(b)(6)

**U.S. Department of Homeland Security**
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

**U.S. Citizenship and Immigration Services**

DATE: MAY 0 8 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 filed a motion to reopen and a motion to reconsider the director's decision. The director granted the motions, reviewed the record of proceeding, and affirmed the prior decision. The petitioner filed an appeal, which is now before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is an engineering consulting business. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer pursuant to section 203(b)(3)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(ii). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the U.S. Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not qualify for the third preference classification. Specifically, the director determined that the beneficiary did not possess a bachelor's degree in mechanical engineering from a university accredited in the United States.

On appeal, counsel submits a brief, and the petitioner resubmitted additional evidence regarding the beneficiary's Bachelor of Science in mechanical engineering program. The AAO concurs with the director's conclusion that the beneficiary's bachelor's level education from an unaccredited U.S. college cannot support classification as a professional. Thus, the AAO will uphold the director's decision.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (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.

The beneficiary earned a U.S. four-year Bachelor of Science degree in mechanical engineering from in Pensacola, Florida in May 2005. Thus, the issue is whether the beneficiary's four-year Bachelor of Science degree in mechanical engineering constitutes a qualified professional degree.

**Eligibility for the Classification Sought**

As noted above, DOL certified the ETA Form 9089 in this matter. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries that Congress assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. Federal courts have recognized this division of authority. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The beneficiary obtained his four-year Bachelor of Science degree in mechanical engineering from in Pensacola, Florida in May 2005. The director noted in his December 16, 2011 decision that, although may have met the requirements in the state of Florida for a certificate of exemption from the state institutional licensing program, this fact does not make the college accredited, as defined by U.S. Citizenship and Immigration Services (USCIS). As stated in the director's August 30, 2011 denial, none of the accreditation agencies recognized by the U.S. Department of Education (ED) have recognized as being accredited. The director further noted in his December 16, 2011 decision that purposely chose not to seek accreditation. The director found that the value of the education that the beneficiary received was not in question, only the accreditation status of his college.

The word "bachelor's" is not open to broad interpretation. It is a specific undergraduate degree that a college or university awards. Moreover, the AAO is not persuaded that any diploma or certificate labeled a "bachelor's" degree must be presumed to be a bachelor's degree as that term is normally understood. The United States has no centralized authority exercising control over postsecondary educational institutions. *See* www.ed.gov/print/admins/finaid/accred/accreditation.html (accessed on March 26, 2013). Rather, to ensure a basic level of quality, private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluation institutions or programs to determine whether or not they are operating at basic levels of quality. *Id.* ED recognizes certain accrediting bodies for the accreditation of institutions of higher (post secondary) education. *Id.* Thus, it is clear that accreditation from an ED recognized body ensures a "basic" level of quality. Conversely, it necessarily follows that there is no assurance that an institution that is not accredited by an ED recognized body provides that "basic" level of quality.

In light of the above, USCIS will not presume that a "Bachelor of Science in mechanical engineering" diploma from an unaccredited institution is an actual bachelor's degree. The AAO emphasizes that the director's August 30, 2011 and December 16, 2011 decisions both advised the petitioner of concerns regarding the beneficiary's educational background, but the petitioner has not provided sufficient evidence that a Bachelor of Science degree in mechanical engineering from is routinely accepted as the equivalent to a Bachelor of Science degree in mechanical engineering from regionally accredited institutions.

On appeal, counsel asserts that the beneficiary is currently in H-1B status. Thus, counsel claims that USCIS deemed his education to be accredited. Counsel also contends that the Texas Board of Engineering has found the beneficiary's degree to be sufficient for him to be licensed as an engineer in that state.

In accordance with the director's December 16, 2011 decision and with the October 14, 1997 submitted letter from the Florida State Board of Independent Colleges and Universities to counsel states that met the requirements in the state of Florida for a certificate of exemption, which allows the school to be categorized with accredited

nonpublic colleges and universities that are not subject to licensure. The exemption is based on demonstration that it had "academic articulation" with accredited colleges and universities. However, these facts do not make the college accredited, as defined by USCIS. None of the accreditation agencies recognized by ED have recognized as being accredited.

Counsel reveals that did not seek accreditation for philosophical reasons. Counsel references a February 21, 2003 submitted letter from the Florida Department of Education to which states that the school's status exempts it from requiring licensure from the Commission for Independent Education, as it meets certain qualifying criteria.

Counsel contends that the beneficiary's degree from should be given the same weight as a degree from an accredited college. Counsel notes that numerous accredited colleges accept credits and degrees from and that even has the authority to issue Forms I-20 for nonimmigrant students, which that school issued to the beneficiary.

The AAO notes that counsel concedes in the brief that the petitioner was not submitting new evidence on appeal. The AAO concurs with the director who found that the value of the education that the beneficiary received was not in question, only the accreditation status of the beneficiary's college.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). In this matter, the priority date is August 10, 2009, the date the DOL accepted the ETA Form 9089 for processing. *See* 8 C.F.R. § 204.5(d). The labor certification states that the position requires a bachelor's degree in mechanical engineering, no training, and no experience in the proffered position of mechanical engineer.

Because the beneficiary does not possess a U.S. Bachelor of Science degree in mechanical engineering from an accredited university, he does not qualify for preference visa classification as a professional under section 203(b)(3)(ii) of the Act.

**Qualifications for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference

> status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that USCIS read the ETA Form 9089 as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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 an alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See 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 alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in mechanical engineering is the minimum level of education required. Line 6 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is not acceptable.

The beneficiary does not possess the bachelor's degree in mechanical engineering required for the job as specified on the labor certification. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act. Accordingly, the petition may not be approved.

Beyond the decision of the director,[1] the petitioner has also failed to establish its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[2] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the instant case, the proffered wage is $61,900.00, and the priority date was August 10, 2009. The beneficiary's 2010 Form W-2 states that the petitioner paid him $58,035.62 that year. In the petitioner's May 25, 2011 response to the director's Request for Evidence (RFE), counsel mistakenly relied on the prevailing wage and not the proffered wage. The AAO finds that the petitioner failed to submit evidence demonstrating that it had the ability to pay the beneficiary the difference between wages paid and the proffered wage for 2010. Further, the petitioner failed to establish that factors similar to *Sonegawa* existed in the instant case, which would permit a conclusion that the petitioner had the ability to pay the proffered wage despite its shortfalls in wages paid to the beneficiary, net income, or net current assets.

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

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[1] 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).

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

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.