

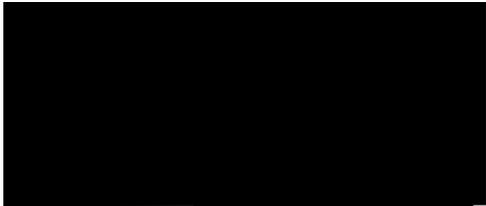
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Services

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FILE:

LIN-02-181-53811

Office: NEBRASKA SERVICE CENTER

Date: NOV 13 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 preference visa petition was denied by the Director, Nebraska Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The petitioner filed a motion to reconsider and the motion to reconsider was granted by the AAO but the previous decision of the AAO was affirmed. The matter is again before the AAO on a second motion to reconsider. This motion will be granted, the previous decisions of the AAO will be reaffirmed, and the petition will remain denied.

The petitioner is a nonprofit social/human services organization. It seeks to employ the beneficiary permanently in the United States as an education supervisor (literacy coordinator). As required by statute, a Form ETA 750,<sup>1</sup> 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 four-year bachelor's degree as required on the Form ETA 750. Accordingly, the director denied the petition on March 20, 2003. The AAO affirmed the director's decision on a subsequent appeal and motion to reconsider after the appeal on August 9, 2004 and February 7, 2006 respectively.

The record shows that the motion is properly filed timely and makes a specific allegation of error in law or fact. The motion qualifies as a motion to reconsider because counsel asserts that the AAO misapplied the law. *See* 8 C.F.R. § 103.5(a)(3). 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.

In the instant motion to reconsider, counsel asserts that the AAO failed to discuss the amendment allowing for the equivalent of four years of college through the "B.A. or equivalent" language on the labor certification, and therefore, the instant petition should also be considered under the skilled worker category. However, the record does not contain any evidence showing that the petitioner specified on the Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience and the labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. In order to determine whether the instant petition could be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on July 12, 2007 granting the petitioner 12 weeks to submit additional evidence to support its assertions in the motion of reconsider. The AAO received the response on October 4, 2007.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon motion to reconsider and in response to the AAO's RFE.

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

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.

The approved labor certification in the instant case requires four years of college studies, a B.A. or equivalent and two years of experience in the job offered. The alien will supervise four to eight employees in the proffered position. The petitioner modified the four years of college studies with “B.A. or Equivalent required” before the labor certification was certified by DOL. However, the requirements of the bachelor’s degree or equivalent, two years of experience in the job offered and supervising 4-8 employees were never further modified, defined or interpreted. Therefore, the proffered position requires a bachelor’s degree and two years of experience and the ability to supervise 4-8 employees. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 25-9031.00, instructional coordinators, to the proffered position. DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database at <http://online.onetcenter.org/crosswalk/DOT?s=099.117-026+&g+Go> (accessed October 30, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Five requiring “extensive preparation” for the occupation type closest to the proffered position. As examples of Job Zone Five, DOL lists “librarians, lawyers, aerospace engineers, physicists, school psychologists, and surgeons.” DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means “[a] bachelor’s degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master’s degree, and some require a Ph.D., M.D., or J.D. (law degree).” See <http://online.onetcenter.org/link/summary/25-9031.00#JobZone> (accessed October 30, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience. For example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job.

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

The proffered position must be properly analyzed as a professional since the position requires a bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation.

Citizenship and Immigration Services (CIS) records show that the petitioner has been claiming that the proffered position is a professional position on its I-129 nonimmigrant petition for temporary workers under H-1B status. The petitioner filed at least three H-1B petitions for the instant beneficiary in the proffered position (literacy coordinator) as a professional position and all of these petitions were approved.<sup>2</sup> Pursuant to these approvals, the beneficiary has been working for the petitioner in H-1B status<sup>3</sup> in the professional position of literacy coordinator since September 6, 1996. In those H-1B petitions, the petitioner required a bachelor's degree and claimed that the beneficiary was qualified for the proffered position because he holds a bachelor's degree in education. The petitioner described the duties of the proffered position as follows:

Responsible for the development of the curriculum and ensuring quality education of students. Develop department budget, track spending, an[sic] reconcile accounts. Prepare grant proposals and request continued funding. Participate in the screening, interviewing and in the selection of new employees in the department. Responsible for supervising and design of teaching curriculum for instructors and volunteers. Responsible for assessing the needs of community and development of programs in teaching English, Spanish, and U.S. Citizenship. Orient students and instructors.

The duties described in those H-1B petitions are exactly same as the ones in Item 13 of the Form ETA 750A. The record shows that it has been the petitioner's consistent assertion that the proffered position in issue is a professional position and CIS approved these H-1B petitions based on the agreement with the petitioner's claim.

Now after ten years the petitioner claims that the proffered position should be a skilled worker position instead of a professional. The petitioner's assertion in the instant case may illuminate derogatory information. In *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988), the Board stated: Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining

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<sup>2</sup> The petitioner filed Form I-129 nonimmigrant petition LIN-96-187-51416 for the beneficiary in the proffered position on June 6, 1996 and this H-1B petition was approved on September 10, 1996; on June 7, 1999 the petitioner filed the second H-1B petition for the beneficiary in the same position and the second petition was approved on July 10, 1999 for a period from June 6, 1999 to June 5, 2002; the third petition was filed on May 31, 2002 and approved on October 25, 2002 for a period from June 5, 2002 to June 5, 2003 beyond the sixth year under the American Competitiveness in the Twenty-first Century Act of 2000 (AC 21) (Public Law 106-313).

<sup>3</sup> Pursuant to Section 101(a)(15)(H)(i)(b) of the Act, H-1B status will be granted to an alien "who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1)." Section 214(i)(1) provides that: "For purposes of section 101(a)(15)(H)(i)(b) and paragraph (2) the term 'specialty occupation' means an occupation that requires - (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty or its equivalent) as a minimum for entry into the occupation in the United States."

evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See id*

Therefore, counsel's assertion that the instant petition should be considered under skilled worker category is misplaced. The AAO concurs with the director's determination that the professional category is the only appropriate category for the proffered position based on its educational and experience requirements and will consider the petition under professional category only.

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 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 above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 21, 1997. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended Foreign Languages Teaching Center (CELE) in the field of "English as a Second Language" from June 1992 to June 1993, culminating in the receipt of an "English Teacher Certificate;" that he attended the Universidad Nacional Autonoma de Mexico (National Autonomous University of Mexico or UNAM) in the field of "Liberal Art" from September 1983 to September 1985, culminating in the receipt of "Graphic Design;"<sup>4</sup> and that he attended El Instituto Mexicano Norteamericano de Relacion & Culturales, A.C. (the Mexican American Institute of Cultural Relations, A.C. or MAICR) in the field of "English as a Second Language" from February 1985 to February 1986, culminating in the receipt of an "English Teacher Certificate." He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

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<sup>4</sup> The beneficiary did not indicate it is a degree or certificate.

In corroboration of the beneficiary's educational background, the petitioner provided a copy of the beneficiary's transcripts from UNAM showing that the beneficiary studied six semesters during the academic years from 1983 to 1986 in a bachelor of arts in graphic design program;<sup>5</sup> a certificate from MAICR on February 27, 1986, which indicates that the beneficiary has satisfactorily completed the intermediate program with an overall of 170 class-hours of the English language;<sup>6</sup> a certificate of studies from CELE at UNAM on November 17, 1993, which certifies that the beneficiary took 13 teacher formation courses in English during the academic year 1992-1993;<sup>7</sup> the beneficiary's resume which claims that the beneficiary attended an English teacher program during 1991 to 1992,<sup>8</sup> and attended MAICR for English teacher program during 1985 to 1986;<sup>9</sup> an evaluation report from Foundation for International Services, Inc. (FIS) dated May 28, 1996, which claims that the beneficiary also obtained certificates for completion of 300 hours of academic work on February 27, 1986 and 306 class-hours of English on March 3, 1981 from MAICR.<sup>10</sup> The petitioner also submitted evaluations from [REDACTED], Chair and Professor of English at Pacifica Lutheran University and [REDACTED], Instructor at Tacoma Community College, and a letter from [REDACTED], Professor of English at the University of Puget Sound.

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes; nor did anyone including the petitioner, the beneficiary or evaluators, claim that the beneficiary holds such a single United States baccalaureate degree or a single foreign equivalent degree prior to the priority date in the instant case. 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)(3) of the Act as he does not have the minimum level of education required for the

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<sup>5</sup> This office notes that the Licenciado En Diseño Grafico (Bachelor of Arts in Graphic Design) is awarded upon completion of 9 semesters at Escuela Nal De Arts Plasticas (National School of Fine Arts), UNAM. See <http://www.dgae.unam.mx/planes/acatlan/Dise%F1o-graf-acatlan.pdf> (accessed on October 30, 2007). The beneficiary did not submit any evidence of his Licenciado En Diseño Grafico or Bachelor of Arts in Graphic Design degree in the record.

<sup>6</sup> The record does not contain any evidence showing that the 170 class-hour English language course was a college/university level curriculum or the MAICR is a regional accredited institution of higher education in Mexico.

<sup>7</sup> This office accessed CELE's official website at <http://iana.cele.unam.mx/en>. According to the website, the Foreign Language Teaching Center of CELE offers its Teachers of Foreign Languages Training Course in the areas of German, French, English, Italian and Portuguese. The program is directed at people interested in becoming a teacher or professor in foreign languages, as well as any teacher or professor of foreign languages interested in improving their ability to perform better as an educator. The program duration is two semesters and is organized by modules. Upon completion of the Teachers of Foreign Languages Training Course, CELE issues a certificate of studies and grants a diploma that is recognized by the preparatory and university-level teaching institutions of Mexico (accessed on October 30, 2007).

<sup>8</sup> The beneficiary explains that CELE is a division of UNAM, however, the petitioner did not submit any evidence for the studies at CELE for 2001-2002.

<sup>9</sup> The beneficiary explains that MAICR was formerly sponsored and supported by the English Language Program Office which was part of the American Embassy in Mexico.

<sup>10</sup> However, the evaluator did not submit the reviewed certificates of 300 hours of academic work program and 306 class-hours of English from MAICR with his evaluation report. Nor did the petitioner submit such evidence in any stages of the proceedings.

equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's denial and the AAO's previous decisions must be affirmed.

However, in the instant motion to reconsider and the response to the AAO's RFE dated July 12, 2007, counsel asserts that the AAO's prior decisions failed to discuss the amendment allowing for the equivalent of 4 years of college through the "B.A. or equivalent" language on the labor certification, and therefore, the instant petition should also be considered under the skilled worker category. Therefore, the AAO will discuss whether the beneficiary would meet the educational requirements set forth on the Form ETA 750 and thus be qualified for the proffered position if the proffered position could be appropriately analyzed under the skilled worker category.<sup>11</sup>

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered. Further, those decisions, in conjunction with decisions by the Board of Alien Labor Certification Appeals (BALCA), support our interpretation of the phrase "B.A. or equivalent."

As previously noted, the certified Form ETA 750 requires 4 years of college studies and B.A. or equivalent as the minimum educational requirements for the proffered position and the evidence submitted in the record shows that the beneficiary's education includes six semesters (three years) of studies in the field of graphic design at UNAM, a certificate from MAICR on February 27, 1986 certifying the completion of 170 class-hours of English intermediate courses, and a certificate of studies from UNAM on November 17, 1993 for the completion of 13 teacher formation courses during the academic year 1992-1993. Despite the beneficiary's representations on the Form ETA 750B, resume, and evaluations from FIS, [REDACTED], and [REDACTED], no evidence was submitted to support the claim that the beneficiary holds other certificates. 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)). A complete review of the beneficiary's transcripts for six semester studies in a bachelor degree in graphic design program at UNAM reveals that after successfully completing 8 courses in each of the first two semesters, the beneficiary had 5 approved courses and 3 not approved courses (NP – not taken and NA – not approved) in the third semester, 1 approved course and 7 NP or NA courses in the fourth semester and all NP or NA courses in the fifth and sixth semesters. Therefore, the beneficiary's studies at UNAM in the field of graphic design could be credited at maximum three semesters or one and a half years. The beneficiary possesses 3 semesters of college studies and two certificates from MAICR and UNAM respectively. Thus, the issues are whether the three semesters of college studies is sufficient to demonstrate equivalency to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's two certificates in an English teaching training program in addition to the three semesters of college studies in the field of graphic design.

#### **Authority to Evaluate Whether the Alien is Eligible for the Classification Sought**

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

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<sup>11</sup> A position requiring a bachelor's degree and two years of experience, considered by DOL to be a Job Zone Five occupation, could not be appropriately analyzed as a skilled worker position, merely requiring two years of work experience or training.

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Act certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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, including the 9<sup>th</sup> Circuit that covers the jurisdiction for this matter.

There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now CIS), 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: "[B]oth 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 (November 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)(3)(A)(ii) of the Act 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. 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). 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." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

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)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

#### **Authority to Evaluate Whether the Alien is Qualified for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (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.* § 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).

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 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.” 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).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated.

The key to determining the job qualifications specified in the labor certification 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, Part A of the labor certification, as filled in by the petitioner, reflects the following requirements:

14.	EDUCATION	
	Grade School	
	High School	
	College	4*
	College Degree Required	B.A. or equivalent
	Major Field of Study	
	TRAINING	no

The applicant must also have two (2) years of employment experience in the job offered which as described in Item 15 "Must have 2 years of experience as a Literacy Coordinator. Must be bi-lingual (Spanish/English)." In Item 15 the 4 years of college requirement is defined as "B.A. or equivalent required."

Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Once again, we are cognizant of the recent holding in *Grace Korean*, which held that CIS is bound by the employer's definition of "bachelor or equivalent." In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *K.S. 20 I&N Dec. at 719*. In this matter, the court's reasoning cannot be followed as it is inconsistent with the actual practice at DOL. Regardless, that decision is easily distinguished because it involved a lesser classification, skilled workers as defined in section 203(b)(3)(A)(i) of the Act. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (citing *Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. See *American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind

us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court. If we were to accept the employer's definition of "or equivalent," instead of the definition DOL uses, we would allow the employer to "unlawfully" tailor the job requirements to the alien's credentials after DOL has already made a determination on this issue based on its own definitions. We would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education "equivalent" to a degree at the recruitment stage as represented to DOL.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. 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.

In this case, counsel asserts that the proffered position in the instant petition qualifies in the skilled worker category. The regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." As noted previously, the certified Form ETA 750 requires four years of college studies, Bachelor's degree or equivalent, and two years of experience in the job offered. Counsel asserts that the certified labor certification does not require a bachelor's degree because an asterisk next to the number 4 modified the four-year college requirement. However, counsel's assertion that the modification, amendment or definition of the four-year college requirement as "B.A. or equivalent required" concludes that the labor certification does not require a bachelor's degree is misplaced. The original copy of the certified labor certification in the record shows that the labor certification defines the annotated four-year college studies requirement in item 15 as "B.A. or equivalent required." However, the labor certification does not delete, correct, amend, define or further clarify the meaning of its "B.A. or equivalent" language with respect to the degree requirement. The labor certification does not define the degree requirement or term "equivalent." Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's degree or equivalent might be met through a combination of lesser degrees, certificates, college studies and/or quantifiable amount of work experience.

Furthermore, the AAO's RFE dated July 12, 2007 requested the petitioner to submit evidence showing that the petitioner specified that the minimum academic requirements of four years of college and a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience in the petitioner's labor market test. The AAO specifically requested evidence demonstrating that the petitioner communicated its express intent about the actual minimum requirements of

the proffered position to DOL during the labor certification process. The AAO received the response on October 4, 2007. However, the response to the AAO's RFE does not include any documentary evidence showing that the petitioner ever defined or specified that the minimum educational requirements of four years of college and a bachelor's degree or equivalent might be met through a combination of lesser degrees, certificates, college studies and/or quantifiable amount of work experience during any stage of the labor certification application processing. Instead the petitioner consistently required a bachelor's degree or equivalent as the minimum educational requirements in every aspect of the recruitment phase of the labor certification process before DOL, including the internal posting notice, newspaper advertisements and applicant interview questionnaires. Although the singular degree requirement is not applicable to skilled workers, the regulation governing skilled workers still requires that the beneficiary meet all the educational and training requirements of the labor certification in addition to showing two years of qualifying employment experience.

As previously noted, the beneficiary did not obtain a bachelor's degree or a foreign equivalent degree from any college or university in Mexico. The beneficiary's three semesters of college studies in graphic design combined with a certificate of studies for completing two semesters of English teaching courses and a certificate for completing 170 class-hours of English language courses from an unknown institution could not be evaluated as the equivalent to a U.S. bachelor's degree even if such combination had been allowed by the certified labor certification and the petitioner's express specification clearly communicated to DOL during the labor certification process. Further, the evaluations in the record from FIS, [REDACTED] and [REDACTED] 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 for classification as professional. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). In addition, as previously noted, these evaluations also evaluated the beneficiary's education, however, no evidence to support their claims concerning the beneficiary's educational background was submitted with the evaluations or any stage of processing in the instant case. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the AAO finds that the petitioner would have failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date even if the petition had been considered under the skilled worker category. While the motion to reconsider is granted, counsel's arguments on motion to reconsider cannot overcome the director's denial and the AAO's previous dismissals. The previous decisions of the director and the AAO will be affirmed and the petition will remain denied.

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 motion is granted. The previous decisions of the AAO dated August 9, 2004 and February 7, 2007 respectively, are affirmed. The petition remains denied.