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

(b)(6)

DATE: MAY 0 8 2013 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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

Thank you,

for
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (director), 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 describes itself as a software solutions business. It seeks to employ the beneficiary permanently in the United States as a senior marine consultant. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 6, 2007. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess a U.S. bachelor's degree or foreign equivalent as required by the terms of the labor certification and for classification as a professional.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> 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-
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> > (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

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> 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
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[2] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the 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.

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[2] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

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

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> 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).

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

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).[3] The AAO will first consider whether the petition may be approved in the professional classification.

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[3] Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

> 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.

Section 101(a)(32) of the Act defines the term "profession" to include, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the offered position is not statutorily defined as a profession, "the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation." 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i)

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor's degree as a minimum for entry; the beneficiary possesses a U.S. bachelor's degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor's degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS or the

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record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, the AAO will consider the petition under both the professional and skilled worker categories.

Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also 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." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). 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) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the beneficiary possesses a bachelor's degree from India, completed in 1995.

The record of proceeding does not contain any copies of academic degree certificates. While the beneficiary claimed to have been awarded an actual bachelor's degree, in Section J.11 of ETA Form 9089, the record contains no bachelor's degree certificate. Rather, the record of proceeding contains a certificate of competency as master of a foreign-going ship issued on February 2, 1995 by the

government of India. Additionally, the record contains a number of certificates awarded to the beneficiary for various skills associated with shipping and maritime duties.

The record also contains an evaluation of the beneficiary's credentials prepared by on July 20, 2005.[4] The evaluation concludes that the beneficiary's certificate of competency (master of foreign-going ship) awarded by the government of is equivalent to a "Bachelor's degree in naval science from a regionally accredited institution."

The only remarks included on the evaluation are the following:

> This certificate is issued following a prescribed program of study, examination and sea-going experience designed to prepare candidates for professional work in the

The unidentified evaluator concludes that the beneficiary's training for the is equivalent to a bachelor's degree.

The evaluator provided no explanation for the conclusion; did not address in any way the courses which the beneficiary completed, the practical training which the beneficiary received or the examinations which the beneficiary completed; and did not address how such work might correspond with academic tertiary education which an individual would complete at an accredited college or university in the United States. In short, the evaluator failed to evaluate the beneficiary's training.

On February 6, 2009, the director issued a request for evidence (RFE), noting the deficiencies in the evaluation and asking the petitioner to provide evidence of the beneficiary's bachelor's degree. In response, among other items, the petitioner submitted a letter dated March 2, 2009 from [5] Dean of the and another letter dated March 3, 2009 from an individual who claims to be the principal of the [6]

In the first letter, Mr. states:

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[4] The name of the author is not identified.

[5] According to the website of is a non-executive director of the company (accessed January 4, 2013). is the parent company of which is the company for which the beneficiary currently works. This fact calls into question Mr. s objectivity in assessing the beneficiary's credentials and qualifications.

[6] The author did not print his or her name, and the signature is illegible.

> [The beneficiary] holds a Master's Certificate of Competency issued by the Govt of India, on February 02nd, 1995 [sic]. This is based upon education obtained at the India, as well as acquired sea time in the merchant marine in the rank of Cadet (trainee) and various officer ranks, as mandated by the international Standards for Training, Certification and Watchkeeping (STCW) 1995, Reg. II/2.
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> Both service at sea as well as college attendance are considered towards the eligibility of a student, when he/she applies for various examinations in the merchant marine, towards acquiring Certificates of Competency. The Master's Certificate of Competency is only awarded to the highest grade of seagoing officer in the Deck/Navigation Department, and is a pre-requisite for commanding a ship.
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> . . .
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> Since the above requirements are augmented by several modular courses and equipment training (such as Firefighting, Medicare, Radar simulation, etc.), the evaluation of such professional qualifications is *usually* stated to be equivalent to a Bachelor's degree in Nautical (Naval) Science, and is considered as such in most countries.
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> [emphasis added].

In the second letter, the individual who identifies him/herself as principal states:

> This is to confirm that [the beneficiary] attended classes at this institution from November 1992 to May 1993, under the prescribed curriculum to comply with the approved syllabus for Class 1 Master (FG) Examinations, conducted by the Mercantile Marine Department, as authorized by the Directorate General of Shipping, Govt. of India.
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> . . .
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> The is a fully-accredited institution authorized to provide education and courses to students intending to appear for professional examinations for Deck and Engine Officer certification, including examinations to attain an internationally recognized Class 1 Master (FG) certificate, in accordance with the International Maritime Organization's Standards for Training, Certification and Watchkeeping (STCW) 1995, Reg. II/2.

Neither Mr. nor the principal claims that the master's certificate of competency is an academic award. Each states that the certificate is required for "commanding a ship." Neither Mr. nor the Principal claims that the certificate was granted by an accredited college or

university. Mr. speaks of the requirements for attaining the certificate and claims that "both service at sea as well as college attendance are considered towards the eligibility of a student." However, neither Mr. nor the petitioner provided evidence demonstrating that the beneficiary attended an accredited college. The individual who claims to be the principal of the states that the institution is "a fully-accredited institution." However, this individual does not state that it is an accredited college or university. Rather, according to the principal, the and Research provides "education and courses to students intending to appear for professional examinations for Deck and Engine Officer certification."

Neither Mr. nor the principal provided any documentary evidence demonstrating that the beneficiary completed an academic course of study, upon the completion of which he was awarded a bachelor's degree. In fact, neither provided any evidence demonstrating that the beneficiary completed any academic coursework which would equate to college or university level study at an accredited institution of higher learning in the United States.

Therefore, based upon the evidence in the record, the beneficiary's claim that he was awarded a bachelor's degree is untrue, and the evaluation and letters attesting to the beneficiary's qualifications are inaccurate.

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On ETA Form 9089, in Section J, the beneficiary specifically claimed to have been awarded a bachelor's degree which is required for the proffered position. However, the record of proceeding contains no such degree and, further, contains no evidence demonstrating that the beneficiary was awarded any academic qualification. Based upon the evidence in the record, it appears as though the beneficiary's claim is false. Further, the fact that the beneficiary claimed to have been awarded the precise degree which is required for the proffered position appears to have been made for purposes of being deemed qualified for purposes of obtaining the certified ETA Form 9089, obtaining approval on Form I-140 and, ultimately for purposes of obtaining permanent residence.

See section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), regarding misrepresentation, "(i) in general – any alien, who by fraud or willfully misrepresenting a material fact, seeks (or has sought to procure, or who has procured) a visa, other documentation, or admission to the United States or other benefit provided under the Act is inadmissible."

A willful misrepresentation of a material fact occurs is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961).

See also 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

> (d) finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

The evidence indicates that the beneficiary misrepresented his educational credentials for the purposes of securing a certified ETA Form 9089. The beneficiary's claim to have been awarded an actual bachelor's degree cut off the DOL's line of inquiry into the beneficiary's qualifications. Had the beneficiary indicated that he was awarded a maritime certificate and claimed that this certificate was equivalent to a bachelor's degree, the DOL could have examined the claim more closely to determine whether or not the labor certificate permitted degree equivalence and whether or not the beneficiary's qualifications satisfied the academic requirements stipulated by the petitioner. Further, the beneficiary's claim cut off the consideration of other potential qualified U.S. workers who might have possessed the required academic qualifications. Since the misrepresentation was made for purposes of securing the certified ETA Form 9089 and approval on Form I-140, the misrepresentation appears to be willful. Under the circumstances, the certified ETA Form 9089 is subject to invalidation.

Counsel and the beneficiary assert that they did not commit fraud or misrepresentation. Rather, they contend that there was a misunderstanding. Since the AAO finds these arguments to be plausible, the AAO will not invalidate the labor certification due to a finding of fraud or misrepresentation.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

Given the fact that the beneficiary has not supported his claim to have been awarded an actual bachelor's degree with a degree certificate and associated academic transcripts, the fact that the academic evaluation is unsubstantiated either with analysis or evidence in support of the beneficiary's academic qualifications, and the fact that the letters submitted do not even assert that the beneficiary

was awarded an academic qualification, the AAO does not accept the conclusions set forth in the evaluation.

The petitioner relies on the beneficiary's training for the merchant marines as being equivalent to a U.S. bachelor's degree. Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

The AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[7] 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.[8]

EDGE contains no academic qualifications identified as certificate of competency (master of foreign-going ship) or any similar designations or qualifications. In other words, EDGE has no record of academic qualifications resembling the certificate, which was awarded to the beneficiary

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[7] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

[8] 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.

by the government of India. Further, there is no record of an accredited college or university bearing the name of [redacted] either in EDGE or on the website of the All India Council of Technical Education (AICTE).[9] Therefore, the evidence would suggest that the beneficiary's credential is not an academic qualification from an accredited college or university.

Based on the lack of any qualifications resembling the beneficiary's credential in EDGE when combined with the evidence as discussed above, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in naval science as required by the terms of the labor certification or in any field.

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal was not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in naval science or its foreign equivalent. The AAO informed the petitioner of EDGE's conclusions in a Notice of Intent to Dismiss (NOID)/Request for Evidence dated February 19, 2013.

In response to the NOID/RFE,[10] the petitioner submits a signed and notarized recruitment report from [redacted] the petitioner's CEO, which includes copies of emails regarding potential candidates for the proffered position, ads, an Internet posting, announcements on the petitioner's webpage, a prevailing wage determination, and a posting notice. The AAO notes that the ads, posting, and announcements specifically state that the position requires a bachelor's degree in naval science or its foreign equivalent. The petitioner also submits a signed statement from the beneficiary in which he states that he understood his credentials to constitute a foreign equivalent to a bachelor's degree based on the findings of the two educational evaluations previously submitted. The AAO finds that the petitioner fails to establish that the beneficiary possessed the requisite education for the proffered position as of the priority date.

After reviewing all of the evidence in the record, it is concluded that the petitioner has failed to establish that the beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university. The petitioner has failed to overcome the conclusions of EDGE with reliable, peer-reviewed information. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The AAO will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least

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[9] *See* http://www.aicte-india.org/misappengineering.htm and http://www.aicte-india.org/downloads /E&T/Maharashtra_E&T.pdf (accessed January 4, 2013).

[10] Counsel also requested via a March 15, 2013 letter more time in which to respond to the AAO's February 19, 2013 NOID/RFE. On March 20, 2013, the AAO denied the request, stating that there is no provision for an extension per 8 C.F.R. § 103.2(b)(8)(iv).

two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

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

> If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in naval science or foreign equivalent.
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.

H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 36 months as a marine superintendent, general manager, master (captain), or chief officer.
H.14. Specific skills or other requirements: 3 years of required experience must include claims adjusting, marine emergency response and setting up marine environmental management systems, with ISO 9001 and ISO14001 and commanding ocean going vessels.

As is discussed above, the labor certification states that the beneficiary possesses a bachelor's degree from India, completed in 1995. However, the beneficiary merely completed training with the merchant marines in India. Based on the lack of any qualifications resembling the beneficiary's credential in EDGE when combined with the evidence as discussed above, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in naval science as required by the terms of the labor certification or in any field.

The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the beneficiary.[11] Nonetheless, the AAO's NOID/RFE permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.[12] Specifically, the AAO requested that the petitioner provide

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[11] The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

[12] In limited circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner's intent concerning the actual minimum educational requirements of the offered position is

a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

In response to the NOID/RFE, the petitioner submits a signed and notarized recruitment report from Anush Ramachandran, the petitioner's CEO, which includes copies of emails regarding potential candidates for the proffered position, ads, Internet posting, announcements on the petitioner's webpage, a prevailing wage determination, and a posting notice. The AAO notes that the ads, posting, and announcements state that the position requires a bachelor's degree in naval science or its foreign equivalent. They do not demonstrate that the petitioner intended to accept lesser educational requirements than those which were listed on the labor certification. Counsel states that the beneficiary made a mistake in the characterization of his education, but that this mistake, based on a reasonable belief, cannot be found to be a misrepresentation. Even if the petitioner had demonstrated that its organization and the beneficiary had not engaged in misrepresentation, the petitioner has still failed to establish that the beneficiary possessed the requisite education for the position as of the priority date.

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

Therefore it is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in naval science or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.[13]

The AAO notes the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" relates solely to the alien's educational background, precluding consideration of

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evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary's credentials. Such a result would undermine Congress' intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. *See Id.* at 14.

[13] In addition, for classification as a professional, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14.[14] In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* *See also Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).

In the instant case, the AAO provided the petitioner the opportunity to establish its intent regarding the term "or equivalent" on the labor certification and the minimum educational requirements of the labor certification. The petitioner failed to establish that "or equivalent" was intended to mean that the required education could be met with an alternative to a four-year U.S. bachelor's degree or foreign equivalent.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

Beyond the decision of the director,[15] the petitioner has also failed to establish that it will be the actual employer of the beneficiary. *See* 8 C.F.R. § 204.5(c); 20 C.F.R. § 656.3.

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[14] In *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act.

[15] 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).

In determining whether the petitioner will be the beneficiary's actual employer, USCIS will assess the petitioner's control over the beneficiary in the offered position. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) (hereinafter "*Clackamas*"); *see also* Restatement (Second) of Agency § 220(2) (1958). Such indicia of control include when, where, and how a worker performs the job; the continuity of the worker's relationship with the employer; the tax treatment of the worker; the provision of employee benefits; and whether the work performed by the worker is part of the employer's regular business. *See Clackamas*, 538 U.S. at 448-449; *cf.* New Compliance Manual, Equal Employment Opportunity Commission, § 2-III(A)(1), (EEOC 2006) (adopting a materially identical test and indicating that said test was based on the *Darden* decision).

The evidence in the record does not establish that the petitioner will be the beneficiary's actual employer. On June 22, 2012, the AAO issued a NOID/Notice of Derogatory Information (NDI). In that notice, the AAO indicated that, according to the New York Department of State, Division of Corporations, the petitioner's business was inactive, having been merged out on July 20, 2011. In response, the petitioner provided a timeline of events, which affected the petitioning organization beginning in 2006. In a letter dated July 10, 2012, PhD, chairman, stated:

> A. [The beneficiary] was employed by the undersigned, President of on January 27th, 2006 in the rank of Vice President…
>
> was the payroll processing company for which was the company that [the beneficiary] performed his work for.
>
> B. commenced the acquisition of a new company, on May 10, 2006 …
>
> F. The acquisition of was completed on May 27, 2009 … On May 29, 2009, a petition to transfer [the beneficiary's] H-1B from was approved, at which time [the beneficiary] commenced working full-time for He obtained a new H-1B visa on June 17, 2009 under this company . His employment at continued without interruption since that time …
>
> Based on the above description and enclosed documents, I would request your consideration of the dismissal of [the beneficiary's] appeal against denial of his original I-140 application [sic], in order for him to continue with his employment at

According to Part 5 of Form I-140, the petitioner, is a software solutions company. On its U.S. Return of Partnership Income (Form 1065) for 2005, identified itself as a software company.[16] As quoted above, on appeal, the petitioner stated that "was the payroll processing company for which was the company that [the beneficiary] performed his work for." As discussed above, has merged into According to its website,

Since was a software company and, according to the petitioner, was "the payroll processing company for and since the petitioner states that the beneficiary actually performed his work for which, according to its website is a provider of "maritime regulatory consulting, compliance, emergency preparedness, security, environmental and response management services," the evidence indicates that was not the intended employer in the instant circumstance. Rather the evidence indicates that was the intended employer since the petitioner states that the beneficiary worked for this entity and planned to continue to do so. Now, the petitioner indicates that has merged into The petitioner states that the beneficiary works for and hopes that instant appeal will be sustained so that the beneficiary may continue to work for

Even though all of the aforementioned entities might be owned by the same groups of people, each is a separate and distinct legal entity. According to the petitioner, the beneficiary never worked for the I-140 petitioner, and the I-140 petitioner never intended to employ him. Nor could the I-140 petitioner employ the beneficiary since it was not a maritime company, but was a provider of software solutions.

In response to the AAO's February 19, 2013 NOID/RFE, counsel again concedes that the beneficiary did not work for the petitioner's organization, but states that the services that the beneficiary provides are functionally the same as those listed on the labor certification. The AAO accordingly finds that the petition must also be denied because the petitioner failed to establish that it will actually employ the beneficiary.

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.

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[16] As asserted by the petitioner, has now merged into However, information obtained through Dunn and Bradstreet indicates that was a custom software company (accessed January 4, 2013).

ORDER: The appeal is dismissed.