

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

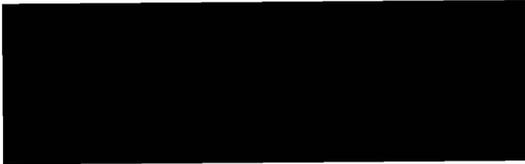
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



File:

EAC-05-015-50738

Office: VERMONT SERVICE CENTER

Date: JAN 22 2007

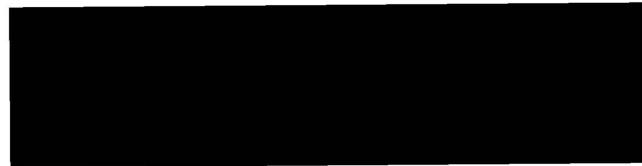
In re:

Petitioner:

Beneficiary:

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

The petitioner is a software development and information technology consulting business, and seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 29, 2005 denial, the petition was denied for failure to document that the beneficiary met the position requirements of the certified labor certification.

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.¹

The record shows that the appeal is properly filed, 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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is 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), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 12, 2004. The proffered wage as stated on Form ETA 750 is \$80,000 per year, 40 hours per week. The labor certification was approved on May 10, 2004, and the petitioner filed the I-140 on the beneficiary's behalf on

¹ 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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

October 21, 2004. On the I-140 petition, the petitioner listed the following information related to the petitioning entity: established February 2000; gross annual income: \$25 million; net annual income: \$2.5 million; and employees: 300.

On November 16, 2004, the director issued a Request for Evidence (“RFE”). The RFE requested that petitioner submit additional evidence to demonstrate that the beneficiary possessed the required Bachelor’s degree or its educational equivalent at the time of filing the Form ETA 750. The petitioner responded, but the director determined that the evidence submitted in response to the RFE was insufficient to overcome the deficiencies in the petition, and that the petitioner failed to demonstrate that the beneficiary had a bachelor’s degree, and therefore, did not meet the requirements of the labor certification. The petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary’s qualifications, Citizenship and Immigration Services (“CIS”) must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the “job offer” position description for a programmer analyst provides:

In a consulting environment, meet with client management to gather technical and functional requirements. From requirements develop specifications. From specifications, analyze, code, design, develop, implement, test, and troubleshoot software applications using tools and technologies such as Java 1.3, JSP, EJB, HTML, XML, Oracle 8.i, Apache 1.2.2, Voyager 4.0.1.6. WebMethods integration, Jbuilder 3.5, kawa 4.1, PVCS, VSS, Visio flow diagram, Rational Rose UML design tool, CISCO load balance unit, Sun Solaris & Windows 2000.

Further, the job offered listed that the position required:

Education:	College: 4 years College degree: Bachelor’s degree
Major Field Study:	*Quantitative discipline – please see attached.
Experience:	2 years in the job offered, Programmer Analyst, or 2 years as a Software Engineer or Systems Administrator.

Regarding the field of study, the petitioner attached a separate page, which read as follows:

This requirement is meant to define the minimum education requirement for the position offered. A degree is the normally accepted method of entry into

this profession according to the Department of Labor's own Occupational Outlook Handbook and SVP. The employer recognizes that the degree's actual name is not significant as long as it has a significant core of necessary related courses. Thus, a degree in any of the following would be acceptable:

- Accounting
- Automation & Technology
- Biology/Biochemistry/Chemistry
- Business/Business Administration/Applications
- Commerce
- Computer Applications
- Computer Information Systems
- Computer Science
- Data Processing
- Datametrics
- Economics/Applied Economics
- Engineering (Aeronautical, Agricultural, Chemical, Civil, Communications, Computer, Electrical, Electronic, Industrial, Manufacturing, Mechanical, Network, Telecommunications)
- Finance
- Industrial Management
- Management Information Systems
- Mathematics
- Physics
- Statistics
- Theoretical Mechanics/Physics

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed prior education as: (1) Indira Gandhi National Open University, New Delhi, India; Field of Study: Computer Science; from January 1997 to June 1997, for which he received a Certificate in Computing; and (2) Bharathiar Univeristy, Coimbatore Tamil Nadu, India; Field of Study: Computer Science; from September 1992 to November 1995, for which he received a Bachelor of Science degree.

The regulations define professional under the third preference category 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(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for professional classification that:

(C) Professionals. 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 an official college or university record showing the date the 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

The petitioner submitted four different evaluations of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

Evaluation One:

- Evaluation: [REDACTED] Ph.D., Associate Professor of Computer Science, Zicklin School of Business, Baruch College, The City University of New York, New York, New York.
- The evaluation provided that the beneficiary completed a Bachelor of Science degree in Computer Science at Bharathiar University of Madras in India, which would be equivalent to three years of academic study toward a Bachelor of Science degree in Computer Science in the U.S.

Evaluation Two:

- Evaluation: also by [REDACTED] Ph.D., Associate Professor of Computer Science, Zicklin School of Business, Baruch College, The City University of New York, New York, New York.
- The evaluation reviewed the beneficiary's work experience and concluded that the beneficiary had four years and eight months of work experience, which would be equivalent to one year of academic study toward a Bachelor of Science degree in Computer Science in the U.S.
- The evaluation notes that: "[the beneficiary] has supplemented his employment through the completion of professional training programs in computer science. He has completed training with such institutions of information technology education as Indira Ghandi National Open University (receiving a Certificate in Computing); Pentasoft Software and Exports (receiving a Certificate of Proficiency in Synon); and Uptron ACL (receiving a Postgraduate Diploma in Computers and Information Management)."

Evaluation Three:

- Evaluation: also by [REDACTED] Ph.D., Associate Professor of Computer Science, Zicklin School of Business, Baruch College, The City University of New York, New York, New York.
- The evaluation provided that the beneficiary completed a Bachelor of Science degree in Computer Science at Bharathiar University of Madras in India, which would be equivalent to three years of academic study toward a Bachelor of Science degree in Computer Science.
- The evaluation reviewed the beneficiary's work experience and concluded that the beneficiary had four years and eight months of work experience, which would be equivalent to one year of academic study toward a Bachelor of Science degree in Computer Science.
- Based on the combined studies and work experience the evaluator concludes that the beneficiary has the equivalent of a U.S. Bachelor's degree in Computer Science.

The petitioner submitted the fourth evaluation on appeal:

Evaluation Four:

- Evaluation: International Credentials Evaluators.

- The evaluation provided that the beneficiary completed a Bachelor of Science degree in Computer Science at Bharathiar University of Madras in India, which would be equivalent to three years of academic study toward a Bachelor of Science degree in Computer Science.
The evaluation included the beneficiary's certificate in Computing program at Indira Gandhi National Open University, which the evaluator considered to be the equivalent of one semester of academic study in Computer Science.
- The evaluation additionally considered the beneficiary's diploma earned at the National Institute of Information Technology (NIIT) where he took courses in computer programming. The evaluator determined these studies to be the equivalent of one year of post-secondary education in Computer Programming at an accredited university in the U.S.
- Based on the three programs combined, the evaluator concluded that the beneficiary had the equivalent of a Bachelor's degree in Computer Science.

Regarding the first evaluation, the evaluator concludes that the beneficiary would only have three years of education toward a U.S. Bachelor's degree. The evaluator did not find that the degree was equivalent to a U.S. Bachelor's degree. Further, we note that the labor certification specified that the beneficiary would be required to show four years of college that resulted in a Bachelor's degree. Based on the first evaluation, the petitioner cannot demonstrate that the beneficiary meets the position requirements as set forth in the certified ETA 750.

The second evaluation concludes that the beneficiary has the equivalent of one year of education in computer science based on four years and eight months of work experience. Standing alone, the evaluation would not demonstrate that the beneficiary is qualified for the position. And, even if the second evaluation were combined with the first evaluation, the two together would not demonstrate that the beneficiary met the position requirements. The education and work experience combined would not demonstrate that the beneficiary had four years of college education. The labor certification was not drafted to consider a Bachelor's degree or equivalent in "education, training, or experience." The ETA 750 did not define equivalency in this manner, and to argue that the ETA 750 should be read to include the equivalent in education and experience, or otherwise, would be unfair to U.S. workers without degrees, but with the equivalent in experience, that may not have responded to advertisements during the labor certification recruitment phase. Additionally, we note that the rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but 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 did not set forth any alternative requirements or definition of equivalent to include a combination of education and experience. Therefore, the second evaluation is deficient, and the petitioner cannot demonstrate that the beneficiary met the position requirements based on this evaluation.

The third evaluation, which concludes that the beneficiary has the equivalent of a Bachelor's degree, is premised on a combination of the beneficiary's education and work experience, and is deficient for the same reason that the second evaluation similarly fails as set forth above.

Finally, the last evaluation concludes that the beneficiary meets the requirements of a U.S. Bachelor's degree by combining the three-year degree with several training programs that the beneficiary attended. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must

produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree.² Additionally, we note that the second evaluation described the beneficiary's work at Indira Ghandi National Open University as "training" rather than academic education.³

² We are aware 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 Citizenship and Immigration Services (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." We note that the AAO is not bound to follow the published decision of a United States district court in matters, which arise in another 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 other Circuit Court decisions discussed below. 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. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have 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.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (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 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

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

Based on a review of four evaluations, the petitioner has failed to demonstrate that the beneficiary has a Bachelor's degree or foreign equivalent thereof to qualify for the certified ETA 750. Therefore, the petition was properly decided.

On appeal, the petitioner points to the fourth evaluation and claims that the beneficiary meets the requirements of the certified ETA 750 based on education alone. We note that educational programs cannot be combined to meet the Bachelor's degree standard. *See* 8 C.F.R. § 204.5(l)(3)(ii). The petitioner then argues that the focus should not in fact be on the degree, but that the petitioner is more interested that the beneficiary meets the area of study in the quantitative discipline set forth.

With the labor certification submission, the petitioner specifically listed that a bachelor's degree and four years of college was required. Further, the petitioner cited to the DOL Occupational Outlook Handbook and noted that the position typically requires a degree. The petitioner cannot now argue that it is enough that the beneficiary studied a quantitative discipline, computer science. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

Further, since the petitioner required a bachelor's degree rather than merely college studies, the petition may not be considered under the lesser category of a skilled worker. The certified ETA 750 requires the completion of a Bachelor's degree. The petitioner has not demonstrated that the beneficiary has a bachelor's degree, and accordingly does not meet the requirements of the certified ETA 750.

The petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750 and the petition was properly denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir.1983). *See also Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

While we do not lightly reject the reasoning of a District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(2).

³ Further, we note that a review of NIIT's website evidences that NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website, but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prepare them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student. There is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program.

ORDER: The appeal is dismissed.