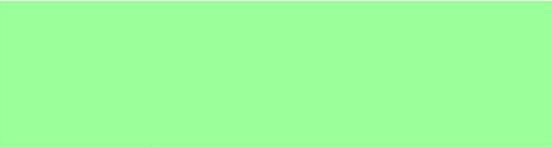


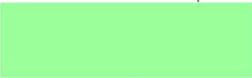


U.S. Citizenship  
and Immigration  
Services

(b)(6)



DATE: **MAR 20 2013**

OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:

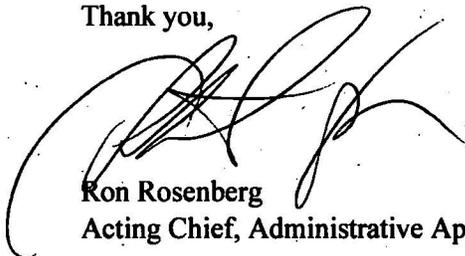


INSTRUCTIONS:

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. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a software development and consulting business. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the Department of Labor (DOL), accompanied the petition.<sup>1</sup> Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the labor certification supported the visa classification sought.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>2</sup>

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 November 20, 2008, which establishes the priority date.<sup>3</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on February 23, 2011.

As noted above, the petitioner seeks a visa classification for the beneficiary as a professional. The proffered position's requirements are found on ETA Form 9089 Part H. This section of the

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<sup>1</sup> 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).

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

<sup>3</sup> 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.

application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. The instructions for the ETA Form 9089, Part H, provide:

***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, 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: Other
- H.4.A. If Other is indicated in question 4, specify the education required: "Bachelor's or equivalent."
- H.4-B. Major Field of Study: "Computer Science, MIS, CIS, or Engineering (any field)."
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: "Business, Tech, Math, Arts, or related."
- H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
- H.8-A. If Yes, specify the alternate level of education required: Other.
- H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: "3 years of college in any above major/alternate field of study."
- H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "1."
- H.9. Is a foreign educational equivalent acceptable? Yes.
- H.10. Experience in an alternate occupation: 24 months of experience in "Pro Ana, QA Ana/Eng, Associate, S/W Prog, Dev, or related."
- H.11. Job description: "Analyzes, designs, develops, implements, customizes and maintains applications and systems using Oracle, DB2, SQL Server, Java, Win Runner, Test Director, Quick Test Pro, Load Runner, C++, VC++ Unix, and Windows 2000, XP."
- H.14. Specific skills or other requirements: "Any suitable combination of education, training, or experience is acceptable."

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).

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).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

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

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>5</sup>

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<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

<sup>5</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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).<sup>6</sup>

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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 (9<sup>th</sup> Cir. 1984).

<sup>6</sup> 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 equivalent degree." In order to have experience and 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.

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.) 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 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for

It is noted that the director's denial is not based upon whether the beneficiary possesses the credentials of a Bachelor's degree in "Computer Science, MIS, CIS, or Engineering (any field)" or in an alternate field of study of "Business, Tech, Math, Arts, or related," or whether the beneficiary has the required 24 months of experience in the job offered, but whether these requirements are the minimum requirements for a professional third preference visa classification that was designated by the petitioner on the Form I-140. As noted by the director, the labor certification must support the visa classification sought.

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 proffered position as set forth on the ETA Form 9089 must also show that the minimum requirement for entry is a baccalaureate degree. Additionally, the regulation at 8 C.F.R. § 204.5(l)(3)(i) specifically provides that the "job offer portion of an individual labor certification, Schedule A application, or Pilot Program application for a professional must demonstrate that the job requires the minimum of a baccalaureate degree."

The petitioner seeks a professional visa classification on the Form I-140. However, both the primary and alternative education requirements state in Part H of the ETA Form 9089 that the minimum requirements are "other," and can be satisfied by someone without a U.S. bachelor's degree, by someone with a Bachelor's degree or equivalent, or by someone with three years of college in

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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, and which would also include work experience deemed to equate to an academic equivalency.

“Computer Science, MIS, CIS, or Engineering (any field)” or an alternative field of “Business, Tech, Math, Arts, or related.” Therefore, since the minimum education requirement is not a Bachelor’s degree but “other” in the form of a Bachelor’s degree or “equivalent” or only three years of college, regardless of whether a degree is obtained, the labor certification does not support a visa designation selection on the Form I-140 as a professional.

The director noted this deficiency twice prior to the petition’s denial: first, the director issued a Request for Evidence (RFE), which noted, “the labor certification you submitted does not support the classification you requested;” and second, in an Intent to Deny, “as the petitioner is willing to hire an individual with less than a United States bachelor’s degree or foreign equivalent, the position does not qualify for classification as a professional.” In both cases counsel responded that the position was one for a professional. The director then noted in the decision that, “by virtue of their own labor certification, they [the petitioner] certify that they will accept a candidate with only three years of college and one year of experience, which is less than a U.S. bachelor’s degree.”

On appeal, counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7<sup>th</sup> Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes “relevant” post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case. The focus is how the minimum requirements are defined on the labor certification in order to determine which visa category to select and if the proffered position may be otherwise be treated as a skilled worker occupation. Here, the petitioner selected box e. for professional on Form I-140, which requires a bachelor’s degree.

It remains that the minimum educational requirements set forth by the petitioner on the labor certification do not support the visa designation of professional made by the petitioner on the Form I-140 as the labor certification allows for the minimum education of less than a bachelor’s degree. The appeal will be dismissed on this basis.

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.