



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF C-, INC

DATE: DEC. 1, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development company, seeks to permanently employ the Beneficiary in the United States as a programmer/analyst. The Petitioner requests classification of the Beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). The Director, Texas Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The petition is accompanied by a Form ETA 750, Application for Alien 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 March 15, 2004. *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 as 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.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.

## I. LAW AND ANALYSIS

### A. The Roles of the DOL and USCIS in the Immigrant Visa Process

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 of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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

It is left to USCIS to determine whether the offered position and the beneficiary qualify for the requested preference classification, and whether the beneficiary satisfies the minimum requirements of the offered position as set forth on the labor certification.

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>1</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

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<sup>1</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

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.

*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:

[T]he 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 or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).<sup>2</sup> We will first consider whether the petition may be approved in the professional classification.

#### B. Educational Requirements for 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(1)(2).

The regulation at 8 C.F.R. § 204.5(1)(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(1)(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(1)(3)(i)

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 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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<sup>2</sup> Employment-based immigrant visa petitions are filed on Form I-140, Immigrant Petition for Alien Worker. The petitioner indicates the requested classification by checking a box on the Form I-140. The Form I-140 version in effect when this petition was filed did not have separate boxes for the professional and skilled worker classifications. In the instant case, the petitioner selected Part 2, Box e of Form I-140 for a professional or skilled worker. The petitioner did not specify elsewhere in the record of proceeding whether the petition should be considered under the skilled worker or professional classification. After reviewing the minimum requirements of the offered position set forth on the labor certification and the standard requirements of the occupational classification assigned to the offered position by the DOL, we will consider the petition under both the professional and skilled worker categories.

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

In the instant case, the labor certification states that the Beneficiary possesses a Bachelor of Science degree from the [REDACTED] awarded in 1993. The record contains a copy of a certification from the [REDACTED] (India) that the Beneficiary had "passed Sections A and B of the Institution Examinations in the Electronics and Communication Engineering Branch in Summer 1988 and Winter 1993 respectively." Accompanying records confirm that the Beneficiary completed examinations in [REDACTED] in summer 1988 and in [REDACTED] in Winter 1993. The Petitioner also submitted the Beneficiary's diploma from Indira [REDACTED] and university transcripts confirming that the Beneficiary had been awarded a Master of Business Administration degree in December 1997.

The record contains an evaluation of the Beneficiary's educational credentials prepared by [REDACTED], for [REDACTED] on December 17, 2003. The evaluation states that the Beneficiary "has the equivalent of a Bachelor's degree in Computer Information Systems from an accredited college or university in the United States of America" based on the combination of his membership in the [REDACTED] (India), his Master of Business Administration degree from [REDACTED], and his certificates from [REDACTED] and [REDACTED].

In response to the director's May 19, 2014, request for evidence, the Petitioner submitted a new evaluation from [REDACTED]. [REDACTED] concluded that the Beneficiary's certificate from the [REDACTED] (India) is "equivalent to a "Bachelor of Science Degree in Electronics and Communications Engineering with a concentration in Computer Engineering (27 credits for a major in Computer Engineering) from an accredited college or University in the United States of America." [REDACTED] listed numerous classes that he claimed the Beneficiary had completed; however, the record contains no evidence to corroborate the assertion that the Beneficiary completed any coursework. Rather, the evidence from the [REDACTED] (India) exclusively discusses the passing of examinations.

On appeal, the Petitioner submits a copy of a diploma showing that the Beneficiary was awarded a Bachelor of Arts degree by [REDACTED] in July 1984. The Petitioner also submits transcripts from [REDACTED] showing that the Beneficiary completed coursework there in April 1983 and July 1984. The Petitioner submits new credentials evaluations completed by [REDACTED] for the [REDACTED] and by [REDACTED].

In his March 11, 2015, evaluation, [REDACTED] concludes that the Beneficiary "has attained the equivalent of a Bachelor of Science degree in Electronics Engineering and a Master of Business

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Administration Degree from an accredited institution of higher education in the United States.” [REDACTED] states that his conclusion is based on “[t]he course of studies undertaken, the number of credit units earned, the number of years of coursework, the grades earned for coursework and the final diploma.” However, the record contains no evidence of coursework, credits, or diploma; rather, the evidence submitted relates exclusively to the Beneficiary’s satisfactory scores on examinations administered by the Institution for Engineers (India).

In his March 13, 2015, evaluation, [REDACTED] summarized that based on “the number of years of coursework, the nature of the coursework, the grades attained in the courses, and passage of the Institute’s Section A and B Examinations, it is the judgment of The [REDACTED] that [the beneficiary] attained the equivalent of a Bachelor of Science Degree in Electronic Engineering and a Bachelor of Administration Degree from an accredited college or university in the United States.” However, [REDACTED] does not explain how he was able to base his evaluation on the duration or the nature of the coursework taken by the Beneficiary at the [REDACTED] (India), since [REDACTED] also states that “it is the practice of the Institution to issue examination results at the end of each two-year period of study, rather than issuing transcripts specifying each of the completed courses.”

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding a beneficiary’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the beneficiary’s eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert’s qualifications or the relevance, reliability, and probative value of the testimony).

In this case, the credentials evaluations submitted by the Petitioner rely on evidence that is not contained in the record of proceedings. Specifically, they all refer to the Beneficiary’s credit hours and the nature of his coursework at the [REDACTED] (India), but no evidence has been submitted to demonstrate that coursework. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)).

On June 19, 2015, we issued a request for evidence (RFE) and noted that the submitted credentials evaluations cited corroborating evidence, but were not accompanied by such evidence. The Petitioner responded to the RFE, but did not address this deficiency.

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It is noted that the regulation at 8 C.F.R. § 204.5(l)(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 a beneficiary 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 a beneficiary 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(l)(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 *Snaphnames.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. The Petitioner's assertion on appeal that the regulations and statute do not require that the institution granting the degree be an actual university or college is not persuasive.

In the instant case, the Petitioner relies on the Beneficiary's membership in the [REDACTED] (India) as being equivalent to a U.S. bachelor's degree. As is noted above, the record

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contains evaluations of the Beneficiary's educational credentials which conclude that the Beneficiary's I.E.T.E. membership is equivalent to a U.S. bachelor's degree. We have reviewed the Electronic Database for Global Education (EDGE) that was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to EDGE, membership in the [REDACTED] (India) "represents attainment of a level of education comparable to a bachelor's degree in the United States." We notified the Petitioner of the conclusions of EDGE in our RFE.

As is explained above, for classification as a professional, the Beneficiary must possess a foreign degree from a college or university that is equivalent to a U.S. bachelor's degree. While EDGE concludes that the Beneficiary's Institution membership is "comparable to" a bachelor's degree in the United States, it is not a degree from a college or university. The [REDACTED] (India) is not an institution of higher education that can confer a degree. Therefore, the Beneficiary possesses the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree" within the meaning of 8 C.F.R. § 204.5(l)(2). While counsel stresses that the government of India has recognized [REDACTED] (India) membership as equivalent to a bachelor's degree, this standard is not binding on USCIS.

On appeal, the Petitioner submits a copy of a diploma showing that the Beneficiary was awarded a Bachelor of Arts degree in mathematics by [REDACTED] in July 1984. The Petitioner also submits transcripts from [REDACTED] showing that the Beneficiary completed coursework there in April 1983 and July 1984. EDGE states that a bachelor of arts/bachelor of commerce/bachelor of science degree in India "represents attainment of a level of education comparable to two to three years of university study in the United States."

Finally, the Petitioner submitted evidence that in December 1997 the Beneficiary was awarded a Master of Business Administration degree by the [REDACTED]. While EDGE states that a Master of Business Administration from India represents attainment of a level of education comparable to a bachelor's degree in the United States, a degree in business administration is not one of the fields of study indicated on the Form ETA 750 as required for the proffered position.

After reviewing all of the evidence in the record, it is concluded that the Petitioner has not established that the Beneficiary possessed at least a U.S. baccalaureate (or a foreign equivalent degree) in the required field as of the priority date. Therefore, the Beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

### C. Educational Requirements for Skilled Worker

We will also consider whether the petition may be approved in the skilled worker classification. Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

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

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] 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]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

In the instant case, the labor certification states that the offered position has the following minimum requirements:

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#### EDUCATION

College: 4 years.

College Degree Required: B.S. or equivalent.

Major Field of Study: CIS, or Computer Eng.

TRAINING: None Required.

EXPERIENCE: Two years in the job offered or in the related occupation of software engineer.

OTHER SPECIAL REQUIREMENTS: None.

As is discussed above, the record contains a copy of a certification from the [REDACTED] (India) that the Beneficiary had “passed Sections A and B of the Institution Examinations in the Electronics and Communication Engineering Branch in Summer 1988 and Winter 1993 respectively.” Accompanying records confirm that the Beneficiary completed examinations in [REDACTED] in summer 1988 and in [REDACTED] in Winter 1993. The Petitioner also submitted the Beneficiary’s diploma from [REDACTED] and university transcripts confirming that the Beneficiary had been awarded a Master of Business Administration degree in December 1997.

The labor certification does not permit a lesser degree, a combination of lesser degrees, and/or a quantifiable amount of work experience, such as that possessed by the Beneficiary.<sup>3</sup> The Petitioner did not establish that the terms of the labor certification are ambiguous and that the Petitioner intended the labor certification to require less than a four-year U.S. bachelor’s or foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

In our June 19, 2015, RFE we offered the Petitioner an opportunity to submit evidence of its intent concerning the actual minimum requirements of the position. In response, the Petitioner submitted illegible photocopies of two newspaper advertisements. The Petitioner also submitted a copy of the signed recruitment report, which makes repeated reference to the position requiring “a bachelor’s degree in computer information systems, or a related discipline.” The recruitment report explains, “[w]e are unable to consider applicants with less than two years of progressively responsible experience following completion of a baccalaureate degree.” The report further states that the company received six applications for the position and that all of the applicants were rejected

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<sup>3</sup> The DOL has provided the following field guidance: “When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job.” See Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep’t. of Labor’s Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep’t. of Labor’s Empl. & Training Administration, Interpretation of “Equivalent Degree,” 2 (June 13, 1994). The DOL’s certification of job requirements stating that “a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer’s definition.” See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that “[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree.” See Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

because they did not possess the required experience and/or skills to perform the job. Copies of the submitted resumes reveal that five of the applicants claimed to possess at least a bachelor's degree.

It appears that the Petitioner did not reject any applicants based on the lack of a four-year bachelor's degree from a college or university. However, it is unclear from the record whether the Petitioner's recruitment efforts expressed to potential applicants any intent to accept less than a four-year degree from a college or university. While our RFE specifically requested the Petitioner to submit "copies of the prevailing wage determination, all online, print and additional recruitment conducted for the position, the job order, [and] the posted notice of the filing of the labor certification," the Petitioner submitted illegible photocopies of the print ads and simply stated that the remainder of the requested information was unavailable because of the passage of time. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The Petitioner, through counsel, stresses that it stated on the labor certification that the position requires a "B.S. or equivalent" and that it did not require a "Foreign Equivalent Degree." The Petitioner suggests that in writing "or equivalent" on the labor certification it was allowing for the acceptance of anything "equal in value" to a U.S. bachelor's degree. However, no specific terms are set out on the Form ETA 750 or in the employer's recruitment efforts to define the term "equivalent." Moreover, it is noted that on the same labor certification the Petitioner expressly stated that four years of college education were required to qualify for the position and, as quoted above, the Petitioner specified in its recruitment report to the DOL that "[w]e are unable to consider applicants with less than two years of progressively responsible experience following completion of a baccalaureate degree." Therefore, the current assertion that the Petitioner intended "or equivalent" to mean something less than a U.S. bachelor's degree is not persuasive.

It is concluded that the terms of the labor certification require a four-year U.S. bachelor's degree in CIS or computer engineering or a foreign equivalent degree. The Beneficiary does not possess such a degree. The Petitioner did not establish that the Beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the Beneficiary does not qualify for classification as a skilled worker.<sup>4</sup>

We note the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that "B.S. or foreign equivalent" relates solely to the beneficiary's educational background, precluding consideration of the beneficiary's combined education and work experience. *Snapnames.com, Inc.* at \*11-13. Additionally, the court determined that the word "equivalent" in the employer's educational

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<sup>4</sup> In addition, for classification as a skilled worker, the beneficiary must also meet all of the requirements of the offered position set forth on the labor certification. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); see also *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

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requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at \*14.<sup>5</sup> In addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *Id.* at \*7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree). In the instant case, the Petitioner did not establish that "or equivalent" was intended to mean that the required education could be met with an alternative to a four-year U.S. bachelor's degree or foreign equivalent degree.

In summary, the Petitioner did not establish that the Beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree in the required field from a college or university as of the priority date. The Petitioner also did not establish that the Beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the Beneficiary does not qualify for classification as a professional under section 203(b)(3)(A)(ii) of the Act or as a skilled worker under section 203(b)(3)(A)(i) of the Act.

#### D. Work Experience Requirements

As stated above, the labor certification requires candidates to possess two years of work experience in the offered job of programmer analyst or in the related occupation of software engineer. On the labor certification, the Beneficiary claimed the following employment:

- Employment as a programmer analyst for [REDACTED] North Carolina, from April 1999 until July 2000;
- Employment as a programmer analyst for [REDACTED] Arizona, from August 2000 until October 2002;
- Employment as a programmer analyst for [REDACTED] California, from November 2002 until December 2003; and,
- Employment as a programmer analyst for the Petitioner since January 2004.

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<sup>5</sup> In *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), the court concluded that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." However, the court in *Grace Korean* makes no attempt to distinguish its holding from the federal circuit court decisions cited above. Instead, as legal support for its determination, the court cites to *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)(the U.S. Postal Service has no expertise or special competence in immigration matters). *Id.* at 1179. *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act.

(b)(6)

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In support of these claims, the Petitioner submitted an employment letter from a manager at [REDACTED]. This letter describes the Beneficiary's duties and salary, but does not state the Beneficiary's dates or duration of employment.

The Petitioner submitted an October 30, 2002, employment letter from [REDACTED] attesting to the beneficiary's salary and his employment there as a programmer analyst since August 2000. However, this letter does not describe the Beneficiary's duties and the letter does not identify the title of its author as is specifically required by 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

The Petitioner submitted a July 7, 2000, employment letter from [REDACTED] affirming the Beneficiary's employment there from April 1999 until July 2000. The letter briefly describes the Beneficiary's duties as involving "Client Server and Internet Technologies like Java, C++ and Databases." The letter does not identify the title of its author as is specifically required by 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A).

In our June 19, 2015, RFE we notified the Petitioner of these deficiencies and requested the Petitioner to submit additional documentation of the beneficiary's claimed work experience with [REDACTED] with [REDACTED], and with [REDACTED].

In response to the RFE, the Petitioner submits a statement from the Beneficiary, who explains that he had been unable to contact his three previous employers and speculated that they were no longer in business. The website maintained by the North Carolina Department of the Secretary of State confirms that [REDACTED], was dissolved on [REDACTED] 2005. The website maintained by the [REDACTED] confirms that [REDACTED], was dissolved on [REDACTED] 2005. The website maintained by the California Secretary of State confirms that [REDACTED] has been dissolved. The Petitioner submits employment letters from three individuals who attest to having worked with the Beneficiary as claimed on the labor certification. The letters include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. *See* 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Therefore, this documentation satisfies the noted deficiencies in the documentation of the Beneficiary's qualifying employment history.

#### E. Ability to Pay the Proffered Wage

Beyond the decision of the director, the petitioner has not established its continuing ability to pay the proffered wage as of the priority date. *See* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between

the wage paid, if any, and the proffered wage.<sup>6</sup> If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In our June 19, 2015, RFE we requested that the Petitioner provide copies of its federal income tax returns, annual reports, or audited financial statements for 2007 through 2014. In response, the Petitioner provided copies of only the first page of its IRS Form 1120S, Federal income tax return for each year from 2007 through 2014. Without complete copies of its tax returns we are unable to determine the Petitioner's net income or net current assets for the years in question.<sup>7</sup> We are also unable to determine the total wages owed by the Petitioner each year.

We also requested that the Petitioner provide copies of IRS Forms W-2 or 1099 issued to the Beneficiary from 2007 through 2014. In response, the Petitioner submitted copies Forms W-2 issued to several of its employees during this period, but only submitted wage information for the Beneficiary in 2007. It is noted that the W-2s that were previously submitted show that the Beneficiary was paid less than the proffered wage in 2004, 2005, and 2006.

The Petitioner's Federal tax returns for 2004, 2005, and 2006 were submitted with the petition. These records reveal that in 2004 and 2005 Petitioner's net income was less than the difference between the proffered wage and the wage actually paid to the Beneficiary in each respective year. These returns also reveal that the Petitioner's net current assets in 2004 and 2005 were greater than the difference between the proffered wage and the wage actually paid to the Beneficiary in each year, respectively.

In response to our RFE, the Petitioner submitted evidence relating to its business line of credit. In calculating the ability to pay the proffered salary, USCIS will not augment the petitioner's net income or net current assets by adding in the petitioner's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. See John Downes and Jordan Elliot Goodman, *Barron's Dictionary of Finance and Investment Terms* 45 (5<sup>th</sup> ed. 1998).

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<sup>6</sup> See *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1<sup>st</sup> Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

<sup>7</sup> We note that the Petitioner's net income as listed on Line 21 of its 2014 tax return is less than the proffered wage of \$74,800 per year. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 of Schedule K. See Instructions for Form 1120S, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed November 30, 2015) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). The Petitioner has not provided Schedule K for any of its tax returns for 2007-2014.

Since the line of credit is a “commitment to loan” and not an existent loan, the Petitioner has not established that the unused funds from the line of credit are available at the time of filing the petition. As noted above, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm’r 1971). Moreover, the petitioner’s existent loans will be reflected in the balance sheet provided in the tax return or audited financial statement and will be fully considered in the evaluation of the petitioner’s net current assets. Comparable to the limit on a credit card, the line of credit cannot be treated as cash or as a cash asset. However, if a petitioner wishes to rely on a line of credit as evidence of ability to pay, the petitioner must submit documentary evidence, such as a detailed business plan and audited cash flow statements, to demonstrate that the line of credit will augment and not weaken its overall financial position. Finally, USCIS will give less weight to loans and debt as a means of paying salary since the debts will increase the petitioner’s liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, USCIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg’l Comm’r 1977).

Our RFE further noted that according to USCIS records, the Petitioner has filed I-140 petitions on behalf of 13 other beneficiaries. We noted that 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). In response, the Petitioner listed the priority dates for six workers for whom it had filed Form I-140 petitions. The Petitioner provided copies of the Form W-2 issued to each of these workers. The Petitioner states that it is not offering employment to any beneficiaries of Form I-140 petitions except the current Beneficiary and the six beneficiaries named on this list. The evidence in the record does not document the wage proffered to each beneficiary.

The Petitioner did not submit complete copies of its tax returns for 2007 through 2014. The Petitioner did not submit the requested evidence of wages paid to the Beneficiary from 2008 through 2014. The Petitioner also did not submit all of the requested evidence pertaining to the other beneficiaries for whom it had petitioned. Our RFE advised the Petitioner that we would dismiss the appeal if it did not submit requested evidence which precludes a material line of inquiry. *See* 8 C.F.R. § 103.2(b)(14). Without the requested evidence, we cannot determine whether the Petitioner has the continuing ability to pay the proffered wage to the Beneficiary and the proffered wages to the beneficiaries of its other petitions.

## II. CONCLUSION

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

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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.

Cite as *Matter of C-, Inc*, ID# 14019 (AAO Dec. 1, 2015)