficiary meets the requirements of the labor certification and that the labor certification requires a Bachelor’s degree. As set forth above, the professional category requires a bachelor’s degree. Instead, the petitioner asserts that the beneficiary should be considered as a skilled worker, which would allow for an equivalency. Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, 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. “Skilled worker” is now a separate category on Form I-140 and the petition cannot be considered as both a professional or skilled worker on the same petition.¹⁰

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. November 30, 2006). In that case, the labor certification application 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. *Id.* 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. *Id.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated on the ETA 9089 and does not include alternatives to a four-year bachelor’s degree. 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

¹⁰ A different Form I-140 was used at the time *Grace Korean* was decided that allowed the petitioner to apply for a worker as either a “professional or skilled” worker on the same petition. That is no longer the case. Here, the petitioner selected professional. There is no provision in statute or regulation that compels United States Citizenship and Immigration Services (USCIS) to readjudicate a petition under a different visa classification once the decision has been rendered. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1988).

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 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the petitioner selected "professional" only on Form I-140. Whether the labor certification states any equivalency is irrelevant. To qualify for the professional category as filed, the petitioner must establish that the beneficiary has a four-year Bachelor's degree.

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*, 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 professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *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 application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) 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." (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and 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' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, 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) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree

that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

Moreover, we have 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.¹¹ 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.¹²

EDGE states that the Diploma of College Studies/Diplome d'etudes Collégiales (DCS/DEC) is a preuniversity program that represents attainment of a level of education comparable to one year of university study in the United States.

As noted by the director, the educational evaluation in the record does not find that the beneficiary holds the foreign equivalent of the required Bachelor’s degree. The evaluation used an equivalence to determine that the beneficiary’s three years of experience equaled one year of college to conclude that the beneficiary had achieved the equivalent of a U.S. four-year Bachelor’s degree in Electronics Technology, but that regulatory-prescribed equivalence applies

¹¹ See *An Author’s Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNA_TIONAL_PUBLICATIONS_1.sflb.ashx.

¹² 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.

to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); see also *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). Additionally, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate. The petitioner filed the petition for a professional requiring a Bachelor's degree. The beneficiary does not have a Bachelor's degree and does not meet the terms of the labor certification to be classified as a professional.¹³

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

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

In the instant case, the labor certification requires three years of experience in the offered position. The labor certification states that the offered position requires the beneficiary to develop new laser products, manufacturing capabilities and develop and sustain processes for hermetic products. Additionally, he is required to operate and maintain hermetic equipment and

¹³ The ETA Form 9089 does not provide that the minimum academic requirements of a Bachelor of Science degree in Electronics Technology might be met through one year of education and twelve years of experience or some other formula other than that explicitly stated on the ETA Form 9089, and the petitioner did not file the I-140 petition for a skilled worker.

facilitate new product introduction including assembly of documentation to support new product releases.

Part B, Item 15 of the labor certification states that the beneficiary qualifies for the offered position based on experience as: (1) a scientific technician with [REDACTED], from May 1, 2004 to the present; (2) a process engineer with [REDACTED] from January 4, 2002 to October 31, 2002; (3) a process engineer with [REDACTED] from January 1, 2000 to February 3, 2002, (4) a technician with [REDACTED] from January 18, 1999 to January 14, 2000; (5) an electronic assembly teacher with [REDACTED] from January 20, 1997 to December 15, 2001; (6) a lab equipment technician with [REDACTED] from September 30, 1996 to January 31, 1999; and (7) an electronic assembly technician with [REDACTED] from June 12, 1995 to December 22, 1995.¹⁴ No other experience is listed.

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

(ii) *Other documentation—*

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

The record of proceeding contains an experience letter from [REDACTED] Human Resources Manager on [REDACTED] letterhead stating that the beneficiary has been employed as a scientific technician from May 10, 2004 to the present.

Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position.¹⁵ Specifically, the petitioner indicates that questions J.19

¹⁴ The ETA Form 9089 requires a listing of all jobs held in the past three years and other qualifying experience. In the instant case, beneficiary's job as a substitute teacher with the [REDACTED] from October 31, 2003 to April 3, 2004 is also listed on the ETA Form 9089. This position does not appear to be qualifying experience for the proffered position.

¹⁵ 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) 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.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or

(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term "employer" means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

and J.20, which ask about experience in an alternate occupation, are not applicable. In response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?" the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 36 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable¹⁶ and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a scientific technician, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

The record also contains an experience letter from [REDACTED] Office Manager on [REDACTED] letterhead stating that the beneficiary was employed as a process engineer. The letter does not list the beneficiary's job duties. And, the start date, and end date for the position are not specified, thus preventing the AAO from determining the length of the beneficiary's claimed experience. The letter does not state that the beneficiary was a scientific technician, and the labor certification does not allow an individual to qualify based on any alternate occupation.

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

¹⁶ A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

5) For purposes of this paragraph (i):

(ii) A "substantially comparable" job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

The record contains three experience letters on [REDACTED] letterhead. The first letter, from [REDACTED] Director Quality & Asian Operations states that the beneficiary was employed at the company. The letter does not state the beneficiary's position or list his dates of employment. The second letter, from [REDACTED] Ph.D., Sr. Member of Technical Staff, Hermetic Package Development, states that the beneficiary was a member of the [REDACTED] group employed from January 2000 to January 2002. The letter states that the beneficiary is "an expert" in seam sealing hermetic optical packaging and helium leak detecting. The letter does not detail the beneficiary's duties and does not list the beneficiary's position at the company. The third letter appears to be signed by [REDACTED],¹⁷ Human Resources. It states that the beneficiary was employed on a full-time basis as a "Mbr Tech Supp Staff 2" from January 24, 2000. The letter does not detail the beneficiary's job duties or list an end date of employment, thus preventing the AAO from calculating beneficiary's qualifying experience for the proffered position. And, the beneficiary's stated job title of "Mbr Tech Supp Staff 2" appears to conflict with the job title for this position listed on the ETA Form 9089. The ETA Form 9089 lists the beneficiary's job title for this position as "process engineer." None of the three [REDACTED] letters state that the beneficiary was a scientific technician, and the labor certification does not allow an individual to qualify based on any alternate occupation. Additionally, the start date of employment listed on the letter is slightly different than the date listed on the ETA Form 9089 which lists his start date as January 1, 2000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Finally, the record contains a letter from [REDACTED] Service Delivery Manager, on [REDACTED] letterhead stating that the beneficiary worked for eight months as an audio-visual technician. The letter does not list the beneficiary's dates of employment, describe his job duties or state if the job was full-time or part-time. Similarly, the letter does not state that the beneficiary was scientific technician, and the labor certification does not allow an individual to qualify based on any alternate occupation.

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). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Additionally, the evaluator relied on all of the beneficiary's other experience from 1993 to 2005 to conclude that the beneficiary had the equivalent of a bachelor's degree. That experience cannot be double counted to establish that the beneficiary also has the required experience.

¹⁷ The author's signature appears but not the author's name typed. The handwritten signature appears to read "[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, the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

The record before the director closed on May 4, 2010 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2009 federal income tax return was the most recent return available. However, the record does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2008 or 2009 to demonstrate that the petitioner can pay the proffered wage from the December 17, 2008 priority date onward.

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

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.