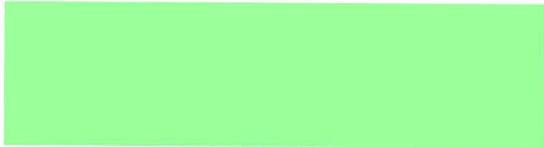




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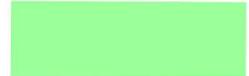
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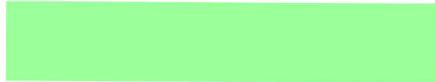
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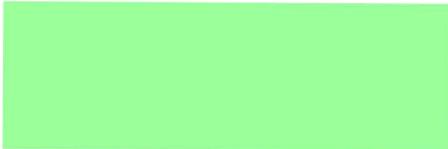
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (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 Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a company specializing in the manufacturing and design of women's apparel. It seeks to permanently employ the beneficiary in the United States as a technical production associate. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box "1.e" at Part 2, indicating that it seeks to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).

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 July 30, 2012. *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 in the field of study 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.<sup>1</sup>

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-

(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

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<sup>1</sup> 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

(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).<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). 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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<sup>2</sup> 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).

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. 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)

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 at least a U.S. bachelor’s degree or a foreign equivalent degree from a college or university; and the job offer portion of the labor certification requires at least a bachelor’s degree or a foreign equivalent degree.

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)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

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:

[9089]

H.4. Education: Bachelor's.

H.4-B. Field of Study: Fashion, Graphic, or Textile Design

H.5. Training: None required.

H.6. Experience in the job offered: Yes.

H.6-A. Number of months experience in the job offered required: 12.

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: None accepted.

H.11. Job Duties: "Execute individual designs and/or collections according to stated product briefs. These designs must be produced according to stated product briefs and produced with knowledge of product components, cost, target margins and required FOB[is. Collaborate with Design, Product Development, Merchandising, Vendors and Production[.] Cross pollinate concepts and creative ideas as well as technical information between these departments and maintain seasonal design direction. Work cross-functionally with various departments to coordinate assortment of ideas and samples for presentation through artwork print, fabric, silhouettes, outfit coordination and presentation boards. Maintain Time and Action Calendars[.] Develop and track all designs from idea conception through production completion to ensure timely completion of all designs and design packages according to the Time and Action Calendar. Create computer generated graphic layouts, create line art drawings, printed graphics, trims, trend inspiration and support generated graphic layouts, create line art drawings, printed graphics, trims, trend inspiration and support documents. Create computer deliverables, including spec sheets, technical drawings and new art work."

H.14. Specific skills or other requirements: None.

As set forth in the labor certification in this case, an individual can qualify for the offered position based on a U.S. Bachelor's degree in Fashion, Graphic, or Textile Design, or a foreign equivalent degree, and one year of experience in the offered position of technical production associate.

As is noted above, in order to be classified as a professional, the beneficiary must possess at least a U.S. bachelor's degree or a foreign equivalent degree from a college or university. The regulation at 8 C.F.R. § 204.5(1)(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 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(1)(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 in Management, Merchandising, and Product Development from the [REDACTED] California, completed in 2010.

However, the record contains a copy of the diploma and transcript for the beneficiary's Associate of Arts, Professional Designation Degree, in Merchandise Product Development from the [REDACTED] California, awarded June 19, 2009. It also contains the beneficiary's diploma and transcript for her Associate of Arts, Advanced Study Degree, from the same institution issued on March 22, 2010.

Further, the record contains a copy of the beneficiary's diploma and a copy of her transcript for her Bachelor of Science degree in Management, with a major in Communications Technology Management, from [REDACTED] Philippines, awarded March 31, 2007.

The record also contains an evaluation of the beneficiary's educational credentials prepared by Dr. [REDACTED] Ph.D. of [REDACTED] dated November 2, 2010. The evaluation states that the course work for the beneficiary's Philippine Bachelor of Science degree in Management from [REDACTED] including four years of specialized courses in her concentration of study, Communications Technology Management, is substantially similar to the required course work leading to a Bachelor's degree from an accredited U.S. institution of higher learning in the United States. Dr. [REDACTED] also considers the beneficiary's two [REDACTED] Associate of Art degrees in Merchandise Product Development and in International Manufacturing and Product Development obtained in 2009 and 2010 respectively, finding that the course work for the two programs included course work in Fashion Product Development and related areas. The evaluator ultimately concludes that, based on the beneficiary's foreign bachelor's degree and two U.S. associate of arts degrees, the beneficiary has attained the equivalent of a Bachelor of Arts degree with a concentration in Fashion Product Development from an accredited U.S. college or university.

The record contains a second evaluation in the record, dated May 1, 2013, also from [REDACTED] prepared by Dr. [REDACTED] Ph.D. Dr. [REDACTED] draws identical conclusions regarding the beneficiary's Philippine Bachelor of Science degree. Dr. [REDACTED] concludes that based on the beneficiary's Philippine Bachelor of Science degree and the beneficiary's associates degrees, that the beneficiary had attained the equivalent of a Bachelor's degree with a concentration in Fashion Design from an accredited U.S. institution of higher education. There is no analysis of this determination or explanation as to how or why this second evaluation of the beneficiary's credentials, prepared by the same evaluating company, concludes that the beneficiary's degrees are equivalent to a U.S. Bachelor's degree in the field of Fashion Design, whereas the earlier evaluation concluded the beneficiary's degrees are equivalent to a U.S. Bachelor's degree in the field of Fashion Product Development. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>3</sup>

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<sup>3</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

According to EDGE, a four-year Bachelor of Science degree from the Philippines is comparable to the attainment of a level of education comparable to a Bachelor's degree in the United States.

However, the record establishes that the beneficiary does not possess a single U.S. Bachelor's degree, or a single foreign equivalent degree, in the field of fashion, graphic or textile design, as required by the terms of the labor certification. The evaluations in the record rely on the beneficiary's four-year foreign bachelor's degree combined with the beneficiary's two U.S. Associate of Arts degrees from [REDACTED] to establish a U.S. Bachelor's degree equivalency in Fashion Design or Fashion Product Development. However, the beneficiary does not possess a single 4-year U.S. bachelor's degree or foreign equivalent degree in the field of fashion, graphic, or textile design. *See Snapnames.com, supra.* Further, the AAO notes that the labor certification here does not permit a combination of degrees to establish an equivalency to a U.S. Bachelor's in the required field.

On appeal, the petitioner's counsel asserts that the beneficiary's Bachelor of Science degree in Management, with a major in Communications Technology Management, from [REDACTED] Philippines satisfies the bachelor's degree requirement of the labor certification because the core courses and/or concentrations for the foreign degree are similar to those listed on the O\*Net Details Report for the position of graphic designer and fashion designer. The petitioner's counsel states that the beneficiary's classes at [REDACTED] in electronic publishing, multimedia systems and visual thinking for communication managers were "design" classes. However, this assertion is not supported by the evaluations in the record and is without merit.<sup>4</sup> According to the beneficiary's transcript from [REDACTED] in the Philippines, the beneficiary took no classes in fashion design, graphic design or textile design. The beneficiary's Bachelor of Science degree in Management, with a major in Communications Technology Management, from [REDACTED] is not, by itself, the equivalent of a U.S.-awarded bachelor's degree in fashion, graphic or textile design.

Therefore, the evidence in the record on appeal is not sufficient to establish that the beneficiary possesses a United States baccalaureate degree, or a foreign equivalent degree, in the required field,

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(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. 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.

<sup>4</sup> The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

or that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

While a combination of education might be accepted in the skilled worker context depending on the terms of the labor certification and a beneficiary's qualifications, there is no provision in statute or regulation that compels USCIS to readjudicate a petition under a different preference classification once the director has rendered a decision. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

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. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

Additionally, 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).

Thus beyond the decision of the director, the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all the education, training, and 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'l Comm'r 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981).

In the instant case, the labor certification states that the offered position requires twelve months of experience in the offered position of Technical Production Associate and that experience in an alternate occupation is not acceptable. On the labor certification, the beneficiary claims to qualify for the offered position based on experience as: (1) a Design Assistant, in a full-time capacity, with [REDACTED] California from July 1, 2010 to September 30, 2010; (2) a Production and Marketing A[ssociate], in a part-time capacity (20 hours weekly), with [REDACTED] California from November 1, 2009 to May 30, 2012; and (3) a Marketing Associate with [REDACTED] in a part-time capacity (20 hours weekly) from April 1, 2005 to June 30, 2007.

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). Here, the record contains a letter from the president of [REDACTED] dated December 21, 2012, which indicates that it employed the beneficiary in a part-time capacity as a Production and Marketing Associate from November 2009 to May 2010. There is also a letter from the Executive Brand Manager of [REDACTED] corroborating the beneficiary's claimed part-time employment as a Marketing Associate with that company from April 2005 to June 2007.

There is a discrepancy between the labor certification and the letter from [REDACTED] with respect to the length of the beneficiary's employment with this employer. ON the labor certification, the beneficiary indicates that she was employed from November 1, 2009 to May 30, 2012, and the letter from the president of [REDACTED] indicates that she was employed there from November 2009 to May 2010. The record contains no explanation for this inconsistency in the record. This casts doubt on the validity of the beneficiary's claimed experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, the AAO notes that the beneficiary's employment with all three of the referenced former employers were in positions that are not the same as the offered position of technical production associate, as required by the labor certification. As noted, the labor certification does not allow for consideration of experience in alternate occupations in order to qualify for the offered position here. Moreover, the employer letter from [REDACTED] makes clear that the job duties of the beneficiary's former position of Production and Marketing Associate with that company do not include all of the duties of the offered position here, as certified by the ETA Form 9089, including: "execut[ing] individual designs and/or collections according to stated product briefs.... [c]ollaborat[ing] with Design, Product Development, . . . and Production[.]" *See* ETA Form 9089, Question H.11. Similarly, the employer letter from [REDACTED] does not establish that the beneficiary's former position with that company as a part-time Marketing Associate required the ability to "[e]xecute individual designs and/or collections according to stated product briefs" and to produce the designs "according to stated product briefs and produced with knowledge of product components, cost, target margins and required FOB[is]." *See id.* The letter also does not indicate whether, as a Marketing Associate, the beneficiary had to "[c]ollaborate with Merchandising . . . and Production," as required in the offered position, or "[m]aintain Time and Action Calendars . . . and] [d]evelop and track all designs from idea conception through production completion to ensure timely completion of all designs and design packages according to the Time and Action Calendar." Lastly, the record does not contain a letter from the beneficiary's third employer, [REDACTED] to demonstrate her claimed experience with that company as a Design Assistant.

The AAO notes that the beneficiary's only experience in the offered position is with the petitioner, as indicated on the labor certification. However, the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the offered position. Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner, or experience in an alternate occupation, cannot be used to qualify the beneficiary for the certified position. *See* 20 C.F.R. § 656.17. Specifically, the petitioner indicates "not applicable" in response to question J.20, which inquires whether the beneficiary possesses experience in an alternate occupation, which, as noted in question

H.10, was not permitted in this case. The petitioner responded “no” to question J.21, which asks, “Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?” In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable, as defined in 20 C.F.R. § 656.17, and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the labor certification indicates in response to question K.1 that the beneficiary was employed as in the offered position by the petitioner. Therefore, the beneficiary’s position indicated with the petitioner is not only substantially comparable, but it is identical, to the offered position. Moreover, as stated, the labor certification does not allow for an applicant to qualify through experience in an alternate occupation. Therefore, according to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Thus, 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.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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 appeal is dismissed.