



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

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

MATTER OF MTDS-, INC.

DATE: NOV. 16, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a global manufacturer of outdoor power equipment, seeks to permanently employ the Beneficiary in the United States in the position of purchasing/planning analyst. The Petitioner requests classification of the Beneficiary as a skilled worker. See Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants 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. 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 6, 2013. See 8 C.F.R. § 204.5(d).

The Director's decision concludes that the Petitioner had not demonstrated that the Beneficiary met the minimum requirements at the time the labor certification was accepted, and was therefore not qualified for the proffered position.

The record shows that the appeal is properly filed, timely 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.<sup>1</sup>

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

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 significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>2</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

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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:

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<sup>2</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A).

[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.

*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.

The beneficiary must 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).

In evaluating the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification].” *Id.* at 834 (emphasis added). USCIS will not look beyond the plain language of the labor certification to determine the employer’s claimed intent.

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

- H.4. Education: Other: Bachelor’s in business administration with (cont’d at H.14).
- H.5. Training: None required.
- H.6. Experience in the job offered: None required.
- 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 an MRP Production Analyst or closely related.
- H.14. Specific skills or other requirements: Background in education, training or experience must include demand planning, inventory control and supplier capacities as well as working with computerized MRP systems with experience in reducing costs, fine tuning lead times, supplier's capacity and constraints and restrictions; 5% travel required, mostly domestic; no telecommuting benefit, no alternate work or residence location. --- Cont'd from H.4-A (Education Req'd): \*concentration in Marketing and Demand Planning or closely related or equivalent in education, training and experience. --- Any suitable combination of education, training or experience is acceptable.

(b)(6)

*Matter of MTDS-, Inc.*

Part J of the labor certification states that the Beneficiary's highest level of education related to the offered position is "completed equivalent to a bachelor's degree as of 2003" in business administration with a concentration in marketing and demand planning from [REDACTED] Canada, completed in 1997.

The record of proceeding contains a copy of the Beneficiary's diploma in business administration-marketing major and transcripts from [REDACTED] Canada, completed in 1997.

The record contains an evaluation of the Beneficiary's credentials prepared by [REDACTED] for The [REDACTED] on March 22, 2011. The record also contains an evaluation of the Beneficiary's credentials prepared by [REDACTED] for [REDACTED] on March 22, 2011. Both evaluations state that the Beneficiary's diploma from [REDACTED] is equivalent to two years of study toward a Bachelor of Business Administration degree with a concentration in marketing from an accredited college or university in the United States.

While the two evaluations agree regarding the equivalency of the Beneficiary's education credentials, the two evaluations differ regarding the amount of experience required in combination with the Beneficiary's education credentials to find that the Beneficiary holds the equivalent of a Bachelor of Business Administration degree with a concentration in demand planning and marketing from an accredited institution of higher education in the United States. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The [REDACTED] evaluation combines the Beneficiary's diploma with at least twelve (12) years of experience in demand planning and material resource planning (MRP) (from 1998 until the date of the evaluation) to find that the Beneficiary has the equivalent of a Bachelor of Business Administration degree with a concentration in demand planning and marketing from an accredited institution of higher education in the United States. The [REDACTED] evaluation combines the Beneficiary's diploma with at least seven (7) years of bachelor's-level training and employment experience in business, demand planning and related fields (from 1998 until 2008) to find that the Beneficiary has the equivalent of a Bachelor of Business Administration degree with a concentration in demand planning and marketing from an accredited institution of higher education in the United States.

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 an alien'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 alien's eligibility. *See Id.* at 795. USCIS may give less weight to an opinion that is not corroborated,

(b)(6)

*Matter of MTDS-, Inc.*

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).

The Petitioner relies on the Beneficiary's two-year diploma combined with her work experience as being equivalent to a U.S. bachelor's degree.

We have also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." See <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." <http://edge.aacrao.org/info.php>. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.<sup>3</sup>

According to EDGE, a two- to three- year diploma from [REDACTED] Canada is comparable to "two to three years of university study in the United States."

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 business administration with a concentration in marketing and demand planning or closely related.

On June 19, 2015, we issued a notice of intent to dismiss (NOID) the appeal, informing the Petitioner that the Beneficiary's education is equivalent to two years of university study in the United States and of the differences between the education evaluations. We requested independent objective evidence to resolve those differences. *Matter of Ho* at 591-92. We specifically requested that any additional credentials evaluation submitted in response to the NOID should address the conclusions of EDGE set forth above, as well as the differences between the two evaluations.

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<sup>3</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that 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 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.

(b)(6)

*Matter of MTDS-, Inc.*

Our NOID noted the Petitioner's claim that it intended the terms of the labor certification to require an alternative to a U.S. bachelor's degree or a single foreign equivalent degree and requested evidence of the Petitioner's claimed intent. As set forth in our NOID, while the labor certification states that a combination of education, training and experience might be acceptable, it does not set forth the specific combination that would be acceptable or a standard by which the Petitioner could determine that an individual was qualified.

The Petitioner contends that the DOL's certification is acceptance of the employer's actual minimum requirements which cannot be less than the qualifications of the Beneficiary and that whether the Beneficiary met the DOL standards cannot be in dispute. However, section 212(a)(5)(A)(i) of the Act, establishes that the DOL's role is to determine (1) there are not sufficient workers who are able, willing, qualified 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 (2) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed. The DOL does not make a determination as to whether the Beneficiary meets the minimum requirements of the labor certification.

The DOL has provided the following field guidance for interpreting labor certification requirements: when the labor certification states that a "bachelor's degree in computer science" is required, and the beneficiary has a four-year bachelor's degree in computer science from the University of [REDACTED] "there is no requirement that the employer include 'or equivalent' after the degree requirement" on the Form ETA 750 or in its advertisement and recruitment efforts. 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). Further, where the Form ETA 750 indicates that a "U.S. bachelor's degree or the equivalent" may qualify an applicant for a position, where no specific terms are set out on the Form ETA 750 or in the employer's recruitment efforts to define the term "equivalent," "we understand ['equivalent'] 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). Where the Form ETA 750 states that work experience or a certain combination of lesser diplomas or degrees may be substituted for a bachelor's degree, "the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative [to the degree] 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). State Workforce Agencies should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." 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). Finally, 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." *Id.* In response to our NOID, the Petitioner

(b)(6)

*Matter of MTDS-, Inc.*

notes that we cite memoranda that were decided prior to publication of the current regulations, which went into effect in March 2005. To our knowledge, the field guidance memoranda referred to here have not been rescinded.

The posting notice, job notice, online, print and additional recruitment submitted by the Petitioner show that it advertised the position as requiring a bachelor's degree in business administration with a concentration in marketing and demand planning or closely related or equivalent in education, training and experience. Although the Petitioner indicated that it would accept less than a single source four-year bachelor's degree, it did not define what would be an acceptable combination of education, training and experience.

In response to our NOID, the Petitioner submitted a June 9, 2015, affidavit stating that its understanding of the requirements on the instant labor certification with regard to the equivalence of a bachelor's degree is that the Beneficiary held a two-year degree and more than six years of experience. The Petitioner asserts that it based its interpretation on the Beneficiary's H-1B nonimmigrant petition and applied the standard that any applicant for the position who appeared to meet any reasonable standard of equivalency would be considered to meet the educational requirements. The Petitioner also submitted a July 14, 2015, letter from [REDACTED] on [REDACTED] letterhead stating that its evaluation included the full body of the Beneficiary's experience, but that the bachelor's degree equivalency would only require six years of the Beneficiary's experience combined with her academic studies. The letter references the three years of experience for one year of education rule for translating work experience into equivalent academic study. The Petitioner contends that USCIS has a method for determining the equivalency which was incorporated in its application in USCIS' regulations and which should apply to the instant case. However, that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The Beneficiary was required to have a bachelor's degree on the ETA Form 9089 and there was no specification as to what would be an acceptable combination of education, training and experience.

The Petitioner cites *Hoosier Care v. Chertoff*, 482 F. 3d 987 (7th Cir. 2007), to support its assertion that we are limited to only determining whether an alien is qualified for a position and the DOL certifies the requirements for the position. *Hoosier* held that the DOL, rather than USCIS, was entitled to determine whether a foreign worker's bachelor's degrees in agriculture and maritime transportation qualified them as skilled workers in a residential care facility for disabled children and adults. It held that DOL determined whether such an education was relevant post-secondary education for the position proffered. The labor certification in *Hoosier* required a bachelor's degree in any field and did not provide for an alternative combination of education, training and experience. As such, *Hoosier* is distinguishable from the instant case. In the instant case, we do not question whether the minimum requirements certified by the DOL are appropriate for the proffered position. Rather, we find that the minimum requirements certified by the DOL do not set forth what would be an acceptable combination of education, training and experience to the bachelor's degree requirement.

(b)(6)

*Matter of MTDS-, Inc.*

The Petitioner cites *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), asserting that the labor certification in the instant case is far clearer as to the employer's intention. In *Grace Korean* a federal district court held 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." *Id.* at 1179. Although the reasoning underlying a district judge's decision is given due consideration, we do not need to follow its analysis as a matter of law. See *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). Moreover, a judge in the same district subsequently held that the assertion that DOL certification precludes USCIS from considering whether the alien meets the educational requirements specified in the labor certification is wrong. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 5 (D. Or. Nov. 30, 2006). Furthermore, as discussed above, we find that the labor certification clearly indicates that a four-year bachelor's degree is not necessary to meet the minimum requirements. We find that the labor certification does not specify what would be an acceptable combination of education, training and experience.

In response to our NOID, the Petitioner refers to a 2007 decision issued by us claiming that, as the facts are similar to the instant case, we should sustain the appeal. The Petitioner 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).

The Petitioner cites a recent Supreme Court slip opinion in *King v. Burwell* (June 25, 2015) to support its contention that its labor certification application should be interpreted in a way that is consistent with its intention as its author. However, the case cited has no bearing on the instant case as it does not relate to the labor certification process and references the Affordable Healthcare Act. We note that the Petitioner submitted an affidavit with its response to our NOID. The affidavit, signed by [REDACTED] human resources, states "our requirement was simply a Bachelor's Degree and six years of experience." Based on this statement, the actual minimum requirement intended by the Petitioner is a bachelor's degree, and not the equivalent of a degree based on any combination of education and experience, such as that possessed by the Beneficiary.

The Petitioner contends that it is irrational to believe that it would intend the labor certification requirements to be ones that the Beneficiary did not meet and that it is logical to assume that it intended to use the H-1B equivalent standard. However, the Petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the DOL. The Petitioner did not specifically state on the labor certification, as well as throughout all phases of recruitment, exactly what would be considered equivalent or alternative to the degree in order to qualify for the proffered position. U.S. workers may have been dissuaded from applying for the position because the Petitioner did not define any acceptable equivalency. Furthermore, the Petitioner listed on the ETA Form 9089 at section H.8 that it would not accept any alternative combination of education and experience.

The signed recruitment report also does not provide any indication of the method by which the Petitioner determined whether an applicant met the educational requirements of the labor certification or whether that method was communicated to the applicants. The signed recruitment report simply states that an applicant “lacks required degree or equivalent.” We note that the recruitment report lists 40 applicants for the proffered position, but the Petitioner did not submit any resumes, as specifically requested in our NOID.

In Part H.14 of the labor certification, the Petitioner listed the specific skills for the proffered position as, “Background in **education, training or experience** must include demand planning, inventory control and supplier capacities as well as working with computerized MRP systems with experience in reducing costs, fine tuning lead times, supplier’s capacity and constraints and restrictions....” (emphasis added). In its recruitment report, the Petitioner repeatedly noted that it rejected applicants for lacking experience in areas such as demand planning, inventory control, supplier capacities, and working with computerized MRP systems with experience in reducing costs, fine tuning lead times, supplier’s capacity and constraints and restrictions. The recruitment report notes that many of the applicants possessed a bachelor’s or master’s degree, however the Petitioner did not address whether each applicant’s education or training included the required skills. Therefore, the recruitment report does not demonstrate the combination of education, experience and training that the Petitioner considered to be equivalent to a bachelor’s degree.

Further, the Petitioner noted in its recruitment report that most of the applicants did not have the required two years of experience as an MRP Production Analyst or “closely related” job. Nothing in the recruitment report demonstrates that the Petitioner defined what jobs it considered to be “closely related” to the position of MRP Production Analyst. This further limits the probative value of the recruitment report in demonstrating the Petitioner’s intent in defining its minimum requirements for the proffered position.

As the Petitioner has not demonstrated its intent in defining the minimum requirements for the proffered position, it cannot be determined that the Beneficiary qualifies as a skilled worker and that she meets the terms of the labor certification.

Beyond the decision of the director,<sup>4</sup> the evidence in the record does not establish that the Beneficiary possesses the required experience for the offered position. As is discussed above, the Petitioner must demonstrate that the Beneficiary possessed all of the requirements stated on the labor certification as of the September 6, 2013 priority date. See *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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<sup>4</sup> We may deny an application or petition that fails to comply with the technical requirements of the law even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); see also *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that we conduct appellate review on a *de novo* basis).

(b)(6)

*Matter of MTDS-, Inc.*

The labor certification states that the offered position requires 24 months of experience as an MRP production analyst or closely related position, such experience must be beyond the experience added to the Beneficiary's education credentials sufficient to meet the minimum educational requirements of the labor certification.

Part K of the labor certification states that the Beneficiary qualifies for the offered position based on experience as an MRP production analyst with [REDACTED] Canada, from April 1, 2003 to January 25, 2008; an MRP systems analyst with [REDACTED] Arizona, from May 19, 2008 to May 1, 2009; and as an MRP systems analyst with the Petitioner from May 1, 2009 to May 19, 2014, the date on which the labor certification was signed. No other experience is listed.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains a November 17, 2008, experience letter from [REDACTED] plant manager, on [REDACTED] Canada letterhead stating that the company employed the Beneficiary in different roles from 1998 to January 2008. He states that the Beneficiary worked under his direct supervision as an MRP production analyst for the last four years (approximately January 2004 to January 2008) and provides a description of her job duties. However, the letter does not provide specific dates of employment and the corresponding titles for the "various positions" referred to by [REDACTED]

In response to our NOID, the Petitioner submitted a July 8, 2015, letter from [REDACTED] senior manager, HR, on [REDACTED] Florida letterhead, stating that the Beneficiary was hired on May 21, 1998, separated on January 25, 2008, and that her current position title (her title at the time of separation) is production planner. The letter does not provide the job title(s) and job description(s) for the Beneficiary's employment with the company from May 21, 1998 to January 25, 2008.<sup>5</sup> As discussed in our NOID, [REDACTED] experience letter does not provide a job title and description for the Beneficiary's employment between 1998 and approximately January 2004. Additionally, [REDACTED] letter differs regarding the Beneficiary's job title at the time of her separation from the company by stating that she was employed as an MRP production analyst from January 2004 to January 2008, rather than as a production planner. *Matter of Ho* at 591-92.

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<sup>5</sup> A previously submitted experience letter and the Beneficiary's resume reflect that she held multiple positions with differing job duties as she advanced in [REDACTED]

(b)(6)

*Matter of MTDS-, Inc.*

In response to our NOID, the Petitioner provided a July 15, 2015, experience letter on its letterhead stating that the Beneficiary was employed as an MRP systems analyst from May 2009 until January 2010 and an MRP systems analyst for the handheld products division since January 2010. The letter further states that the Beneficiary was employed by ██████████ Arizona, as an MRP system analyst from May 2008 to May 2009 and that the Petitioner acquired ██████████ in May 2009. However, the letter does not provide specific dates of employment or a sufficient description of the Beneficiary's job duties in each of the positions noted. The Petitioner did not provide evidence that it acquired ██████████ in May 2009 and is therefore able to attest to her employment at ██████████. Further, in response to question J.21 on the ETA Form 9089, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?," the Petitioner answered "no." In general, if the answer to question J.21 is no, then the experience with the employer may be used by the Beneficiary to qualify for the proffered position if the position was not substantially comparable.<sup>6</sup> The evidence in the record does not reflect that the Beneficiary's experience with the Petitioner was in a position in which the job duties are not substantially similar to the position offered.<sup>7</sup>

Therefore, the evidence in the record is not sufficient to establish that the Beneficiary possessed sufficient experience in combination with her education to meet the educational requirement of the labor certification and 24 months of experience as an MRP production analyst or closely related position by the priority date as required by the terms of the labor certification.

Therefore, the Beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A) of the Act.

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.

Cite as *Matter of MTDS-, Inc.*, ID# 14175 (AAO Nov. 16, 2015)

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<sup>6</sup> A definition of "substantially comparable" is found at 20 C.F.R. § 656.17(i)(5)(ii), which states, "A 'substantially comparable' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records."

<sup>7</sup> The job duties performed by the Beneficiary with the Petitioner as an MRP systems analyst from May 1, 2009, to at least September 6, 2013, and listed at Part K, Job 1 of the labor certification are nearly identical to the job duties listed for the proffered position at Part H. 11.