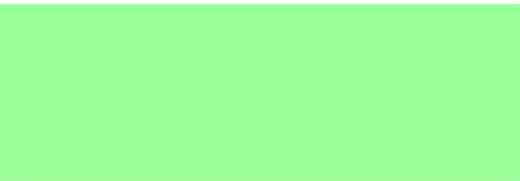


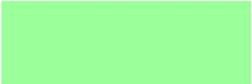
(b)(6)

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

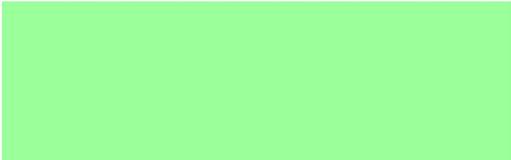


DATE: **FEB 06 2015** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

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

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. On December 2, 2014, we sent the petitioner a Notice of Intent to Dismiss (NOID). The petitioner responded to the NOID on December 31, 2014. The appeal will be dismissed.

The petitioner describes itself as a value added manufacturer, integrator and processor of specialized electronic products. It seeks to permanently employ the beneficiary in the United States as an industrial engineer. 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 petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 21, 2007. *See* 8 C.F.R. § 204.5(d).

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

- H.4. Education: Bachelor's in Engineering (Any)
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 24 months as a senior engineer, engineer, or any other job designation with similar job [word truncated].¹
- H.14. Specific skills or other requirements: None.

Part J of the labor certification states that the beneficiary possesses a bachelor's degree in engineering (mechanical) from [REDACTED] India, completed in 2001.

Regarding the beneficiary's education, the record contains a copy of the beneficiary's certificate issued by [REDACTED] on March 26, 2001, indicating that the beneficiary was elected as an [REDACTED] of [REDACTED] a copy of the beneficiary's provisional certificate issued by [REDACTED] on March 26, 2001, indicating that the beneficiary passed Sections A and B of the [REDACTED] Examinations in the mechanical engineering branch in [REDACTED]

¹ In the NOID, we noted that the petitioner appears to have attempted to provide more information in Part H.10-B. than the ETA Form 9089 permits, resulting in a truncated sentence on the form. We asked the petitioner to provide a complete copy of the draft ETA Form 9089 as submitted to DOL in order to document the complete language provided to DOL in Part H.10-B. of the form. In its response to the NOID, the petitioner indicates that the word "duties" was truncated and provides the draft ETA Form 9089 and the ETA Form 9089 submitted to DOL. The petitioner has established that the beneficiary has the required 24 months of experience as a senior engineer and, thus, the beneficiary has the required experience for the proffered position.

winter 1991 and winter 2000; the beneficiary's Examinations results dated March 28, 1992 (for the winter 1991 examination) and March 26, 2001 (for the winter 2000 examination); the beneficiary's certificate issued by on March 30, 1989, indicating that the beneficiary was elected to the as a senior technician; the beneficiary's certificate of diploma issued by the in India indicating that he completed a course of instruction in mechanical engineering with machinshop technology as an elective subject and passed the board's final examinations held in April 1988; the beneficiary's marks sheets issued by the in India in April 1986, November 1986, April 1987, November 1987, and April 1988; the beneficiary's secondary school certificate; and several course and training completion certificates for the beneficiary.

The director's decision denying the petition concludes that the petitioner did not demonstrate that the beneficiary met the minimum requirements of the labor certification at the priority date. On appeal, the petitioner asserts that the beneficiary is qualified for the proffered job based on his attainment of the equivalent of a bachelor's degree in the United States. Our NOID addressed the beneficiary's educational qualifications and the petitioner's ability to pay the proffered wage.

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 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991); *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.²

BENEFICIARY'S QUALIFICATIONS: EDUCATION

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-

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

(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).³ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

³ Based on revisions to the Act, the current citation is section 212(a)(5)(A).

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A).⁴ We will first consider whether the petition may be approved in the professional classification.

⁴ 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

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)(2).

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

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

Section 101(a)(32) of the Act defines the term “profession” to include, but is not limited to, “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(l)(3)(i)

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

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.

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. The petitioner states in its response to our NOID that if the beneficiary is determined not to be eligible for classification as a professional, then classification as a skilled worker *must* be considered. We disagree. The petitioner cites a 1993 non-precedent decision of the Administrative Appeals Unit (AAU) in support of this claim, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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 an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991) (emphasis added).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' requirement of a single "degree" for members of the professions is deliberate.

The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(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 *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008)(for professional classification, USCIS regulations require the beneficiary to possess a single four-year U.S. bachelor's degree or foreign equivalent degree).

Thus, the plain meaning of the Act and the regulations is that the beneficiary of a petition for a professional must possess a degree from a college or university that is at least a U.S. baccalaureate degree or a foreign equivalent degree.

In the instant case, the labor certification states that the beneficiary possesses a bachelor's degree in engineering (mechanical) from [REDACTED] India, completed in 2001.

The record contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] on July 21, 2004. The evaluation states that based on the beneficiary's education, his [REDACTED] and his progressively more responsible employment experiences from January 1989 to June 2004, the beneficiary:

has the equivalent of graduation from high school in the United States, a bachelor's degree in mechanical engineering from a regionally accredited college or university in the United States and has through the expert opinion letter by Dr. [REDACTED] of [REDACTED] as a result of his education and his progressively more responsible work experience, an educational background the equivalent of an individual with a bachelor's degree in industrial engineering technology from an accredited university or college in the United States.

Ms. [REDACTED] stated in her evaluation that "Dr. [REDACTED] Ph.D., ... [stated] that in his professional opinion [the beneficiary] has, through his education and his progressively more responsible work experience, an educational background the equivalent of an individual with a Bachelor's degree in Industrial Engineering Technology from an accredited university or college in the United States." In our NOID, we asked the petitioner to provide a copy of Dr. [REDACTED] letter and any related supporting documentation that accompanied the letter.

In response to the NOID, the petitioner provides a copy of a letter dated July 18, 2004 from [REDACTED] Ph.D. The letter states that the beneficiary has earned the educational equivalent to a Bachelor's degree in Industrial Engineering Technology from an accredited university or college in the United States "through his educational background and his 14 years of full-time, progressively more responsible work experience from 1988 through 2002." The NOID response also includes an additional evaluation from Ms. [REDACTED] dated July 8, 2004. The evaluation reviews the beneficiary's education and work experience and states that the beneficiary "has the equivalent of graduation from high school in the United States and a bachelor's degree in mechanical engineering from a regionally accredited college or university in the United States."

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] PhD, Professor and Associate Dean of the [REDACTED], dated April 30, 2009. [REDACTED], PhD states that the beneficiary's "certificate of Associate from [REDACTED] is equivalent to a bachelor's degree in mechanical engineering from a U.S. accredited regional college." Unlike Ms. [REDACTED] evaluation, Dr. [REDACTED] evaluation discusses only the beneficiary's [REDACTED] certificates and membership; his evaluation does not discuss the beneficiary's work experience or other education.

The record also contains an evaluation of the beneficiary's educational credentials prepared by [REDACTED] on May 6, 2009. The evaluation states that based on the beneficiary's education and his [REDACTED] the beneficiary "has the equivalent of graduation from high school in the United States and a bachelor's degree in

mechanical engineering from a regionally accredited college or university in the United States.” This evaluation does not discuss the beneficiary’s work experience.

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 (Comm’r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. USCIS may give less weight to an opinion that is not corroborated, or in accord with other evaluations. *Id.* See also *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)); *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).

Where the analysis of the beneficiary’s credentials relies on a combination of lesser degrees, examinations 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 required for classification as a professional.

In the instant case, the petitioner relies on the beneficiary’s [REDACTED] as being equivalent to a U.S. bachelor’s degree. [REDACTED] is awarded to students who have passed Sections A and B of the [REDACTED] Examinations, who have the requisite training and employment experience, and who have reached a certain age.⁵

The evaluations by Dr. [REDACTED] and Ms. [REDACTED] both rely on the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). In response to the director’s Request for Evidence dated April 1, 2009, the petitioner provided a copy of the EDGE report referenced by the evaluators. According to its website, AACRAO is a “non-profit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries.” See <http://www4.aacrao.org/centennial/about.htm>. EDGE is “a web-based resource for the evaluation of foreign educational credentials.” See <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁶

⁵ See [www.\[REDACTED\].org](http://www.[REDACTED].org) (accessed January 26, 2015); see also [REDACTED] (excerpts submitted by the petitioner in the record). The report states that [REDACTED] was established in [REDACTED] as the first professional body of engineers founded in India, and that it “acts as a qualifying body and conducts examinations under its non-formal education program for prospective entrants... .” *Id.* at page 36. The report further states that [REDACTED] is equivalent to a bachelor of engineering degree.

⁶ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that we provided a rational explanation for our reliance on information provided by AACRAO to support our 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*

According to EDGE, the beneficiary's diploma in mechanical engineering from in India "represents attainment of a level of education comparable to up to one year of university study in the United States. Credit may be awarded on a course-by-course basis." Further, EDGE states that the beneficiary's [REDACTED] in [REDACTED] "represents attainment of a level of education comparable to a bachelors degree in the United States." The director noted the petitioner's submission of the EDGE results in her decision.

However, there is no evidence that [REDACTED] is a college or university or that [REDACTED] which is based on a combination of training, education, practical experience, and examinations, is a "degree." Therefore, the beneficiary has not received a baccalaureate degree from a college or university as required by both the terms of the labor certification and the requirements of the professional visa category.

Further, according to EDGE, the system of education in India consists of three streams: (i) the *school stream*; (ii) the *university stream* (including college); and (iii) the *non-university stream*. <http://edge.aacrao.org/country/overview/india-overview>. The *school stream* consists of pre-primary, primary and secondary education. The *university stream* is provided by universities and a network of colleges that are established by state and federal acts.⁷ Non-university education in the *non-university stream*, both in traditional and professional subjects, is provided through distance education, correspondence courses, technical institutes, polytechnics, vocational training institutes, specialized professional training institutions and by professional societies and institutions. *Id.* EDGE clearly establishes the difference between colleges and universities in India (in the *university stream*), and professional associations such as [REDACTED] in India (in the *non-university stream*). [REDACTED] is not a college or university in India.

Therefore, based on the conclusions of EDGE, the evidence in the record is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree in engineering.

In response to our NOID, the petitioner provides correspondence dated August 16, 1978, indicating that the Indian government recognizes passage of Sections A and B of the [REDACTED] Examinations as equivalent to a bachelor's degree for purposes of recruitment to government employment. Further,

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.

⁷ There are approximately 693 recognized universities currently operating in India, including central universities, state universities, deemed universities and "private universities." <http://www.ugc.ac.in/oldpdf/alluniversity.pdf> (accessed January 26, 2015). The University Grants Commission (UGC) oversees standards of teaching, examinations and research in Indian universities. The UGC is also responsible for attending to financial needs of universities and colleges by allocating and disbursing grants. See <http://edge.aacrao.org/country/overview/india-overview> (accessed January 26, 2015). [REDACTED] is not listed as a recognized university in India on the UGC website. <http://www.ugc.ac.in/oldpdf/alluniversity.pdf> (accessed January 26, 2015).

the petitioner provided an excerpt from [REDACTED] indicating that the Indian government recognizes 15 courses of Sections A and B of the [REDACTED] Examinations as equivalent to a degree in the appropriate branch of engineering. Mechanical Engineering is one of the 15 courses listed. However, these documents do not establish that [REDACTED] is a college or university that can confer a degree.

As explained above, in order to be classified as a professional, the beneficiary must possess at least a U.S. bachelor's degree or a foreign equivalent degree from a college or university. While EDGE concludes that [REDACTED] in [REDACTED] is comparable to a bachelor's degree in the United States, it is not a degree from a college or university. [REDACTED] is not a college or university that can confer a degree.⁸ Therefore, the beneficiary does not possess a "foreign equivalent degree" within the meaning of 8 C.F.R. § 204.5(l)(3)(ii)(C). The petition may not be approved in the professional classification.

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 that 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

⁸ *See Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 *11 (D. Or. Nov. 30, 2006) (finding that USCIS was justified in concluding that The Institute of Chartered Accountants of India membership was not a college or university "degree" for purposes of classification as a member of the professions holding an advanced degree).

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 this case, 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.⁹ Part H.8. does not allow for an applicant to qualify for the proffered job based on an alternate combination of education and experience. Nonetheless, our NOID permitted the petitioner to submit any evidence that it intended the labor certification to require an alternative to a U.S. bachelor’s degree or a single foreign equivalent degree, as that intent was explicitly and specifically expressed during the labor certification process to the DOL and to potentially qualified U.S. workers.¹⁰ Specifically, we requested that the petitioner provide a copy of the signed recruitment report required by 20 C.F.R. § 656, together with copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts.

In response to the NOID, the petitioner provides a letter dated December 24, 2014, from [REDACTED] Manager II, HR & Administration, stating that “as per the Company internal policy, [the petitioner] only hires individuals with four year of [sic] Bachelor Degree or foreign equivalent for the

⁹ 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.

¹⁰ In limited circumstances, USCIS may consider a petitioner’s intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer’s subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. See *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008). The best evidence of the petitioner’s intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence ensures that the stated requirements of the offered position as set forth on the labor certification are not incorrectly expanded in an effort to fit the beneficiary’s credentials. Such a result would be contrary to Congress’ intent to limit the issuance of immigrant visas in the professional and skilled worker classifications to when there are no qualified U.S. workers available to perform the offered position. See *id.* at 14.

technical engineering positions.” The petitioner did not provide a copy of the signed recruitment report, copies of the prevailing wage determination, all recruitment conducted for the position, the posted notice of the filing of the labor certification, and all resumes received in response to the recruitment efforts. The petitioner states in response to the NOID that it “did not interview any skilled U.S. workers with less than [sic] bachelor’s degree or foreign equivalent to US bachelor’s degree for the Industrial Engineer position and therefore the recruitment process documentation is not being submitted.” The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

A bachelor’s degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm’r 1977). The face of the labor certification does not permit an applicant to qualify for the position offered by an alternate combination of education or experience. The petitioner unequivocally stated that it considered only applicants with four year U.S. bachelor’s degrees, and provided no evidence to establish it would accept an alternate combination of education and experience to meet that requirement.

The petitioner failed to establish that 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.

Therefore, it is concluded that the terms of the labor certification require a four-year U.S. bachelor’s degree in engineering or a foreign equivalent degree. The beneficiary does not possess such a degree. The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker.¹¹

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 alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word “equivalent” in the employer’s educational requirements was 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 *14.¹² In

¹¹ In addition, for classification as a professional, 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 (Acting Reg’l Comm’r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r. 1971).

¹² 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

addition, the court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS, Civ. Act No. 06-2158* (D.D.C. Mar. 26, 2008)(upholding USCIS interpretation that the term "bachelor's or equivalent" on the labor certification necessitated a single four-year degree).

In the instant case, unlike the labor certifications in *Snapnames.com, Inc.* and *Grace Korean*, the required education is clearly and unambiguously stated on the labor certification and does not include the language "or equivalent" or any other alternatives to a four-year bachelor's degree.

In summary, the petitioner has failed to establish that the beneficiary possessed a U.S. bachelor's degree or a foreign equivalent degree from a college or university as of the priority date. The petitioner also failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification as of the priority date. 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.

ABILITY TO PAY THE PROFFERED WAGE

Further, in our NOID, we indicated that the petitioner must demonstrate that it has been able to pay the annual proffered wage of \$53,500.00 from the priority date of September 21, 2007 until the beneficiary obtains lawful permanent residence. See 8 C.F.R. § 204.5(g)(2). In order to establish ability to pay, the petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date. *Id.*

In response to the director's RFE, the petitioner submitted IRS Forms W-2 issued to the beneficiary for 2007 and 2008.¹³ The petitioner paid the beneficiary more than the proffered wage in 2007 and 2008. The petitioner also submitted its IRS Form 1120, U.S. Corporation Income Tax Return, for 2007.¹⁴

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.

¹³ In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence may be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. However, for the petition to be approved, the petitioner must submit its annual reports, federal tax returns, or audited financial statements for each year from the priority date pursuant to 8 C.F.R. § 204.5(g)(2).

¹⁴ USCIS examines the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). The petitioner had sufficient net income to pay the proffered wage in 2007.

In our NOID, we asked the petitioner to submit its annual reports, federal tax returns or audited financial statements for 2008, 2009, 2010, 2011, 2012, and 2013. In response to the NOID, the petitioner provides reviewed consolidated financial statements for the petitioner and its subsidiary company, [REDACTED]¹⁵ for 2008, 2009, 2010, 2011, 2012, and 2013.

The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The accountant's report that accompanied those financial statements makes clear that they are reviewed statements, as opposed to audited statements. The unaudited financial statements submitted in response to our NOID are not persuasive evidence. Reviews are governed by the American Institute of Certified Public Accountants' Statement on Standards for Accounting and Review Services (SSARS) No.1., and accountants only express limited assurances in reviews. As the accountant's report makes clear, the financial statements are the representations of management and the accountant expresses no opinion pertinent to their accuracy. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

In our NOID, we also asked the petitioner to submit any IRS Forms W-2 or 1099 issued to the beneficiary for 2009, 2010, 2011, 2012, and 2013. In response to the NOID, the petitioner provides IRS Forms W-2 issued to the beneficiary for 2009, 2010, 2011, 2012, and 2013. The petitioner paid the beneficiary more than the proffered wage in each of those years.

Although the petitioner established that it paid the beneficiary more than the proffered wage in each relevant year, it did not provide its annual reports, federal tax returns or audited financial statements as required by 8 C.F.R. § 204.5(g)(2) for 2008, 2009, 2010, 2011, 2012, and 2013. Therefore, the petition may not be approved.

We also noted in our NOID that according to USCIS records, the petitioner has filed multiple I-140 petitions on behalf of other beneficiaries. If a petitioner has filed multiple petitions for multiple beneficiaries, the petitioner must establish that it has the ability to pay the proffered wages to each beneficiary. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). See also 8 C.F.R. § 204.5(g)(2).

We asked the petitioner to provide the following information for each beneficiary for whom it has filed a Form I-140:

¹⁵ Because a corporation is a separate and distinct legal entity from its shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. See *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

- Full name.
- Receipt number and priority date of each petition.
- Exact dates employed by your organization.
- Whether the petition(s) are pending or inactive (meaning that the petition has been withdrawn, the petition has been denied but is not on appeal, or the beneficiary has obtained lawful permanent residence). If a petition is inactive, provide the date that the petition was withdrawn, denied, or that the beneficiary obtained lawful permanent residence.
- The proffered wage listed on the labor certification submitted with each petition.
- The actual wage paid to each beneficiary from the priority date of the instant petition to the present.
- IRS Forms W-2 or 1099 issued to each beneficiary from the priority date of the instant petition to the present.

In response to the NOID, the petitioner submits the requested information regarding two of the six other I-140 petitions it has filed. It did not submit the requested information for the four other petitions it has filed.¹⁶ The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The petition may not be approved because the petitioner has not submitted regulatory-prescribed evidence of its ability to pay the wage, and the petitioner did not submit the requested evidence regarding the other I-140 petitions it has filed which precludes a material line of inquiry.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

¹⁶ The missing information relates to the following petitions:

- [REDACTED] The petition was filed on November 25, 2006 and approved on June 12, 2007. The beneficiary of that petition obtained permanent residence on October 4, 2012.
- [REDACTED] The petition was filed on July 25, 2007 and withdrawn on October 2, 2008.
- [REDACTED] The petition was filed on September 13, 2007 and approved on April 15, 2009. It does not appear that the beneficiary of that petition has obtained permanent residence.
- [REDACTED] The petition was filed on December 13, 2007 and approved on March 2, 2009. The beneficiary of that petition obtained permanent residence on March 9, 2010.