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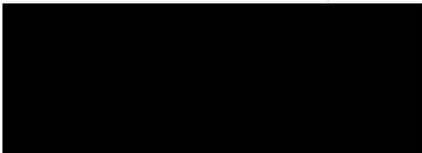
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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File:



LIN-03-254-50301

Office: NEBRASKA SERVICE CENTER

Date: OCT 12 200

In re:

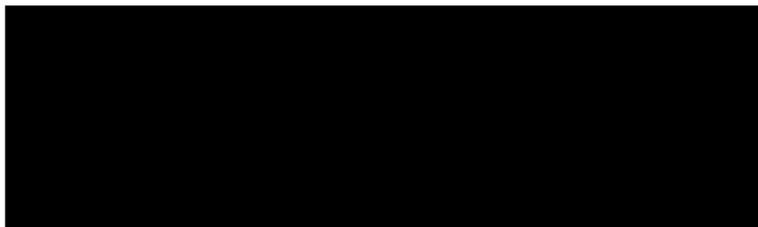
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner filed a motion to reopen. The Acting Director (director) granted the motion to reopen and affirmed the prior decision to deny the petition. The petitioner appealed that decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The AAO reopened the petition on motion for the purpose of entering a new decision pursuant to 8 C.F.R. § 103.5(a)(5)(ii). The appeal will be dismissed.

The petitioner is a computer-aided design (CAD) / computer-aided manufacturing (CAM) application / reverse engineering firm. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer or CAD application engineer. As required by statute, the petition is accompanied by the 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 to perform the duties of the proffered position. Specifically, the petitioner had not documented that the beneficiary had the requisite four-year U.S. bachelor's degree or the foreign equivalent degree as of the priority date. Therefore, the director denied the petition.

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 May 7, 2004 denial, at issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position in that he possesses a four-year U.S. bachelor's degree or a foreign equivalent degree in Mechanical Engineering, Mechanical Technology, or Industrial Design.

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 regulation at 8 C.F.R. § 204.5(l)(3) provides in pertinent part:

(ii) *Other documentation*—

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

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

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or

a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form 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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on March 14, 2002.

The AAO maintains plenary power to review the 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 federal courts have long recognized the AAO's *de novo* review authority. 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 on appeal.<sup>1</sup>

Relevant evidence in the record includes:

A copy of the beneficiary's secondary school certificate which indicates that during April 1986, at the age of 15, the beneficiary passed his secondary school certificate examination at Parishad High School, Lankalakoderu, Hyderabad, India.

A copy of the beneficiary's certificate from the State Board of Technical Education and Training (SBTET), Andhra Pradesh Hyderabad (India) which indicates that on February 28, 1990, at the age of 19, the beneficiary received the award of diploma for having completed the three-year full-time diploma course in Mechanical Engineering at M.R.K. Polytechnic Veeravasaram.

A copy of the beneficiary's SBTET (India) provisional certificate of consolidated marks which indicates that the beneficiary has completed the three-year full-time diploma course of study in Mechanical Engineering at M.R.K. Polytechnic Veeravasaram and that he became eligible for the award of diploma on February 28, 1990.

A copy of the beneficiary's M.R.K. Polytechnic Veeravasaram Conduct Certificate and a copy of his SBTET (India) Memorandum of Marks issued after completing his first year of the three-year diploma course of study. Both of these indicate that the beneficiary began his three-year diploma course of study during 1986.

A copy of the beneficiary's memorandum of marks from examinations held in November 1988 and January/February 1990 at M.R.K. Polytechnic Veeravasaram.

A copy of a certificate issued October 18, 2003 from the Institution of Engineers (India) which states that the beneficiary passed Section A of the Institution Examinations in the Mechanical Engineering Branch during winter 1992 and that, subsequent to the priority date, during winter 2002, the beneficiary passed Section B of that set of examinations.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

Copies of the beneficiary's marks received from the Institution of Engineers (India) which demonstrate that during winter 1992 the beneficiary passed Section A of certain examinations in engineering administered by that institution and that in winter 1998, he failed Section B of this set of examinations.

A copy of a certificate which states that during June 1992 the beneficiary completed a one-year post-diploma course in tool design at the Central Institute of Tool Design (CITD), Ministry of India, Government of India.

A copy of the beneficiary's marks received from the CITD during his one-year post-diploma course in tool design. This memorandum of marks is not dated.

An educational evaluation report prepared by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),<sup>2</sup> Office of International Education Services dated July 31, 2007 which indicates that after completing 10 years of primary/secondary schooling, the beneficiary earned a three-year diploma from the SBTET (India). At which point, the beneficiary had completed the equivalent of one-year of college-level study in engineering technology. Subsequent to this, the beneficiary passed the Institution of Engineers (India) Section A examinations, but failed Section B. According to the AACRAO, no additional academic credit may be accorded the beneficiary for passing only Section A of these examinations. Also, the beneficiary completed a one-year Post-Diploma course through CITD. Such work is not considered comparable to having earned academic credit. In sum, according to the AACRAO, the beneficiary's educational qualifications [as of the priority date] are equivalent to having completed one year of engineering technology studies at the undergraduate level.

An educational evaluation report dated May 19, 2004 written by [REDACTED] of Morningside Evaluations and Consulting, New York, New York which indicates that the beneficiary's 1990 diploma from MRK Polytechnic Veeravasaram [three-year diploma earned under the auspices of SBTET(India)] represents the equivalent of three years of college-level study leading to a university degree in Mechanical Engineering. [REDACTED] indicates that when this diploma is combined with the beneficiary's 1992 certificate in Tool Design from the Central Institute of Tool Design (CITD) in Hyderabad, India and his passage of Section A and Section B of the Institution of Engineers (India) Mechanical Engineering Examinations, this demonstrates that the beneficiary has the equivalent of a U.S. bachelor of science degree in Mechanical Engineering.

An educational evaluation report dated September 1, 1999 written by [REDACTED] of the Trustforte Corporation, New York, New York which indicates that the beneficiary's three-year diploma from the SBTET (India) represents the equivalent of three years of college-level study leading to a university degree in Mechanical Engineering. [REDACTED] also indicates that when this diploma is combined with the beneficiary's 1992 certificate in Tool Design from the CITD, this demonstrates that the beneficiary has the equivalent of a U.S. bachelor of science degree in Mechanical Engineering.

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<sup>2</sup> ACCRAO, according to its website, [www.accrao.org](http://www.accrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." It maintains a database which evaluates educational institutions and their programs of study throughout the world. This database, known as the Electronic Database for Global Education (EDGE), according to the registration page for EDGE, <http://accraoedge.accrao.org/register/index/php>, is "a web-based resource for the evaluation of foreign educational credentials."

A sworn statement dated July 5, 2007, which is not notarized, in which the beneficiary attests to having attended the SBTET(India) from May 1986 through February 1990, and attests to his having represented on the Form ETA 750B that his three-year diploma from that institution was a bachelor's degree, rather than a diploma, based on a sincere belief that it was appropriate to refer to this diploma as either a diploma or a bachelor's degree, and based on the understanding that the term bachelor's degree would be the more appropriate term to use when describing this diploma to Americans, as they would more likely be familiar with the term bachelor's degree than the term three-year diploma.

Copies of two letters dated January 7, 2003 and July 23, 2003, respectively, written by [REDACTED] Director, Business and Trade Services, Office of Adjudications, Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), which express [REDACTED] opinion to counsel in cases not related to the instant petition, regarding the possible means to satisfy the requirement of a foreign equivalent advanced degree for purposes of 8 C.F.R. § 204.5(k)(2).

A copy of an undated advisory memorandum as posted to the American Immigration Lawyers Association (AILA) website on November 13, 1995, written by [REDACTED] Associate Commissioner, entitled "INS on Supporting Documentation for H-1B Petitions" which indicates that credentials evaluations submitted with an H-1B petition by a reputable credentials evaluation service should be accepted without question unless containing obvious errors, and that in the H-1B petition context, if the *bona fides* of a particular credentials evaluator are questioned Adjudications - INS Headquarters (HQADN) should be contacted for appropriate action.

A copy of the Board of Alien Labor Certification Appeals (BALCA) decision *Parking Company of America, Inc.*, 95-INA-404 (BALCA 1997), which indicates that where U.S. workers were informed through the employer's recruitment efforts that a specific degree was required for a position and were not informed that they might substitute experience for the degree, the employer may not then place a foreign worker in the position who does not have the specific degree listed on the labor certification but who, according to a credentials evaluation in the record, has obtained the equivalent of that degree through his experience.

Briefs submitted in support of the petition dated June 7, 2004, July 20, 2004 and April 4, 2007, as well as counsel's responses to notices of derogatory information dated July 5, 2007 and September 7, 2007.

The record does not contain any other evidence relevant to the beneficiary's educational qualifications.

On appeal, counsel indicates that it is sufficient for the petitioner to show that the beneficiary has the equivalency of a bachelor's degree based on a combination of his education and past work experience.

To determine whether a beneficiary is eligible for an employment-based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). As noted earlier, to be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the March 14, 2002 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, items 14 and 15 of the Form ETA 750A set forth the minimum education, training, and experience that an applicant must have for the proffered position of mechanical engineer. That form specifies that the position requires:

Education:	Grade School: no specific number of years required High School: no specific number of years required College: 4 years required College degree required: Bachelor degree or the equivalent foreign degree
Major Field Study:	Mechanical Engineering, Mechanical Technology, or Industrial Design
Experience:	2 years experience in the proffered position or 2 years as a Design Engineer, Mechanical Engineer, Automotive Engineer, or CAD/CAM/CAE Engineer
Other Special Requirements:	2 years experience in design of automotive parts using Unigraphics, I-DEAS, or CATIA

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At item 11, which requests that the beneficiary list all schools, colleges and universities attended, including any trade or vocational training, the beneficiary indicated that from the age of fifteen to the age of nineteen, May 1986 to February 1990, he studied at the SBTET (India) and received a Bachelor's degree in Mechanical Engineering.<sup>3</sup> He indicated that following

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<sup>3</sup>Based on this representation, the AAO issued two notices of derogatory information. These stated that the record showed that the beneficiary had completed only three years of education at the SBTET (India) culminating in a diploma, rather than a four-year bachelor's degree in Mechanical Engineering. The second notice included the AACRAO credentials evaluation which specified: that completion of the SBTET (India) three-year diploma was equivalent to completing only one year of college-level study in engineering technology; and that in India, possession of such a diploma would only qualify a student to enter the second year of a four-year bachelor of engineering program. The notices informed the petitioner that the listing of four years of study culminating in a bachelor's degree where the beneficiary had not completed four years of study and had not earned a bachelor's degree from the SBTET (India), and where four years of study culminating in the bachelor's degree was required for the proffered position may constitute willful misrepresentation of a material fact under Section 212(a)(6)(C) of the Act.

In response to the notices, the petitioner through counsel asserts that neither the beneficiary nor the petitioner made willful misrepresentations. Counsel asserts that in India "the beneficiary's [SBTET(India) diploma/] degree would be generally accepted as a Bachelor's degree and so that is the title [the beneficiary] gave it in his educational history. His purpose in doing so was only to express his educational credentials in terms an American would be familiar with." In support, the beneficiary provided a sworn statement which indicates that he stated that he received a bachelor's degree in Mechanical Engineering from the SBTET (India) because his attorney informed him that the term "diploma" "would not be meaningful to the Department of Labor" and because his diploma was "generally considered the equivalent of a Bachelor's degree from an Indian university." Also submitted were documents that indicated that the beneficiary began his studies for the three-year diploma from SBTET(India) in 1986 and that he completed these studies in 1990.

This office finds that as the record currently stands there is not sufficient evidence to make a finding that the beneficiary is inadmissible under Section 212(a)(6)(C) of the Act based on willful misrepresentation of a material fact.

this he enrolled at the Central Institute for Tool Design (CITD), Hyderabad, India, from July 1991 to June 1992 for which he received a Postgraduate Diploma in Tool Design.<sup>4</sup> The beneficiary did not indicate on that form that he had pursued any other formal studies.

The proffered position requires a bachelor's degree and two years of experience. Because of those requirements, the proffered position is for a professional. The DOL assigned the occupational code of 007.061-014, mechanical engineer, to the proffered position. The DOL's occupational codes are assigned based on normalized occupational standards. According to the DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g+Go> (accessed October 9, 2007), based on the description of the position and the requirements for the position most analogous to the proffered position, the position falls within Job Zone Four. This means that "considerable preparation" is required for the occupation type closest to the proffered position. According to the 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. In this SVP range, "[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 October 9, 2007). Regarding the training and overall experience required for such occupations, the DOL also states the following:

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 professional category is the most appropriate category under which to analyze the position since it requires a four-year bachelor's degree, which is required by 8 C.F.R. § 204.5(1)(3)(ii)(C), as well as two years of experience, and since the DOL's assignment of educational and experiential requirements for the occupation indicate that it is a professional position.

The regulations define professional under the third preference category as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(1)(2). As noted earlier, the regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies that for professional classification the petition must be accompanied by evidence that the alien holds a U.S. baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. A bachelor's degree is generally found to require four years of education. See *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Further, in this instance, the Form ETA 750 specifically requires four years of college-level study. The regulation at 8 C.F.R. § 204.5(1)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must have earned one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree.

Thus, first, this office will analyze this as a petition for a professional. The AACRAO evaluation in the record specifies that as of the priority date the beneficiary did not have a U.S. bachelor's degree or the foreign equivalent degree, but had only completed the equivalent of one year of college-level study. Further, on appeal, counsel

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<sup>4</sup> Evidence in the record indicates that the correct title for this is a post-diploma in tool design from the CITD, not a postgraduate diploma.

acknowledges that the beneficiary did not possess the requisite foreign equivalent degree by the priority date, when he suggests that CIS should allow the beneficiary to substitute past work experience for the remaining years of college-level study required for the bachelor's degree/foreign equivalent degree that the beneficiary lacks. Therefore, the petition shall not be approved as a professional.

Any assertion that CIS must accept any credentials evaluation submitted into the record, regardless of whether that evaluation is inconsistent with other evidence in the record including the petitioner's own evidence, is not persuasive. As noted earlier, counsel submitted the undated advisory memorandum posted to the AILA website on November 13, 1995, written by [REDACTED], INS Associate Commissioner, entitled "INS on Supporting Documentation for H-1B Petitions" which indicates that credentials evaluations submitted with an H-1B petition by a reputable credentials evaluation service should be accepted without question unless they exhibit obvious errors. The memorandum expresses [REDACTED] opinion about the use of credentials evaluations in the H-1B petition context. First, such advisory memoranda are not binding on the AAO or other CIS adjudicators and do not have the force of law. *See Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1998). Further, in the memorandum, [REDACTED] is not issuing advice that is relevant to the instant preference category, but rather is issuing advice related to H-1B petitions. Moreover, the points made in the memorandum, even if they had been directed to the instant preference immigrant category, would not lead to a finding that the petitioner has provided consistent, reliable evidence that the instant beneficiary had the requisite bachelor's degree or foreign equivalent degree as of the priority date. That is, regardless of whether obvious errors exist on the face of an evaluation, CIS is obliged to consider the entire record and where, as in this instance, the petitioner submits two contradictory credentials evaluations, this calls the authenticity of both evaluations into question.

More specifically, this office notes first that CIS may, in its discretion, use as advisory opinions statements such as credentials evaluations submitted as expert testimony. However, where an opinion is not in accord with other information in the record or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this case, the credentials evaluations submitted contradict each other and contradict the suggestions made on appeal regarding the beneficiary's academic qualifications. The Trustforte evaluation indicates that the beneficiary's SBTET (India) three-year diploma combined with his 1992 certificate in Tool Design from the CITD, Hyderabad, India are the equivalent of a U.S. bachelor of science degree in Mechanical Engineering. However, the Morningside credentials evaluation, also provided by the petitioner, indicates that the beneficiary's SBTET (India) three-year diploma and his 1992 certificate in Tool Design from the CITD must be combined with his passage of Sections A and B of the Institution of Engineers (India) Mechanical Engineering Exam to show an equivalency of a U.S. bachelor of science degree in Mechanical Engineering.<sup>5</sup> Finally, in the appeal brief dated April 4, 2007, the petitioner through counsel indicates that it is necessary to combine the beneficiary's academic work with his past work experience to demonstrate that the beneficiary possessed the equivalent of a U.S. bachelor of science in Mechanical Engineering as of the priority date, and urges this office to consider certain administrative decisions which, according to counsel, allow for work experience to substitute for the completion of a degree. This office finds that these inconsistencies in the record cast doubt on the Trustforte and Morningside credentials evaluations as well as the rest of the petitioner's evidence.<sup>6</sup> As the Board states in *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988):

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<sup>5</sup> This office notes further that this evaluation attempts to include academic work that the beneficiary obtained after the priority date [passage of Section B examinations of the Institution of Engineers (India)] to qualify the beneficiary for the position, and it relies on academic work [passage of Sections A and B examinations of the Institution of Engineers (India)] which the beneficiary did not list on the Form 750B when requested to list all his previous academic work.

<sup>6</sup> It is also noted that the evaluations submitted by the petitioner conflict with the AACRAO evaluation results

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 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.* Thus, the petitioner's credentials evaluations from private sources will not be given weight in this analysis.

Second, even if CIS were to analyze this matter as a skilled worker petition, as counsel suggests, and even if the record included consistent, independent evidence that by combining the beneficiary's certificates, diplomas and passage of examinations or by combining his certificates, diplomas and past work experience, the beneficiary possessed what the petitioner, in hindsight, might consider an acceptable substitute for the relevant U.S. bachelor's degree or the foreign equivalent degree, CIS would still be obliged to deny the petition. The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that if the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational requirements as well as any other requirements of the *individual labor certification*. Here, the Form ETA 750 specifies that the beneficiary must have four years of college-level study culminating in a U.S. bachelor's degree or the foreign equivalent degree in Mechanical Engineering, Mechanical Technology or Industrial Design. The petitioner did not set forth any alternative acceptable substitutions for the degree such as a combination of educational programs, or education and past work experience. As noted earlier, CIS may not ignore a term of the Form ETA 750 as certified, and as such it may not ignore that an actual degree is required in this instance. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The petitioner could have clarified or changed the minimum requirements for the proffered position before the Form ETA 750 was certified by the DOL. For example, the petitioner could have specified on the Form ETA 750 that it would accept *in lieu of the bachelor's degree or the foreign equivalent degree* some combination of diplomas and certificates which are each individually less than the bachelor's degree, or some combination of diplomas and a certain amount of experience.<sup>7</sup> However, the petitioner did not do so.

It is crucial to this analysis to underscore that if, for example, the petitioner had indicated on the Form ETA 750 that it deemed a combination of certain diplomas, examinations and certificates together with a certain number of years of experience, an acceptable substitute for the U.S. bachelor's degree or the foreign equivalent degree, and if, in turn, the petitioner had identified such acceptable substitute(s) for the degree when recruiting U.S. workers for the position, that would have put U.S. workers without degrees on notice that they were eligible to apply. If the petition were accompanied by a Form ETA 750 certified by the DOL

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which indicate that all the academic work completed by the beneficiary as of the priority date is equivalent to only one year of college-level study. This office would point out that the evaluations submitted by the petitioner appear to have been provided by for-profit agencies. The AACRAO evaluation was produced by a non-profit evaluation service, which by definition would have no material motive for inflating the beneficiary's academic credentials, and it is the only evaluation to find that the beneficiary had less than the required education.

<sup>7</sup>Again, in that event, CIS would analyze the petition as a skilled worker petition pursuant to section 203(b)(3)(A)(i) of the Act, rather than a petition for a professional pursuant to section 203(b)(3)(A)(ii). Only petitions that require a minimum of a bachelor's degree or an equivalent foreign degree are considered petitions for professionals.

which specified that such a mix of qualifications might substitute for the degree that could change the outcome in this matter. However, according to the Form ETA 750 as certified, U.S. workers without degrees were never given such notice. The petitioner is now apparently seeking to hire a foreign worker who did not have the relevant U.S. degree or foreign equivalent degree as of the priority date in contradiction to the stated requirements of the Form ETA 750, and in contradiction to the job requirements which the petitioner listed during its efforts to recruit U.S. workers. Yet, the purpose of the instant visa category is to allow foreign workers to fill only those U.S. positions for which the petitioner has demonstrated that qualified U.S. workers are not available. CIS shall not permit the petitioner to offer the beneficiary the proffered position *after* the petitioner, through the stated requirements of the Form ETA 750, excluded U.S. workers with qualifications similar to the beneficiary from applying for and filling the position.

This office notes that submitted into the record were copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from [REDACTED] of the INS Office of Adjudications (now CIS) to counsel in other cases. The letters express [REDACTED] opinion about the possible means to satisfy the requirement of a U.S. advanced degree or the foreign equivalent degree for purposes of 8 C.F.R. § 204.5(k)(2). The AAO notes first that such correspondence solicited to obtain advice from CIS is not binding on the AAO or other CIS adjudicators and does not have the force of law. *See Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from [REDACTED], Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000). Further, the AAO notes that in the letters [REDACTED] is not commenting on any regulations that are relevant to the third preference category. In his January 2003 and July 2003 letters, Mr. [REDACTED] commented on issues related to immigrant petitions for members of the professions holding advanced degrees. Also, the points made in the letters, even if they were directed to the preference category relevant to the instant matter, would not lead to a finding that the petitioner has demonstrated that the instant beneficiary was qualified for the position as of the priority date. That is, [REDACTED] indicated in the January 2003 letter that when demonstrating that a beneficiary has the relevant U.S. advanced degree or the foreign equivalent degree "education and experience may not be combined to satisfy the degree requirement. An actual degree is required." [REDACTED] also indicated in this letter that provided that the proper credentials evaluation service determines that two or more foreign *degrees* combined comprise the foreign degree equivalent to the relevant U.S. advanced degree, the advanced degree requirement may be met through the possession of more than one foreign *degree*. Yet, in this instance, the credentials evaluations submitted by the petitioner contradict each other and contradict suggestions made on appeal and have thus been rejected as unreliable; and on appeal counsel suggests that CIS should combine a three-year diploma, a non-academic certificate and past work experience, as the beneficiary has no actual foreign degree.

The July 2003 letter indicates that where an alien has completed three years of academic work at the university level culminating in an *actual degree*, which is a three-year degree, and completed a *PONSI-recognized* post-graduate diploma, in [REDACTED]' opinion, "such a combination may be deemed the equivalent of a four-year U.S. bachelor's degree" in the second preference, advanced degree context. That is, [REDACTED] indicated that, in the second preference category, CIS could consider combining a three-year degree at the university level with a postgraduate diploma. Yet, in the instant matter, the beneficiary has a three-year diploma which he began after completing the tenth grade, not the twelfth grade. Thus, the diploma represents the completion of only one year of university-level study. As such, the beneficiary does not possess a three-year bachelor's degree at the university level. Further, the record does not indicate that as of the priority date, the beneficiary possessed a *post-graduate* diploma. The AACRAO evaluation indicates that the beneficiary's "post-diploma" from the CITD does not represent formalized studies for which academic credit might be granted. Even the Morningside evaluation submitted by the petitioner, which makes claims that the beneficiary's three-year diploma does represent three years of university-level study, acknowledges that the beneficiary's tool design "post-diploma" from CITD does not represent an additional year of university-level work. Rather, the Morningside evaluation indicates that beyond the three-year diploma and the CITD "post-diploma" in the record, the beneficiary must combine his

passage of Sections A and B of the Mechanical Engineering Branch examinations of the Institution of Engineers (India) to demonstrate that he possesses the equivalency of a four-year U.S. bachelor's degree.

Any assertion that relevant legal authority indicates that the petitioner may allow the beneficiary to qualify for the proffered position based on a combination of education and experience, where U.S. workers without degrees were never put on notice that they might qualify for the position in such a manner is not persuasive. In support of such an assertion, on appeal, counsel cites to: *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Portugues Do Atlantico Information Bureau, Inc.*, 19 I&N Dec. 194 (Comm. 1984); *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969); *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967); *Matter of Sun*, 12 I&N Dec. 535 (D.D. 1966); *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966); and *Matter of Devnani*, 11 I&N Dec. 800 (Acting D.D. 1966).<sup>8</sup> This office notes that all the cases cited by counsel were decided prior to the Immigration Act of 1990 (IMMACT 90).

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<sup>8</sup> These cases may be summarized as follows.

In *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988), the Commissioner determined that, in the nonimmigrant visa context, the employer could combine the beneficiary's education, experience and professional attainments to demonstrate an equivalency to a bachelor's degree in Electrical Engineering.

In *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988), the Commissioner found that, in the nonimmigrant visa context, a "combination of education and experience may be considered equivalent to a professional degree, but usually only when a substantial amount of specialized academic course work is combined with employment and training which are documented as conveying to the employee professional knowledge and competency." The Commissioner held that the proposed position "requires a preeminent business person," and that the beneficiary would qualify for the nonimmigrant petition on the basis that the individual would direct 725 employees at the petitioner's largest facility, would be indirectly responsible for another 1,350 employees, and the position paid \$100,000 per year, plus benefits estimated at \$52,000.

In *Matter of Portugues Do Atlantico Information Bureau, Inc.*, 19 I&N Dec. 194 (Comm. 1984), the Commissioner, deciding a case in the nonimmigrant visa context, determined that both the beneficiary and the position did not meet professional criteria and the petition was denied. This case includes *dicta* which indicates that "individuals lacking the particular degrees normally prerequisite to professional practice in their fields of endeavor may be classified as professionals in rare instances where they occupy clearly professional positions and have substantially completed normal education requirements for the position they occupy."

In *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966), the District Director found that the individual was a professional economist and qualified for an immigrant visa based on his extensive past experience, and high level of occupational attainment. This was despite his lack of a degree in the field of economics, although he had completed coursework at several universities.

In *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967), the Regional Commissioner determined that the petitioner could combine the beneficiary's education, including a bachelor of commerce degree in accounting with postgraduate work toward a master of commerce degree, with his nine years of specialized experience in accounting to demonstrate the equivalency to a bachelor's degree in accounting, and that the beneficiary would qualify as a member of the professions within the meaning of section 101(a)(32) of the Act, and be eligible for an immigrant visa.

On appeal, counsel indicates that prior to IMMACT 90, there was no separate regulation that applied only to nonimmigrant petitions which specifically allowed the petitioner, under certain circumstances, to substitute a certain number of years of experience for a four-year baccalaureate degree or for some number of years of study that a given beneficiary might fall short of such a degree. Based on this, he concludes that prior to IMMACT 90, there was no distinction between nonimmigrant and immigrant visas where substituting experience for academic work was concerned. As such, he asserts that the reasoning in the pre-IMMACT 90 decisions which he cites, both those involving nonimmigrant visas and those involving immigrant visas, should apply to the present case.

Such reasoning is faulty. If, subsequent to IMMACT 90, the intent in the *immigrant visa* context was to automatically allow, or to continue to automatically allow, petitioners to substitute a certain number of years of experience for a four-year bachelor's degree or for a certain number of years of academic study leading to that degree, where a degree or its foreign equivalent was specifically required by the labor certification application, the regulations relating to immigrant visa petitions would have been modified to reflect this. Instead, the decision was made at that time to allow such a showing of a "degree equivalency" from that point forward only in the H nonimmigrant petition context. See 8 CFR § 214.2(h)(4)(iii)(D)(5).

Counsel's appeal brief develops this point further in that he refers to comments to the regulations put forth to implement IMMACT 90 which indicate that those third preference immigrant visa beneficiaries who formerly were allowed to use a combination of education and experience to equate to a degree would no longer be allowed to do so. That is, subsequent to the implementation of IMMACT 90, beneficiaries who claim to possess a combination of education and experience that the petitioner might consider equivalent to a degree could no longer qualify for third preference immigrant visas as professionals because *an actual degree or the foreign equivalent degree* would be needed for the third preference professional category. Instead, such beneficiaries might only qualify under the category of skilled worker as there is no degree requirement in that category. Further, before such a beneficiary might qualify as a skilled worker, the petitioner would need to make clear on its labor certification application that the beneficiary's academic achievements and/or past work experience were sufficient to qualify a worker for the position by specifying on that form that the minimum qualifications for the proffered position include such a substitute for the degree as clearly defined

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In *Matter of Sun*, 12 I&N Dec. 535 (D.D. 1966), the district director determined that the position of a hotel manager is a profession based on the complexity of the duties involved, not the existence of a degree.

In *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969), the Regional Commissioner, reviewing an immigrant visa petition, determined that the beneficiary would qualify as a professional librarian under section 101(a)(32) of the Act based on a combination of three and one-half years of academic work at the college level and over twelve years of experience. The decision was based in part on the fact that "in a few areas of the professions, it is not always possible to obtain the usual formal education," and the Regional Commissioner noted that "in Israel, at the time the subject resided there, there were no schools offering degrees in library science."

In *Matter of Devnani*, 11 I&N Dec. 800 (Acting D.D. 1966), the Acting District Director, reviewing an immigrant visa petition, determined that the beneficiary's high level of education, a master's degree from a U.S. university, combined with his "extensive specialized experience in the chemical industry qualifies him for professional status as an organic chemist." The beneficiary completed a bachelor of science in Chemistry in India, determined to be the equivalent of two years of U.S. college-level studies, as well as a master of business administration completed at a U.S. university. He also had over ten years of experience in the chemical industry.

on the form. In the present case, as discussed earlier, the petitioner made no such specifications regarding an acceptable substitute for the degree. The Form ETA 750 as drafted, with its clear requirements of a four-year degree or foreign equivalent degree in Mechanical Engineering, Mechanical Technology or Industrial Design coupled with two years of experience in the field, does not leave open the option of analyzing the position as a skilled worker position.<sup>9</sup>

Regarding the cases cited by counsel and summarized at footnote 7, this office would note that those decisions do not list the terms of the relevant Forms ETA 750 as certified. Thus, this office is not able to discern whether a U.S. bachelor's degree or the foreign equivalent degree was a required term of the relevant Forms ETA 750. Further, even if any language in cases decided prior to IMMACT 90 might suggest that under certain circumstances an immigrant visa petitioner could, for example, substitute four years of specialized professional experience by the beneficiary for one year of college-level study to demonstrate that the beneficiary "possessed" a four-year bachelor's degree or the foreign equivalent degree, as specifically required by the Form ETA 750, this would not be relevant to the instant matter. The instant case was filed subsequent to IMMACT 90. The regulations which implement IMMACT 90 indicate that the third preference professional must possess an actual degree or the foreign equivalent degree and that the third preference skilled worker must meet each required term of the labor certification application as certified, including the requirements of four years of college culminating in a degree or a foreign equivalent degree where the labor certification application so specifies. See 8 C.F.R. § 204.5(l)(3)(ii)(B) and (C).

Regarding *Syscorp International*, 89-INA-212 (BALCA 1991), the BALCA decision relied upon in the 2007 appeal brief, this office notes that counsel does not state how DOL precedent is binding in these proceedings. 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, BALCA 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). Second, the AAO would note that the relevant Form ETA 750 in that matter was filed on April 26, 1988, prior to the implementation of IMMACT 90. As such, the case was decided according to statutes and regulations in place prior to the implementation of that act, and not according to those relevant to the instant case. Further, the BALCA decision in the record *Parking Company of America, Inc.*, 95-INA-404 (BALCA 1997), decided after the implementation of IMMACT 90 indicates, in keeping with the reasoning employed by the AAO in this present matter, that where U.S. workers were informed through the employer's recruitment efforts that a specific degree was required for a position and were not informed that they might substitute experience for the degree, the employer may not then place a foreign worker in the position who does not have the specific degree listed on the labor certification but who, according to a credentials evaluation in the record, has obtained the equivalent of that degree through his experience.

Counsel also asserts on appeal that CIS may not set the terms of the Form ETA 750, nor may it interpret the terms in a manner that is different from what was obviously intended by the DOL and the petitioner.<sup>10</sup> CIS

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<sup>9</sup>As suggested earlier, at times Forms ETA 750 which require degrees may be analyzed as skilled workers, such as where the proffered position requires a degree but does not require that the beneficiary be a member of the professions. Yet, in such circumstances, for all cases filed subsequent to IMMACT 90, the beneficiary must still possess an actual degree or the foreign equivalent degree as of the priority date. See also *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977)(stating that the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications as stated on its Form ETA 750 as certified by the DOL).

<sup>10</sup>Counsel also suggests on appeal that the court in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. November 3, 2005), determined that CIS does not have the authority to interpret what is meant by the terms "bachelor's degree or foreign equivalent degree," as set forth on the labor certification, and that this district court decision is binding on the AAO. First, the AAO is not bound to

follow the published decision of a U.S. district court, even in matters which arise in the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). While the reasoning that underlies such a decision shall be given due consideration when it is properly before the AAO, this office need not, as a matter of law, follow the district court judge's analysis. See *Id.* at 719. This office notes that the court in *Grace Korean* did not distinguish its holding from holdings that relate to parallel matters of law and fact in certain circuit court decisions, which are binding on the AAO in proceedings which arise in these respective circuits. (The most relevant of these circuit court decisions are discussed below.) Instead, the *Grace Korean* court, as legal support for its findings, cited to a case which determined that the United States Postal Service (USPS) has no special expertise in immigration or employment law and as such, when the court reviewed the legality of a USPS regulation regarding the hiring of certain immigrants, the court would not show special deference to the USPS. See *Grace Korean United Methodist Church* at 1179 and *Tovar v. U.S. Postal Service*, 3 F.3d 1271 (9th Cir. 1993). The *Grace Korean* court also cited to *Omar v. INS*, 298 F.3d 710, 714 (8th Cir.2002), overruled in part on other grounds, *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), a case in which the court similarly finds that the INS' interpretation of a criminal statute is not entitled to deference as that agency has no special competence in criminal law. The court in *Grace Korean*, then, relying in part on the reasoning in *Tovar* and *Omar*, concludes that only the DOL has the expertise and the authority to define the qualifications for the proffered position set forth in the labor certification.

The reasoning in *Tovar* and *Omar* is not applicable to the present matter, nor was it properly applied in the matter before the *Grace Korean* court. Various circuit courts have held that it is CIS, not DOL, which has the authority to evaluate whether the alien is qualified for the proffered position in accordance with the terms of the labor certification and that it is section 204(b) of the Act which grants CIS this authority.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth circuit stated:

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

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). The court relied on an *amicus* brief from the DOL that stated the following:

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

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (9th Cir. 1984).

The 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

has not done either in this case. That is, the Form ETA 750 specifically requires four years of college level study culminating in a bachelor's degree or the foreign equivalent degree, and by way of his representations on the Form ETA 750B, the beneficiary presented himself to the DOL as one who possessed a single-source four-year bachelor's degree in Mechanical Engineering.<sup>11</sup> As such, what appears to have been obviously intended by the petitioner and the DOL, according to the unambiguous language of the Forms ETA 750A and 750B as certified, was that the minimum qualifications for the proffered position include a four-year U.S. bachelor's degree or a foreign equivalent degree. Further, in response to counsel's assertions, this office would stress that it may not allow the petitioner to modify the terms of the Form ETA 750 after certification of that form and after completing its efforts to recruit U.S. workers for the proffered position.

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

**ORDER:** The appeal is dismissed.

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

The AAO does not off-handedly reject the reasoning of a district court. Yet, the decision in *Grace Korean* runs counter to section 204(b) of the Act. The AAO will continue to interpret the "equivalent" of a bachelor's degree as meaning a single-source, foreign equivalent degree, as opposed to the accumulation of several years of experience which do not involve formal coursework, unless the petitioner specifies a different meaning for the term "equivalent" on the labor certification such that potentially-qualified U.S. workers are put on notice as to any alternative means of qualifying for a position. This office notes that this interpretation is consistent with the relevant regulation which defines a degree as a degree or a foreign equivalent degree. *See* 8 C.F.R. § 204.5(l)(2).

<sup>11</sup> This office would underscore that should the DOL consider the beneficiary's representations on the Form 750B at all when determining the actual minimum requirements for the position, in this case those representations would have only reinforced the notion that the petitioner's intent regarding the minimum academic qualifications were precisely what was stated on the Form ETA 750A: a bachelor's degree or the foreign equivalent degree.