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



U.S. Citizenship  
and Immigration  
Services

DATE: JUL 18 2014 OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

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)

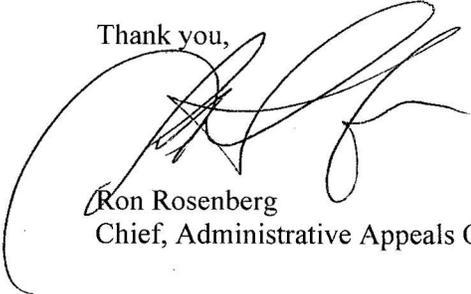
ON BEHALF OF PETITIONER:

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.

Thank you,

  
Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center (director), approved the employment-based immigrant visa petition and certified his decision to the Chief, Administrative Appeals Office (AAO). The AAO will remand the director's certified decision of April 22, 2013, for further action, consideration, and the entry of a new decision in accordance with below.

## I. PROCEDURAL HISTORY

The petitioner operates an online payment network. It seeks to permanently employ the beneficiary in the United States as a "Software Engineer 3, Quality." The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).<sup>1</sup>

An ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), accompanies the petition. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is February 15, 2012. *See* 8 C.F.R. § 204.5(d).

The petitioner filed this Form I-140, Immigrant Petition for Alien Worker, on December 17, 2012. Prior to reaching a decision, the director issued a Request for Evidence (RFE) to the petitioner, requesting additional documentation from the petitioner to demonstrate that the beneficiary met the minimum educational requirements as defined on the labor certification. The petitioner responded on April 8, 2013. The director then certified his decision to the AAO.

A director may certify his or her decision to the AAO "when the case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1). Certification to the AAO may occur "only after an initial decision is made." 8 C.F.R. §§ 103.4(a)(4), (5).

The director's certified decision discusses that the terms of labor certification require a Bachelor's degree, or a foreign equivalent degree, in Computer Information Systems, Computer Science, Engineering, or a closely related field. The director found that the petitioner failed to demonstrate that the beneficiary possessed the primary educational requirements for the position offered. The decision states:

A review of the record shows the petitioner has not demonstrated the beneficiary in this case met the minimum educational requirements of the position according to the above. Based on the record, the beneficiary was awarded a Bachelor of Science degree in mathematics, statistics and computer science from a university in India, in 2001, following three years of study. However, a U.S. baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec,

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<sup>1</sup> Section 203(b)(3)(A)(i) of the Act allows 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.

244 (reg. 1977). Since the beneficiary's degree was awarded after only three years of study, it will not be considered the foreign equivalent of a U.S. Bachelor's degree; and since the beneficiary does not possess the foreign equivalent of a U.S. Bachelor's degree, he does not qualify for the proffered position, again, according to the above.

The director also notes that the petitioner responded "No" to the question on the labor certification, which could have permitted the petitioner to define alternative educational and experience requirements for the position offered. Despite these findings, the director then discusses terms that appear later on the labor certification and appear to qualify the primary requirements such that the beneficiary would qualify for the position offered based on these alternate requirements. The decision states:

However, the beneficiary does qualify for the position based upon a review of the petitioner's notation in H.14 of the labor certification. H.14 reads, in part: "Will accept [a] 3-year or [a] 4-year Bachelor's degree." Further, it is USCIS policy to read Part H of the labor certification in its entirety, to include H.14, regarding the petitioner's minimum educational and experience requirements for the position. This permits a petitioner in H.14 the opportunity to further explain or to clarify the position's requirements listed in, say, H.4 through H.4-B, or H.8 through H.8-C. Therefore, since the beneficiary has a three-year Bachelor's degree, and H.14 allows for a three-year Bachelor's degree, the beneficiary is considered to have met the minimum educational requirements of the position. USCIS has also noted the beneficiary's degree awarded in 2001 predates the filing of the labor certification application on February 15, 2012; thus he met the minimum requirements of the position at the time of filing.

In view of the above, the petition is approved.

However, USCIS approves this petition with the following reservation: In approving the petition, USCIS is ignoring the terms of the labor certification and imposing additional requirements. The labor certification in this case could be read as to require at least a four-year Bachelor's degree. The petition indicated its minimum educational requirement in H.4, a Bachelor's degree. As noted earlier, a Bachelor's degree generally requires four years to complete, and the beneficiary of this petition does not have a four-year Bachelor's degree, based on the record. H.8 through H.8-C of the labor certification allows a petitioner to list an alternate level of education and experience. In this case, the petitioner answered the question at H.8 to indicate there was no acceptable alternate level of education, such as a three-year Bachelor's degree. The petitioner could have stated in H.8 through H.8-B that it was willing to accept a three-year Bachelor's degree, but it chose not to. Instead, the petitioner annotated H.14 to indicate that it was willing to accept a three-year Bachelor's degree. However, H.14 is to list "[s]pecific skills or other requirements," not to change or contradict the primary or alternate requirements set forth in H.4 through H.4-B, or H.8 through H.8-C. USCIS should not ignore the terms of the labor

certification which precede H.14 in this case, nor should it impose additional requirements based on the petitioner's annotation in H.14.

The decision indicates that the director interpreted the minimum educational requirements of the offered position stated on the accompanying labor certification to allow alternatives to a four-year Bachelor's degree. Accordingly, the director approved the petition and certified the decision to the AAO; the unusually complex or novel issue the director seeks to address is his interpretation of the terms of the labor certification. The AAO will remand the director's certified decision of April 22, 2013, for further action, consideration, and the entry of a new decision in accordance with below.

## II. LAW AND ANALYSIS

The AAO conducts review on a *de novo* basis. *See, e.g., Soltane v. Dep't of Justice*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on certification.<sup>2</sup>

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(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(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(1)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(1)(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.

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<sup>2</sup> Pursuant to 8 C.F.R. § 103.4(a)(2), the petitioner submitted a brief and supporting documents within 30 days of service of the Notice of Certification. The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on certification. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

### The Requirements for the Position Offered

The DOL's issuance of the labor certification certifies that "there are not sufficient workers who are able, willing, qualified ... and available" to perform the duties of the offered position and that "the employment of [a foreign worker] will not adversely affect the wages and working conditions" of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The purpose of this provision is "to protect U.S. workers from foreign competition, and to allow U.S. employers to hire foreign workers when qualified U.S. workers were not available." *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286, 1288 (9th Cir. 1992) (citing Immigration & Nationality Act, Legislative History, H.R. Rpt. 82-1365 (Feb. 14, 1952) (reprinted in 1952 U.S.C.C.A.N. 1653, 1705)).

When adjudicating a petition seeking immigrant preference classification, USCIS "may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *see also* section 204(b) of the Act, 8 U.S.C. § 1154(b) (requiring USCIS to approve an immigrant visa petition if the petition states "true" facts and the beneficiary qualifies for the requested classification).

USCIS "is bound by the DOL's certification and may invalidate it only upon determining that it was procured through fraud or misrepresentation of a material fact." *Tongatapu*, 736 F.2d at 1309 (citations omitted); *see also* 20 C.F.R. § 656.30(d).

In *Tongatapu*, the Ninth Circuit cites and follows *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), which found that "it is the language of the labor certification job requirements that will set the bounds" of the position's qualifications. 696 F.2d at 1015. *Madany* states that USCIS must "recognize that [the] DOL bears the authority for setting the *content* of the labor certification and that [USCIS] cannot impose job qualifications beyond those contemplated therein." *Id.* (no emphasis added); *see also* *Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833-34 (D.D.C. 1984) (determining the minimum educational requirements of a job opportunity "involves reading and applying the plain language of the [labor certification] application," and USCIS "must examine the certified job offer exactly as it is completed by the prospective employer.")

In the instant case, the labor certification states the following minimum requirements for the offered position of Software Engineer 3, Quality:<sup>3</sup>

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<sup>3</sup> The petitioner previously filed another Form I-140, Immigrant Petition for Alien Worker, on the beneficiary's behalf, for what appears to be the same petition, "Software QA Engineer," although without the "3" designation of the position on the instant labor certification, "Software Engineer 3, Quality." The labor certification in that matter, ETA Case Number [REDACTED] required a master's degree in Computer Information Systems, Computer Science, Engineering, or a closely related field, and one year of experience in the position offered, or in the position of "software QA engineering." Alternatively, the labor certification indicated that the petitioner would also accept a Bachelor's degree and five years of experience in lieu of the primary requirements. As the job duties set forth on the earlier labor certification are the same as the current labor certification, this calls into question the true minimum requirements of the position offered as the labor certification in this

- 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: "Computer science, engineering, or a closely related field."
- 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 in "software QA engineering."
- H.14. Specific skills or other requirements:

\* Will accept single degree or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service. Will accept 3-year or 4-year Bachelor's degree.

Experience must include the following: ability to read and understand technical design specification documents and implementing automated test harnesses; ability to design test plans and execute test procedures for complex applications; good knowledge of QA methodology; white box testing; and experience with C++/Java/scripting. Experience may be gained concurrently. Any suitable combination of education, training and experience is acceptable.

### **The Beneficiary's Qualifying Experience**

The evidence in the record does not establish that the beneficiary possessed the required experience for the offered position.

A petitioner must establish that a beneficiary satisfied all of the education, training, and experience requirements stated on the labor certification by the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

The labor certification states that the 12-month period of employment experience required for the offered position must include: the ability to read and understand technical design specification documents and implementing automated test harnesses; the ability to design test plans and execute test procedures for complex applications; good knowledge of QA methodology; white box testing; and experience with C++/Java/scripting.

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matter only requires a Bachelor's degree and one year of experience. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent, objective evidence; attempts to explain or reconcile such inconsistencies, absent competent, objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592. The petitioner should address and resolve this issue in response to any notice or request from the director.

Part J.21 of the ETA Form 9089 further states that the beneficiary did not gain any of the qualifying experience with the petitioner in a position substantially comparable to the offered job opportunity.

The petitioner must support the beneficiary's claimed qualifying experience with letter(s) from the beneficiary's prior employer(s) that include the name, address, and title of the employer(s), and a specific description of the duties the alien performed. 8 C.F.R. § 204.5(g)(1); *see also* 8 C.F.R. § 204.5(l)(3)(ii)(A). If this evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. 8 C.F.R. § 204.5(g)(1).

Two experience letters accompanied the petition. One is from the purported president of [REDACTED] stating that the company employed the beneficiary as a programmer analyst from March 2007 to July 2008. The other is from the purported site HR director of [REDACTED], stating that the beneficiary worked for the company as a technical support team manager from May 17, 2002 to December 1, 2006.

The experience letter from [REDACTED] dated August 31, 2009, does not contain any description of the beneficiary's duties. Therefore, this letter does not meet the requirements of the regulation at 8 C.F.R. § 204.5(g)(1) and cannot demonstrate the beneficiary's qualifying employment experience as a Software Engineer 3, Quality, or in the related occupation, software QA engineer.

Further, the experience letter from [REDACTED] also conflicts with the evaluation of the beneficiary's foreign educational credentials regarding the beneficiary's position and start date of employment there. Both the labor certification and the letter from [REDACTED] state that the beneficiary worked as a technical support team manager from May 17, 2002, to December 1, 2006. However, the March 31, 2006, credentials evaluation states that the beneficiary worked for [REDACTED] as a software programmer from March 2002 to May 2003 and as a technical support team manager thereafter. The letter from [REDACTED] indicates that the beneficiary held only a single position for the duration of his employment. The discrepancies in the beneficiary's purported positions and start date with [REDACTED] cast doubt on the validity of the company's experience letter and the evaluation of the beneficiary's foreign educational credentials. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). Therefore, without resolution of this issue, it is not clear that the beneficiary would have the equivalent of a bachelor's degree as claimed, even if it were determined that the labor certification allowed for the equivalent of a degree. This issue is discussed further below.

In addition, the labor certification requires 12 months of experience in the position offered, Software Engineer 3, Quality, or in the acceptable alternate occupation of software QA engineering. It is unclear from the record if the beneficiary's purported employment as a technical support team manager would fulfill these requirements, as the subject matter area of technical support appears to differ from the required experience in quality assurance. Further, the letter does not state that the beneficiary has any of the required special skills.

Unlike the experience letter from [REDACTED], the letter from [REDACTED] dated July

10, 2009, describes the beneficiary's experience. But the letter does not document the beneficiary's experience with "white box testing" or experience with "C++/Java/scripting," as the labor certification requires. Further, the letter does not state whether the beneficiary worked full-time or part-time. Therefore, the experience letter from [REDACTED] does not establish the beneficiary's qualifications for the offered position. In addition, although both the labor certification and the letter from [REDACTED] state the beneficiary's experience with "black box" testing, they do not suggest that experience with black box testing could stand in lieu of the required experience in white box testing.

The record also contains copies of the beneficiary's certificates from the [REDACTED] in India, showing courses in the "C" and "Java" programming languages. The labor certification, however, specifically requires "*experience* with C++/Java/scripting" (emphasis added). Although the beneficiary's certificates may establish that the beneficiary took courses in the "C" and "Java" programming languages, they do not demonstrate his experience with the technologies specifically required by the labor certification. The [REDACTED] certificates do not indicate any courses in scripting languages.

In a previous petition for the beneficiary, the petitioner submitted a printout of an article about white-box testing from the free, online encyclopedia Wikipedia.<sup>4</sup> The printout also contains a note, apparently from the beneficiary, referring to the Wikipedia article's assertion that white-box testing requires programming skills. In the note, the beneficiary states that he has programming skills in "C" and "Java" as his [REDACTED] Society certificates indicate.

The Wikipedia article and the beneficiary's accompanying note also fail to establish the beneficiary's experience with "white box testing," as the labor certification requires. The beneficiary's note is self-serving and does not constitute independent, objective evidence of his knowledge of white-box testing. *See Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence). The labor certification specifically requires experience with white box testing, in addition to the experience with C and Java, which are all requirements listed separately. There is no indication on the labor certification that experience with C and Java is sufficient to demonstrate experience with white box testing, which is a requirement listed separately from the enumerated requirements of C and Java.

In response to the AAO's RFE, which was sent on August 1, 2013, and requested additional evidence of the beneficiary's qualifying experience<sup>5</sup> as well as the labor certification recruitment

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<sup>4</sup> The record shows that USCIS denied the petitioner's previous petition on August 15, 2011, finding that the petitioner failed to establish the beneficiary's educational qualifications for the offered position. The petitioner previously offered the beneficiary a position with the same job duties as the instant position, but with a slightly different job title and different educational and experience requirements, as set forth above. *See* n. 3, *supra*.

<sup>5</sup> The petitioner's response to the DOL's Audit Notification indicates that the petitioner rejected both U.S. applicants for the job opportunity due to lacking required special skills. Specifically, the

materials, the petitioner submits a letter from a purported former coworker of the beneficiary. The September 5, 2013 letter is from a purported business systems analyst on the stationery of [REDACTED]. The letter states that the beneficiary worked full-time for [REDACTED] as a Programmer Analyst from March 1, 2007, to July 20, 2008, and describes the duties he performed there, including his purported experience with white box testing and C++/Java/scripting. The letter states: "I am able to attest to this as I held the position of Business Systems Analyst, and was a co-worker of [the beneficiary] from March, 2007 to July, 2008."

This letter does not meet the regulatory requirements necessary to document the beneficiary's experience. The petitioner has not provided a letter from the beneficiary's former employer as the regulation at 8 C.F.R. § 204.5(g)(1) requires because there is no evidence that the beneficiary's coworker also served as his employer. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence regarding the facts at issue. *Id.*

Counsel asserts that the experience letter on [REDACTED] stationery neglected to state the beneficiary's experience with white box testing and C++/Java/scripting "[d]ue to administrative error." Counsel asserts that the beneficiary contacted the human resources department at [REDACTED] "on multiple occasions" to obtain a new experience letter, but "his phone calls were not returned."

Counsel's assertions do not constitute evidence and therefore do not demonstrate the unavailability of the required evidence pursuant to 8 C.F.R. § 103.2(b)(2)(i). *See Matter of Obaigbena*, 19 I&N Dec. 533, 538 n. 2 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Even if the petitioner established the unavailability of an amended experience letter from [REDACTED] the coworker's letter is insufficient to demonstrate the beneficiary's claimed qualifying experience there. The letter does not include an address and therefore does not comply with the regulation at 8 C.F.R. § 204.5(g)(1). Further, the letter provided does not meet the regulatory requirements for secondary or tertiary evidence. 8 C.F.R. § 103.2(b)(2)(i) (a petitioner must demonstrate the non-existence or unavailability of both the required document, and relevant secondary evidence, before submitting at least two affidavits, sworn to or affirmed by persons who are not parties to the petition and who have direct personal knowledge of that which must be proved). The petitioner has not asserted or demonstrated that secondary evidence is unavailable. Therefore, as the petitioner has not established that initial evidence, or secondary evidence, is unavailable, the unsworn letter cannot

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petitioner rejected one applicant who "did not possess one year of experience in software QA engineering and did not possess multiple special skill requirements." The petitioner rejected the other applicant who "did not possess the vast majority of special skills required for the position," although that applicant did meet the "minimum degree and experience requirement." This further supports the conclusion that the petitioner purposefully enumerated the special skills required for the position offered, and that the petitioner evaluated applicants as to whether they possessed all of the special skills required on the labor certification.

be accepted in lieu of the regulatory required evidence.

Also, although the letter identifies the writer as a former coworker of the beneficiary, the letter does not establish that the coworker had personal knowledge of the beneficiary's job duties at [REDACTED]. Counsel asserts that USCIS should accept "[s]econdary evidence, such as letters written by former supervisors of the beneficiary." The letter does not state that the coworker supervised the beneficiary, or even worked on the same project(s) or in the same location(s) as the beneficiary. The coworker's letter would not constitute independent, objective evidence of the beneficiary's job duties at [REDACTED] if the beneficiary merely told the coworker about his job duties, as the coworker would not be aware of the beneficiary's job duties based on personal knowledge or supervision of the beneficiary. Therefore, the petitioner has failed to establish that the beneficiary possessed the qualifications for the offered position specified on the labor certification by the petition's priority date.

As the petitioner has failed to establish that the beneficiary possessed the qualifications for the offered position specified on the labor certification by the petition's priority date, the petition is currently unapprovable. This issue was not the basis of the director's decision, and the matter will be remanded to the director to provide the petitioner an opportunity to document whether the beneficiary possesses the required experience and skills as of the priority date.

### **The Beneficiary's Educational Credentials**

The labor certification states that the beneficiary received a Bachelor's degree in Computer Information Systems from [REDACTED] in India in 2001. Copies of the beneficiary's university transcript and a March 31, 2006, evaluation of his foreign educational credentials state that he obtained a 2001 Bachelor of Science degree from [REDACTED] after three years of study.

The educational evaluation, by [REDACTED] Ph.D. and [REDACTED] for [REDACTED] concludes that the beneficiary possesses the equivalent of a U.S. Bachelor's degree in Computer Information Systems based on the combination of his Indian Bachelor's degree, technical education in computer applications at the [REDACTED] of India,<sup>6</sup> computer hardware training

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<sup>6</sup> The record contains a "Certificate of Business Professional Programmer," representing an "O" Level certification from the [REDACTED] of India, awarding the beneficiary a grade of "C" ("55% - 64%"), on October 31, 2000, while the beneficiary's was also enrolled in his Bachelor's degree. The record also contains a letter, dated August 29, 2001, from the [REDACTED], indicating that the beneficiary "cleared" ten papers at the "A" Level. However, the letter indicates that a formal certificate will be issued only after the beneficiary successfully completes a project. In addition, a handwritten notation on the letter states, "you are advised to submit your project." Therefore, as the record does not contain a formal certificate confirming the beneficiary's completion of the [REDACTED] "A" Level examination, it is unclear whether this level of certification was ever awarded to the beneficiary and whether the evaluator's reliance on this certificate was warranted. This casts doubt on the materials used in the evaluation. *Matter of Ho*, 19 I&N at 591. In any future filings with USCIS, or on remand, the petitioner should address this issue with

through [REDACTED] and four years of employment experience as a software programmer and technical support team manager at [REDACTED] in India from March 2002 to March 2006. The evaluation states that the beneficiary's Bachelor's degree equals three years of study towards a U.S. Bachelor's degree in Computer Science or Computer Information Systems.

As noted above, the director determined that the record failed to demonstrate that the beneficiary's three-year, Indian Bachelor's degree equals a four-year, foreign equivalent degree of a U.S. baccalaureate degree. *See Matter of Shah*, 17 I&N at 245 (a U.S. Bachelor's degree generally requires four years of university or college education). On January 24, 2013, the director issued a RFE to the petitioner, noting the findings of the educational evaluation and the petitioner's statement in part H.8 of the labor certification that it would not accept an alternate combination of education and experience for the offered position. The RFE states that the beneficiary does not appear to have a four-year Bachelor's degree, as part H.4 of the labor certification requires, and requests evidence that the beneficiary possessed a U.S. Bachelor's degree or a foreign equivalent degree by the petition's priority date. Although the petitioner indicated in part H.14 of the labor certification that it will also accept a three-year Bachelor's degree "or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service," the RFE states that part H.14 of the labor certification calls for "[s]pecific skills or other requirements" of the offered position, not changes to the educational and experience requirements stated elsewhere on the form. The director noted that the beneficiary's three-year degree is only equal to three years of education, and is not the foreign equivalent of a Bachelor's degree.

In response to the RFE, counsel argued that USCIS, in meetings and teleconferences with representatives of the [REDACTED] and in unpublished AAO decisions, has stated that petitioners may indicate their acceptance of alternatives to four-year Bachelor's degrees in either parts H.8 or H.14 of labor certification. Counsel argued that the petitioner's labor certification indicated its acceptance of alternatives to four-year Bachelor's degrees in part H.14 pursuant to the statements and unpublished decisions of USCIS officials and demonstrated that the beneficiary met those alternative requirements by the petition's priority date.

On April 22, 2013, the director approved the petition and certified the decision to the AAO. But, in certifying his decision to the AAO, he expressed "reservation" over the conflict between the petitioner's statements in parts H.4 and H.8 of the labor certification, and those in part H.14. Parts H.4 and H.8 state that the offered position requires a four-year Bachelor's degree, without acceptance of any alternate combination of education and experience, whereas part H.14 indicates that the petitioner will accept a "single degree or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service" and will accept a "3-year or 4-year Bachelor's degree."

On certification, counsel urges the AAO to apply the plain language as expressed on the labor certification to determine the minimum educational requirements of the offered position. Counsel argues that the plain language of part H.14 of the labor certification demonstrates the petitioner's

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independent, objective evidence that the beneficiary completed this certification. *Id.* at 591-592.

willingness to accept not only four-year Bachelor's degrees, but also three-year Bachelor's degrees "or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service" to meet the minimum educational requirements of the offered position. Counsel asserts: "There is no other meaning that can be gauged from these requirements."

However, counsel's focus on the plain language of part H.14 of the labor certification ignores the plain language of parts H.4 and H.8 and the language in H.14 subject to several different interpretations. Part H.4 provides the petitioner with choices to indicate the minimum acceptable level of education required for the position offered, including specific degree choices, as well as the selection of the choice "other" which includes the option of then providing a written description of the "other" type of education in part H.4-A of the labor certification. Part H.8 provides the petitioner the opportunity to specify an alternate combination of education and experience than that specified in parts H.4 and H.6, including an "other" option with the space to "indicate the alternate level of education required." In contrast to the terms specified by the petitioner in part H.14, the terms specified in parts H.4 and H.8 of the form state that the offered position requires a Bachelor's degree without any acceptable alternate combination of education and experience. Rather than indicating an "other" educational credential in parts H.4 or H.8, the petitioner in part H.4 states that the offered position requires a minimum of a four-year "Bachelor's" degree. Also, when asked in part J.19 of the ETA Form 9089, "Does the alien possess the alternate combination of education and experience as indicated in question H.8?" the petitioner states "NA" (not applicable), confirming the petitioner's statement in part H.8 that it will not accept an alternate combination of education and experience to meet the educational requirements of the offered position. In reading the form as a whole, H.14 contains an asterisk, which appears to correspond to an asterisk the petitioner also placed in H.4-B ("major field of study"), as follows:

\* Will accept single degree or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service. Will accept 3-year or 4-year Bachelor's degree.

The director relies on the beneficiary's foreign three-year Bachelor's degree in the certified decision. However, as confirmed by the educational evaluation provided by the petitioner, the beneficiary's foreign three-year Bachelor's degree is only equivalent to three years of study, not an actual Bachelor's degree. The terms of H.14 are unclear as to whether the petitioner intended any three-year bachelor's degree to be acceptable, to include applicants such as the beneficiary with only three years of education and not the equivalent of a U.S. bachelor's degree.

USCIS cannot ignore terms of the labor certification. *See Tongatapu*, 736 F.2d at 1309 (citing *Madany*, 696 F.2d at 1015). Parts H.4 and H.8 of the instant ETA Form 9089 state that the offered position requires a minimum of a four-year Bachelor's degree and that the petitioner will not accept an alternate combination of education and experience. A U.S. Bachelor's degree generally requires four years of university or college education. *See Matter of Shah*, 17 I&N at 245. Yet, part H.14 of the form states that the petitioner will accept a three-year Bachelor's degree "or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service."

Because the plain language of the labor certification does not clearly establish the minimum educational requirements of the offered position (if three years of education would be accepted), the AAO issued an RFE, dated August 1, 2013, to the petitioner. The RFE requested copies of the petitioner's labor certification recruitment materials in an additional attempt to determine the petitioner's intended minimum educational requirements for the offered position, as expressed to potential willing and qualified U.S. workers.

The petitioner provided the requested recruitment materials in response to the RFE. However, while providing those materials, counsel argues that the labor certification advertisements cannot demonstrate the petitioner's intended educational requirements for the offered position. Citing the DOL's online answer to a frequently asked question, counsel argues that an employer need not state its acceptance of any suitable combination of education or experience "in advertisements used to notify potential applicants of the employment opportunity." See OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers, "Advertisement Content," Question 7, available at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed May 5, 2014).

The online answer that counsel cites addresses a statement first required by *Matter of Kellogg*, 94-INA-465, 1998 WL 1270641 (BALCA Feb. 2, 1998) (*en banc*). In *Kellogg*, the Board of Alien Labor Certification Appeals held that, where an alien qualifies for the offered position based solely on alternate job requirements, the DOL will consider the alternate requirements to be unlawfully "tailored" to the alien's qualifications unless the employer states in the labor certification application and in its advertisements for the offered position that applicants with "any suitable combination of education, training, or experience are acceptable." *Kellogg*, 1998 WL 1270641 at \*5.

As of March 25, 2005, DOL regulations require applications under its re-engineered labor certification program, Program Electronic Review Management (PERM), to state the "*Kellogg* language" where the beneficiary already works for the employer and only qualifies for the offered position by virtue of the employer's alternative requirements.<sup>7</sup> See 20 C.F.R. § 656.17(h)(4)(ii). Unlike in *Kellogg*, however, the regulation at 20 C.F.R. § 656.17(h)(4)(ii) does not require the language to appear in advertisements for the offered position. See OFLC Frequently Asked Questions and Answers, "Advertisement Content," Question 1, available at <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed May 5, 2014).

Counsel's reliance on the DOL's "*Kellogg* language" policy is misplaced. Although the instant labor certification states the *Kellogg* language as required by the regulation at 20 C.F.R. § 656.17(h)(4)(ii), the *Kellogg* language in part H.14 differs from the alternative educational requirements stated in the same part. The *Kellogg* language does not require specific alternative job requirements of the offered position. The language states only the employer's general assurance that the alternative job requirements are substantially equivalent to the job's primary requirements

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<sup>7</sup> As noted above, the petitioner indicated in Part J.19 of the labor certification that the question of whether the beneficiary possessed "the alternate combination of education and experience as indicated in question H.8" was "not applicable," suggesting that there is not an alternate acceptable combination of education and experience for the position offered.

pursuant to the regulation at 20 C.F.R. § 656.17(h)(4)(i) (alternative job requirements “must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought.”) As the OFLC answer states: “[t]he placement of the language on the application is simply a mechanism to reflect compliance with a substantive, underlying requirement of the program.” See OFLC Frequently Asked Questions and Answers, “Advertisement Content,” Question 7, *available at* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed May 5, 2014).

In requesting the labor certification recruitment materials for the offered position, the AAO acknowledges not only that the petitioner need not state the “*Kellogg* language” in the advertisements, but also that the ads need not contain specific job requirements or job duties. See 20 C.F.R. § 656.17(f)(6); OFLC Frequently Asked Questions and Answers, “Advertisement Content,” Question 1, *available at* <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed May 5, 2014) (“[t]he regulation does not require employers to run advertisements enumerating every job duty, job requirement, and condition of employment”). However, the advertisement must provide a description of the vacancy “specific enough to apprise the U.S. workers of the job opportunity for which certification is sought.” 20 C.F.R. § 656.17(f)(3). The advertisement may not “contain any job requirements or duties which exceed the job requirements or duties listed on the ETA Form 9089.” 20 C.F.R. § 656.17(f)(6). The advertisements may not contain “terms and conditions of employment that are less favorable than those offered to the alien.” 20 C.F.R. § 656.17(f)(7). The OFLC Frequently Asked Questions and Answers, “Multiple Positions,” Question 2, states:

As stated in the advertising requirements provision, the advertisement must provide a description of the vacancy specific enough to apprise U.S. workers of the job opportunity for which certification is sought. At issue in evaluating whether the advertisement meets this criterion is whether the advertisement is written to attract the interest of the greatest number of qualified U.S. workers and encourage them to apply, not whether specific words or [phrases] have, or have not, been used. The advertisement will be reviewed to ensure that it reasonably describes the vacancy and reflects the job opportunity as described on the ETA Form 9089.

See <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (accessed May 5, 2014).

By reviewing the recruitment materials, the AAO affords the petitioner an additional opportunity to demonstrate that it expressed its claimed acceptance of alternatives to the four-year Bachelor’s degree required by Part H.4 to meet the minimum educational requirements of the offered position.

The petitioner’s job order and newspaper advertisements for the offered position do not contain specific job requirements and do not state the educational minimum for the position. The materials state the offered position’s title among several available positions at the petitioner’s worksite.

The petitioner’s posting notice states that the offered position requires a “Bachelor’s degree, or foreign equivalent,” and that the petitioner will accept “single degree or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service.” The posting notice does not state that a “3-year or 4-year Bachelor’s degree” might be acceptable.

The advertisement that appeared on the petitioner's company website states that the offered position requires a "Bachelor's Degree or Equivalent." This advertisement does not state that a "3-year or 4-year Bachelor's degree" or a "single degree or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service" might be acceptable.

The petitioner also placed an external, online advertisement with [REDACTED] for the offered position. Similar to the job order and the newspaper ads, the external online ad states the offered position's title among several available positions at the petitioner's worksite. The ad also states: "Minimum Education: Bachelors." Because the ad's statement of the offered position's minimum education requirement does not indicate any alternatives to a "Bachelors" degree, qualified U.S. workers without four-year Bachelor's degrees who saw the ad may not have believed themselves eligible for the offered position.

The petitioner's ETA Form 9141, Application for Prevailing Wage Determination (PWD), states that the offered position requires at least a U.S. Bachelor's degree. The PWD application states that "any suitable combination of education, training and experience is acceptable." But, unlike the labor certification, the PWD application does not state that a "3-year or 4-year Bachelor's degree" or a "single degree or any combination of degrees, diplomas or professional experience determined to be equivalent by a qualified evaluation service" might be acceptable.

The petitioner's response to the AAO's RFE also includes an Audit Notification, dated May 10, 2012, from DOL, and the petitioner's response to that audit. The Audit Notification was issued with two requests: (1) to provide the resumes and applications of all U.S. workers who applied for the job opportunity, such that DOL may determine if potentially qualified U.S. workers were rejected for lawful, job-related reasons; and (2) to provide DOL with information on the employer's employee referral program, such that DOL may determine if the petitioner accurately notified its employees of the job opportunity. While DOL appears to have audited the petitioner's labor certification, the audit did not appear to consider whether the beneficiary had an actual bachelor's degree, or determine the equivalency, if any, of the beneficiary's educational qualifications. It is unclear whether DOL would have been on notice that the beneficiary possessed less than a four-year Bachelor's degree in an acceptable field of study, as was specified on the labor certification such that the petitioner's ads should have been examined. Part J. of the labor certification states that the beneficiary possessed a Bachelor's degree, because the petitioner indicated in Part J.11 that the beneficiary possessed a Bachelor's degree, and did not select the "other" response that was available, with which it could have provided additional descriptive information in Part J.11-A. Therefore, the labor certification before DOL states that the beneficiary was qualified for the position offered based on the assertion that the beneficiary possessed a Bachelor's degree in Computer Information Systems awarded by [REDACTED] India, in 2001.

Contrary to the assertion on the labor certification, the evaluation that the petitioner provided to USCIS indicates that the beneficiary's course of study at [REDACTED] is equivalent only to three years of study, and is not equivalent to a U.S.-awarded Bachelor's degree in Computer Information Systems. Nothing in the record indicates that DOL was aware that the beneficiary possessed a three-year Bachelor of Science degree, less than the foreign equivalent to a U.S.

Bachelor's degree, or that the petitioner was relying on a combination of education, lesser degrees or training, and experience, to fully assess the terms of the labor certification against the varying terms provided in the petitioner's recruitment. Exhibit 2 of the petitioner's response to the Audit Notification includes a letter from the petitioner, dated June 1, 2012, in which the petitioner's Director of [REDACTED] states, "Software Developers, Applications is in the O\*Net job zone 4, SVP Range 7.0 to < 8.0, and the normal educational level for the occupation is a bachelor's degree." The petitioner's Director further states, "[REDACTED] requirement of a bachelor's degree, or its foreign equivalent, is within job zone 4's parameters for educational level requirements." Therefore, prior to the approval of the labor certification, the petitioner appears to have asserted to DOL during this audit process that the petitioner's educational requirements for the position are a Bachelor's degree, or its foreign equivalent. The petitioner did not describe any alternate acceptable levels of education or combinations of education and experience. The petitioner did not indicate in its audit response to DOL that it was relying on the beneficiary's three-years of study in combination with [REDACTED] certificates and experience to conclude that the beneficiary met the terms of the labor certification, or three years of education to reach a "3-year bachelor's degree," which is not the foreign equivalent to a U.S. Bachelor's degree.

As counsel for the petitioner stated in response to the AAO's RFE, the beneficiary does not possess a U.S. Bachelor's degree or a foreign-equivalent degree. The petitioner also has not established that the beneficiary possessed the experience, to include all the special skills, required on the labor certification as of the priority date. Were the petitioner to overcome the identified lack of experience, the director may consider consulting with DOL prior to issuing a final decision. The director may consult with DOL on the issue of the stated requirements on the labor certification and the requirements expressed in the petitioner's recruitment for the job opportunity, specifically as to whether the statements on the labor certification compared to all the recruitment pieces are sufficient to establish that the petitioner stated an acceptable equivalency to the required Bachelor's degree.

On certification, counsel argues that USCIS should allow the petitioner to indicate its willingness to accept alternatives to a four-year Bachelor's degree in part H.14 of the ETA Form 9089 "[b]ecause USCIS has not provided petitioners and the legal community with any formal guidance on how one should prepare Form ETA 9089 on behalf of EB-3 skilled workers whose positions require a Bachelor's degree that can either be three years or four years in length."

As previously discussed, however, Congress has charged the DOL with certifying offers of permanent employment in the United States to foreign workers. *See* section 212(a)(5)(i) of the Act; *Tongatapu*, 736 F.2d at 1309 (citing *Madany*, 696 F.2d at 1015). USCIS lacks authority to issue or adjudicate ETA Forms 9089. *See La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless Congress confers power upon it.") Therefore, USCIS does not provide formal guidance on the preparation of labor certifications.

Counsel argues that USCIS officials have informally advised employers and attorneys on how to complete ETA Forms 9089. However, any statements of that nature do not bind the AAO. *See Askenazy Prop. Mgmt. Corp.*, 817 F.2d at 75 (the AAO is bound by the Act, USCIS regulations, precedent USCIS and BIA decisions, and published decisions of the relevant U.S. Court of Appeal);

*R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (a federal agency's legal memoranda are not binding, even when private publications print them or they are widely circulated). Unpublished AAO decisions containing contrary interpretations of similar terms on labor certifications also do not bind the AAO in this matter. *See, e.g., Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988) (the AAO need not approve applications and petitions based merely on prior approvals that may have been erroneous).

In the Notice of Certification, the director notes that the DOL has found that "the vast majority" of workers in the offered position's occupational classification possess at least Bachelor's degrees. *See* O\*NET OnLine Summary Report for: 15-1132.00-Software Developers, Applications, "Education," available at, <http://onlineonetcenter.org/link/summary/15-1132.00> (accessed on May 5, 2014) (stating that 17 percent of software developer, applications positions in Standard Occupational Classification (SOC) code 15-1132 require master's degrees and 75 percent require Bachelor's degrees).<sup>8</sup> The percentage of U.S. software developer positions requiring Bachelor's degrees may inform the DOL in reviewing and certifying the minimum job requirements of an offered position. However, USCIS must accept the contents of a labor certification as approved by the DOL. *See Tongatapu*, 736 F.2d at 1309 (citing *Madany*, 696 F.2d at 1015). USCIS may not look beyond the labor certification materials to determine the job requirements of an offered position.

In attempt to document the beneficiary's qualifications for the position offered, the petitioner relies on the beneficiary's three-year Bachelor's degree combined with [REDACTED] certifications and work experience as being equivalent to a U.S. bachelor's 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 at 244. Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree. *Id.*

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

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<sup>8</sup> Parts F.2 and F.3 of the labor certification, which was filed on February 15, 2012, classify the offered position as a software developer, applications in SOC code 15-1031.00. However, the prevailing wage determination, which was filed on November 21, 2011, classifies the offered position as a software developer, applications in SOC code 15-1132.00. In 2010, the DOL revised the SOC code structure, eliminating code 15-1031.00 and replacing it with code 15-1132.00. *See* "What's New in the 2010 SOC," U.S. Bureau of Labor Statistics (Feb. 2010), p. 7, available at [http://www.bls.gov/soc/soc\\_2010\\_whats\\_new.pdf](http://www.bls.gov/soc/soc_2010_whats_new.pdf) (accessed May 5, 2014).

equivalencies.<sup>9</sup>

According to EDGE, a three-year Bachelor of Science degree from India is comparable to “three years of university study in the United States.”

EDGE also discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. EDGE provides that a postsecondary diploma, such as the beneficiary’s [REDACTED] certificate,<sup>10</sup> is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor’s degree. Registration for [REDACTED] “O” or “A” Level certificates does not require a Bachelor’s degree<sup>11</sup> as a prerequisite. Rather, entrance to these programs appears to be lateral to that of a Bachelor’s program. As these certificate programs do not require post-secondary education, such as the beneficiary’s three-year Bachelor’s degree, as a prerequisite to admission, there is no basis by which the AAO could determine that these certificate courses are in addition to, or build upon, the beneficiary’s degree such that they could be considered in combination with a three-year Bachelor’s degree. Rather, they appear to be an unrelated series of post-secondary courses intended to stand on their own and operate outside of the formal post-

<sup>9</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “Master’s” degree were only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. 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>10</sup> As noted above, the record indicates that the beneficiary received a certificate confirming passage of the “O” Level by the [REDACTED], but the record does not contain the certificate confirming if the beneficiary passed the “A” Level of certification by that entity, despite the evaluators’ inclusion of that certificate in their educational evaluation. See *Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

<sup>11</sup> Registration for O Level certification is the completion of “10+2” years of schooling, an ITI Certificate after class 10, or the successful completion of the second year of a Government recognized polytechnic engineering diploma course after class 10. See *Registration, [REDACTED] O Level Syllabus*, page 7, [REDACTED] (accessed May 5, 2014); see also “Registration >> Eligibility Criteria,” <http://www.nielit.gov.in/student493.htm> (accessed May 5, 2014) (listing the registration criteria for each [REDACTED] certification). Registration for A Level certification is the completion of the O Level or a government recognized polytechnic engineering diploma after class 10. See *Registration, [REDACTED] A Level Syllabus* at page 7, [REDACTED] (accessed May 5, 2014).

secondary educational structure that confers Bachelor-level and advanced degrees. Documentation developed by the [REDACTED] states, [REDACTED] is a joint [REDACTED] [REDACTED] and [REDACTED] Govt. of India.” See [REDACTED] O Level Syllabus, pages 2-3, [REDACTED] (accessed May 5, 2014). The objective of that Scheme “is to generate qualified manpower in the area of Information Technology (IT) at the national level, by utilizing the facilities and infrastructure available with the institutions/organizations in the non-formal sector.” *Id.* at 3; see also [REDACTED] (accessed May 5, 2014) (“the objective of the Scheme is to develop quality manpower in IT by utilizing the expertise available with the non-formal computer training institutes”). While the beneficiary completed at least one of the [REDACTED] certificates prior to completing his Bachelor of Science degree, there is no indication in the record that the [REDACTED] courses were eligible for transfer as college credit to that Bachelor of Science program. Rather, as indicated above, they appear to be related to the development of IT manpower through non-formal institutions. The petitioner has provided insufficient evidence to document that these certificates, if issued, could be evaluated as additional bachelor-level education that would be in addition to, rather than lateral with, the beneficiary’s existing three-years of study towards the awarded Bachelor of Science degree. Additionally, as noted previously, the evaluation also partially relies on experience with identified issues that must be resolved. See *Matter of Ho*, 19 I&N Dec. at 591-92 (the petitioner must resolve inconsistencies in the record by independent, objective evidence).

Therefore, based on the conclusions of EDGE and the petitioner’s evaluation, the evidence in the record on appeal is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. Bachelor’s degree in Computer Information Systems, Computer Science, Engineering, or a closely related field, or the equivalent of a Bachelor’s degree.

### III. CONCLUSION

In summary, the record does not establish that the beneficiary possessed the required experience as of the priority date. If the petitioner is able to overcome the identified lack of experience, the director may wish to consult with DOL regarding whether the petitioner’s recruitment, which appears to have different requirements than the labor certification, is sufficient to state an acceptable equivalency to the Bachelor’s degree required in Part H.4 of the labor certification. The AAO need not and does not reach a determination on whether the petitioner stated an acceptable equivalency, as that issue is not ripe until the petitioner establishes that the beneficiary did possess the required experience as of the priority date, and until DOL provides advice on whether the recruitment compared to the terms of the labor certification are acceptable.

Therefore, as it appears that the director has approved the petition, the matter will be remanded to the director to take appropriate action. The director may request any evidence relevant to the outcome of the decision and should afford the petitioner a reasonable opportunity to respond. Upon review and consideration of any response, the director shall enter a new decision.

(b)(6)

*NON-PRECEDENT DECISION*

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The petition will be remanded for the reasons stated above. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act; *Otiende*, 26 I&N Dec. at 128. Here, that burden has not been met.

**ORDER:** The petition is remanded to the director for issuance of a new, detailed decision.