

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

B6

PUBLIC COPY



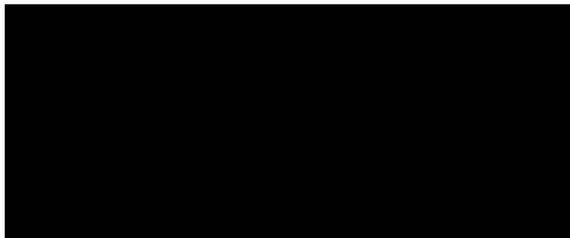
FILE: [REDACTED] Office: VERMONT SERVICE CENTER  
EAC-03-238-52846

Date: JAN 04 2007

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a world-wide provider of insurance and financial services. It seeks to employ the beneficiary permanently in the United States as an applications developer (senior associate). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification application), approved by the Department of Labor (DOL). DOL assigned the occupational title of programmer analyst and occupational code of [REDACTED] to the proffered position. The director determined that the petitioner failed to establish that the beneficiary satisfies the minimum educational requirements according to the requirements of the proffered position. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's January 20, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary meets the requirements for the position as stated on the application for alien employment certification. The director determined that the beneficiary holds a "functional equivalent" to instead of a "foreign degree equivalent to a Bachelor's degree in Computer Information Systems, Computer Science, or a related field." Additionally, the director determined that despite the petitioner's request to change the requested classification from "e" skilled worker to "g" any other worker, the Form ETA 750 did not support such a request.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 203(b)(3)(A)(iii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

At the outset, the petition may only be classified as either a professional or skilled worker. The proffered position does not qualify under the unskilled, any other worker category. The petitioner requested classification under the professional or skilled worker category on the initial petition, but in response to a request for evidence, counsel conceded that the beneficiary "does not have the equivalent of a university degree unless his extensive experience is considered," and sought to amend the category petitioner under from "e" skilled worker or professional to "g" any other worker.

The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part: "*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

*Skilled worker* means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a

temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part: “*Other worker* means a qualified alien who is capable, at the time of petitioning for this classification, of performing unskilled labor (requiring less than two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.”

The proffered position requires a bachelor’s degree. Because of that educational requirement, requesting classification of the petition as an unskilled, other worker is misplaced. The unskilled worker category requires less than two years of experience and no educational accomplishments. To be assigned that category would render the actual job requirements delineated by the petitioner on the Form ETA certified by DOL meaningless.

Additionally, DOL assigned the occupational code of 030.162-014 to the proffered position which crosswalks<sup>1</sup> to 15-1051.00, computer system analysts according to their public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g+Go> (accessed December 12, 2006). According to DOL’s extensive description of the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Four requiring “considerable preparation.” According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” See <http://online.onetcenter.org/link/summary/15-1051.00> (accessed December 12, 2006). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See <http://online.onetcenter.org/link/summary/15-1051.00#JobZone> (accessed December 20, 2006).

The proffered position may be properly analyzed as professional since the position requires a bachelor’s degree, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL’s classification and assignment of educational requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements. While the position does not fall neatly into the skilled worker category since it requires a bachelor’s degree and one year of experience, and according to DOL’s SVP classifications the occupation requires considerable preparation, the regulation at 8 C.F.R. § 204.5(l)(2) states that relevant post-secondary education may be considered as training for a skilled worker position. Since the skilled worker category is for positions requiring at least two years of experience or training, the bachelor’s degree would compensate for the additional year of experience or training needed to qualify for the skilled worker category.

---

<sup>1</sup> DOL’s standard occupational classification system changed between the Form ETA 750’s certification and now so old codes must be “crosswalked” to their corresponding new codes and job titles and descriptions.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on October 2, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of applications developer (senior associate). In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |   |
|-----|-------------------------|---|
| 14. | Education               |   |
|     | Grade School            | -   |
|     | High School             | -   |
|     | College                 | grad  |
|     | College Degree Required | Bachelor degree   |
|     | Major Field of Study    | <b>Engineering, Math, Physics, Computer Science*</b> <sup>2</sup> |

The applicant must also have one year of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision, or in the related occupation of Programmer BI Consultant.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary represented that he attended secondary school and post-secondary school from 1980 through 1983, attended Megs Datamatics in New Delhi, India studying computer programming from November 1984 through April 1985 which culminated in a Diploma in Computer Programming, attended Varanasi Sanskrit University in India studying English, Math, and Science from 1987 through 1988 for which he received a Bachelor of Science degree, and studied Impromptu and Powerplay at Cognos in Bracknell, United Kingdom, in April 2000 for which he received a certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the

---

<sup>2</sup> The \* annotated the major field of study with "or equivalent."

baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii) states, in pertinent part:

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>3</sup>. The record contains the following relevant evidence pertaining to the beneficiary's qualifications: certificates of completion from various computer skills training programs; credential evaluations from Morningside Evaluations and Consulting (Morningside) and M.S., Ph.D. a Bachelor of Science degree in mathematics and physics issued to the beneficiary from Varanasey Sanskrit University and accompanying transcripts; secondary school certificates; and employment experience letters. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that the case should be considered under the "skilled worker" category instead of the "professional category" and that the beneficiary has two years of qualifying employment experience. Subsequently, counsel submitted a copy of the holding in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005) and states that the case is "directly in point" without further elaboration.

Two credential evaluations were submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[CIS] 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."

The AAO recognizes members of NACES, the National Association of Credential Evaluation Services (NACES) as reputable and credible credential evaluation services since the U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical

---

<sup>3</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

standards in the types of credential evaluations provided by the private sector. Neither Morningside nor Dr. [REDACTED] are members of NACES.

The credential evaluation from Morningside combined the beneficiary's completed "three years of academic coursework towards a degree from an accredited institution of higher education in the United States" with his "eight years of work experience and professional training" to determine that he held the equivalent of a Bachelor of Science degree in Computer Information Systems from an accredited institution of higher education in the United States. Morningside applied an equivalency ratio of three years of work experience for one year of college training. Dr. [REDACTED] stated that the beneficiary's completion of the Bachelor of Science Degree program significantly paralleled parameters and curricula at accredited institutions of tertiary education in the United States without providing an analysis of semester hours. Additionally, Dr. [REDACTED] combined the beneficiary's educational accomplishments with his employment experience to determine that his credentials were the equivalent of a Bachelor of Science Degree in Computer Science from an accredited institution of tertiary education in the United States.

Both credential evaluations concur that the beneficiary has the equivalent of a bachelor's degree through the combination of the completion of three years of study and work experience. Neither states that the beneficiary's degree *alone* establishes equivalency to completion of a baccalaureate degree program at an accredited university in the United States. Additionally, the Morningside evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor.

Although the petitioner did not delineate four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A, it is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(1)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The AAO also notes that the petitioner did not connect the "equivalency" language on the educational requirements to the degree but rather to the field of study. Thus, while the regulation for professionals requires a foreign equivalent degree, the petitioner did not. Additionally, the petitioner did not indicate what type of equivalent field of study it would accept to the fields of study it specifically delineated. It also did not indicate that it was willing to accept a foreign equivalent to a bachelor's degree or otherwise articulate alternative permutations of educational equivalencies that would be accepted in lieu of a bachelor's degree.

Counsel cites to *Grace Korean United Methodist Church* but does not articulate an argument for that citation. We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds 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.” 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 (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. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at \*8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

In this matter, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, has held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter<sup>4</sup>. Additionally, in this case, the

---

<sup>4</sup> Relying in part on *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983), 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 (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)(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.*

petitioner has not set forth a “bachelor’s degree or its equivalent” language as part of its job requirements and thus, *Grace Korean’s* holding is not directly on point as asserted by counsel.

Finally, counsel suggests that if the beneficiary is not qualified under the professional section of the third preference category, then CIS should consider the beneficiary’s qualifications under the skilled worker section of the third preference category. Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary’s bachelor’s degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. 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.” *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 [labor certification application form].” *Id.* at 834 (emphasis added). 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 petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of a foreign degree equivalent to a U.S. bachelor’s degree in engineering, math, physics, computer science, or an equivalent field.

The beneficiary has a three-year bachelor’s degree in mathematics and physics. If supported by a credential evaluation stating the beneficiary’s degree was equivalent to a United States bachelor’s degree, a four-year baccalaureate degree from India could reasonably be considered to be a “foreign equivalent degree” to a United States bachelor’s degree. Here, the record reflects that the beneficiary’s formal education consists of less than a four-year curriculum. Additionally, the petitioner has not indicated that a combination of education and experience achievements can be accepted as meeting the minimum educational requirements stated on the

---

§ 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).

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 (9<sup>th</sup> Cir. 1984).

labor certification<sup>5</sup>. Thus, the combination of educational achievements may not be accepted in lieu of one baccalaureate degree. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

**ORDER:** The appeal is dismissed.

---

<sup>5</sup> For example, the educational requirements were not listed with a foreign equivalency designation or some clarification that the petitioner would be willing to accept a combination of a certain amount of experience with certain educational accolades. The AAO is loath to presume the outcome of the recruitment results before DOL had applicants been aware that some lesser form of educational requirements could have established their qualification and eligibility for the proffered position, such as their completion of lesser amounts of semester hours than a four-year baccalaureate program and experience.