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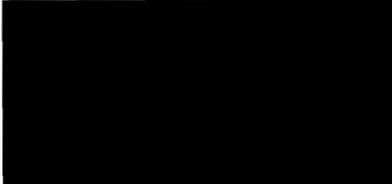
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U.S. Citizenship and Immigration Services

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FILE: LIN 07 056 52996 Office: NEBRASKA SERVICE CENTER Date: APR 22 2008

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner is a technology firm. It seeks to employ the beneficiary permanently in the United States as a computer software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate.

On appeal, counsel asserted that the beneficiary can qualify as a member of the professions holding an advanced degree with a U.S. baccalaureate or a foreign equivalent degree plus five years of progressive experience pursuant to 8 C.F.R. § 204.5(k)(2). Counsel also relies on a memorandum that does not address the issue in contention: what constitutes a foreign equivalent degree.

On December 27, 2007, this office advised the petitioner of information obtained from the Electronic Database for Global Education (EDGE) and requested evidence regarding the entrance requirements for Indotronix, where the beneficiary received his postgraduate diploma, and whether that institution is accredited by the All-India Council for Technical Education (AICTE). This office further requested the petitioner's recruitment report.

As noted in our December 27, 2007 notice, EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). Significantly, the individuals providing the evaluations on which the petitioner relies indicate that they have relied on AACRAO publications and one evaluator indicates that he is a member of AACRAO. Given this information, it becomes relevant whether the evaluations are consistent with the AACRAO materials on which the evaluators purport to rely.

We received the petitioner's response on February 22, 2008. The petitioner submits new evaluations of the beneficiary's education that are inconsistent with previous evaluations in the record. The petitioner also submits its recruitment report. Counsel asserts both that the beneficiary has the requisite education to qualify for classification as an advanced degree professional pursuant to section 203(b)(2) of the Act and that the skilled worker classification set forth at 8 C.F.R. § 203(b)(3) of the Act does not require a specific degree. Counsel cites no legal authority, and we know of none, that would allow the petitioner to request multiple classifications with the same petition. In fact, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Commr. 1998). We find that a change of classification is a material change to the petition. Thus, the only classification we will consider in this decision is the classification originally requested, advanced degree professional pursuant to section 203(b)(2) of the Act.

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.*

Initially, the petitioner submitted the beneficiary’s third-class three-year Bachelor of Science degree from Andhra University. The subjects listed are English, Telugu, Mathematics, Chemistry and Physics. The petitioner also submitted the beneficiary’s Post Graduate Diploma in Computer Applications from the Indotronix Institute of Informatics. Finally, the petitioner submitted an evaluation from the Trustforte Corporation concluding that the beneficiary’s three-year degree from Andhra University constitutes “the equivalent of three years of academic studies toward a Bachelor of Science Degree at an accredited institution of higher education in the United States.” The evaluation then asserts that the beneficiary’s postgraduate diploma coursework “fulfilled the requirements for a bachelor’s level concentration in Computer Science at an accredited US college or university.” Ultimately, the evaluation concludes that the beneficiary’s academic history is the “equivalent of a Bachelor of Science from an accredited US institution of higher education.” This evaluation was prepared by Barry S. Silberzweig, who indicates that he is a member of AACRAO and that he relied on AACRAO publications.

Thus, the issues are whether the beneficiary has a degree that is a foreign equivalent degree to a U.S. baccalaureate degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the alien certification and, if so, whether the job requires an advanced degree professional as required at 8 C.F.R. § 204.5(k)(4).

### **Eligibility for the Classification Sought**

As noted above, the ETA Form 9089 in this matter is certified by DOL. In response to our December 27, 2007 notice, counsel asserts that DOL has the authority to define the employment requirements underlying an alien employment certification. DOL’s role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In response to our December 27, 2007 notice, counsel relies on a letter from [REDACTED] III, Director of the Business and Trade Services Branch of CIS' Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000)(copy incorporated into the record of proceeding).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at \*6786 (October 26, 1990). At the time of enactment of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”<sup>1</sup> In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor’s degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

The initial evaluation from the Trustforte Corporation concluded that the beneficiary’s three-year degree documented the completion of “the equivalent of three years of academic studies toward a Bachelor of Science Degree at an accredited institution of higher education in the United States.” In response to our December 27, 2007 notice, the petitioner submits a new evaluation of the beneficiary’s education from ██████████ of Career Consulting International. ██████████ asserts that the beneficiary’s three-year baccalaureate from Andhra University by itself is equivalent to a U.S. baccalaureate. This conclusion is inconsistent with the previous evaluation from the Trustforte Corporation.

██████████ purports to reach this conclusion by assigning various credits for the beneficiary’s courses. These credits do not appear on the beneficiary’s transcript and ██████████ does not explain how she determined the number of credits. A Project for International Education Research (PIER)

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<sup>1</sup> Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

Workshop Report on South Asia I80 (1986) explicitly states that “transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year.” The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate “may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis.” This information seriously undermines [REDACTED] assertion that the beneficiary’s three years of baccalaureate education is comparable to 120 credits and a four-year baccalaureate in the United States.

further asserts: “UNESCO clearly recommends that the 3 and 4 year Indian degree should be treated as equivalent to a bachelor’s degree by all UNESCO members.” She provides three website addresses in support of this assertion and subsequently quotes the following UNESCO recommendation:

Member States should take all feasible steps within the framework of their national systems and in conformity with their constitutional, legal and regulatory provisions to encourage the competent authorities concerned to give recognition, as defined in paragraph 1(e), to qualifications in higher education that are awarded in the other Member States.

The petitioner also submitted 138 pages of UNESCO materials, only two of which are relevant. The recommendation provided relates to “recognition” of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

“Recognition” of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State and deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define “comparable qualification.” At the heart of this matter is whether the beneficiary’s degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

The two other new evaluations from [REDACTED] of Marquess Educational Consultants and Dr. [REDACTED] of the AUAP Evaluation Service are similar to [REDACTED] evaluation. We note that [REDACTED] expressly asserts that his evaluation adheres to the recommendations stated in a specific AACRAO publication, discussed in more detail below.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In this matter, the opinions of [REDACTED] are not consistent with the previous evaluation of the petitioner's degree. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* The record does not contain objective evidence resolving these inconsistencies in the petitioner's favor. As the record does not resolve this inconsistency, we will not consider the beneficiary's three-year baccalaureate as a foreign equivalent degree to a U.S. baccalaureate. Thus, we must now consider the beneficiary's diploma from Indotronix.

On December 27, 2007, we advised the petitioner that we had reviewed the EDGE created by AACRAO. As noted above, [REDACTED] states that he is a member of AACRAO and [REDACTED] asserts that he relied on AACRAO materials, specifically, *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986). AACRAO, according to its website, [www.aacrao.org](http://www.aacrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India. It discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

Finally, we noted that the beneficiary's diploma reflects that the Indian government recognizes Indotronix for 'O' level courses. It does not suggest that Indotronix is accredited by AICTE or that it requires an Indian baccalaureate for entry into the postgraduate diploma program.

Thus, we requested additional evidence about Indotronix.<sup>2</sup> In response, the petitioner did not submit any official materials about Indotronix. Rather, [REDACTED] simply asserts that Indotronix requires a three-year baccalaureate for admission and is accredited by the Department of Electronics for "O" Level courses. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) provides that evidence that an alien is a professional requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." While this regulation relates to a lesser classification, we cannot conclude that the evidence required to demonstrate that an alien is a member of the professions holding an advanced degree is any less than the evidence required to show that the alien is a professional. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).

Moreover, it is significant that both the statute and relevant regulations use the word "degree" in relation to professionals and members of the professions holding an advanced degree. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the profession holding an advanced degree is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of

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At the time of our December 27, 2007 notice, the petitioner was not claiming that the beneficiary's three-year baccalaureate was a foreign equivalent degree to a U.S. baccalaureate on its own. Thus, we did not advise the petitioner that EDGE provides that a three-year baccalaureate is only comparable to three years of undergraduate education towards a U.S. baccalaureate.

learning.” Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). Thus, Congress’ exclusive use of the word “degree,” both when defining members of the profession holding an advanced degree in the statute and when providing the minimum education required if combined with five years of experience in the legislative history, reveals that the advanced degree, or the baccalaureate if combined with five years of experience, must be a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential.

The petitioner initially relied on the beneficiary’s postgraduate diplomas in addition to his three-year baccalaureate as equivalent to a U.S. baccalaureate. But the postgraduate diplomas are not degrees issued by a college or university. Thus, they cannot be considered as evidence that the beneficiary has a foreign equivalent degree to a U.S. baccalaureate, even in combination with a three-year baccalaureate. Four years of education is not presumptive evidence of education equivalent to a U.S. baccalaureate, especially when less than four years of that education was acquired at a college or university.

Even if we accepted that Indotronix were a college or university, the petitioner has not complied with our request to demonstrate that Indotronix both requires a three-year baccalaureate for admission and is an accredited university or institution or accredited by AICTE. [REDACTED] assertion that Indotronix requires a three-year baccalaureate for admission is simply not credible in light of the information on its diplomas that it is accredited for “O” level education. Ordinary level education is inherently secondary education, not undergraduate or graduate level education.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

### **The Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) 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)(5), 8 U.S.C. § 1182(a)(5). **The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).**

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

*Tongatapu*, 736 F. 2d at 1309.<sup>3</sup>

In addition, the regulation at 8 C.F.R. § 204.5(k)(4) provides the following:

(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. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. **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.**

(Bold emphasis added.)

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<sup>3</sup> *But cf. Hoosier Care, Inc. v. Chertoff*, 482 F. 3d 987 (7<sup>th</sup> Cir. 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought here.

As noted by counsel, when determining the terms of the alien employment certification, CIS may not ignore a term nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which CIS 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. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, “Job Opportunity Information,” describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, you checked “other” on Part H, line 4, of the alien employment certification in regards to the minimum level of education required. On line 4-A you specified that “other” meant “BS Equivalency.” Line 6 reflects that five years of experience is required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Finally, line 9 reflects that a foreign educational equivalent is acceptable.

If the job requires anything less than a U.S. baccalaureate or foreign equivalent degree plus five years post-baccalaureate experience, then it does not require an advanced degree professional as defined at 8 C.F.R. § 204.5(k)(2). In order to ascertain what the petitioner meant by “BS Equivalency,” we requested the petitioner’s recruitment report. In response, counsel asserts that CIS “has neither the authority nor expertise to impose its definition of ‘BS or BS equivalent’ *for purposes of the ETA-9089 approval* as meaning anything other than what the Department of Labor interpreted the term to mean at the time it adjudicated and issued the labor certification.” (Emphasis in original.) Counsel cites *Tovar v. U.S. Postal Service*, 3 F. 3d 1271, 1276 (9<sup>th</sup> cir. 1993) and *Omar v. INS*, 298 F. 3d 710, 714-15 (8<sup>th</sup> Cir. 2002) in support of our purported lack of authority to interpret the language of the alien employment certification.

Unlike the cases cited by counsel, which involved the U.S. Postal Service interpreting immigration law and legacy Immigration and Naturalization Services (INS) interpreting criminal law, our inquiry in this matter, whether the job requires an alien meeting the classification requirements, involves a law and regulation with which we are specifically charged with enforcing. As stated above, DOL’s role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). Conversely:

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).

*Madany*, 696 F.2d at 1012-1013. Moreover, as quoted above, the regulation at 8 C.F.R. § 204.5(k)(4) explicitly states that the alien employment certification must reflect that the job requires an advanced degree professional. Thus, there is no question that CIS is charged with interpreting the job requirements and making preference classification decisions.

We acknowledge that the plain language on the ETA Form 9089 is ambiguous. In order to better ascertain the petitioner's intent, we requested the recruitment report, which the petitioner submitted. The response is also ambiguous. While the newspaper advertisements specify that a "BS" plus five years of experience is required, the Internet advertisements reflect that the petitioner would accept a "4-yr BS or 3-yr BS or BS Education equivalency." As it appears that the petitioner was willing to accept a three-year baccalaureate or an education equivalency which may include a combination of education and experience, it appears that the job does not require a member of the professions holding an advanced degree as defined at 8 C.F.R. § 204.5(k)(2).

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, while the beneficiary may meet the job requirements on the alien employment certification, such an interpretation requires us to conclude that the job does not require an advanced degree professional as required under 8 C.F.R. § 204.5(k)(4). For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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.