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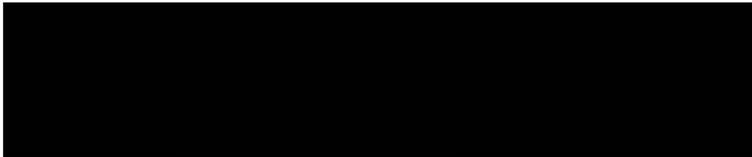
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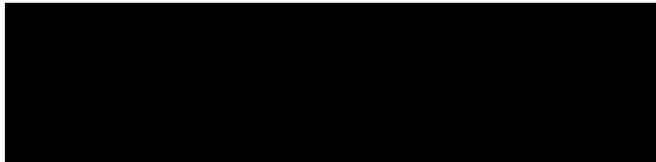


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: JAN 30 2008  
LIN 05 078 51078

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 Acting Director, Nebraska Service Center, denied the employment-based immigrant visa petition,<sup>1</sup> which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved as a skilled worker.

The nature of the petitioner's business is remedy-based software development. It seeks to employ the beneficiary permanently in the United States as a senior systems analyst. As required by statute, a Form ETA 750,<sup>2</sup> Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the acting director determined that the beneficiary did not possess a bachelor's degree (or equivalent) when the request for certification was accepted, and that the beneficiary cannot be found to have met the minimum requirements stated on the Form ETA-750 as of that date. Therefore the petition was not approved.

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), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The I-140 petition was filed by the petitioner<sup>3</sup> on January 18, 2005, and it was denied by the acting director on September 6, 2005. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on April 16, 2002.<sup>4</sup> The petitioner must also 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also, *Janka v. U.S. Dept. of Transp.*,

<sup>1</sup> The petitioner has filed other employment-based immigrant visa petitions for the beneficiary. On August 31, 2000, the petitioner filed, then withdrew, a petition identified in the records of CIS as SRC 00 266 51126. A third petition (LIN 07 004 53127) was filed on October 3, 2006. It was approved on June 13, 2007.

<sup>2</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089

<sup>3</sup> According to the record of proceeding,

\_\_\_\_\_ was merged into \_\_\_\_\_ whose federal employer identification number is \_\_\_\_\_

<sup>4</sup> It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

*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.<sup>5</sup>

On appeal, counsel asserted that the petitioner filed an I-140 petition requesting a preference visa in the skilled worker classification, and the director erroneously adjudicated the petition under the professional worker classification. According to counsel the petitioner submitted documentation to the U.S. Department of Labor (DOL) along with the Application for Alien Employment that made it "clear that the petitioner would accept three years of relevant experience as the equivalent of one year of college education." Counsel also contended that "DOL applied this standard in determining whether the ETA-750 could and should be certified."

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

*Minimum Education, Training, and Experience Required to Perform the Job Duties*

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

*Minimum Education, Training, and Experience Required to Perform the Job Duties.* Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements in Blocks 14 and 15:

Block 14:

Grade School	Blank
High School	Blank
College	<u>X</u>
College Degree Required	<u>Bachelors [degree] or equivalent</u>
Major Field of Study	<u>computer science, math, engineering, or related field</u>

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<sup>5</sup> 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).

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Block 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision, or two years of experience in the related occupation of “designing & implementing [computer] applications.”

#### Block 15

Block 15 of Form ETA 750A relating to “Other Special Requirements” stated “One year of experience developing Remedy Action Request applications. Experience may be gained concurrently. Employer provided travel of up to 100% required.”

According to the labor certification, the proffered position requires a college bachelor’s degree and two years of experience. Because of those requirements, the director determined that the proffered position is for a professional occupation. DOL assigned the occupational code of 189.117-030 “*project director*” to the proffered position. This is because the beneficiary will direct computer programmers and engineers in his job duties<sup>6</sup> that according to the job description stated in the labor certification requires the beneficiary to “oversee and manage the design, development and implementation of enhancements and new features ....” The job title is senior systems analyst (i.e. DOL O\*NET OnLine job code 15-1051.00).

DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database ( See <<http://online.onetcenter.org/link/summary/15-1051.00>> accessed November 20, 2007) and its extensive description of the position and requirements for the position it falls within Job Zone Four<sup>7</sup> 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.” 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 Acting Director’s Finding*

The acting director determined that the petition requested that the beneficiary be accorded the visa preference classification under Section 203(b)(3) of the Immigration and Nationality Act (the Act), as amended, as a qualified immigrant who holds a baccalaureate degree and who is a member of the professions. As already stated, the director determined that the beneficiary did not satisfy the minimum level of education stated on

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<sup>6</sup> See a letter from the petitioner by \_\_\_\_\_ president, dated April 14, 2002, in the record of proceeding.

<sup>7</sup> According to O\*NET OnLine the occupation “*project director*” is found under a general heading of “Managers, All Other.” The webpage accessed at <http://online.onetcenter.org/link/custom/11-9199.99> accessed December 23, 2007, provides that 51% of those working in this occupation have attained bachelor’s degrees, 26% have attained some college, and 23% have attained high school or less.

the labor certification. Specifically, the director determined that the beneficiary did not possess a bachelor's degree (or equivalent) when the request for certification was accepted, and that the beneficiary cannot be found to have met the minimum requirements stated on the Form ETA-750 as of that date. •

*Preference Classification - Professional*

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), 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)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary possesses a foreign two-year associate's degree (i.e. two-years of university-level credit) from the Sir Sandford Fleming College of Technology, at Peterborough, Ontario, Canada.<sup>8</sup> Thus, the issues are whether that associate's degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's employment experiences in addition to that degree. We must also consider whether the beneficiary meets the other job requirements such as employment experience of the proffered job as set forth on the labor certification.

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

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

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

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<sup>8</sup> See <http://www.flemingc.on.ca/> accessed January 4, 2008. According to the American Association of Collegiate Registrars and Admission Officers (AACRAO), Electronic Database for Global Education (EDGE), the beneficiary could receive a college diploma after two years of college attendance in the Northwest Territories Educational System beyond the higher secondary certificate or equivalent. See <http://www.acrao.org>.

application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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

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

Under § 212(a)(5)(A) of the [Act] (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

- (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
- (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9<sup>th</sup> Circuit that covers the jurisdiction for this matter.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>9</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

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

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

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS), hereinafter "CIS"), responded to

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<sup>9</sup> This provision is now section 212(a)(5)(A) of the Act.

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: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

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

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

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

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

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

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (CIS) “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at \*8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

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

#### *Eligibility - Degree Equivalency and an Unrelated Degree*

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).

The beneficiary had attained a foreign two-year associate's degree (i.e. two-years of university-level credit) from the Sir Sandford Fleming College, at Peterborough, Ontario, Canada in Business Administration – Information Systems. As stated above, the petitioner required that an applicant for the proffered position have a college bachelor's degree or equivalent in the major field of study of computer science, mathematics, engineering, or a related field. As already stated, a college bachelor's degree in the United States is attained after a four-year college or university level education. See *Matter of Shah, Id.*

The petitioner had submitted an education evaluation report from the Foundation for International Services, Inc., Bothell, Washington, prepared by [REDACTED] as dated August 25, 2000. [REDACTED] opined that the beneficiary's two-year associate's degree (i.e. two-years of university-level credit) from the Sir Sandford Fleming College, at Peterborough, Ontario, Canada in Business Administration – Information Systems "is equivalent to an associate's degree (two-years of university level credit) in business administration and management information systems from an accredited community college in the United States." The AAO agrees with this opinion.

#### *The Roles of the Employer, DOL and CIS in the Employment-based Immigration Process*

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.

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 FNS (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’s or a foreign degree that is equivalent to a U.S. bachelor’s degree. We are satisfied that DOL’s interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a “B.S. or equivalent.” The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer’s attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that “a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers.” BALCA concluded:

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

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

Significantly, when DOL raises the issue of the alien’s qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL’s certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court. If we were to accept the employer’s definition of “or equivalent,” instead of the definition DOL uses, we would allow the employer to “unlawfully” tailor the job requirements to the alien’s credentials after DOL has already made a determination on this issue based on its own definitions. We would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education “equivalent” to a degree at the recruitment stage as represented to DOL.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine “the language of the labor certification job requirements” in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on us, run counter to Circuit Court decisions that are binding on us, and are 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.

The beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification for the professional classification.

*Counsel’s Contentions on Appeal*

To restate counsel’s assertions on appeal, counsel contended that the petitioner filed an I-140 petition requesting a preference visa in the skilled worker classification, and the director then erroneously adjudicated the petition under the professional worker classification. According to counsel the petitioner submitted documentation to the U.S. Department of Labor (DOL) along with the Application for Alien Employment Certification that made it “clear that that the petitioner would accept three years of relevant experience as the equivalent of one year of college education.”

*Preference Classification - Skilled Worker*

The proffered position could also be properly analyzed as a skilled worker since the normal occupational requirements do not always require a bachelor’s degree but a minimum of two to four years of work-related experience. Therefore, the AAO will also examine the petition under the skilled worker category which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application.

Section 203(b)(3)(A)(i) of 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.

In support of the appeal counsel has submitted the following relevant documents: explanatory and cover letters from counsel dated March 22, 2004, April 15, 2002, May 6, 2004 and October 5, 2005; letters from the petitioner dated May 5, 2004, and September 29, 2005; a letter from the Employment Security Department, State of Washington, dated September 30, 2005, by [REDACTED], Program Manager; a letter dated May 24, 2004, from [REDACTED], Alien Certification Program along with an acknowledgement of receipt of the Application for Alien Employment Certification Form ETA 750; the labor certification accepted April 16, 2002; “Exhibit 2” entitled “List of Remedy-Skilled Individuals Contacted During the Period of Recruitment, October 17, 2001 - April 16, 2002;” a job description for computer systems analyst; sample forms received by the petitioner from the Employment Security Department, State of Washington, to be used for recruitment of applicants and advertisement in the labor certification process; printed copies of Internet web pages (<http://edc.dws.state.ut.us>) accessed April 15, 2002, providing DOL data relating to the offered job and salary required; a 13 page letter from the present employer, [REDACTED], dated April 14, 2002, by [REDACTED] its president; an education evaluation report from the Foundation for International Services, Inc., Bothell, Washington, prepared by [REDACTED] as dated August 25, 2000; the beneficiary’s diploma in Business Administration – Information System, from the Sir Sandford Fleming College, at Peterborough, Ontario, Canada; and the beneficiary’s school transcript.

In this case, the instant petition contains a position that qualifies in the skilled worker category. The regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification “must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.” As noted previously, the certified Form ETA 750 requires a Bachelor’s degree or equivalent in computer science, math, engineering, or related field, and two years of experience in the job offered or in the related occupation of designing and implementing computer applications. Besides these requirements the petitioner requested that an applicant demonstrate one year of experience developing Remedy Action Request applications (that experience may, however according to the petitioner, be gained concurrently).

The singular degree requirement (found under the professional classification) is not applicable to skilled workers and the regulation governing skilled workers only requires that the beneficiary meet the requirements of the labor certification which must include at least two years of qualifying employment experience. A review of the beneficiary’s employment experience stated on the labor certification shows that he was employed as a programmer/analyst with Electronic Data Systems Corp., Whitby, Ontario, Canada from June 1990 to December 1998; with Electronic Data Systems Corp., Raleigh, North Carolina as a software engineer from January 1999 to October 2000; and with AR Focus, Maple Valley, Washington State, now Dynamic Computing Services Corp. as a senior systems analyst from October 2000 to present (i.e. April 12, 2002). According to the record of proceeding, the beneficiary is currently employed by Dynamic Computing Services Corp. The Form ETA 750 was accepted on April 16, 2002.

According to a letter from the petitioner dated September 29, 2005, that itself was substantiated by a letter from the Employment Security Department, State of Washington, dated September 30, 2005, by [REDACTED], Program Manager, the petitioner employer “treated this labor certification application as one for a skilled worker.” Several documents in the record of proceeding confirm this intent.

In a letter dated April 14, 2002 from the petitioner to DOL transmitted during the labor certification review process, the petitioner stated on this issue:

Due to the technical nature of the duties to be performed by the project manger ... the position requires that the ... [petitioner’s] employee in that position have at least a bachelor’s degree in computer science, math, engineering or a related field, *or extensive high-level experience that would be the functional equivalent of such a degree* , or at least two years of experience in Remedy-based computer software engineering or computer systems analysis. All senior-level systems analysts who are project managers at ... [the petitioner] meet these minimum education and experience requirements.

(Emphasis added.)

Further, the petitioner’s letter dated September 29, 2005, to CIS stated in pertinent part:

“[The petitioner] ... would accept ... individuals with experience sufficient to be the equivalent of a U.S. bachelor’s degree. Thus the offered position was for a skilled worker, not a professional.”

A correlating letter from the Employment Security Department, State of Washington dated September 30, 2005, to CIS stated in pertinent part:

\* \* \*

In processing this application [the Employment Security Department, State of Washington] ... treated this labor certification application as one for a skilled worker, one either who held a bachelors degree (from a US [sic] or foreign college or university) or who had a functional equivalent in the form ... [of] experience or from a combination of education and experience

Although the ETA-750 does not explicitly state that the petitioner would accept three years of relevant experience in lieu of one year of college, the materials submitted in support of the labor certification application make it quite clear that this is the standard that the employer used to recruit qualified workers for the offered position. This office never considers an application for labor certification by reviewing the ETA-750 standing alone, but always considers the supplemental information contained in the attached materials in deciding whether labor certification can be approved. It was obvious from the petitioner's ETA-750 and the supporting materials that the beneficiary did not qualify for the offered position based on holding a degree, because he held neither a U.S. nor equivalent foreign bachelor's degree. Had he not qualified using the three-for-one standard set out in the materials submitted by the petitioner,<sup>10</sup> the ETA-750 could not have been certified, because ... [the beneficiary] obviously does not hold a U. S. or foreign bachelor's degree.

The petitioner submitted supplemental materials during the recruitment phase of the Application for Alien Employment Certification Form ETA 750 process to support the employer's intent to accept a combination of education and experience to meet the degree equivalency requirement.<sup>11</sup> Further, according to the summary report in the record (i.e. "List of Remedy-Skilled Individuals Contacted During the Period of Recruitment, October 17, 2001 - April 16, 2002") submitted by the petitioner detailing its recruitment efforts, a large volume of candidates were screened and eight job offers were made to applicants (other than the beneficiary) for the offered position but none accepted the job.

The U.S. Department of Labor (DOL) has provided the following field guidance:

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<sup>10</sup> It should be noted that according to regulations the "three for one" rule (i.e. three years of job experience equals one year of university-level credit) is accepted for the non-immigrant based classification (for example H1-B visas) but not for an employment based immigrant petition such as is found here. There is no provision under the classification sought for a combination of education and work experience to equal an actual four-year degree as there is for non-immigrants under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Likewise there is no provision for the combination of an actual degree in one field plus additional education to be equivalent to a degree in another field.

<sup>11</sup> Documents found in the record of proceeding include but are not limited to the following: a letter dated May 6, 2004, from counsel to ██████████ of the State of Washington, Employment Security Department; a letter from the petitioner to ██████████ dated May 5, 2004 with an exhibit entitled "List of Remedy-Skilled Individuals Contacted During the Period of Recruitment, October 17, 2001 - April 16, 2002." According to the exhibit, the petitioner conducted 280 calls to 138 job candidates and subsequently made offers to eight of these candidates which were refused. Further, the petitioner has submitted 14 documents that consist of material sent to ██████████ and received from her office relating to the advertising and recruitment phase of the labor certification process for the offered job.

When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job. *See* Memo. from [REDACTED] Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994).

DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [Citizenship and Immigration Services (CIS)] CIS to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From [REDACTED] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From [REDACTED] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

In this case, the employer during the labor certification process before DOL, in the petition process and in this appeal process before CIS has consistently stated that "equivalent" means a quantifiable amount of employment experience. Under the skilled worker category, CIS may consider the petitioner's express intent concerning its actual minimum requirements for equivalency to a U.S. bachelor's degree, which in this case permits combining education and experience. The petitioner's supporting documents submitted in the labor certification process illustrates its good faith intent to inform and recruit qualified U.S. workers that includes those without bachelor's degrees but who had equivalent work experience. According to the results of recruitment submitted to DOL and found in the record of proceeding, the petitioner's efforts were unsuccessful in recruiting qualified candidates from the U.S. workforce.

Based upon the beneficiary's two-year associate's degree in Business Administration - Information System, and his progressive professional employment experience as a programmer/analyst (June 1990 to December 1998), software engineer (January 1999 to October 2000), senior systems analyst (October 2000 to present) the beneficiary is qualified under the skilled worker classification according to the terms of the labor certification as a senior systems analyst.<sup>12</sup>

For these reasons the petition may be approved.

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 met that burden.

**ORDER:** The appeal is sustained. The petition is approved as a skilled worker.

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<sup>12</sup> There is no issue that the beneficiary has two years of experience in the job offered as those duties are described at Block 13 of the Form ETA 750A. The beneficiary has approximately six years as a senior systems analyst and several additional years in related computer science professions. The beneficiary has attained the equivalent of an associate's degree equal to two-years of university level credit.