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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
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Washington, DC 20529-2090

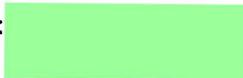


U.S. Citizenship  
and Immigration  
Services



DATE: SEP 04 2013

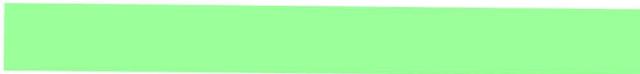
OFFICE: NEBRASKA SERVICE CENTER

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IN RE:

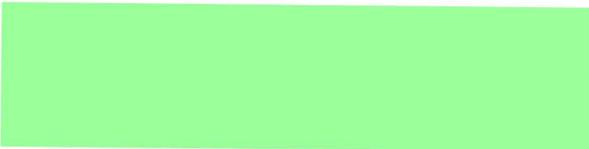
Petitioner:

Beneficiary:



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

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), 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 software development services business. It seeks to permanently employ the beneficiary in the United States as a programmer analyst. On the Form I-140, Immigrant Petition for Alien Worker, the petitioner marked box "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 April 19, 2012. See 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the proffered position as described on the labor certification does not require a U.S. bachelor's degree or foreign equivalent. Therefore, the labor certification does not support the Form I-140 request 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.

At issue in this case is whether the labor certification in the instant case requires a bachelor’s degree and therefore supports the requested Form I-140 classification as a professional. On appeal, counsel for the petitioner appears to assert that the position offered on the labor certification does require a bachelor’s degree and that the director erred in denying the petition due to inclusion of “*Kellogg*” language on the labor certification.<sup>3</sup>

Part H of the labor certification states that the offered position has the following minimum requirements:

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<sup>3</sup> Counsel appears to contend on appeal that the director should have requested further evidence before denying the petition. The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances “where there is no evidence of ineligibility, and initial evidence or eligibility information is missing.” The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

- H.4. Education: Bachelor's degree in computer information systems.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 months.
- H.7. Alternate field of study accepted: Computer science, engineering, math, electronics, management, business, technology or related.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 12 months as a software engineer, programmer, specialist systems or related.
- H.14. Specific skills or other requirements: “\*Position requires extended travel and/or relocation to project sites/locations throughout the United States. \*\*Employer defines a foreign educational equivalent in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Bachelor's Degree. \*\*\*Employer is willing to accept any suitable combination of work experience, education and training that is equivalent to the actual minimum requirements of the position and shows demonstrable ability in the required skill sets.”

*Kellogg* language is “any suitable combination of education, training or experience are acceptable.” See *Matter of Francis Kellogg*, 94-INA-465 (BALCA Feb. 2, 1998). The AAO does not interpret the language to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. See the following Board of Alien Labor Certification Appeals (BALCA) decisions: *Federal Insurance Co.*, 2008-PER-00037 (BALCA Feb. 20, 2009) and *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009). Generally, the inclusion of the *Kellogg* language does not undermine the requirements of the proffered position as stated on the labor certification.

However, the labor certification in the instant case also states in H.14 “[e]mployer defines a foreign educational equivalent in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Bachelor's Degree.” By including this statement in H.14, the petitioner explicitly states its intent to accept less than a full single-source baccalaureate degree or foreign equivalent degree. The petitioner's acceptance of a combination of lesser degrees, diplomas or professional certificates precludes the labor certification from consideration in support of a request for professional classification. The plain language of the labor certification reflects that the petitioner does not require the minimum of a bachelor's degree for the proffered position, but rather will accept a combination of lesser degrees, experience, education or training.<sup>4</sup> To determine whether a beneficiary is eligible for an employment based immigrant visa, United States Citizenship and

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<sup>4</sup> On the labor certification, in response to question J.19 the petitioner states that the beneficiary qualifies on the primary educational requirements. However, as discussed below, the beneficiary does not possess the minimum requirements for the proffered position.

Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). 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. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, 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.* at \*7.

Therefore, the labor certification as written does not support the Form I-140 request for classification as a professional.

Counsel also points out that according to USCIS guidance, "Kellogg language would not be the basis for denial if the beneficiary met the statutory requirements for the classification." As noted above, the labor certification included language beyond that specified in *Kellogg*. Furthermore, the AAO also notes that even if the language included in H.14 were ignored and the labor certification were to be read as requiring at least a bachelor's degree, it does not appear that the beneficiary possess a U.S. bachelor's degree or single source foreign degree equivalent, as is required for classification as a professional.

The record contains a copy of the beneficiary's three-year bachelor's degree in computer applications and marks sheet from the [REDACTED] completed in December 2008 and a copy of the beneficiary's Diploma in Electronics and Communication Engineering and marks sheet from the [REDACTED] completed in April 2001. The record also contains a copy of the beneficiary's Master of Business Administration degree and transcript from [REDACTED] completed in May 2013. The priority date in the instant case is April 19, 2012. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). On the labor certification, the petitioner indicates that the beneficiary qualifies for the proffered position based on his degree from IGNOU, not any other degree. Therefore, as the beneficiary's master's degree was awarded after the priority date of the instant petition, it may not be considered in determining whether or not the beneficiary meets the requirements of the proffered position as it was awarded after the priority date of the instant petition.

Regarding the beneficiary's bachelor's degree and diploma, 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.

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. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The beneficiary's degree from IGNOU appears to be a three-year degree. Counsel acknowledges that it is a three-year degree and does not assert that it is a U.S. bachelor's or foreign equivalent degree as is required for classification as a professional. Counsel also notes that the beneficiary's Diploma in Electronics and Communication Engineering was three years of post-secondary education and appears to be asserting that this education could be combined with the beneficiary's bachelor's degree to meet the terms of the labor certification. Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, as in the instant case, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree required for classification as a professional. The record of proceeding also contains a number of professional training certificates; however, as the labor certification does not require training, these are of little probative value. Therefore, the beneficiary does not qualify for classification as a professional and would not meet the terms of the labor certification as of the priority date.

In summary, the petitioner has failed to establish that the proffered position requires a bachelor's degree and the proffered position cannot be approved as a professional. Therefore, the beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

Beyond the decision of the director, the petitioner has failed to establish that a *bona fide* job offer exists. According to USCIS records, the petitioner has one employee, not 31 employees as stated on

the Form I-140. It is unclear how the petitioner would employ the beneficiary as a programmer analyst with only one employee. Therefore, the record does not establish that the petitioner would be the beneficiary's employer or that a *bona fide* job offer exists.

Also beyond the decision of the director, the petitioner has failed to establish its continuing ability to pay the proffered wage as of the priority date. See 8 C.F.R. § 204.5(g)(2). According to USCIS records, the petitioner has filed 20 Form I-140 petitions on behalf of other beneficiaries in the past three years. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not include financial information from the priority date year nor does it document the priority date of each petition, the proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, it is also concluded that the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions from the priority date of the instant petition onward.

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).

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 appeal is dismissed.