

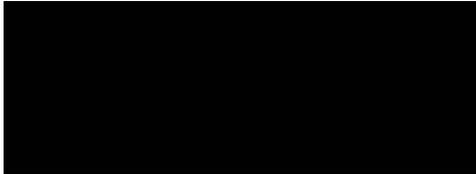
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER
WAC-01 019 51458

Date: **NOV 20 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 employment-based preference visa petition was initially approved by the Director, California Service Center. The director served the petitioner with notice of intent to revoke the approval of the petition (NOIR). The petitioner responded to the NOIR with additional evidence and the contention that the director was precluded from revoking the approved petition based upon laches as well as other equitable remedies, doctrines or defenses asserted by the petitioner.¹ In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker. The appeal will be dismissed.

The petitioner is a supermarket corporation. It seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified for the classification sought because he did not have a four-year bachelor's degree, notwithstanding the opinion of the petitioner's credentials evaluation service, which combined the beneficiary's educational background and employment experiences. The director denied the petition accordingly.

The evidence in the record of proceeding shows that the petitioner is structured as a corporation. On the petition, the petitioner claimed to have been established in 1987 and to currently employ 500 workers. On the Form ETA 750B, signed by the beneficiary on July 19, 1999, the beneficiary did claim in an amendment dated February 28, 2000, to have worked for the petitioner from October 1998 and, as stated in the letter, "Still working as of 8/1999."

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 August 31, 2005 revocation, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary is qualified for the classification sought, which is computer programmer.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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)(3)(ii)(C) states, in pertinent part:

¹ Laches is an affirmative defense in which the party raising the defense has the burden of proving that he changed his position to his detriment and prejudice through reliance upon the unreasonable delay in instituting actions against him. See *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); *Matter of Onal*, 18 I&N Dec. 147 (BIA 1981, 1983). This proceeding is not an action at law but an administrative review proceeding. The affirmative defense of laches is not available to the petitioner in this proceeding as is discussed below.

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 of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

The proffered position requires a four-year Bachelor of Science degree in computer science and two years of experience. Because of those requirements, the proffered position is for a professional. The U.S. Department of Labor (DOL) assigned the occupational code of 15-1021.00, computer programmer, 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=030.162-014+&g+Go> (accessed June 28, 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 Four requiring "considerable preparation" for the occupation type closest to the proffered position. 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/15-1031.00#JobZone> (accessed June 28, 2007). 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 id.

The proffered position may be properly analyzed as professional since the position requires a four-year bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(I)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements.

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 August 16, 1999.

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.²

² 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).

The Petition

The petitioner has submitted, along with the petition and labor certification, the following documentation as found in the record of proceeding: cover letters from counsel dated October 3, 2000 and April 11, 2001; an evaluation report concerning the beneficiary's credentials by the Foundation for International Services, Inc. dated March 11, 1998; a Certificate of Graduation, as translated, from [REDACTED] stating that the certificate of graduation was issued on February 24, 1979, to [REDACTED] that certified that he fulfilled all the requirements of the curriculum in computer science; the beneficiary's transcript, as translated, from Myung Ji Technical College detailing two years of technical school courses taken in 1977 and 1998 [sic 1978]; a letter from [REDACTED] the Controller of El Tigre Inc. dated April 5, 2001, that the company employs 480 employees and it had gross income in the year 2000 of \$50 million; the petitioner's California Employment Development Department (EDD) Form DE-6, Quarterly Wage Reports for all employees for the year ended December 31, 1999; a tax registration certificate from the City of Los Angeles, California for the petitioner; an employment verification from [REDACTED] president of [REDACTED] that the beneficiary was the operations officer, in programming and data base consulting from August 10, 1986 to July 15, 1997; as well as correspondence between the petitioner and the State of California, Employment Development Department amending the Application for Alien Employment Certification prior to its certification.

The Director's Request for Evidence

The director issued a request for evidence to the petitioner on January 20, 2001. In response counsel submitted the following documents: a cover letter from counsel dated April 11, 2001; an evaluation of the beneficiary's credentials by the Foundation for International Services, Inc. dated March 11, 1998; a Certificate of Graduation from [REDACTED] that a certificate of graduation was issued on February 24, 1979, to [REDACTED] that certified he fulfilled all the requirements of the curriculum in computer science; the beneficiary's transcript, as translated, from [REDACTED] for two years of technical school courses taken in 1977 and 1998 [sic 1978]; and, a letter from [REDACTED] the Controller of El Tigre Inc. dated April 5, 2001, that the company employs 480 employees and it had gross income in the year 2000 of \$50 million.⁴

The director approved the petition on August 11, 2001.

Notice of the Intent to Revoke

Subsequently, the director issued a notice of intent to revoke the petition to the petitioner on May 15, 2005. Specifically the director noted that the labor certification required that the beneficiary have at the time of filing of the Application for Alien Employment Certification a Bachelor of Science (B.Sc.) degree in computer science and two years of experience in the field. The director found that according to the evidence submitted by the petitioner that the beneficiary has an associate's degree and that equivalence of experience for education may only be used for H-1B non-immigrant petitions (and therefore, not for immigrant petitions).

³ No description of these job duties is found in that letter.

⁴ The ability of the petitioner to pay the proffered wage is not an issue in this case.

Response to the Intent to Revoke

Counsel submitted a response to the director's intent to revoke approval of the petition. Counsel submitted a legal statement dated June 9, 2005, and included as exhibits the director's intent to revoke notice, notices of action, and the request for evidence, an excerpt from a West immigration publication relative to L-1 visa eligibility as well as the documents submitted by counsel in response to the request for evidence dated January 20, 2001 as already stated above.

Notice of Revocation

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

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

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

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

On August 31, 2005, the director issued a notice of revocation of the petition, which was approved on August 11, 2000. The director noted that the labor certification required that the beneficiary have at the time of filing of the Application for Alien Employment Certification a Bachelor of Science (B.Sc.) degree in computer science and two years of experience in the field. The director found that the petitioner had not overcome the grounds for revocation since the beneficiary does not have the requisite degree and the petitioner had not submitted sufficient evidence in rebuttal to the director's notice of intent to revoke the petition.

The Appeal

On appeal, counsel asserted that the director erred in failing to respond to each argument raised by the petitioner in the petitioner's response to the director's intent to revoke.

Counsel contends that the director erred in not adhering to adjudication guidelines relative to a review of the beneficiary's qualifications and the employment based immigrant visa petition according to statutes, regulations and case law.

Counsel asserts that the director erred in his interpretation of the documentary evidence submitted as found in the record of proceeding.

Further on appeal, counsel makes an assumption that the issue of the beneficiary's experience and education was "resolved obviously in the favor of the petitioner by the ... director," and counsel asserts that therefore the director abused his discretion to raise "an already settled issue."

In support of the appeal, counsel submits a legal brief dated October 5, 2005, and the following documents: a cover letter from counsel dated September 14, 2005; the director's notice of revocation; an excerpt from a West immigration publication relating to L-1 visa eligibility;⁵ a supplemental legal brief dated November 28, 2005; the cover page received from the U.S. Department of Labor, State of California office transmitting the labor certification; the labor certification; an evaluation report concerning the beneficiary's credentials by the Foundation for International Services, Inc. dated March 11, 1998; a federal court decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005); and, a Brief of *Amici Curiae* submitted in the *Grace Korean United Methodist Church* case.

The Administrative Appeals Office's (AAO) Request for Evidence

The AAO issued a request for evidence to the petitioner on July 31, 2007. In summary, the AAO requested that the petitioner submit evidence of its intent concerning the actual minimum requirements of the position (i.e. computer programmer) as that intent was expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth in the certified labor certification application.

In response counsel submitted the following documents on August 28, 2007: an explanatory letter from counsel dated August 24, 2007 with an exhibit schedule; a letter from the beneficiary to the Employment Development Department, Alien Labor Certification, Sacramento, California dated February 28, 2000; a letter from petitioner by [REDACTED] its vice-president, dated July 24, 2000, to the Employment Development Department, Alien Labor Certification, Sacramento, California, entitled "Statement of Recruitment Efforts & Results;" two letters from the Employment Development Department, Alien Labor Certification, Sacramento, California, to the petitioner dated May 9, 200, and June 20, 2000; a letter from the Employment Development Department, Alien Labor Certification, Sacramento, California, to counsel dated June 15, 2000; two resumes of job applicants; a letter dated June 30, 2000, from petitioner by [REDACTED] inviting one job applicant to interview for the offered position of computer programmer (the requirements stated in that letter's heading are a Bachelor's degree in computer science plus two years of experience); a reply letter to the June 30, 2000, interview invitation directed to the petitioner by that applicant dated July 6, 2000 declining the job opportunity; a certification dated May 15, 2000, made by from petitioner by [REDACTED] president concerning the "Notice of Job Opportunity"⁶ posted on the petitioner's business premises from May

⁵ Visas have different eligibility standards. The L-1 is a non-immigrant visa whereas the subject employment based petition is an immigrant visa. Each preference visa category has its own regulatory criteria.

⁶ The purpose of the Form ETA 750 and supporting materials is to demonstrate that the petitioner sought a U.S. worker for the position but was unable to locate one and that the beneficiary is qualified for the proffered position pursuant to the same criteria to which the petitioner subjected U.S. workers in its search. The purpose of requiring an employer to post notice of the vacant position is to provide U.S. workers with a meaningful opportunity to compete for the proffered position and to assure that the wages and working conditions of the U.S. workers similarly employed will not be adversely affected by the employment of an alien in the proffered position. See 20 C.F.R. § 656.10.

Further, section 122(b) of IMMACT 90 states, in pertinent part,

3, 2000 to May 15, 2000;⁷ the newspaper advertisements required by the regulations; an evaluation of the beneficiary's credentials by the Foundation for International Services, Inc. dated March 11, 1998; and a copy of the labor certification.

Equivalence

Counsel asserts that the director had determined that the beneficiary "had the equivalence of a B.S. degree in computer science," and that this is a settled issue. We note that in the notice of intent to revoke the petition's approval the director admitted error on this issue. The director finally determined based upon the evidence submitted that the petitioner had not established that the beneficiary is qualified for the classification sought because he did not have a four-year bachelor's degree.

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

The Secretary of Labor shall provide, in the labor certification process under section 212(a)(5)(A) of the Immigration and Nationality Act, that:

- (1) No certification may be made unless the applicant for certification has, at the time of filing the application, provided notice of the filing (A) to the bargaining representative (if any) of the employer's employees in the occupational classification and area for which aliens are sought, or (B) if there is no such bargaining representative, to employees employed at the facility through posting in conspicuous locations.

⁷ According to Notice of Filing of Application for Alien Employment it was posted for only nine business days excluding weekends that is less than ten consecutive days required by the regulation below. May 15, 2000, was a Sunday.

20 C.F.R. § 656.20(g)(1) states, in pertinent part:

In applications filed under §§ 656.21 (Basic Process), 656.21a (Special Handling) and 656.22 (Schedule A), the employer shall document that notice of the filing of the Application for Alien Employment Certification was provided:

- (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment.

- (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice shall be posted for *at least 10 consecutive days* (emphasis added). The notice shall be clearly visible and unobstructed while posted and shall be posted in conspicuous places, where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment. Appropriate locations for posting notices of the job opportunity include, but are not limited to, locations in the immediate vicinity of the wage and hour notices required by 20 CFR 516.4 or occupational safety and health notices required by 20 CFR 1903.2(a).

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 appeal.⁸

As already stated the beneficiary attended the [redacted] technical school courses in computer science in 1977 and 1978. According to the labor certification, the beneficiary was employed by the petitioner as a computer programmer from October 1998 to at least through August of 1999 according to the record. Prior to that employment, the beneficiary stated he was a computer programmer (operations officer, programming and data base consulting according to the job verification letter) for Buman Computer Tech Inc., Seoul, Korea from August 1986 to July 1997. From April 1982 to August 1986, the beneficiary worked for the Samwhoan Giup Inc. company, Seoul, Korea, as a computer programmer.

Counsel contends that an evaluation report in the record of evidence concerning the beneficiary's credentials prepared by the Foundation for International Services, Inc. dated March 11, 1998 is evidence of the beneficiary's qualifications. The evaluator stated in paragraph three of the report the following:

In summary, it is the judgment of the Foundation that ... [the beneficiary] has the equivalent of an associate's degree in computer science (2 years) from an accredited community college in the United States and has, as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

We note that the beneficiary last attended the technical school 29 years ago and that the curriculum included other than computer science related studies such as national ethics, literature, P.E. (physical education?), Christian ethics, English, political science, history, military training, business management, introduction to the law and management. These subjects do not involve computer science so the evaluator's opinion that the two years of instruction would equate to two years of computer science instruction from an accredited community college in the United States is not credible.

Further, the computer science course content that existed 29 years ago has presumably changed in the almost three decades since the beneficiary entered technical school so the evaluator's opinion that the two years of computer science instruction would equate to two years of computer science instruction from an accredited community college in the United States is not credible. There is no evidence in the record of proceeding of the beneficiary's continuing education in computer science for the last almost three decades, or evidence of the beneficiary acquiring continuing education through extension courses in various computer languages, applications or systems.⁹

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, the Service is not

⁸ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

⁹ *See* [Http://www.registrar.ucla.edu/archive/catalog/1997_99/about/supped.htm](http://www.registrar.ucla.edu/archive/catalog/1997_99/about/supped.htm) accessed September 10, 2007.

required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The 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 four-year Bachelor of Science degree in computer science 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. The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the petitioner had established that the beneficiary is qualified for the classification sought because the beneficiary did not have a four-year Bachelor of Science degree in computer science as the petitioner as stated on the Form ETA 750, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position. Therefore the director had good and sufficient cause to revoke the petition's approval.

The regulation at 8 CFR § 204.5(l)(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.

Relative to proof of the beneficiary's work experience as a computer programmer, there is a letter from an employment verification letter from [REDACTED] Seoul, Korea, dated December 15, 1997 stating that the beneficiary was the operations officer, in programming and data base consulting, (not as a computer programmer) from August 10, 1986 to July 15, 1997. There is no description of the training received or the experience of the beneficiary in that position from [REDACTED]. The letter submitted does not comply with the above stated regulation.

Although the beneficiary stated in the labor certification that from April 1982 to August 1986, he worked for the Samwhoan Giup Inc. business in Seoul, Korea, as a computer programmer no employment verification letter was submitted verifying this statement.

There is no employment reference in the record of proceeding to demonstrate that the beneficiary had attained work experience as a computer programmer prior to the priority date.

Beyond the decision of the director, we find that the petitioner has failed to provide sufficient regulatory prescribed evidence of the beneficiary's experience for the professional position of computer programmer with letters from employers giving the name, address, and title of the employer and a description of the training received or the experience of the beneficiary.¹⁰

¹⁰ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Counsel contends that the director erred in not adhering to adjudication guidelines relative to a review of the beneficiary's qualifications and the employment based immigrant visa petition according to statutes, regulations and case law.

Counsel also contends that CIS has the burden of proof that a combination of an alien's education and work experience cannot be used to qualify an alien for an immigrant petition. Counsel's assertion is incorrect. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Counsel asserts that the petitioner has available in this matter the defense of "laches," the right to assert "estoppel by laches," and contends there exists a "bar of retroactivity." As a preface to the following discussion, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Counsel offers no regulation or case precedent to support his assertion that "laches," "estoppel by laches or equitable estoppel," or a "bar of retroactivity" are applicable in this administrative review proceeding.¹¹

Further, the AAO is not a court of law and equity and it does not have plenary authority to render legal and equitable relief. Counsel has not cited any case precedent that the AAO may offer such relief, and, the cases cited relative to the remedy of "laches," the right to assert "estoppel by laches equitable estoppel," and the "bar of retroactivity"¹² are not remedies arising in case precedent binding on the AAO. Counsel has not offered any admissible evidence or case precedent authority that these remedies or doctrines may be raised in this case upon the issue of the beneficiary's qualifications.

Counsel contends that CIS had misled the petitioner into the belief that the employment-based preference visa had been approved, and, that the petitioner could hire the beneficiary. However this bare statement without more is not determinative of counsel's assertion that the doctrine of equitable estoppel or equitable estoppel is available to the petitioner because of CIS reputed affirmative misconduct. There has been no demonstration of affirmative misconduct in the record of proceeding on the part of CIS in performance of its empowered duties under statute and regulation. Counsel at various times in his brief surmises that CIS "unquestionably misled the Petitioner to believe that ... [the beneficiary] had met the requirements of possessing a B.S. Degree in computer science." Counsel's logic in making this conjecture is not apparent. It is the petitioner who has the burden of proof to present independent and objective evidence that the beneficiary has a four-year Bachelor of Science degree in computer science and two years of experience. It is the petitioner's failure to do so that is an issue here.

¹¹ Laches or neglect of duty on the part of officers of the Government generally may not be invoked against the Government when it acts to enforce a public right or protect a public interest. *See United States v. Summerlin*, 310 U.S. 414 (1940); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *Bostwick Irrigation District v. United States*, 900 F.2d 1285 (8th Cir. 1990); *United States v. RePass*, 688 F.2d 154 (2d Cir. 1982); *Matter of K-*, 4 I&N Dec. 480 (BIA 1951).

¹² Counsel cites in support of this contention non-precedential cases not binding upon the AAO as well as an internal memo he terms the "Puleo Memorandum" (66 IR 125 January 30, 1989) relating to L-1 non-immigrant visa petitions. As already stated immigrant and non-immigrant visa regulations have different regulatory criteria. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Equitable estoppel is a judicially devised doctrine, which precludes a party to a lawsuit, because of some improper conduct on that party's part,¹³ from asserting a claim or a defense, regardless of its substantive validity. *M.D. Phelps v. Fed. Emergency Management Agency*, 785 F.2d 13 (1st Cir. 1986). Estoppel is an equitable form of action and only equitable rights are recognized. *Keado v. United States*, 853 F.2d 1209 (5th Cir. 1988). Unlike courts of law, the AAO has no plenary powers. By contrast, the AAO in considering and determining cases before it, can only exercise such discretion and authority conferred upon the Attorney General by law. 8 C.F.R. § 103, *et seq.* as amended. The AAO's jurisdiction is defined by regulations and it has no jurisdiction unless it is affirmatively granted by the regulations.

The petitioner has not provided relevant precedential authority that it or the AAO may use to apply the "laches," the right to assert "estoppel by laches or equitable estoppel," and the "bar of retroactivity" against CIS so as to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation.

The standard for revocation is found in statutory authority at § 205 of the Act as stated above and it is that standard that is applicable in this case.

The director and the AAO have authority to evaluate whether the beneficiary 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:

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:

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas 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 Secretary of Homeland Security that:

¹³ The Supreme Court of the United States has not yet decided whether even "affirmative misconduct" is sufficient to estop the Government from enforcing the immigration laws. *INS v. Miranda*, 459 U.S. 14 (1982); *See also Matter of Tuakoi*, 19 I&N Dec. 341 (BIA 1985); *Matter of M/V "Solemn Judge"*, 18 I&N Dec. 186 (BIA 1982).

(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 9th 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 (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, CIS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

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

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

There is no provision in the statute or the regulations that would allow a beneficiary to qualify as a professional under section 203(b)(3) of the Act with anything less than a U.S. baccalaureate degree or foreign equivalent degree. More specifically, a two-year associate degree will not be considered to be a “foreign equivalent degree” to a four-year 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 qualify under section 203(b)(3) 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 classification sought.

The director and the AAO have the authority to evaluate whether the alien is qualified for the job offered which is computer programmer. 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 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(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 (9th Cir. 1984).

The Petitioner's Legal Arguments and Documentary Evidence

On appeal, counsel asserts that the director erred in failing to respond to each argument raised by the petitioner in the petitioner's response to the director's intent to revoke. Counsel also asserts that the director erred in his interpretation of the documentary evidence submitted as found in the record of proceeding. Under these two topics in the brief, counsel in a narrative fashion without identifying specifically an erroneous conclusion of law or a statement of fact as a basis for the appeal, and without citing specific case precedent, complains of the passage of time since the case was initially approved, raises again the "defense of laches," and other defenses, and generally surmises what the director should have done or should not have done in this case. Counsel concludes that "[the petitioner's] minimum educational qualifications" have been met through a combination of work experience and education. Where the analysis of the beneficiary's credentials relies on work experience alone, a lesser degree and work experience, or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." Under Section 203(b)(3)(A)(ii) of the Act, and the terms of the job offer on the certified labor certification application itself, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

On appeal, counsel has submitted the decision of *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 page 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, and 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.

The key to determining the job qualifications is found on ETA Form 750 Part A, Section 14. This section of the application for alien labor certification describes the minimum education, training, and experience for a worker to perform the job duties found in the form for computer programmer. It is important that the ETA Form 750 be read as a whole.

In this matter, Part A, Section 14, of the labor certification states that a four-year Bachelor of Science Degree in the major field of study, computer science, is the minimum level of education required along with two years of experience in the job offered. In the subject labor certification, the terms found on the form were amended to specifically change the job requirements from a four-year college Bachelor Degree in computer science to a four-year college Bachelor of Science Degree in computer science.

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, and, since there is no equivalency language whatsoever in the labor certification or its amendments found in the record of proceeding. Regardless, that decision is easily distinguished because it involved a lesser classification, skilled workers as defined in section 203(b)(3)(A)(ii) of the Act. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree, whereas the classification sought in this matter does.

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 [REDACTED] 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 actual minimum 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 or applied in the instant petition’s labor market test, 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 and the express terms of the labor certification. 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.

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* decision is not binding on the AAO or CIS, the decision runs counter to 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 both bachelor and advanced degrees with reference to a U.S. degree or a foreign equivalent degree. 8 C.F.R. § 204.5(k)(2).

The beneficiary does not have a four-year Bachelor’s of Science degree or a foreign equivalent degree and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. In addition, the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience as a computer programmer from the evidence submitted into this record of proceeding and thus the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved and the director had good and sufficient cause to revoke the petition’s approval.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.