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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JAN 29 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology consulting business. It seeks to employ the beneficiary permanently in the United States as a ".Net Programmer" pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (the DOL).

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree. 8 C.F.R. § 204.5(k)(4). Specifically, the ETA Form 9089 requires a United States master's degree or foreign equivalent degree in computer science, computer applications, engineering, mathematics, information technology, or a related field and 24 months of experience in the job offered or in alternate occupation of developer listed in Part H, Question 10-B, or in the alternate a United States bachelor's degree of foreign equivalent degree and 5 years of progressive experience. The petitioner noted in response to Part H, Question 8, that an alternate combination or education and experience would be acceptable. This alternate level of education and experience is described in response to Questions 8-A and 8-C as a United States bachelor's degree of foreign equivalent degree and 5 years of progressive experience. However, in response to Part H, Question 14, the petitioner stated in pertinent part: "In lieu of a Bachelor's degree, Amensys will accept any suitable combination of education, training, or experience equivalent to a Bachelor's degree."

The director concluded that the petitioner's response to Question 14 (Specific skills or other requirements) lowered the minimum job requirements to below a bachelor's degree plus five years of progressive experience and, thus, disqualified the position for classification as one for an advanced degree professional.

On appeal, counsel reiterates the fact that the petitioner is willing to accept an alien who possesses a combination of experience and training that equated to a bachelor's degree along with 5 years of experience for employment in the offered position of ".Net Programmer." Counsel also reiterates that the petitioner would accept the equivalent of a bachelor's degree as determined by a credentials evaluation. Counsel notes that the DOL's Board of Alien Labor Certification Appeals (BALCA) has expressly held that the requirement of a bachelor's degree in a particular field or its equivalent could be satisfied through a combination of education and experience using the standards set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C) in *Syscorp International,* 89 INA 212 (BALCA 1991). In support of the argument that a bachelor's degree in a particular field or its equivalent could be satisfied through a combination of education and experience, counsel also cites 20 C.F.R. § 56.24(b)(2)(ii), *Mindcraft Software Inc.,*1990 INA 328 (BALCA 1991), *Matter of Yaakov,* 13 I&N Dec. 203 (Reg'l Comm'r 1969), *Matter of Arjani,* 12 I&N Dec. 649 (Reg'l Comm'r 1967), *Matter of Bienkowski,* 12 I&N Dec. 17 (Dist. Dir. 1966), *Matter of Devnani,* 11 I&N Dec. 800 (Acting Dist. Dir. 1966), and *Matter of Sun,* 12 I&N Dec. 55 (Dist. Dir. 1966). Counsel states that it is the DOL which has the authority to

define the job qualifications set forth in the labor certification and cites *Grace Korean United Methodist Church v. Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005), in support of this statement.

The record shows that the appeal is properly filed and timely. 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.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Here, the Form I-140 was filed on December 21, 2011. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

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

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the job offer portion of the ETA Form 9089 is not consistent with the minimum requirements for classification as a professional holding an advanced degree, and the appeal will be dismissed.

By way of background, the regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

> If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the BALCA ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list

alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

Previously, the DOL was denying labor certification applications containing alternative requirements in Part H, Question 14, if the application did not contain the *Kellogg* language. However, two BALCA decisions have significantly weakened this requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the *Kellogg* language on the labor certification application violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements.

Given the history of the *Kellogg* language requirement at 20 C.F.R. § 656.17(h)(4)(ii), the AAO does not generally interpret this phrase when included as a response to Part H, Question 14, to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. To do so would make the actual minimum requirements of the offered position impossible to discern, it would render largely meaningless the stated primary and alternative requirements of the offered position on the labor certification, and it would potentially make any labor certification with alternative requirements ineligible for classification as an advanced degree professional. In other words, the AAO does not consider the presence of *Kellogg* language in a labor certification to have any material affect on the interpretation of the minimum requirements of the job.

Consequently, in this case, the AAO does not agree that *Kellogg* language can be used to elevate an alternative set of job requirements, which are facially less than a bachelor's degree plus five years of progressive experience, to a level at least equal to the minimum requirements of the advanced degree professional category. Here, the petitioner in response to Part H, Question 14 indicated that an alien can qualify for the job without a bachelor's degree by stating in pertinent part that: "In lieu of a Bachelor's degree, [redacted] will accept any suitable combination of education, training, or experience, equivalent to a Bachelor's degree." The specific requirements articulated on the form are any suitable combination of education, training, or experience equivalent to a bachelor's degree, which are less than the minimum requirements for the advanced degree professional category. Accordingly, the presence of the *Kellogg* language in this case serves no purpose other than to illustrate that the alternate requirement of a United States bachelor's degree or a foreign equivalent degree work experience and 5 years of progressive experience could be met through any suitable combination of education, experience, and training. Such a combination does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed. 8 C.F.R. § 204.5(k)(4).

Counsel's statements on appeal have been considered. In *Grace Korean United Methodist Church v. Chertoff,* 437 F. Supp. 2d 1174, a federal district court held that United States Citizenship and Immigration Services (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 will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). A judge in the same district, however, 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).

While 8 C.F.R. § 214.2(h)(4)(iii)(C), *Syscorp International,* 89 INA 212 (BALCA 1991), *Mindcraft Software Inc.,*1990 INA 328 (BALCA 1991), *Matter of Yaakov,* 13 I&N Dec. 203 (Reg'l Comm'r 1969), *Matter of Arjani,* 12 I&N Dec. 649 (Reg'l Comm'r 1967), *Matter of Bienkowski,* 12 I&N Dec. 17 (Dist. Dir. 1966), *Matter of Devnani,* 11 I&N Dec. 800 (Acting Dist. Dir. 1966), and *Matter of Sun,* 12 I&N Dec. 55 (Dist. Dir. 1966), all utilized a rule equating three years of experience for one year of education to determine degree equivalence, 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 United States master's degree or foreign equivalent degree in computer science, computer applications, engineering, mathematics, information technology, or a related field and 24 months of experience in the job offered or in alternate occupation of developer, or in the alternate a United States bachelor's degree of foreign equivalent degree and 5 years of progressive experience on the ETA Form 9089. The petitioner's actual minimum requirements could have been clarified or changed before the ETA Form 9089 was certified by the DOL. Since that was not done, the director's decision to deny the petition must be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.