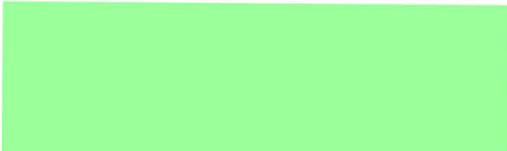


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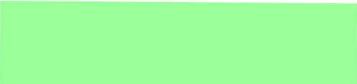
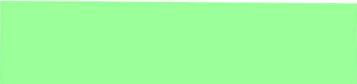
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Service  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services



DATE: **NOV 22 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 (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Elizabeth McCormack".

Ron Rosenberg  
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. The petitioner appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal as abandoned. Counsel to the petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted. Upon review, the appeal will be dismissed.

The petitioner is an IT consulting and integration services business. The petitioner seeks to employ the beneficiary permanently in the United States as an information analyst. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the Department of Labor (DOL).

Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. The director specifically determined that the beneficiary possessed a three-year bachelor's degree that was not the equivalent of a U.S. bachelor's degree or foreign equivalent degree as required by the terms of the labor certification and for classification as a professional. The director denied the petition accordingly.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5 (a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted, including information regarding the delivery of its prior response to the AAO's Request for Evidence (RFE).

As set forth in the director's September 14, 2009 denial, the issue in this case is whether the petitioner has established that the beneficiary possessed all the education as of the priority date as required by the labor certification.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. 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 February 17, 2006.<sup>1</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on August 30, 2007.

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<sup>1</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

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 an information analyst provides in part that the beneficiary apply systems analysis and design techniques to produce innovative computer-based solutions to complex business problems, and to identify, review existing systems and documentation and clarify requirements through user interviews and facilitate workshop sessions.

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 degree.

4-B. Major Field Study: "Any field"

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

The petitioner checked "No" to this question.

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

The petitioner checked "no" to this question.

9. Is a foreign educational equivalent acceptable?

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

6. Experience: 24 months experience in the position offered.

14. Specific skills or other requirements: "None"

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 four years of college culminating in a bachelor's degree in any field and 2 years of experience in the job offered of information analyst.

On the ETA Form 9089, signed by the beneficiary on February 17, 2006, the beneficiary represented that the highest level of achieved education related to the requested occupation was a bachelor's degree in chemistry. He listed the institution of study where that education was obtained as [REDACTED], India, and the year completed as 1984.

The petitioner submitted a copy of the beneficiary's Bachelor of Science degree issued by the University of Bombay on February 11, 1984 and corresponding transcripts. The copy of the degree states that the Bachelor of Science is a "Three-Year Integrated Course."

The petitioner also submitted a copy of a diploma issued to the beneficiary by [REDACTED] and dated January 1997. The diploma indicates that the beneficiary successfully completed the course of study prescribed for "Programmer Analyst."

The director denied the petition on September 14, 2009. The director determined that the beneficiary's three-year Bachelor of Science degree in Chemistry did not constitute a foreign equivalent degree as required by the terms of the labor certification. The director also determined that the transcripts regarding the beneficiary's degree in chemistry reveal no courses in computer science or business. Therefore, the director found that the beneficiary does not hold a baccalaureate degree, which would allow entrance into the position of information analyst. The petitioner appealed the director's decision to the AAO. The AAO summarily dismissed the petition on appeal as abandoned because the petitioner's response to the AAO's RFE was untimely.

Counsel asserts that the academic credentials and the academic evaluations submitted by the petitioner on behalf of the beneficiary are sufficient to establish that the beneficiary possesses the necessary qualifying academic credentials required on the labor certification.

The position requires four years of college culminating in a Bachelor's degree and two years of experience, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(l)(3)(ii)(C). Thus, combined with DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position must be considered as a professional occupation.

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

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a

foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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

On April 2, 2013, the AAO issued a RFE to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes leading to a bachelor's degree beyond the academic studies at [REDACTED]. The AAO also noted that the petitioner did not specify on the ETA Form 9089 that the minimum academic requirements of four years of college and a bachelor's degree might be met through a combination of lesser degrees and/or a quantifiable amount of work experience. The AAO further advised that according to the American Association of Collegiate Registrars and Admissions Officer's (AACRAO) Electronic Database for Global Education (EDGE) database, a Bachelor of Science degree in Chemistry from India is equivalent to three years of undergraduate study in the United States.

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

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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

It is left to USCIS to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>2</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

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

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).<sup>3</sup>

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

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<sup>2</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

<sup>3</sup> 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 (9<sup>th</sup> Cir. 1984).

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 experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

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 ETA Form 9089 does not specify an equivalency to the requirement of 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 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress’ narrow requirement of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

Moreover, as advised in the RFE issued to the petitioner by this office, we have reviewed the EDGE created by AACRAO. According to its website, AACRAO is “a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.” See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* EDGE is “a web-based resource for the evaluation of foreign educational credentials.” <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>4</sup>

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<sup>4</sup> 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. v. USCIS*, 2010 WL 3325442 (E.D.Mich.

EDGE's credential advice provides that a (3 year) Bachelor's degree is comparable to "3 years of university study in the United States. Credit may be awarded on a course-by-course basis."

The record of proceeding contains the following evaluations of the beneficiary's credentials:

- An evaluation dated July 29, 2010 prepared by [REDACTED] for [REDACTED]. The evaluation concludes that the beneficiary's Programmer Analyst Diploma from the [REDACTED] in Canada is the educational equivalent to one year of academic study toward a Bachelor of Science Degree in Computer Information Systems from a regionally accredited institution of higher education in the United States. This evaluation does not discuss the beneficiary's studies at the [REDACTED].
- An evaluation dated December 20, 2012 prepared by [REDACTED] School of Business, [REDACTED]. The evaluation concludes that the beneficiary's Diploma of Programmer Analyst, awarded to him by [REDACTED] in Canada in January 1997, is the educational equivalent to one year of academic study toward a Bachelor of Science Degree in Computer Information Systems from a regionally accredited institution of higher education in the United States. The evaluation describes the [REDACTED] as "a private career college accredited by the [REDACTED]". This evaluation does not discuss the beneficiary's studies at the [REDACTED].
- An evaluation dated June 28, 2007 and prepared by [REDACTED] for [REDACTED]. The evaluation assigns credit hour values to the individual coursework completed by the beneficiary. The evaluation describes the beneficiary's three-year Bachelor of Science Degree in Chemistry from the [REDACTED] in India as representing the equivalent of 120 semester credit hours, a Bachelor of Science Degree with a major in Chemistry from an accredited institution of higher education in the United States.
- An evaluation dated June 27, 2007 and prepared by [REDACTED] for [REDACTED]. The evaluation assigns credit hour values to the individual coursework. In addition, the evaluation states that the beneficiary's three-year Bachelor of Science Degree in Chemistry from the [REDACTED] India, represents the equivalent of 120 semester credit hours, and a Bachelor of Science with a major in Chemistry from a regionally accredited institution of higher education in the United States.

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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.

- An evaluation dated September 29, 2004 and prepared by [REDACTED] for [REDACTED]. The evaluation concludes that the beneficiary's Bachelor of Science degree in Chemistry from the [REDACTED] India, the beneficiary's Diploma from [REDACTED] Canada, which he describes as "professional training," and the beneficiary's past work experience when combined are equivalent to a Bachelor's degree in Computer Information Systems from an accredited institution of higher education in the United States.
- An evaluation dated July 10, 2007 prepared by [REDACTED] India who states that he is a former professor and is familiar with the Indian Educational System. The evaluation concludes that the beneficiary's Bachelor of Science degree in Chemistry from the [REDACTED] India, represents the equivalent of 120 semester credit hours, and would be the equivalent to a Bachelor's degree with a major in Chemistry from an accredited institution of higher education in the United States. He concludes that the beneficiary's educational record represents a single-source degree which is the equivalent of a bachelor's degree in the United States system.
- An evaluation dated May 7, 2013 and prepared by [REDACTED] for [REDACTED]. The evaluation concludes that the beneficiary's Bachelor's degree in Chemistry from the [REDACTED] India has established an equivalency to a Bachelor of Science degree in Chemistry, representing 176 semester credit hours, from an institution of postsecondary education in the United States.
- An evaluation dated July 12, 2000 prepared by [REDACTED] for [REDACTED]. The evaluation indicates that the beneficiary's credentials consist of a Bachelor of Science degree in Chemistry that was awarded by the [REDACTED] India in February 1984, based on examinations passed in May 1982, and a Diploma awarded to him by [REDACTED] Ontario for successful completion of the Programmer Analyst course of study, January 1997. The evaluation concludes that the beneficiary has the equivalent of a Bachelor of Science degree in Chemistry, with a minimum of 120 credits, from an accredited university in the United States plus a two-year postsecondary diploma in computer programming and systems analysis.

In the [REDACTED] evaluations, both [REDACTED] go on at length about Carnegie Units and Indian degrees in general, concluding that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate. The Carnegie Unit was adopted by the Carnegie Foundation for the Advancement of Teaching in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject.<sup>5</sup> For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.<sup>6</sup> This unit system was adopted at a time when high schools lacked uniformity in the courses they

<sup>5</sup> The Carnegie Foundation for the Advancement of Teaching was founded in 1905 as an independent policy and research center whose motivation is "improving teaching and learning." See <http://www.carnegiefoundation.org/about-us/about-carnegie> (accessed November 30, 2011).

<sup>6</sup> <http://www.carnegiefoundation.org/faqs> (accessed November 30, 2011).

taught and the number of hours students spent in class. The Carnegie Unit does not apply to higher education.<sup>7</sup>

The record fails to provide peer-reviewed material confirming that assigning credits by lecture hour is applicable to the Indian tertiary education system. For example, if the ratio of classroom and outside study in the Indian system is different than the U.S. system, which presumes two hours of individual study time for each classroom hour, applying the U.S. credit system to Indian classroom hours would be meaningless. [REDACTED] at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise" at 12, see [http://handouts.aacrao.org/am07/finished/F0345p\\_M\\_Donahue.pdf](http://handouts.aacrao.org/am07/finished/F0345p_M_Donahue.pdf), accessed \* and incorporated into the record of proceedings, provides that the Indian system is not based on credits, but is exam based. *Id.* at 11. Thus, transfer credits from India are derived from the number of exams. *Id.* at 12. Specifically, this publication states that, in India, six exams at year's end multiplied by five equals 30 hours. *Id.*

Additionally, both the [REDACTED] evaluation and the [REDACTED] evaluation rely on or reference a UNESCO document. The relevant language relates to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

'Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State and deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for inclusion in a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004) (accessed on March 25, 2013 at <http://unesdoc.unesco.org/images/0013/001388/138853E.pdf> and incorporated into the record of proceedings), provides:

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<sup>7</sup> See <http://www.suny.edu/facultysenate/TheCarnegieUnit.pdf> (accessed November 30, 2011).

Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. UGC, AICTE and AIU are developing criteria and mechanisms regarding the same.

*Id.* at 84. (Emphasis added.)

Similarly, the evaluation of [REDACTED] relies on his finding that the beneficiary's three years of education is the equivalent of 120 credit hours. For the reasons stated above, this evaluation is also insufficient to demonstrate that the beneficiary has three years of education equivalent to three years of academic study in the United States, based upon a number of credit hours completed in India.

Additionally, the evaluation of Professor [REDACTED] is inconsistent with the evaluations of [REDACTED] in that the evaluation of Professor [REDACTED] states that the beneficiary's Bachelor of Science degree in Chemistry from the [REDACTED] India, the beneficiary's Diploma from [REDACTED] Canada, and the beneficiary's past work experience are together the equivalent to a Bachelor's degree in Computer Information Systems from an accredited institution of higher education in the United States. He assesses the beneficiary's degree as only equivalent to three years of study. The evaluations of [REDACTED] state that the beneficiary's Bachelor of Science degree in Chemistry from the [REDACTED] India, standing alone, represents the equivalent of 120 semester credit hours, with a major in Chemistry from an accredited institution of higher education in the United States. The record shows that [REDACTED] authored and signed both the [REDACTED] evaluation dated June 27, 2007 and the [REDACTED] evaluation dated May 7, 2013. However, in the former evaluation [REDACTED] concludes that the beneficiary's degree represents 120 semester credit hours while in the latter he concludes that the beneficiary's Bachelor's degree in Chemistry represents the equivalent of 176 semester credit hours in the United States. These inconsistencies have not been explained in the record. 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, in fact, lies, will not suffice. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 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, 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'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 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 petitioner relies on the beneficiary's three-year bachelor's degree from the University of Bombay, India as being equivalent to a U.S. bachelor's degree. However, a three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. A United States baccalaureate degree is generally found to require four years of education. See *Matter of Shah*, 17 I&N Dec. 244 (Reg.Comm. 1977). Although counsel asserts that *Matter of Shah* does not state that a bachelor's degree in the U.S. always requires four years of study, the petitioner's labor certification demonstrates that it was not willing to accept anything less than an equivalent to a U.S. bachelor's degree or a foreign equivalent degree. The record indicates that the beneficiary does not hold a U.S. bachelor's degree or a foreign equivalent degree.

The beneficiary also holds a diploma from [REDACTED] Canada. The [REDACTED] evaluations state that this degree is the equivalent of one year of university study. However, the record does not demonstrate that this diploma combined with the beneficiary's three-year degree is a single academic degree that is a foreign equivalent degree to a U.S. bachelor's degree. As stated above, the regulation 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. The combination of a degree deemed less than the equivalent to a U.S. baccalaureate degree and a diploma or certificate does not meet that requirement.

The ETA Form 9089 does not provide that the minimum academic requirements of a bachelor's degree might be met through three years of college or some other formula other than that explicitly stated on the ETA Form 9089. The copies of the notice(s) of Internet and newspaper advertisements, provided with the petitioner's response to the RFE issued by this office, also fail to advise any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. The advertisements do not list the education required for the position.

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<sup>8</sup>, 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.<sup>9</sup> 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 Sonogawa*, 12 I&N Dec. 612 (Reg. Comm'r 1967).

In the instant case, the proffered wage is \$33.99 per hour (\$70,699.20 per year) and the priority date is February 17, 2006. The petitioner submitted a copy of the beneficiary's Forms W-2 indicating that he received the following wages: \$81,929.03 in 2006, \$81,375.02 in 2007, \$85,871.84 in 2008, \$86,193.21 in 2009, \$88,117.22 in 2010, \$89,311.44 in 2011, and \$95,180.34 in 2012. Although the Forms W-2 demonstrate that the petitioner paid the beneficiary wages in excess of the proffered wage, the beneficiary's social security number that appears on the Forms W-2 is different from the social security number that appears on the Form I-140. This inconsistency calls into question the petitioner's claimed employment of the beneficiary. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, this evidence cannot be used to demonstrate the petitioner's ability to pay the proffered wage.

The petitioner failed to submit its annual reports, federal tax returns, or audited financial statements or 2007 through 2012 as requested in the RFE. Accordingly, the petitioner has failed to demonstrate its ability to pay the proffered wage from the priority date onwards.

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<sup>8</sup> 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 (9<sup>th</sup> 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).

<sup>9</sup> *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> 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 (6<sup>th</sup> 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, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The motion to reopen and reconsider is granted. The petition is denied.