U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K- Corp.

DATE: OCT. 2, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a mobile application and software development business, seeks to permanently employ the Beneficiary in the United States as an infrastructure/application support engineer under the classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. In a subsequent motion to reopen and motion to reconsider, the Director affirmed the denial. The matter is now before us on appeal. The appeal will be dismissed.

The Director determined that the Petitioner had not established that the Beneficiary possessed an advanced degree as required by the terms of the labor certification and for the requested preference classification as of the petition's priority date.

The Petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.[1] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2] We conduct appellate review on a *de novo* basis. Our de novo authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 January 15, 2014.[4]

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[1] *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).

[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

[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).

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

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

H.4. Education: Master's degree in Information Technology.
H.5. Training: None required.
H.6. Experience in the job offered: Yes, 24 months.
H.7. Alternate field of study: Yes, Computer Science or Equivalent.
H.8. Alternate combination of education and experience: Bachelor's degree and 5 years.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: None.

Part J of the labor certification states that the Beneficiary possesses a master's degree in information technology from [redacted], India, completed in 2007. The record contains a copy of the Beneficiary's Academic Assessment Record for his master's degree, which shows his examination results for his final semester in May 2007, and a diploma for a master's degree awarded at the convocation held on February 23, 2008 and issued on August 11, 2008. The record also includes a copy of the Beneficiary's bachelor's degree in information technology from [redacted], India, issued on January 8, 2007, as well as the Beneficiary's Provisional Certificate dated December 15, 2006, and Statements of Marks demonstrating that the Beneficiary successfully completed six semesters.

The record also contains three evaluations of the Beneficiary's educational credentials. The first evaluation was prepared by [redacted]. for [redacted] on November 4, 2014, and states that the Beneficiary possesses the equivalent of a bachelor's degree from a United States college or university. The second evaluation was prepared by the American Association of Collegiate Registrars and Admissions Officers (AACRAO) on October 14, 2014, and states that the Beneficiary has completed a level of education comparable to a bachelor's degree from an accredited college or university in the United States. A third evaluation was prepared by [redacted] for [redacted] on March 19, 2008, and states that the Beneficiary possesses the foreign equivalent of a master's degree in computer science from a United States university. The [redacted] evaluation was submitted with the initial petition and the [redacted] and AACRAO evaluations were submitted in response to the Director's September 17, 2014, request for evidence (RFE).

The [redacted] evaluation reviewed the Beneficiary's bachelor's degree from [redacted], India, and determined that the bachelor's degree in information technology program at [redacted] is "substantially similar to the required course work leading to a Bachelor's Degree from an accredited institution of higher learning in the United States." [redacted] also states that the Beneficiary completed three years of specialized courses in information technology and other related subjects in this program, and was awarded a bachelor of science in information technology in 2006.

[redacted] goes on to review the Beneficiary's master's degree from [redacted], India. [redacted] states that this program requires graduation from bachelor's-level studies and is "substantially similar to the required course work leading to a Bachelor's Degree from an accredited institution of higher learning in the United States." [redacted] also states that the Beneficiary was awarded a master of science in information technology in 2007.

The AACRAO evaluation reviewed both the Beneficiary's bachelor's and master's degrees, as well as a Certificate in Aircraft Maintenance Engineering from [redacted] of [redacted][5] AACRAO determined that the Beneficiary's bachelor's degree from [redacted] was awarded on January 8, 2007 and is comparable to three years of credit from a regionally accredited college or university in the United States. AACRAO further determined that the Beneficiary's master's degree from [redacted] was awarded on August 11, 2008 and, in combination with previous study, is comparable to a bachelor's degree from a regionally accredited college or university in the United States. AACRAO noted that the Beneficiary's certificate in aircraft maintenance is "comparable to two and a half years of lower division credit from a technical college in the United States that is <u>not</u> regionally accredited."

The [redacted] evaluation also reviewed both the Beneficiary's bachelor's and master's degrees. [redacted] concluded that the Beneficiary's bachelor's degree awarded in 2006 from [redacted] is "equal to three years of undergraduate coursework from an accredited institution of higher education in the United States," and that the second year of the Beneficiary's master's program at [redacted] completed in 2007 is "equivalent to one year of graduate-level coursework or a Master's degree from an accredited institution in the United States."

Part K of the labor certification states that the Beneficiary possesses the following employment experience that postdates his education:

- IT Manager with [redacted] India from June 2, 2007 to May 23, 2008 (12 months);
- IT Manager with [redacted] India from June 4, 2008 until April 6, 2009 (10 months);
- Senior System Administrator with [redacted] California from November 30, 2009 to June 1, 2010 (six months); and
- Senior System Engineer with [redacted] California from June 8, 2010 to February 8, 2013 (32 months).

The Beneficiary listed four additional jobs on the labor certification. This experience, from September 11, 2000 to May 18, 2007, occurred prior to the completion of the Beneficiary's final semester of his bachelor's degree at [redacted] in May 2007, and therefore will not be discussed.

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[5] A copy of this certificate was not found in the record.

On the labor certification the Beneficiary also listed employment with the Petitioner from April 22, 2013 in the offered position.

The record contains four experience letters in support of the Beneficiary's claimed experience. However, two of the letters describe employment that occurred before the Beneficiary completed the final semester of his bachelor's degree in May 2007 and will not be considered. The two remaining letters describe the Beneficiary's experience as follows:

- Sr. System Administrator with [redacted] from November 30, 2009 to June 1, 2010 (six months); and
- IT Manager with [redacted] from June 4, 2008 to April 6, 2009 (10 months).

The Director notified the Petitioner in his RFE that he had reviewed the Electronic Database for Global Education (EDGE) created by the AACRAO. According to its website, www.aacrao.org, 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." http://www.aacrao.org/About-AACRAO.aspx (accessed October 1, 2015). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials." http://edge.aacrao.org/info.php (accessed October 1, 2015). Authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[6] If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* U.S. Citizenship and Immigration Services (USCIS) considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[7]

In his RFE, the Director noted that the original submission of the petition demonstrated that the Beneficiary possessed a three-year bachelor's degree and a two-year master's degree, which

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[6] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

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

according to EDGE, is the foreign equivalent of a U.S. bachelor's degree.[8] In response to the RFE, the Petitioner submitted the credential evaluations by [redacted] and AACRAO and noted that both evaluations concluded that the Beneficiary possessed the foreign equivalent of a U.S. bachelor's degree. The Petitioner also noted that the Beneficiary possessed more than five years of required experience.

In his November 28, 2014, decision denying the petition, the Director concluded that the evaluations of the Beneficiary's educational credentials were inconsistent.[9] The Director relied on the conclusions of EDGE and the AACRAO evaluation, finding that the Beneficiary's three-year bachelor's degree from [redacted] coupled with his two-year master's degree from [redacted] equates to a bachelor's degree from an accredited college or university in the United States. The Director further noted that the AACRAO evaluation lists the date of the beneficiary's degree award from [redacted] as August 11, 2008, and that the record did not establish that the Beneficiary possessed five years of progressive, post-baccalaureate experience from August 11, 2008 to the priority date of January 15, 2014. The Director considered the Beneficiary's two experience letters from [redacted] and [redacted] and determined that this documented 421 days of experience, which is less than the five years of experience required to meet the terms of the labor certification and to qualify for classification as an advanced degree professional.

In his January 22, 2015, decision denying the motion to reopen and motion to reconsider, the Director again noted the inconsistency in the [redacted] evaluation. The Director again concluded that the Petitioner had not demonstrated that the Beneficiary is qualified for the requested visa classification, as he does not have at least a master's degree or foreign equivalent or a bachelor's degree or foreign equivalent followed by five years of experience in the specialty.

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[8] USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). *See also 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); *Viraj, LLC v. Mayorkas*, 2014 WL 4178338 *4 (C.A.11 Ga. Aug. 25, 2014) (the AAO is entitled to give letters from professors and academic credentials evaluations less weight when they differ from the information provided in EDGE).

[9] In his decision, the Director misstated that the [redacted] evaluation indicated that the Beneficiary's master's degree from [redacted] is the foreign equivalent of a U.S. master's degree. As noted above, the [redacted] evaluation concluded that the Beneficiary's master's degree program at [redacted] was substantially similar to a U.S. bachelor's degree program. The Morningside evaluation, however, concluded that the Beneficiary's education at [redacted] and [redacted] resulted in the equivalent of a master's degree from an accredited institution in the U.S. The [redacted] evaluation is inconsistent with the determinations in the [redacted] and AACRAO evaluations, as well as with the conclusions of EDGE.

On appeal, the Petitioner states that the Beneficiary completed his master's degree at [redacted] in May 2007, rather than on August 11, 2008 as concluded by the Director and listed in the AACRAO evaluation. The Petitioner cites to the [redacted] evaluation which lists the award date as 2007 and provides a letter from the Office of the Registrar (Evaluation), [redacted] The March 13, 2015, letter states that the Beneficiary was a student of the university, that he appeared for fourth semester examinations held in May/June 2007, that the examination results were announced on August 6, 2007, that the Marks Statement was printed on August 24, 2007, and that the Beneficiary was qualified "for all purposes of Academics and Appointments" on August 6, 2007. The letter is accompanied by a "Revised Time Table for B.Sc. (IT) & M.Sc. (IT) Examinations May-June-2007-I Cycle."

II. LAW AND ANALYSIS

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

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> > (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
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> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[10] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14)

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

> 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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> . . .
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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:

> [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:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic

> workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> 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 the beneficiary are eligible for the requested employment-based immigrant visa classification.

B. Eligibility for the Classification Sought

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).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined 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.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

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.

The Petitioner has not submitted any additional evidence on appeal to establish that the Beneficiary's education resulted in a U.S. advanced degree or foreign equivalent degree. Based on the conclusions of EDGE and the evidence in the record discussed above, the Petitioner has established that the Beneficiary's master's degree from [redacted] is the foreign equivalent of a U.S. bachelor's degree in information technology.

In the instant case, the Petitioner claims that the Beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor's degree followed by at least five years of progressive experience in the specialty.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

As discussed above, the record contains evidence that the Beneficiary has 16 months of progressive experience after achieving the foreign equivalent of a bachelor's degree.[11] In order to qualify for the requested visa category and meet the minimum requirements for the offered position as listed on the labor certification, the record must contain evidence establishing a minimum of 60 months of progressive, post-baccalaureate experience. On appeal, the Petitioner asserts that the Director miscalculated the award date of the Beneficiary's degree and that the Beneficiary has five years of experience from the degree completion date of May 2007.

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[11] We note that the labor certification requires experience in the job offered, Infrastructure/Application Support Engineer, and that no experience in an alternate occupation is acceptable. We do not conclude here that the Beneficiary's experience letters document 16 months of experience in the job offered, as required by the terms of the labor certification. With any further filings, the Petitioner should demonstrate that the Beneficiary's experience as IT Manager and Senior System Administrator were in the offered position of Infrastructure/Application Support Engineer.

We are not persuaded by the Petitioner's argument. The Beneficiary's master's degree from [redacted] states that it was awarded at the "Convocation held on February 23, 2008," based upon the Beneficiary having passed the examination held in May 2007. The letter from the Office of the Registrar states that the Beneficiary appeared for examinations in May 2007 and received the examination results in August 2007. While the letter asserts that the Beneficiary was "qualified only on August 6, 2007 (the date on which results have been announced)," the letter does not assert that the degree was awarded earlier than the convocation date of February 23, 2008 as stated on the actual degree. Although the letter states that the beneficiary became "qualified" on the date the exam results were announced, the letter does not explain for what the beneficiary was qualified, or whether additional requirements must have been met before the convocation date or before the Beneficiary earned the degree. Even if we were to accept that the Beneficiary became qualified for the degree upon the announcement of the exam results, the Petitioner does not cite any authority that indicates that the date a beneficiary meets the qualifications for a degree is controlling of when the degree was earned.

Even if the Petitioner's assertion that the Beneficiary's degree was earned upon announcement of the exam results was accepted, the record does not include experience letters documenting the Beneficiary's five years of experience from August 6, 2007. As discussed above, the record includes four letters documenting the Beneficiary's experience. In addition to the two experience letters discussed above, the record includes a letter stating that the Beneficiary was employed as a Sr. Software Engineer with [redacted] from September 30, 2004 to May 18, 2007,[12] and a letter stating that the Beneficiary was employed as a Member of [redacted] from September 11, 2000 to February 12, 2002. Both of these letters document experience that occurred before the Beneficiary's exam results were announced on August 6, 2007 and cannot be considered post-baccalaureate.[13]

The Petitioner bears the burden of proof in these proceedings and is required to provide evidence establishing eligibility at the time of filing. *See* 8 U.S.C. § 1361, and 8 C.F.R. 103.2(b)(2). Here, the Petitioner did not provide evidence sufficient to meet its burden of proof. As such, we cannot find that the Beneficiary has five years of progressive, post-baccalaureate as required by the terms of the labor certification and for classification as an advanced degree professional.

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[12] This letter does not indicate whether the Beneficiary's employment was full- or part-time. As the dates of the Beneficiary's employment overlap with his bachelor's degree studies, doubt is cast on whether the employment was full-time. This issue must be addressed in any further filings if the Petitioner intends to rely on this experience. 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).

[13] The record includes a previously filed petition with the Beneficiary's experience letter from [redacted] documenting the Beneficiary's experience as an IT Manager from June 2, 2007 to May 23, 2008, nearly 12 months. Even if the portion of this experience occurring before the Beneficiary's bachelor's degree award date is considered and added to the 16 months of documented experience, it is still not sufficient to total five years of post-baccalaureate experience.

After reviewing all of the evidence in the record, it is concluded that the Petitioner has not established that the Beneficiary possessed at least a U.S. 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 before the priority date. Therefore, the Beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

C. The Minimum Requirements of the Offered Position

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).

In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). 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. v. Michael Chertoff*, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006).

In the instant case, the labor certification states that the offered position requires a master's or foreign equivalent degree and two years of experience in the job offered, or alternatively, a bachelor's or foreign equivalent degree and five years of experience in the job offered.

For the reasons explained above, the petitioner did not establish that the beneficiary possesses the required experience for the offered position.

The petitioner did not establish that the beneficiary possessed the minimum requirements of the offered position set forth on the labor certification by the priority date. Accordingly, the petition must also be denied for this reason.

D. Evidence of the Petitioner's Continued Ability to Pay the Proffered Wage

Beyond the decision of the director,[14] the Petitioner has also not established its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8

[14] 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 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

C.F.R. § 204.5(g)(2). Evidence of ability to pay "shall be in the form of copies of annual reports, federal tax returns, or audited financial statements." *Id.*

We note that the record includes pay stubs which purport to show that the Beneficiary was employed and paid at a rate that would exceed the annual proffered wage of $100,000. The Petitioner cites to the May 4, 2004, Interoffice Memorandum of William R. Yates that allows adjudicators to find that petitioners have the ability to pay the proffered wage if they can establish they are currently meeting that obligation. While we agree with the Petitioner's characterization of that policy memorandum, we also note that such a memorandum does not have the authority to overrule or disregard requirements listed in the regulation. According to the regulation, a petitioner must include with its initial evidence "annual reports, federal tax returns, or audited financial statements." The Petitioner has not provided any of these documents. While additional evidence may be submitted to establish the petitioner's ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the Petitioner has not established its continuing ability to pay the proffered wage to the Beneficiary since the priority date.

III. CONCLUSION

In summary, the Petitioner did not establish that the Beneficiary possessed an advanced degree as required by the terms of the labor certification and for the requested preference classification. Therefore, the Beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The director's decision denying the petition is affirmed. The Petitioner also did not establish its continuing ability to pay the proffered wage as of the priority date. Therefore, the petition must also be denied for this reason.

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 K- Corp.*, ID# 13714 (AAO Oct. 2, 2015)