

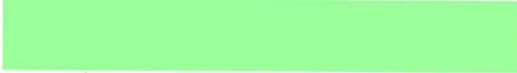
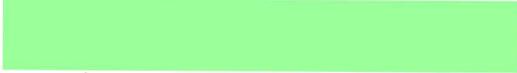


U.S. Citizenship
and Immigration
Services

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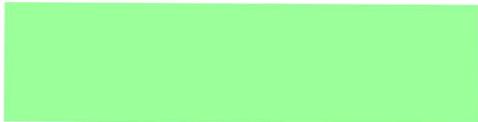


DATE: **MAR 29 2013** OFFICE: TEXAS SERVICE CENTER FILE: 

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:

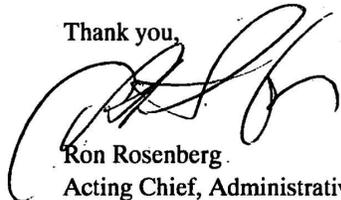


INSTRUCTIONS:

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, Texas 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 an information technology business. It seeks to employ the beneficiary permanently in the United States as an [redacted] network administrator. 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 it was an issue whether the beneficiary qualifies for the professional classification. The director cited to the professional regulations, which require that the individual have a Bachelor's degree. The director then determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification and that "this petition seeking to classify the beneficiary as a professional cannot be approved and is hereby denied."

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 June 29, 2009.³ The Immigrant Petition for Alien Worker (Form I-140) was filed on April 26, 2010.

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.

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:

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 network administrator provides:

Prepare project plan, design and implement and administrate [sic] Datacenter for infrastructure and Virtualization and prepare user documents.

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: Computer Science.
- 7. Is there an alternate field of study that is acceptable?
The petitioner checked "yes" to this question.
- 7-A. If Yes, specify the major field of study:
Computer Information Systems or IT related fields (based on education or w.⁴
- 8. Is there an alternate combination of education and experience that is acceptable?

⁴ The end of the sentence does not appear on the certified labor certification.

The petitioner checked "no" to this question.

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

[Blank].

8-B. If Other is indicated in question 8-A, indicate the alternate level of education required:

[Blank].

8-C. If applicable, indicate the number of years experience acceptable in question 8:

[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 "no."

10. Is experience in an alternate occupation acceptable?

The petitioner checked "no."

14. Specific skills or other requirements: Proficiency in [redacted]
*Employer will accept any suitable combination of education, training and experience.

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's degree in Computer Science, or an alternate field of study to include Computer Information Systems or IT related fields.

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 [REDACTED] Kerala, India and the year completed as 2001.

In support of the beneficiary’s educational qualifications, the petitioner submitted a copy of the beneficiary’s Diploma in Electronics and Communication as well as the beneficiary’s “Diploma in Advanced Computing” from the [REDACTED] Pune, India, several IT certificates of completion, and transcripts from the Government of Kerala, [REDACTED]

The petitioner additionally submitted a credentials evaluation dated January 12, 2009, from [REDACTED] letterhead.⁵ The evaluation lists two separate equivalencies—one including combined education only and the other including education and work experience.

The evaluator states that the beneficiary’s “Diploma in Electrical & Communication Engineering at [REDACTED] Kerala, India⁶ is a three year program. And that it is “[e]quivalent to completing three years of post-secondary education from an accredited university in the United States.”

The evaluator states that the beneficiary’s:

Diploma in Advanced Computing at [REDACTED] is a one year program in Advanced Computing. [REDACTED] is an accredited Institution approved by the Government of India.

Based on the syllabus and duration of each course taken at [REDACTED] it is the opinion of [REDACTED] and [REDACTED] that the coursework is equivalent to one year of post-secondary education in Computer Information Systems from an accredited university in the United States.

Finally, the evaluator states that the beneficiary’s work experience includes “more than seven years in the field of Computer Information Systems.” The evaluator concludes that:

⁵ The evaluator does not state that he is a member of any evaluations associations or otherwise describe his qualifications to render educational equivalencies.

⁶ The evaluation incorrectly refers to the institution as “[REDACTED]” The name of the institution as it appears on the diploma is [REDACTED]

[b]ased on the letter from the employer indicating the duties and duration of work performed, it is the opinion of this evaluator and [REDACTED] that [the beneficiary] obtained equivalent of two years of academic coursework in Computer Information Systems.

Based on the beneficiary's combined educational programs, the evaluator finds that the beneficiary's two programs of study combined are the equivalent of a Bachelor's of Science in Electronics and Communication. The evaluator does not break down the beneficiary's subjects into courses and practicals, and does not award credits for each course and practical, but merely states the years it is equivalent to. The evaluator does not explain how he determined the equivalencies, and does not determine individual course credit numbers.

Based on the beneficiary's combined education and experience, the evaluation describes the beneficiary's Diploma in Electronics and Communication from the State Board of Technical Education in India, the beneficiary's "Diploma in Advanced Computing" from the Advanced Computing Training school [sic], and the beneficiary's seven years of qualifying work experience from July 2001 to January 2009 as the equivalent of a Bachelor of Science in Computer Information Systems.⁷ The evaluation also states that, "[b]ased on the letter from the employer indicating the duties and duration of work performed, it is the opinion of this evaluator and [REDACTED] that [the beneficiary] obtained equivalent of two years academic coursework in Computer Information Systems." The evaluation considers seven years of stated experience including positions as an associate customer engineer, a system operations lead specialist, a customer service engineer, a system analyst and an IT infrastructure consultant. The evaluator states that his evaluation is based on the beneficiary's experience letters.

There are several discrepancies between the employment information contained in the employment letters in the record and employment information listed in the evaluation. First, the evaluator states that the beneficiary worked at [REDACTED] from July 2001 to May 2004 as an associate customer engineer. However, the experience letter from [REDACTED] states that beneficiary worked from July 2001 to April 2004 as a customer support engineer.⁸ The evaluator states that the beneficiary was employed at [REDACTED]

⁷ The evaluation incorrectly identifies the beneficiary's diploma as a "Diploma in Electrical and Communication Engineering" when in fact, the diploma is "Diploma in Electronics and Communication." The evaluation incorrectly refers to the institution as "State Board of Technical Education and Training." The name of the institution as it appears on the diploma is [REDACTED]. 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).

⁸ ETA Form 9089 states that the beneficiary worked at [REDACTED] from July 2001 to April 2004.

although the employment letter letterhead shows that the name of the company is [REDACTED] [REDACTED]. Additionally, the evaluator states that the beneficiary was employed at [REDACTED] as a system analyst; however, the employment verification letter from [REDACTED] does not list the beneficiary's job title. Based on these inconsistencies, it appears that the evaluator relied upon other sources of information beyond those stated in the credential evaluation. 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).

The evaluator does not conclude, and the petitioner does not assert, that the beneficiary has a four-year Bachelor's degree based on either program of study alone.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

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, USCIS 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).

The director denied the petition on November 25, 2011. In the decision the director stated:

Currently at issue is whether the beneficiary qualifies for this classification.

Section 203(b)(3)(A) of the Act states:

(ii) Professionals. Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Title 8, Code of Federal Regulations, Part 204.5(1)(2) *Definitions* states:

Professional means an alien, who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

He determined that the beneficiary did not have the required Bachelor's degree in Computer Science, or an alternate field of study to include Computer Information Systems or IT related fields, as of the June 29, 2009 priority date to qualify as a professional. The director also

determined that the labor certification did not allow for a combination of lesser degrees to equal a U.S. Bachelor's degree.

On appeal, counsel submitted several newspaper advertisements and other job postings to demonstrate the petitioner's willingness to accept any suitable combination of education, training and experience. Counsel asserts that the ETA Form 9089 allows for a combination of lesser degrees and/or work experience equal to a Bachelor's degree and asserts that the beneficiary qualifies for the position based on his education, training and work experience. However, as the petitioner filed the petition for a professional only, whether the labor certification allows for a combination of education and/or experience is not relevant here.

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.

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).⁹ *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).¹⁰

⁹ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

¹⁰ 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).

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 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.

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.

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 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 labor certification requires a Bachelor's degree, and 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.

The AAO has reviewed the [REDACTED] created by the [REDACTED]. According to its website, [REDACTED] 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 [REDACTED]. Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* [REDACTED] is “a web-based resource for the evaluation of foreign educational credentials.” [REDACTED]. Authors for [REDACTED] must work with a publication consultant and a Council Liaison with [REDACTED].

[REDACTED] 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 [REDACTED] to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.¹²

[REDACTED] states that the Diploma of Engineering is based on “three years of study beyond the secondary school certificate (or equivalent) and represents attainment of a level of education comparable to up to one year of university study in the United States. Undergraduate credit “may be awarded on a course-by-course basis,” and “is taken from the final year of the three-year program.” Therefore, the beneficiary’s Diploma in Electronics and Communication would be equivalent to one year of undergraduate study, and not three years as the evaluator asserts.

[REDACTED] also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. [REDACTED] provides that a postsecondary diploma is comparable to one year

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 [REDACTED] 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 [REDACTED] 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 [REDACTED] 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.

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.

further discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. 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. 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 . 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.

In the instant case, the record does not contain any evidence that the beneficiary has a Bachelor's degree or establishing that the beneficiary's "diploma" was issued by an accredited university or institution approved by or that a two-year or three-year bachelor's degree was required for admission into the program of study. The record of proceeding does not contain any information on prerequisite for its diploma program. Therefore, nothing in the record would demonstrate the quality of the education to verify its acceptance for any equivalency as either "post-secondary" or "post-graduate" education, or any other equivalence.

As noted by the director, the educational evaluation considers the beneficiary's combined programs of study, his Diploma in Electronics and Communication in addition to his "diploma" to conclude that the beneficiary holds the "equivalent" of the required Bachelor's degree. The evaluation used a combination of educational programs to determine that the beneficiary's education amounts to the equivalent of a Bachelor's degree in Computer Science. 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.

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 record lacks regulatory evidence to establish the petitioner's ability to pay the proffered wage of \$47,611 from the June 29, 2009 priority date onward. 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 submitted the beneficiary's 2009 Form W-2 showing that the petitioner paid beneficiary \$71,824 in wages as well as two paystubs for 2009 and two paystubs for 2009. Although this evidence would be sufficient to show that the petitioner paid the proffered wage in 2009, the record lacks the evidence prescribed by regulation. 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 does not any contain annual reports, federal tax returns, or audited financial statements for the petitioner for 2009 to demonstrate that the petitioner can pay the proffered wage from the June 29, 2009 priority date onward. In any further filings, the petitioner must submit regulatory evidence of its ability to pay the beneficiary's proffered wage pursuant to 8 C.F.R. § 204.5(g)(2), without such evidence, the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary since the priority date.

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.