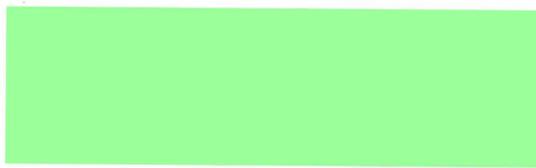




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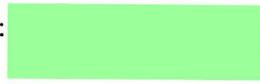
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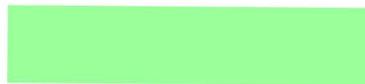
DATE: OCT 09 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE:



IN RE: Petitioner:



Beneficiary:

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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was initially denied by the Director, Nebraska Service Center and came before the Administration Appeals Office (AAO) on appeal. The director's decision was affirmed and the appeal was dismissed by the AAO on February 5, 2013. The matter is now before the AAO on a motion to reopen. The motion will be granted. The previous decision of the AAO, dated February 5, 2013, will be affirmed in part and withdrawn in part, and the petition will remain denied.

The petitioner describes itself as a retail tobacco products company. It seeks to employ the beneficiary permanently in the United States as a purchasing manager. As required by statute, ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL), accompanied the petition. The director determined that the petitioner had not established that the beneficiary met the education and experience requirements of the labor certification and that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. On appeal, the AAO withdrew the portion of the director's decision regarding the petitioner's ability to pay but upheld the decision regarding the beneficiary's qualifications for the instant position. Accordingly, the AAO dismissed the appeal on February 5, 2013.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The issue on motion is whether the beneficiary meets the education and experience requirements of the labor certification.

In the instant case, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). 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 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). For a skilled worker, 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.
- H.4-B. Major Field of Study: Arts.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: Purchasing.
- H.8. Is there an alternate combination of education and experience that is acceptable? No.
- H.9. Is a foreign educational equivalent acceptable? Yes.
- H.10. Experience in an alternate occupation: “24 months of experience as a Market Research Analyst or Purchase Inspector.”
- H.14. Specific skills or other requirements: “N/A.”

The beneficiary possesses a Bachelor of Arts degree from the [REDACTED]. The petitioner previously submitted an evaluation of the beneficiary’s educational credentials from [REDACTED], the president of [REDACTED], in which she concluded that the beneficiary’s “two years of university-level study and thirteen years and seven months of professional experience in Purchasing are equivalent to the degree, Bachelor of Arts in Purchasing, for employment purposes, from an accredited educational institute in the United States.”

On motion, the petitioner submitted an evaluation from [REDACTED], Director of [REDACTED] in which he states that the beneficiary's two-year Bachelor of Arts degree from the [REDACTED] and six of the beneficiary's thirteen years and seven months of experience with the [REDACTED] [REDACTED] are "equivalent to the degree, Bachelor of Arts in Purchasing/Procurement, for employment purposes, from an accredited educational institute in the United States." As part of this evaluation, the evaluator relies specifically upon a letter the General Manager (H.R.) from [REDACTED] dated February 11, 2013, regarding the beneficiary's employment experience there. However, this letter is a photocopied document with an original signature signed in blue ink overtop of the photocopy, which casts doubt on the validity of this letter. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* Therefore, the AAO does not view the February 11, 2013 letter from [REDACTED] to be reliable evidence towards verifying the beneficiary's employment experience there. Accordingly, the AAO does not view the evaluation from [REDACTED], dated February 25, 2013, as establishing that the beneficiary meets the education requirements of the labor certification.

Additionally, as noted by the AAO in its February 5, 2013 decision, the evaluations in the record appear to rely on the rule that three years of experience is equivalent to one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

In the AAO's prior decision, it indicated that it 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, www.aacrao.org, 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." <http://www.aacrao.org/About-AACRAO.aspx> (accessed June 19, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php> (accessed June 19, 2013). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.¹ 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

¹ *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.

Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.²

EDGE states that the Bachelor of Arts from Pakistan “represents attainment of a level of education comparable to 2 to 3 years of university study in the United States.” EDGE also states that “if the Bachelor’s degree is two years of duration, then it is noted as Pass degree and if it is a three year’s degree it is noted as Honors degree.” The AAO noted in its February 5, 2013 decision that nothing in the record demonstrated that the beneficiary’s degree was an Honors degree or based on three years of study.

Therefore, based on EDGE, the copy of the degree in the record, and the evaluation submitted, the AAO previously found that the beneficiary’s studies appear to be only equivalent to two years of study. Further, on motion, the petitioner states “[the beneficiary] completed two years of classroom education at the prestigious [REDACTED] . . . we acknowledge and stipulate that this degree is the equivalent of two years of United States university education.” As noted by the director, the beneficiary does not have a four-year degree as required by the labor certification. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg’l Comm’r 1977).

The labor certification requires a bachelor’s degree and 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.³ Counsel has asserted on appeal and on motion that the petitioner expressed a degree

² 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.

³ 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.”

equivalency on the ETA Form 9089 by checking “yes” to H.9., “Is a foreign educational equivalent acceptable?” The AAO issued the petitioner a Request for Evidence (RFE) on October 22, 2012, which requested the petitioner to submit 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.⁴ The AAO requested that the petitioner provide 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.

The AAO noted in its February 5, 2013 decision that the petitioner submitted its recruitment report with copies of the internal notice and advertisements it placed, and only eight of the nine resumes it received. The AAO also noted that the petitioner did not submit its advertisement placed in [REDACTED]. The petitioner did not address these discrepancies on motion.

Most importantly, the AAO’s decision discussed that the advertisements placed by the petitioner in the recruitment process that are in the record do not specify that an alternate combination of education and experience is acceptable as an alternative to a four-year bachelor’s degree. The advertisement placed on the [REDACTED] website states that a bachelor’s degree and two years of experience are required. The advertisement placed in the [REDACTED] states that a bachelor’s degree or “foreign equivalent” is required with a major in purchasing and two years of experience. The advertisement placed with [REDACTED] states that the position requires a bachelor’s degree or “foreign equivalency” with a major in purchasing and two years of experience in purchasing. The record demonstrates that none of the advertisements provided by the petitioner state that it would accept a combination of education and experience as the equivalent of a bachelor’s degree.

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.

⁴ 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 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.

The AAO also noted that, of the eight resumes the petitioner submitted in response to the AAO's RFE, one of the applicants has a four-year degree and over eight years of experience in purchasing with 17 additional years of experience at two different companies purchasing all products; another applicant had 13 years of experience in purchasing and logistics planning; and another applicant had 13 years of experience in purchasing. The AAO noted that the petitioner did not indicate whether these applicants were interviewed or why they were not qualified for the instant position, or whether the candidates were alerted that they might qualify for the position based on an unspecified combination of education and experience. The petitioner did not provide any additional evidence on motion to resolve these concerns.⁵

The petitioner failed to establish 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 the foreign equivalent thereof, 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 Arts or Purchasing or the foreign equivalent thereof. As the petitioner stipulated, the beneficiary does not possess a U.S. bachelor's degree or a foreign degree that is its U.S. equivalent. 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. The petitioner did not set forth or allow any different level of education and experience on the labor certification in section H.8., or qualify anywhere on the ETA Form 9089, or state in the placed advertisements, that it would allow for any combination of education and experience, or education less than a four-year bachelor's degree, as the beneficiary in this matter has. Therefore, the beneficiary does not qualify for classification as a skilled worker.

We again note 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 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

⁵ The petitioner states on motion that "none of [the applicants] met the basic eligibility requirements." The petitioner further states, "[m]any of the resumes did not contain any evidence of academic completion, just a narrative which could not support the candidate's resume statements." The petitioner appears to be stating that it did not interview potentially qualified U.S. workers because their resumes lacked additional evidence of their academic credentials, such as a copy of their degree. This appears to be inconsistent with the requirements of 20 C.F.R. § 656.10(c)(8), (9), which requires that the job opportunity is clearly open to U.S. workers and that any U.S. workers who apply for the job opportunity are rejected for lawful job-related reasons. The recruitment report in the record does not indicate the lawful job related reasons for rejecting these U.S. workers as required by 20 C.F.R. § 656.17(g).

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 *14.⁶ 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, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the required education is clearly and unambiguously stated on the labor certification in H.4 as a Bachelor's degree in Arts and the field of study is qualified in H.7-A. to allow for an additional field of study, Purchasing. The ETA Form 9089 does not include the language "or equivalent" or allow any other alternatives to a four-year bachelor's degree in Sections H.8 or H.14, or anywhere else on the labor certification. As discussed above, the petitioner's recruitment efforts conducted for this labor certification did not express to potentially qualified U.S. workers any intent to accept experience or a combination of education and experience in lieu of a bachelor's degree.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or the foreign equivalent thereof from a college or university as of the priority date as required by the labor certification. Therefore, the petitioner has 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.

The AAO's February 5, 2013 decision also stated that the petitioner had not established that the beneficiary possessed the required experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In

⁶ 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. Here, as noted above, the petitioner states only that it will accept a bachelor's degree on the ETA Form 9089. The petitioner failed to set forth any allowed equivalency in Section H.8 to allow for lesser education combined with experience or qualify the degree requirements in Section H.14, or anywhere else on the form.

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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires 24 months of experience in the job offered as a Purchasing Manager, or 24 months of experience as a Market Research Analyst or Purchase Inspector. The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). On motion, the petitioner submitted the following documentation regarding the beneficiary's employment experience:

- A letter from the General Manager (H.R.) of [REDACTED] which states that the beneficiary was employed as a Purchase Inspector from November 15, 1989 through June 5, 2003.
- A letter from the President of [REDACTED], which states that the beneficiary was employed there as a Market Research Analyst from November 2003 until September 2004.
- A letter from [REDACTED] dated April 21, 2005, to the beneficiary for the purpose of indicating that [REDACTED] was about to sell its [REDACTED] and [REDACTED] franchises and that the employees of these franchises would have their employment terminated.
- An unsigned letter from [REDACTED], dated February 13, 2013, which states that the beneficiary was employed as a Market Research Analyst by [REDACTED] from October 1, 2004 through June 30, 2005.

As stated above, the letter from [REDACTED] dated February 11, 2013, is a photocopied document with an original signature signed in blue ink overtop of the photocopy, which casts doubt on the validity of this letter. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon 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. *Id.* Accordingly, the AAO cannot accept the beneficiary's employment with [REDACTED] as constituting qualifying experience for the instant position without an explanation as to the inconsistency accompanied by independent, objective evidence of the beneficiary's claimed employment.

The letter from [REDACTED] dated February 13, 2013, is not signed; therefore, the validity of

this letter has not been established. Even without the discrepancy with this letter from [REDACTED] the beneficiary's remaining experience with [REDACTED] and [REDACTED] appears to constitute only 20 months of employment experience, which is less than the required 24 months of experience for the position offered. The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

Therefore, the AAO affirms its decision, dated February 5, 2013, and finds: (1) that the petitioner has not established that the beneficiary met the minimum education requirements of the labor certification as of the priority date; and (2) that the petitioner has not established that the beneficiary meets the experience requirements of the labor certification. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden. The previous decision of the AAO will not be disturbed.

ORDER: The motion is granted, and the decision of the AAO, dated February 5, 2013, is affirmed. The petition remains denied.