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: MAY 0 7 2015

FILE #:
PETITION RECEIPT #:

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 is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed the matter to the Administrative Appeals Office (AAO), and we dismissed the appeal on February 1, 2013. The petitioner filed a motion to reopen and reconsider our decision, and we reopened and affirmed the prior decision on August 15, 2013. The petitioner filed a second motion to reopen and reconsider, and we reopened the matter and affirmed our prior decision on May 9, 2014. The petitioner filed a third motion to reopen and reconsider, and we affirmed our prior decision on December 23, 2014. The petitioner has now filed a fourth motion to reconsider.[1] Our prior decision, dated December 23, 2014, will be reconsidered, a new decision will be entered, and the petition will remain denied.

The Form I-140 identifies the petitioner as "Gold IRA Specialists." The petitioner seeks to employ the beneficiary permanently in the United States as an "Industrial Engineer/ Quantitative Analyst." The director's decision denying the petition concludes that the job offered does not meet the minimum requirements for classification as a member of the professions with an advanced degree. We affirmed the director's decision on appeal as well as our decisions regarding the petitioner's motions to reopen and reconsider.

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.[2] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.

The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), which, in pertinent part, 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." *Id.*

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[3] The priority date of the petition is August 21, 2011.[4]

[1] Counsel asserts on motion that our previous decision constituted an erroneous decision through misapplication of law or policy and therefore qualifies for consideration as a motion to reconsider under 8 C.F.R. § 103.5(a)(3). Therefore, the petitioner's motion is properly filed.

[2] *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). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[3] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in "Industrial Engineering."
H.5. Training: None required.
H.6. Experience in the job offered: 36 months.
H.7. Alternate field of study: "Business Administration or related field."
H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A. If Yes, specify the alternate level of education required: Other.
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: "Combination of education and experience in lieu of a Master's degree."
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "4."
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.12. Are the job opportunity's requirements normal for the occupation? Yes.
H.14. Specific skills or other requirements: Applicant must have a combination of education and experience equivalent to a Master's degree in Industrial Engineering, Business Administration, or a related field, with strong statistical background and analytical skills and a minimum of three years of experience in the financial industry. Excellent writing and communication skills are also necessary. (The three years of experience in the financial industry is a necessity of the business to ensure sufficient exposure to the financial services industry to enable the applicant to perform the required duties effectively. This experience may have been gained either as a part of the degree equivalency or separately.) (The 4 years of experience in Block H.8-C. reduces to 2 years for a Bachelor's degree holder in any of the specified fields.)

Part J of the labor certification states that the beneficiary possesses a Bachelor's degree in Industrial Engineering from the [redacted] completed in 1998. The record contains a copy of the beneficiary's Bachelor's degree in Industrial Engineering and academic transcripts from the [redacted], issued in 1998.

In the prior motion, the petitioner asserted that because the DOL has certified a minimum master's degree level position to USCIS, the instant position meets the minimum requirements for classification of the position as an advanced degree professional position and USCIS does not have the authority to determine otherwise. In our decision, dated December 23, 2014, we held that, independent of the labor certification process undertaken by DOL, USCIS has the authority to determine:

(1) Whether the beneficiary qualifies for classification within the category requested under the Act;
(2) Whether the beneficiary meets the terms of the labor certification for the classification requested under the Act; and
(3) Whether the position offered as stated on the labor certification meets the requirements of the classification requested under the Act.

[4] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

We further held that the petitioner has not established that the *position* offered meets the requirements of the advanced degree professional category or that the *beneficiary* qualifies for classification under the advanced degree professional category pursuant to section 203(b)(2) of the Act according to the terms of the labor certification.

Counsel asserts on motion: (1) that the beneficiary qualifies for classification as an advanced degree professional; and (2) according to court's decision in *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007), it is the DOL and not USCIS that has the authority to determine whether the position offered qualifies as an advanced degree professional position.

II. LAW AND ANALYSIS

1. Division of Authority between the DOL and USCIS in the Immigrant Visa Process

In our previous decision, we cited *SnapNames.com, Inc. v. Chertoff (SnapNames)*, No. CV 06-65-MO, 2006 WL 3491005 (D. Or. Nov. 30, 2006) for the court's description of the employment-based immigrant petition process in cases requiring an underlying labor certification.[5] The court described this process as follows:

> [T]he petitioner submits an application for certification to the DOL describing the job at issue and identifying the alien beneficiary. The petitioner also defines the "minimum education, training, and experience for a worker to perform satisfactorily the job duties." In issuing the certification, the DOL considers the job, as defined by the petitioner, and certifies that (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 ... 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." 8 U.S.C. § 1182(a)(5)(A)(i).
>
> Once certified, the petitioner applies for a visa with [USCIS], submitting DOL's certification in support as required by the regulations. 8 C.F.R. § 204.5(k)(4) (advanced degree professionals); 8 C.F.R. § 204.5(l)(3)(i) (professionals, skilled workers and other workers).[6] It is then [USCIS's] responsibility to determine whether the alien is qualified for a visa under the applicable statute and regulations and under the terms of the certification. 8 U.S.C. § 1154(b); 8 C.F.R. § 204.5(l)(3)(ii)(A)-(D). (Emphasis added).

SnapNames.com, Inc., 2006 WL 3491005, at *4-5. Other federal courts have similarly articulated the division of authority between the DOL and USCIS. The court in *Madany v. Smith*, 696 F.2d 1008, 1012 (D.C. Cir. 1983) concluded that "although the Act allocates a limited role to DOL, it vests

[5] We have modified this analysis slightly to include the regulations pertaining to advanced degree professionals under 8 C.F.R. § 204.5(k)(4) and professionals under 8 C.F.R. § 204.5(l)(3)(i).

[6] We have included the regulations pertaining to advanced degree professionals and professionals here.

primary responsibility for implementation with [USCIS]." The court in *N. Am. Indus., Inc. v. Feldman*, 722 F.2d 893, 898 (1st Cir. 1983), similarly held that "the decision to grant or deny a petition to obtain a preferential immigration classification is one that is within the discretion of [USCIS]." 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.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The Ninth Circuit, citing *K·R.K· Irvine, Inc.,* 699 F.2d at 1006, similarly stated:

> 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).[7]

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984). The court in *Madany v. Smith*, 696 F.2d at 1012-1013, stated further:

> 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).[8]

These cases demonstrate that the DOL and USCIS have two distinct purposes in the employment-based petition process: the DOL's primary responsibility is to protect U.S. workers whereas USCIS's primary responsibility is to determine whether an employment-based petition should be approved under the classification requested in accordance with the Act and USCIS regulations.

On motion, the petitioner asserts that the holdings of the cases cited above predate the PERM[9] program and do not accurately assess the current division of authority between the DOL and USCIS. However, the enactment of the PERM program did not affect the statutory framework regarding the division of authority between the DOL and USCIS. The statute regarding the responsibilities of the DOL was originally enacted in 1952 at section 212(a)(14) of the Act,[10] which stated, in pertinent part, the following:

[7] As stated above, the current citation is section 212(a)(5)(A).

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

[9] New United States Department of Labor (DOL) regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date.

[10] *See* section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14)(1952), June 27, 1952, c. 477, Title II, ch. 2, § 212, 66 Stat. 182.

> Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor [are excludable], if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available . . . to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.

This section was amended in 1976 and contained virtually the same language.[11] It was further amended in 1990 and moved to section 212(a)(5)(A)(i) of the Act with only minor changes from the 1976 version.[12] Specifically, section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i), currently in effect, states that the authority of the DOL regarding employment-based visa petitions is to certify:

> (1) That 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
> (2) That the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The responsibility allocated to the DOL in the employment-based visa petition process prior to and after the enactment of PERM regulations has remained the same. Therefore, the conclusions in the cases cited above regarding this division of authority between the DOL and USCIS are still applicable. While the PERM regulations did provide additional steps that must be taken in the filing of a labor certification, this did not change the division of authority between the DOL and USCIS.

a. The DOL Sets the Content of the Labor Certification.

The petitioner cites *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007) at length, which will be discussed in more detail below. The petitioner states that *Hoosier Care* demonstrates that we have taken out of context *Madany* and other cases that address the division of authority between the DOL and USCIS and that we have selectively interpreted the holding of *Madany*. The court in *Hoosier Care* cited *Madany*, 696 F.2d at 1015, for the proposition that "the DOL bears the authority for setting the content of the labor certification and [USCIS] cannot impose job qualifications beyond those contemplated therein." The petitioner also cites *Grace Korean United Methodist Church v. Chertoff*, 437 F.Supp.2d 1174, 1179 (D.Ore.2005), which stated "If any agency has the power to define the job qualifications set forth in a labor certification, it is the DOL, the agency responsible for reviewing and adjudicating the labor certification." We agree with these points, namely that the DOL has the authority to "set the content of the labor certification" (*Madany, supra*, at 1015) and to

[11] *See* section 212(a)(14) of the Act (1976), PL 94–571 (HR 14535), PL 94–571, October 20, 1976, 90 Stat 2703.
[12] *See* section 212(a)(5)(A)(i) of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978.

"define the job qualifications set forth on the labor certification" (*Grace Korean, supra*, at 1179). However, we do not agree with the petitioner's assertion that "the case law does not support the Service's contention that it has the authority to interpret portions of a certified labor certification." As will be discussed below, the DOL's authority to "set the content" and "define the terms" of the labor certification does not preclude USCIS from *interpreting* the terms of the labor certification. In fact, the Act and the regulations pertaining to USCIS require it to interpret the terms of the labor certification.

The DOL sets the content of the labor certification (as provided by the employer) by certifying that the terms stated by the employer meet the requirements of 20 C.F.R. § 656, yet it is USCIS that interprets these terms to determine whether that content of the labor certification meets the required classification *as it pertains to both the position and the beneficiary*, discussed further below. Once the labor certification is certified and submitted with the Form I-140, Petition for Alien Worker, USCIS must then 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). This demonstrates at the outset that USCIS *interprets* the plain language of the labor certification to determine, as will be discussed further below, whether the position offered as stated on the labor certification qualifies under the classification requested and whether the beneficiary meets the terms of the labor certification and qualifies under that classification.

b. USCIS Determines Whether a Position Offered Meets the Requirements for Classification under the Employment-Based Category Requested.

The regulation pertaining to visa petitions filed for "advanced degree professionals" under 8 C.F.R. § 204.5(k)(4)(i) demonstrate that USCIS has the authority to determine whether (1) the beneficiary and (2) the position offered each qualify for classification under this particular category.[13]

The regulation at 8 C.F.R. § 204.5(k) states the following, in pertinent part:

> (k) *Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability.*

[13] We note that the regulations for professionals and skilled workers contain this same framework which requires USCIS to determine whether the beneficiary and the position offered meet the requirements for the classification requested. For example, the regulation at 8 C.F.R. § 204.5(l)(3)(i) regarding the "professional worker" category states that "[e]very petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . The job offer portion of an individual labor certification . . . must demonstrate that the job requires the minimum of a baccalaureate degree." Regarding the skilled worker regulations at 8 C.F.R. § 204.5(l)(4), see the discussion below pertaining to the court's holding in *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007).

> (3) *Initial evidence.* The petition must be accompanied by documentation showing that the alien is a professional holding an advanced degree . . .
>
> . . .
>
> (4) *Labor certification or evidence that alien qualifies for Labor Market Information Pilot Program—*
> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. . . . *The job offer portion of the 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 or an alien of exceptional ability.*

(Emphasis added). This language demonstrates that the regulation at 8 C.F.R. § 204.5(k)(3) requires that USCIS determine whether the *beneficiary* qualifies as an advanced degree professional, and the regulation at 8 C.F.R. § 204.5(k)(4)(i) requires that USCIS determine whether the *position offered* meets the requirements for an advanced degree professional position. Therefore, USCIS has the authority to determine whether the *beneficiary* and the *position offered* qualify for the classification requested.

On motion, counsel cites *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007), for the premise that the DOL has the authority to determine whether a *position offered* qualifies under the classification requested. The court in *Hoosier Care* addressed the "skilled worker" regulation at 8 C.F.R. § 204.5(l)(4) and held that "the determination of what *kind* of training is required to classify an alien as a 'skilled' worker is made by the Labor Department upon consideration of the submission by the alien's prospective employer." 482 F.3d at 989. The court further concluded that USCIS only determines whether the alien meets the requirements of the labor certification. *Id.* As indicated above, we agree with part of the court's holding in *Hoosier Care*, citing *Madany* at 1015, that the DOL is responsible for setting the content of the labor certification. However, *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case.

Under the Supreme Court's holding in *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967, 982-84, 125 S. Ct. 2688, 2700-01, 162 L. Ed. 2d 820 (2005), we reach a different interpretation from the holding of *Hoosier Care* regarding the division of authority between the DOL and USCIS.[14] Under *Brand X*, we interpret the regulation at issue in *Hoosier Care*, 8 C.F.R. § 204.5(l)(4), in pertinent part, as follows:

[14] In *Brand X*, the court held that, consistent with "*Chevron* deference," an agency charged with interpreting a statute that is silent or ambiguous as to a particular issue may choose a different construction than a court "since the agency remains the authoritative interpreter (within the limits of reason) of such statutes." *Id.* The holding of *Brand X* allows for *Chevron* deference to an agency's interpretation of a statute or regulation even if a court's decision precedes that of an agency. *Id.* at 982-83 (*citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843–844, and n. 11,

> The determination [by USCIS] of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, *as certified by the Department of Labor.*

(Brackets and emphasis added). This means that that even though the DOL certifies the terms of the labor certification for the position offered, as placed on the job by the employer, it is the responsibility of USCIS to determine whether those terms meet the requirements of the classification requested. This interpretation of 8 C.F.R. § 204.5(l)(4) for petitions filed in the "skilled worker" category is consistent with the regulations for the "advanced degree professional" and "professional" categories, 8 C.F.R. §§ 204.5(k)(4)(i) and 204.5(l)(3)(i), respectively, which similarly give USCIS the authority to determine whether the position offered meets the requirements for the specific classification requested.[15] Therefore, despite the court's decision in *Hoosier Care*, the totality of the regulatory framework demonstrates that USCIS has the authority for determining whether a position offered meets the qualifications for the category requested. Nothing in the regulations at 20 C.F.R. § 656, pertinent to labor certifications, gives the DOL the authority to determine whether the job offer portion of the labor certification meets the classification requirements.

c. USCIS Determines Whether the Beneficiary Meets the Terms of the Labor Certification and Qualifies for the Classification Requested Under the Act.

The regulations pertaining to employment-based immigrant petitions under 8 C.F.R. § 204.5 specifically state what documentation must be submitted to USCIS with the Form I-140 to demonstrate that the beneficiary qualifies for classification under the particularly category requested. *See* 8 C.F.R. § 204.5(k)(3) (for "advanced degree professionals," relating to the instant case); *see also, e.g.,*, 8 C.F.R. § 204.5(l)(3)(C) (for "professionals"); 8 C.F.R. § 204.5(l)(3)(ii)(B) (for "skilled

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104 S.Ct. 2778). As noted in our prior decision, the Act is silent as to whether the DOL or USCIS has the authority to determine whether a position offered meets the necessary requirements under employment-based immigrant petition classifications. The "skilled worker" regulation at 8 C.F.R. § 204.5(l)(4) that the court addressed in *Hoosier Care* regarding the division of authority between USCIS and the DOL is ambiguous because it states the basis for the determination of whether a worker is a skilled or other worker, but it does not specifically state *which agency* will make that determination. Therefore, *Chevron* deference should be given to our interpretation of this regulation. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 1663, 146 L. Ed. 2d 621 (2000) (citing *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), in which the court held that "an agency's interpretation of its own regulation is entitled to deference."). We note that the next phrase of the "skilled worker" regulation, 8 C.F.R. § 204.5(l)(4), states that this determination will be based on the requirements of the labor certification "as certified by the Department of Labor," which demonstrates that USCIS will make this determination based upon the already certified labor certification, after the DOL's review is completed.

[15] As noted above, the pertinent language of 8 C.F.R. § 204.5(k)(4)(i) for "advanced degree professionals" states that "[e]very petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . *the job offer portion* of the individual labor certification . . . *must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.* The regulation for "professionals" at 8 C.F.R. § 204.5(l)(3)(i) states that "[e]very petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . *the job offer portion* of an individual labor certification . . . *must demonstrate that the job requires the minimum of a baccalaureate degree.*" (Emphasis added).

workers"); and 8 C.F.R. § 204.5(l)(3)(ii)(D) (for "unskilled (other) workers").[16] We note that none of the inquiries assigned to the DOL under section 212(a)(5)(A)(i) of the Act, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the alien is qualified for a specific immigrant classification. "There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise." *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983) (*Citing Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977)).

We note that the DOL may assess the beneficiary's qualifications in ensuring that U.S. workers are not disadvantaged, but this does not supersede the statutory and regulatory requirements given to USCIS to determine whether the beneficiary qualifies for the classification requested. The court stated in *Madany v. Smith*, 696 F.2d at 1012, that even though an inquiry into an alien's skills or qualifications is not one of the inquiries expressly allocated to DOL, "this does not mean that DOL cannot, or does not, undertake analysis of an alien's qualifications as it performs its statutory functions." (Emphasis added). The court further stated:

> Indeed, DOL may gauge an alien's skill level in evaluating the effect of the alien's employment on United States workers. The fact that DOL may find such an analysis useful, however, does not foreclose INS from considering alien qualifications in the preference classification decision.

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

> 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). Therefore, USCIS, and not the DOL, determines whether the beneficiary is qualified for the employment-based classification requested.

In addition to meeting the requirements of the classification requested, the petitioner must also establish that the beneficiary satisfied all of the educational, training, experience and any other requirements of the offered position by the priority date. 8 C.F.R. § 103.2(b)(l), (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). Even though the labor certification may be prepared with the beneficiary in mind, USCIS has an independent role in determining whether the beneficiary meets the labor certification requirements. *See SnapNames.com, Inc.*, 2006 WL 3491005, at *7 (D. Or. Nov. 30,

[16] Although the instant petition is filed under the "advanced degree professional" category, the regulations relating to "skilled workers," "professional," and "unskilled (other) workers" are cited throughout this decision as additional support of the authority of USCIS in adjudicating employment-based immigrant petitions.

2006). Thus, USCIS has the authority to determine whether the beneficiary qualifies for classification under the act and meets the terms of the labor certification.

Therefore, the DOL is responsible for setting the content of the labor certification, certifying that the position offered will not disadvantage potential U.S. workers and USCIS interprets the plain meaning of that language to determine whether: (1) the position qualifies for classification under the Act; and (2) the beneficiary meets the terms of the labor certification and is qualified for the classification requested.

d. The Position Offered as Stated on the Labor Certification Does Not Meet the Requirements for Classification under the Advanced Degree Professional Category.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).[17] An "advanced degree" is defined in 8 C.F.R. § 204.5(k)(2) as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(4)(i). Both of these requirements describe the minimum requirements for classification under section 203(b)(2) of the Act. Therefore, USCIS has the obligation to determine

[17] We note that these regulations regarding USCIS to determine whether the position offered meets the requirements for the classification requested were promulgated prior to the PERM regulations as part of the Immigration Act of 1990, Public Law 101-649, November 29, 1990 (IMMACT).

whether both the primary and alternate requirements, as minimum requirements for the position offered, meet the terms of the Act for classification as an advanced degree professional.

As stated above, the labor certification states the following primary and alternate requirements of the position offered:

Primary Education and Experience Requirements	**Alternate Education and Experience Requirements**
1. (Part H.4) Master's degree in "Industrial Engineering" or (Part H.7) Master's degree in "Business Administration or related field" and 2. (Part H.6) 36 months of experience in the job offered.	1. (Part H.8-B) "Combination of education and experience in lieu of a Master's degree." (This is stated again in Part H.14 as "a combination of education and experience equivalent to a Master's degree in Industrial Engineering, Business Administration, or a related field . . . and three years of experience in the financial industry." 2. (Part H.8-C, which specifically asks for the number of years experience acceptable as part of the combination of education and experience): **"4" [years of experience].** Part H.14 states that "the 4 years of experience in Block H.8-C. reduces to 2 years for a Bachelor's degree holder in any of the specified fields."

In our previous decisions, we held that these minimum requirements do not meet the minimum requirements for classification of the position under the advanced degree professional category.

On motion, the petitioner asserts that the director has focused on certain parts of the labor certification while ignoring the rest in determining that the position offered does not fit within the category sought. Specifically, the petitioner states that "H.4 through H.7 were the only blocks the [USCIS] needed to concern itself with since the DOL had certified by law (the force of the regulation) that the information contained in blocks H.8 through H.14 were equivalent to H.4 through H.7." At issue here, therefore, is whether the DOL's certification that the alternate requirements are "substantially equivalent" to the primary requirements also means that the DOL has certified that the position offered requires, as a minimum, an advanced degree. As will be shown below under 20 C.F.R. § 656.17(h), the DOL's certification regarding the substantial equivalence of the primary and alternate requirements relates to whether these requirements are "normally required for the occupation." The regulation at 20 C.F.R. § 656.17(h) states, in pertinent part:

> (h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones.
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> . . .
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> (4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought.

This demonstrates that when DOL certifies that the position's alternative and primary requirements are substantially equivalent, this relates only to whether the job opportunity's requirements are normal for the occupation, which is addressed in Part H.12 of the labor certification. Therefore, if the DOL determines that the alternate experience requirements are substantially equivalent to the primary job requirements, this means that DOL is satisfied that the job requirements are "normally required for the occupation" and the petitioner is not required to demonstrate business justification for requirements that are above normal to the DOL. The purpose of this requirement is to enable the DOL to ensure that U.S. workers are not disadvantaged by alternate requirements that are unduly tailored to the beneficiary. Thus, the determination by the DOL regarding whether the alternate requirements are substantially equivalent to the primary requirements does not prevent USCIS from concluding that the overall minimum requirements for the position, including both the primary and the alternate requirements, do not meet the minimum requirements for the classification requested in the immigrant visa petition. As noted above, the DOL regulations at 20 C.F.R. § 656.17 do not state anything about certifying a particular position under a particular immigrant visa classification.

In ascertaining whether the position offered qualifies for classification as an advanced degree professional position, USCIS must ensure that both the primary and alternate requirements of the position offered meet the requirements of a professional holding an advanced degree or the equivalent. If the position offered states minimum requirements for the position offered that are below the minimum requirements for classification as an advanced degree professional position, the position offered does not meet the requirements of 8 C.F.R. § 204.5(k)(4)(i). Neither of the requirements in Part H.8-C or Part H.14 require at least a professional degree above a baccalaureate or a baccalaureate followed by at least five years of progressive experience in the specialty. *Id.* Therefore, the language in Parts H.8-C and H.14 demonstrate that the petitioner is willing to accept less than an advanced degree for the proffered position and the position offered cannot be classified as an advanced degree professional position.

The petitioner cites a USCIS memorandum[18] that states the following regarding the educational and experience requirements in advanced degree professional cases:

[18] *See* the Memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs, and William R. Yates, Deputy Executive Associate Commissions, Office of Field Operations, "Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants," HQ 70/6.2, AD00-08, March 20, 2000.

> The terms, "MA," "MS," "Master's Degree or Equivalent" and "Bachelor's degree with five years of progressive experience," all equate to the educational requirements of a member of the professions holding an advanced degree. The threshold for granting EB-2 classification will be satisfied when any of these terms appear in block 14.[19]

We agree with the statements in this memorandum, but we also note that the petitioner has not cited the full context of this section. The next two paragraphs of this memorandum state the following:

> It is also important to read [the labor certification] as a whole. In particular, if the education requirement in block 14 includes an asterisk (*) or other footnote, the information included in the note must be considered in determining whether the educational requirement, as a whole, demonstrates that an advanced degree or the equivalent is the minimum acceptable qualification for the position.
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> As long as the minimum requirement for the job offered is a master's degree or the equivalent, the position should be found to require a member of the professions holding an advanced degree. This is true even if several variations of this requirement are stated.

In this case, we have read the labor certification as a whole, which includes the specific details in Parts H.8 and H.14 of the labor certification, which state that the petitioner would accept unspecified education coupled with four years of experience, or a bachelor's degree and two years of experience. These terms of the labor certification state minimum requirements that do not meet the minimum requirements for classification of the position as an advanced degree professional position. We also note that this memorandum cited by the petitioner states, "[I]f the job itself does not require an advanced degree professional, the petition must be denied, even if the alien beneficiary actually is an advanced degree professional." As demonstrated above, the labor certification states requirements that do not meet the minimum requirements for classification under section 203(b)(2) of the Act, and the petition was properly denied by the director for this reason.

The petitioner asserts on motion that the four years in Part H.8-C, and the reduction from four years to two years in Part H.14, refers to Specific Vocational Preparation (SVP),[20] not years of experience. The petitioner states that "the entry in H.8-C is written (as required by DOL procedures) in years of SVP where four years of SVP equates to a Master's level of education." However, a review of the plain language of the labor certification indicates that these numbers relate to "experience" not SVP. Part H.8-C asks "If applicable, indicate the number of years experience acceptable in question 8." (Emphasis added). And the petitioner's language in Part H.14 states that "the 4 years of experience in Block H.8-C reduces to 2 years for a Bachelor's degree holder in any of the specified fields" (emphasis added), which clearly indicates that this refers to years of "experience," not SVP.

[19] The petitioner notes that this refers to the Form ETA 750, the predecessor labor certification form to the ETA Form 9089.

[20] The definition of Specific Vocational Preparation, as defined in Appendix C of the Dictionary of Occupational Titles, is "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop

Further, as discussed above, the regulation at 20 C.F.R. § 656.17(h) states that the "job opportunity's requirements . . . must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O*NET Job Zones." Thus, the DOL's determination of SVP is to ensure that job opportunity's requirements are normal for the position offered and not unduly tailored to the beneficiary.

Here, the plain meaning of the labor certification states minimum requirements that are below the threshold for an advanced degree professional position as stipulated in 8 C.F.R. § 204.5(k)(4)(i), which states that the job offer portion of the labor certification must require, at a minimum, an advanced degree. As demonstrated above, we have viewed the labor certification in its totality and given meaning to each of the plain terms of the labor certification. Therefore, we conclude that the position does not constitute an advanced degree professional position.

e. The Beneficiary Meets the Terms of the Labor Certification.

In our previous decisions, we determined that, beyond the decision of the director, the petitioner had not established that the beneficiary met the required terms of the labor certification to qualify for the position offered.[21] On motion, the petitioner asserts that the beneficiary meets the terms of the labor certification and qualifies for the position offered based upon his bachelor's degree and employment experience. We accept that the record demonstrates that the beneficiary meets the terms of the labor certification.[22]

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the facility needed for average performance in a specific job-worker situation." This definition further states that "specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs." A more precise way of referring to the common denominator in SVP as we did in our prior decision would be that SVP puts education, training and experience into a common denominator of "lapsed time" for a typical worker to "learn the techniques, acquire the information, and develop the facility" for average performance in the job. *Id.*

[21] We may deny a petition that fails to comply with the technical requirements of the law even if the director 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 (9th Cir. 2003).

[22] Because the position offered does not qualify as an advanced degree professional position, it is irrelevant whether the beneficiary individually qualifies as an advanced degree professional. As noted above, the USCIS Memorandum cited by the petitioner states that "Deciding whether the position requires an advanced degree professional is independent of whether the alien beneficiary is himself an advanced degree professional. If the job itself does not require an advanced degree professional, the petition must be denied, even if the alien beneficiary actually is an advanced degree professional." *See* Memorandum from Michael D. Cronin and William R. Yates, "Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants," HQ 70/6.2, AD00-08, March 20, 2000. Therefore, for the reasons stated above, the position offered does not constitute an advanced degree professional position, and it is unnecessary for us to reach the issue of whether the beneficiary individually qualifies as an advanced degree professional.

III. CONCLUSION

In summary, it is USCIS and not the DOL that has the authority to determine whether: (1) the position qualifies for classification under the Act; and (2) the beneficiary meets the terms of the labor certification and is qualified for the classification requested. The petitioner has not demonstrated that the position offered meets the requirements of the advanced degree professional category.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. 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 previous decision of the AAO, dated December 23, 2014 is affirmed. The petition remains denied.