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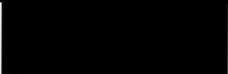
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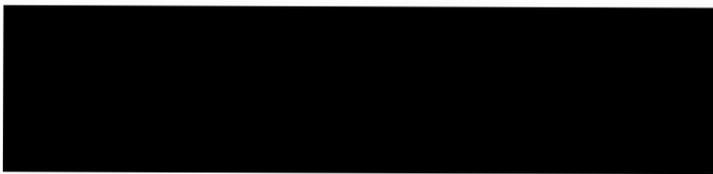
IN RE:

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:

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, initially approved the employment-based visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The director subsequently reaffirmed the revocation on motion. The matter is now before the Administrative Appeals Office (AAO) on appeal. The petition underlies an Application to Register Permanent Residence or Adjust Status (Form I-485) that has been certified to the AAO. The merits of the I-140 are relevant to an adjudication of the adjustment application that is before the AAO on certification.¹ The appeal must be rejected as untimely filed. Nevertheless, this decision will also address the merits of the appeal as they bear on the adjustment application that is before us on certification.

In a supplemental brief, counsel draws the AAO's attention to a recent opinion, *Firstland Int'l, Inc. v. Ashcroft*, 377 F.3d 127 (2d Cir. 2004), issued by the United States Court of Appeals for the Second Circuit on August 2, 2004. In that opinion, the court in *Firstland* interpreted the third and fourth sentence of section 205 of the Act, 8 U.S.C. § 1155 (2003), to render the revocation of an approved immigrant petition ineffective where the beneficiary of the petition did not receive notice of the revocation before beginning his journey to the United States. *Firstland Int'l*, 377 F.3d at 130. Counsel asserts that the reasoning of this opinion must be applied to the present matter and accordingly, Citizenship and Immigration Services (CIS) may not revoke the approval because the beneficiary did not receive notice of the revocation before departing for the United States, since he was already in the United States when the director issued the revocation.²

On December 17, 2004, the President signed the Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845). See Pub. L. No. 108-458, 118 Stat. 3638 § 5304(c) (2004). Specifically relating to this matter, section 5304(c) of Public Law 108-458 amends section 205 of the Act by striking "Attorney General" and inserting "Secretary of Homeland Security" and by striking the final two sentences. Section 205 of the Act now reads:

The Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 1154 of this title. Such revocation shall be effective as of the date of approval of any such petition.

¹ In the notice of certification, the director acknowledged the filing of the instant appeal and stated that the appeal and entire record of proceeding was included in the certification.

² Counsel's arguments illustrate the illogical effects of the Second Circuit's reasoning: In the present matter, the alien entered the United States as a nonimmigrant on December 19, 1997, three years prior to the filing of the Form I-140 immigrant petition and more than five years prior to the revocation of the petition's approval. Accordingly, it was physically impossible for CIS to have notified the alien of the revocation before he departed for the United States. In effect, counsel's interpretation of *Firstland* would have created a situation where any alien would have an irrevocable immigrant visa petition if the alien simply waited to file the petition until after he or she arrived in the United States.

Furthermore, section 5304(d) of Public Law 108-458 provides that the amendment made by section 5304(c) took effect on the date of enactment and that the amended version of section 205 applies to revocations under section 205 of the Act made before, on, or after such date. Accordingly, the amended statute specifically applies to the present matter and counsel's *Firstland Int'l* argument no longer has merit.

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

The appeal was filed on September 11, 2003, 27 days after the decision was rendered. The regulation at 8 C.F.R. § 205.2(d) states that revocations of approvals must be appealed within 15 days after the service of the notice of revocation. If the decision was mailed, the appeal must be filed within 18 days. *See* 8 C.F.R. § 103.5a(b). The decision affirming the revocation erroneously stated that the petitioner could file an appeal within 33 days. Nevertheless, the director's erroneous advice does not supersede the pertinent regulations. Therefore, the appeal must be rejected as untimely filed.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy. Moreover, a motion must meet the requirements of a motion when it is filed. No provision exists that would allow the petitioner to supplement a motion. The appeal, as originally filed, merely requested that the AAO consider the same assertions, evidence and case law supporting the petitioner's prior motion. Thus, the appeal, at the time it was filed, did not constitute a proper motion to reopen or reconsider the director's most recent decision.

As stated above, however, the petition underlies an adjustment application that is before us on certification. In the decision on the adjustment application certified to the AAO, the director stated: “The appeal and entire record of proceeding for the I-140 is also submitted to the AAO with this certification.” Thus, while the appeal must be rejected as untimely filed, we will consider the merits of the appeal for the sake of argument.

We note that the petitioner has invoked section 106(c)(1) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, § 106(c), 114 Stat. 1251, 1254 (Oct. 17, 2000), which amended section 204 of the Act by adding what is now section 204(j) of the Act, 8 U.S.C. § 1154(j). This provision relates to job flexibility for long delayed applicants for adjustment of status to permanent residence. Specifically, section 204(j) of the Act provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. – A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained adjudicated for 180 days or more shall remain valid **with respect to a new job if the individual changes jobs or employers** if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Every federal circuit court of appeals that has discussed the portability provision of section 204(j) of the Act has done so only in the context of deciding an immigration judge’s jurisdiction to determine the continuing validity of an approved visa petition when adjudicating an alien’s application for adjustment of status in removal proceedings. *Sung v. Keisler*, 2007 WL 3052778 (5th Cir. Oct. 22, 2007); *Matovski v. Gonzales*, 492 F.3d 722 (6th Cir. Jun. 15, 2007); *Perez-Vargas v. Gonzales*, 478 F.3d 191 (4th Cir. 2007). In *Sung*, the court quoted section 204(j) of the Act and explained that the provision only addresses when “an approved immigration petition will remain valid for the purpose of an application of adjustment of status.” *Sung*, 2007 WL 3052778 at *1 (emphasis added). *Accord Matovski*, 492 F.3d at 735 (discussing portability as applied to an alien who had a “previously approved I-140 Petition for Alien Worker”); *Perez-Vargas*, 478 F.3d at 193 (stating that “[s]ection 204(j) . . . provides relief to the alien who changes jobs after his visa petition has been approved”). Thus, this decision on the petition will not address counsel’s assertions relating section 204(j) of the Act. We note, however, that the denial of the beneficiary’s adjustment application was certified to this office and that our decision on that application, issued under separate cover, includes a detailed analysis of section 204(j) of the Act.

The petitioner is a software consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior 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, a Form ETA 750,³ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director initially approved the petition, but upon further review of the petition, the director determined that the beneficiary was not eligible for the classification sought and did not satisfy the minimum level of education stated on the alien employment certification.

³ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate.

On motion, counsel submitted a brief, an evaluation of the beneficiary's credentials and correspondence with a CIS employee. The director reaffirmed his decision on motion.

On appeal, counsel requests that the AAO consider the evidence submitted on motion. Subsequently, counsel submitted supplemental briefs relying on new case law and a new opinion from a CIS employee. Counsel asserts that this new material demonstrates that the beneficiary is eligible for a lesser classification. We note that the petitioner did file a petition in behalf of the beneficiary under a lesser classification, LIN-01-090-52633. The director has also revoked the approval of that petition. The petitioner, however, did not challenge that decision on motion or on appeal. The petitioner may not now challenge the determination on that petition in this proceeding. Nor will we consider whether the beneficiary might be eligible for a lesser classification as part of the adjudication of this petition. 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).

For the reasons discussed below, even if the appeal were timely, it would not succeed on its merits.

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.*

The beneficiary possesses a foreign three-year Bachelor of Commerce degree from the University of Madras and a postgraduate diploma in advanced computer software from Computer Systems Corporation. The petitioner is also an associate member of the Institute of Chartered Accountants of India, a member of the Institute of Cost and Works Accountants of India and is a Certified Public Accountant in Illinois. Thus, the issues are whether any of this education or licensure constitutes a foreign degree equivalent 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 labor certification.**

In one of his supplemental briefs, counsel relies on *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174, 1779 (D. Ore. 2005), which held that CIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent'" when adjudicating a lesser classification than the one sought. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715, 718 (BIA 1993). Although the reasoning underlying a district judge's decision will be

given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Specifically, we are not required to follow the decision of a United States district court in matters arising out of the same district, but are bound by the published decisions of the United States Circuit Courts of Appeals for matters arising out of the same circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d at 74 (administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit).

Regardless, *Grace Korean* involved the adjudication of a petition under a lesser classification than the one sought in this matter. Most significantly, the court in *Grace Korean* repeatedly emphasized that the classification sought in that matter included “skilled workers,” who by statute do not need a degree. In the matter before us, the petitioner seeks to classify the beneficiary as an advanced degree professional, a classification that *does* require a degree. This distinction was acknowledged by the same district court, which concluded that CIS is entitled to deference in interpreting its own regulatory definition of advanced degree. *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005, *10 (D. Or. 2006). Thus, we do not find *Grace Korean* relevant to this matter.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. 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 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In another brief, counsel relied on a letter from Mr. Efren Hernandez 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 the circuit where the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th 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 (9th 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 (5th 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 (Regl. Commr. 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, 101st Cong., 2nd 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 where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

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."⁴ 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 petitioner submitted an evaluation of the beneficiary's credentials from the Trustforte Corporation. The evaluation concludes that the beneficiary's three-year degree from the University of Madras is "equivalent to the completion of three years of academic studies toward the attainment of a Bachelor of Business Administration Degree from an accredited institution of higher education in the United States." The evaluation then concludes that the beneficiary's coursework for admission to the Institutes of Accountants and Cost and Works Accountants are "analogous to the completion of concentrated coursework in accounting at the baccalaureate level." The evaluation continues that the beneficiary's licensure as a CPA in Illinois "is indicative of his attainment of the equivalent of a Bachelor of Science Degree in Accounting from an accredited US institution of higher education." Finally, the evaluation concludes that based on all of the above, the beneficiary "attained the equivalent of a Bachelor of Science Degree in Accounting from an accredited institution of higher education in the United States." A previous evaluation from Foreign Credential Evaluations, Inc., reaches a similar conclusion.

In one of the submissions supplementing the appeal, the petitioner included an October 14, 2005 letter from [REDACTED], Executive Director of the Board of Examiners for Illinois CPAs. Ms. [REDACTED] asserts that prior to 2001, candidates for the Illinois CPA exam "must have successfully completed at least 120 semester hours of acceptable credit." She concludes that in the beneficiary's case, "it was determined by our foreign credentials evaluator that he had the equivalent of a US Bachelor's Degree." She concedes, however, that the Board of Examiner's "determination applied strictly to establishing eligibility for the CPA exam as an Illinois candidate."

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.

⁴ 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.

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)).

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). Significantly, section 203(b)(2)(C) of the Act provides that in determining exceptional ability, "the possession of a degree, diploma, certificate or similar award from a college, university, school, or other institution of learning or a license to practice or certification for a particular profession or occupation shall not be itself be considered evidence of such exceptional ability." The use of the phrase "degree, diploma, certificate or similar award" reveals that Congress does not consider all of these credentials to fall under the definition of "degree." Moreover, section 203(b)(2)(C) of the Act clearly considers licensure a separate qualification from education.

The petitioner relies on the beneficiary's membership in a professional association and his licensure as an accountant in addition to his three-year baccalaureate as equivalent to a U.S. baccalaureate. But the memberships and licensure 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.

While not binding on CIS, we note that a federal district court has upheld our interpretation that a membership in the Institute of Chartered Accountants of India cannot be considered a degree. *Snapnames.com, Inc.*, 2006 WL 3491005 at *10.

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.

Qualifications for 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 (9th 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.

As stated above, counsel relies on *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 for the proposition that CIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." As also stated above, the

AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. at 718. Even assuming that the phrase “B.A. or equivalent,” is open to interpretation as decided in *Grace Korean*, the alien employment certification in this matter did not use that phrase.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Block 14 contains asterisks for both education and experience, referring to the explanation in Block 15. Block 15 provides, in pertinent part:

This application requires a Master’s degree or equivalent. Specifically, the application requires a Bachelor’s degree or foreign equivalent degree, plus five years progressive experience designing and developing mainframe software applications, or a Master’s degree, or foreign equivalent degree, plus three years of experience designing and developing mainframe software applications.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, CIS may not ignore a term of the labor certification, 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.

As stated above, even assuming that the phrase “B.A. or equivalent” is ambiguous and open to interpretation, the petitioner did not use that phrase. Rather, the petitioner used very specific language that tracks the language at 8 C.F.R. § 204.5(k)(2). The use of such language suggests that

our interpretation of 8 C.F.R. § 204.5(k)(2), to which we are accorded deference, should also apply in interpreting the meaning on the alien employment certification. For the reasons discussed above, the beneficiary does not have a foreign equivalent degree to a U.S. baccalaureate. Even if we were to conclude that the language on the alien employment certification allows less than a baccalaureate from a college or university, we would then need to conclude 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). *See* 8 C.F.R. § 204.5(k)(4).

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, the beneficiary does not meet the job requirements on the alien employment certification. For these reasons, considered both in sum and as separate grounds, the appeal could not succeed on its merits and the petition was approved in error and, thus, never valid.

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 rejected as untimely with a separate finding that the appeal could not succeed on its merits.