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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE:

EAC-06-068-52626

Office: VERMONT SERVICE CENTER

Date: JUL 02 2008

IN RE:

Petitioner:

Beneficiary:



PETITION:

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be sustained.

The petitioner has a computer software engineering business, and seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor’s degree as listed on Form ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).¹

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. •

The petitioner has filed to obtain permanent residence and classify the beneficiary as a skilled worker or professional worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A). The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” 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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). 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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on October 6, 1997.² The proffered wage as stated on the Form ETA 750 is \$49,000 per year based on a 40 hour work week. The Form ETA 750 was certified on January 9, 1998, and the petitioner filed the Form I-140 petition on the beneficiary's behalf on January 4, 2006.³

On August 8, 2006, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Specifically, the director concluded that the petitioner did not establish that the beneficiary had a four-year Bachelor's degree, which was listed as a requirement on the certified labor certification. The petitioner appealed that decision to the AAO.⁴

On appeal, counsel⁵ provides that Citizenship & Immigration Services ("CIS") was in error in not issuing a Request for Evidence ("RFE") to allow the petitioner to state what it meant by "or equivalent" in compliance with a recent federal district Court case, *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 CFR 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

³ The petitioner listed on Form ETA 750 is "Mastech Systems Corporation," with an address of 1004 McKee Road, Oakdale, PA 15071. The petitioner listed on Form I-140 is "iGate Mastech, Inc., an iGate company," with an address of 1000 Commerce Drive, Pittsburgh, PA 15272. The petitioner submitted a letter that iGate Mastech, Inc., an iGate company was the successor-in-interest to Mastech Systems so that it could continue processing under the labor certification.

To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

⁴ The petitioner obtained different legal representation for the filing of its appeal. Prior counsel represented the petitioner with respect to filing the Form I-140. Third and separate counsel represented the petitioner with respect to filing Form ETA 750.

⁵ Different counsel had initially filed the petitioner's appeal.

1849-PK (D. Ore. November 3, 2005). Further, counsel provides that the government of India has determined that the beneficiary's education is the equivalent of a bachelor's degree from a recognized university in India, and, therefore, the beneficiary would satisfy the educational requirement as listed on the labor certification.

On April 3, 2007, the AAO issued a Notice of Adverse Information. The Notice provided that the Institution of Engineers is a professional association, and therefore, the beneficiary would not have attended classes there as he had, according to the AAO, implied on Form ETA 750B. On another Form ETA 750 with a different filing, the beneficiary indicated that he had received a bachelor's degree based on studies at the Institute. Further, the beneficiary inconsistently listed his program of study for which he earned a diploma from the **State Board of Technical Education and Training in 1990. Further, between the two filings, several evaluations appeared to be discrepant, as some seemed to rely on both the beneficiary's three-year diploma, and the passage of Section A & B examinations to reach the determination that the beneficiary had a bachelor's degree, while others did not. The AAO advised that it is incumbent on 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. Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988).**

The petitioner, through counsel, responded that the beneficiary had attended coaching classes at the Institution of Engineers ("IEI"), used its libraries, as well as textbooks published by the IEI, as well as IEI remote learning materials. Further, the petitioner contended that the IEI is an institution for instruction. Counsel additionally asserts that the beneficiary did not misrepresent that he "completed a 4-year educational program;" rather it would be proper to state that he "attended IEI." Regarding the second program of study at the State Board of Technical Education, counsel asserts that because the beneficiary relied on his studies at IEI to meet the educational standard, the education at the State Board was not required to be listed. Regarding the inconsistencies between the evaluations, counsel asserts that none of the evaluations dispute that the beneficiary had a bachelor's degree.⁶

On September 17, 2007, the AAO director issued an RFE, which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to demonstrate how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner responded.

The proffered position as listed on the Form ETA 750, requires a four-year bachelor's degree and two years of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. DOL assigned the occupational code of 030.062-010, "Software Engineer," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1032.00> (accessed July 14, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do

⁶ For reasons to be discussed below, we find that the petitioner has overcome the issue of inconsistencies in the beneficiary's listed education. As the beneficiary can rely on his education from the Institute of Engineers to meet the definition of equivalent, his program of study completed at the State Board of Technical Education was not relied on in meeting the requirements.

not.” See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed December 12, 2006).⁷ 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 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.

(Emphasis added.) The above regulation uses 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.

It is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and the regulation quoted above use the word “degree” in relation to professionals, with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) specifying that the evidence of a degree “shall” be in the form of an official record “from a college or university.” A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress’ narrow requirement in of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that member of the profession must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential.

The beneficiary provided a certificate to show that he had passed Sections A and B of the Institution of Engineers Exams in the field of Electronics and Communications Engineering in the winter of 1991 and the winter of 1995. He additionally completed a three-year “diploma” following ten years of high school, and has

⁷ DOL previously used the Dictionary of Occupational Titles (“DOT”) to determine the skill level required for a position. The DOT was replaced by O*Net. Under the DOT code, the position of software engineer has a SVP of 8 allowing for four or more years of experience.

relevant work experience. Thus, the issues are whether the beneficiary's passage of Sections A and B of the Institution of Engineering Exams is equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's work experience and/or additional diploma. We must also consider whether the beneficiary meets the job requirements 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 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 Immigration and Nationality Act (INA) (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.

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).⁸ *Id.* at 423. The necessary result of these two

⁸ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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 (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991)(emphasis added).

On appeal, counsel cites several precedent decisions for the proposition that a single baccalaureate degree is not required.⁹ These cases all predate the Act, which, as stated above, makes clear that a bachelor's degree is

⁹ The cases may be briefly summarized as follows:

Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988). In *Sea* the Commissioner determined that the beneficiary's education, experience and professional attainments would be equivalent to a bachelor's degree in electrical engineering, and that the beneficiary would therefore qualify as a member of the professions for a nonimmigrant petition.

However, the decision in *Sea* case applied to the nonimmigrant category. *Matter of Sea, Inc.* relates to meeting the professional standard for a nonimmigrant petition, and would be relevant to whether education and experience could be combined to obtain nonimmigrant H-1B approval. The rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5).

In *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966), the District Director determined that the individual was a professional economist and qualified for an immigrant visa based on his extensive employment experience, and high level of occupational attainment, 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 beneficiary's education, including a bachelor of commerce degree in accounting with postgraduate work toward a master of commerce degree, combined with nine years of specialized experience in accounting

required to qualify under section 203(b)(A)(ii) of the Act as a professional. Moreover, some of the cases involve nonimmigrants, which, even now, have different regulatory requirements. See 8 C.F.R. § 214.2(h)(4)(ii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

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)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor’s degree from a college or university.

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

would “collectively” be equivalent to a bachelor’s degree in accounting and that the beneficiary would qualify as a member of the professions within the meaning of 101(a)(32).

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 determined that the beneficiary would qualify as a professional librarian under section 101(a)(32) based on a combination of her education, three and a half years, and her experience, over twelve years. Part of the decision was based on “it is recognized that in a few areas of the professions, it is not always possible to obtain the usual formal education. In this case, it has been pointed out 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 determined that the beneficiary’s high level of education, a master’s degree from a U.S. university, combined with the beneficiary’s “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. studies, as well as a master of business administration completed at a U.S. university. He additionally had over ten years of experience in the chemical industry.

market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

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

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

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

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

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

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

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), raised by counsel on appeal. This decision 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." 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), also raised by counsel. In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13.

Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services (“CIS”) properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

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.

Significantly, the United States District Court for the District of Columbia in *Maramjaya v. United States Citizenship and Immigration Services*, 1:06-cv-02158-RCL (March 26, 2008), expressly found that CIS may interpret an ETA 750 requirement for a “Bachelor’s or equivalent” as requiring a single four-year degree.

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.

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

Structured systems analysis, design, development, testing, quality assurance, implementation, integration, maintenance, support and conversion of large volume online transaction processing and batch application systems in a multi-hardware/multi-software environment over centralized database systems using relational/hierarchical/network database management systems, Third Generational Languages (3GLs), Fourth Generation Languages (4GLs), CASE tools and Transaction Processing Software.

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:

Education:	Grade School: 8 years; High School: 4 years; College: 4 years; College degree: Bachelor’s of Science;
Major Field Study:	Science, Computer Science, Engineering

The education box contains an asterisk, which references the clarification “or equivalent.”

Experience: 2 years in the job offered, Software Engineer – IBM Mainframe, or 2 years in the related occupation of Programmer Analyst/Systems Analyst.

Other special requirements: A. DBMS: DB2, IMS DB, IDMS DB.
B. Tools: CICS, IMS DC, IDMS DC, ADS/O, QMF, VSAM, MF-Workbench
C. Languages/CASE tools: TELON, IEF, ADW, CSP, APS.

Qualifying Criteria: 1 of A and 1 of B and 1 of C; or 1 of A and 2 of B; or 1 of A and 2 of C; and high mobility preferred.

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).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: The Institution of Engineers, Calcutta, India; Field of Study: Electronics and Communications Engineering; from January 1991 to November 1995, for which he received "Certification of Passing."

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

Evaluation One:

- Evaluator: Multinational Education & Information Services, Inc., Atlanta, GA.
- The evaluation considered the beneficiary's completion of the Sections A & B Examinations of the Institution of Engineers (India) in 1995.
- The evaluator found passage of the two sections equivalent to completion of a "four-year program of post-secondary academic studies in Electrical and Electronics & Communication Engineering and transferable to an accredited university in the United States."
- The evaluator additionally noted that during the beneficiary's studies that he had taken various courses, including Mathematics, Engineering Drawing, Engineering Graphics, Machine Design & Drawing, Computer Engineering, and such.
- Based on the beneficiary's completion of Sections A & B of the Institution of Engineers Examination, the evaluator concluded that the beneficiary had the equivalent of a Bachelor of Engineering degree in Electronics Engineering from an accredited university in the United States.

The director denied the petition concluding that the Form ETA 750 required that the petitioner have a four-year bachelor's degree or the foreign equivalent to a U.S. Bachelor's degree, and not a combination of experience, diplomas, or certificates.

The petitioner filed an appeal and subsequently provided several other evaluations, which were not submitted with the initial filing.

Evaluation Two:

- Evaluator: World Education Services.
- The evaluation provides that the beneficiary completed high school (Secondary School Certificate) and then completed a three-year program and was awarded a Diploma in Electronics and Communication Engineering in 1990 by the State Board of Technical Education and Training, Andhra Pradesh.
- The Secondary School Certificate and Diploma would be equivalent to high school graduation and an associate degree.
- The evaluation further considered the beneficiary's Associate Membership Certificate awarded by the Institution of Engineers (India) in 1996 based on a major in Electronics and Communications Engineering. The evaluator noted that the rank of Associate Member was attained "through previous education . . . examination and professional experience."
- The evaluator considered the beneficiary's studies to be the equivalent of a Bachelor's degree.

Evaluation Three:

- Evaluator: Foundation for International Services, Inc., Bothell, Washington.
- The evaluation considered the three-year full-time Diploma Course of study under New Curriculum at the Govt. Polytechnic Warangal, and that he was awarded a Diploma in Electronics and Communication Engineering dated February 28, 1990 signed by the Principal of the Polytechnic. The evaluator found this to be the equivalent of graduation from high school plus one year of university level credit in electronics and communication from an accredited community college in the United States.
- The evaluation also considered the Certificate awarded by the Institution of Engineers (India), which provided that the beneficiary became an Associate of the Institution on May 27, 1996. The evaluator considered this to be the equivalent of a bachelor's degree in electrical engineering with a specialization in electronics and communication engineering based on passage of Sections A and B in the Electronics and Communication Engineering Branch.
- The evaluator considered the beneficiary's studies to be the equivalent of a Bachelor's degree in electrical engineering with a specialization in electronics and communication engineering from an accredited college or university in the United States.

Evaluation Four:

- Evaluator: International Credentials Evaluation and Translation Services.
- The evaluation provides that the beneficiary's passage of Sections A & B of the Institutions of Engineers of India Examinations, in 1991 and 1995 would be the U.S. degree equivalent of a Bachelor of Science degree in Electronics Engineering.
- The evaluation considers that the beneficiary was awarded a Sections A & B Examination Certificate in Electronics and Communication Engineering from the Institution of Engineers in India for passing exams in 1991 and 1995. Further, the evaluation provides that the Institution of Engineers is a nationally recognized professional association for the Engineering profession, which grants

membership to individuals who have achieved advanced standing in the profession and have passed the requisite qualifying examinations.

- The evaluation provides that the beneficiary completed the academic requirements of Sections A & B, and students in these sections complete sufficient specialized coursework in Electronics, Systems Management, Communication Engineering, Circuit and Field Theory, Pulse and Digital Circuits, among other relevant courses.
- The evaluation further provides that the Institution of Engineers is a regionally accredited institution of higher education in India, and that its academic criterion in the Section A & B Exam Certificate program “significantly parallels those parameters upheld by accredited colleges and universities of precedence in the United States.”

In response to the AAO’s RFE, counsel asserts that the issue in the petition is whether the “beneficiary has foreign education (and/or experience) equivalent to a U.S. Bachelor of Science degree in Computer Science, Science or Engineering.” Counsel suggests that the Form ETA 750 should be read this way as it was drafted “Bachelor of Science degree in Science, Computer Science or Engineering “or equivalent,” not “or foreign equivalent degree.” Counsel concludes that by reading “or equivalent,” the beneficiary’s education would meet the “or equivalent standard. In support, the petitioner additionally provided another educational evaluation to address the AACRAO evaluation provided to the petitioner with the AAO’s RFE.

Evaluation Five:

- Evaluator: Professor O. Robotham, Medgar Evers College of the City University of New York, School of Business, Department of Computer Information Systems.
- The evaluation provides that the beneficiary has the U.S. equivalent of a Bachelor of Science degree in Electronic Engineering.
- The evaluator provides that he bases his determination solely on completion of Sections A & B of the Institutions of Engineers of India Examinations.
- The evaluation considers that passage of Sections A & B of the Institution of Engineers of India Examinations would satisfy the equivalent of a degree program in the U.S. accredited by the Accreditation Board of Engineering and Technology (ABET).
- The evaluator discusses the relevance of the Institution of Engineers, the Institution’s established course modules, and that the Indian Ministry of Education and Social Welfare has determined completion of Sections A & B Exams is equivalent to the fulfillment of a Bachelor’s degree in Engineering at recognized Indian universities.
- The evaluation discusses ABET, which is the “recognized accrediting body for college and university programs in applied science, computing, engineering, and technology ABET is a federation of 28 professional and technical societies representing these fields in the United States. Among the most respected accreditation organizations in the United States, ABET has provided leadership and quality assurance in higher education for over 70 years.”

Based on this and other evaluations, counsel asserts that the beneficiary does have the equivalent of a bachelor’s degree, and does meet the qualifications as stated on Form ETA 750.

The American Association of Collegiate Registrars and Admission Officers (AACRAO) evaluation provided to the petitioner by the AAO with the RFE provided:

The applicant completed the three-year Diploma in Electronic and Communications Engineering awarded by the State Board of Technical Education and Training, A.P. Hyderabad. Prior to this study the applicant completed the Secondary School Certificate (SSC) representing 10 years of primary and secondary education. The Diploma in Electronic and Communications Engineering represents a total of 13 years of schooling. A year of transfer credit could be awarded for the third and final year of the Diploma program.

The applicant passed Sections A and B of the Institution of Engineers (India) Examinations [sic]. Passing Section A & B leads to an Associate Membership in the Institution of Engineers (India) which is recognized by the Government of India as the equivalent of a Bachelor's degree in engineering for employment and promotion purposes and by universities in India for admission to graduate programs.

Form ETA 750B lists that the beneficiary obtained a "Certification of Passing" from the Institution of Engineers, Calcutta, India, based on studies in the field of Electronics and Communications Engineering from January 1991 to November 1995. The petitioner has provided a copy reflecting that the beneficiary passed Sections A and B of the Institution of Engineers Examinations, as well as documentation that the Government of India recognizes such "technical/professional qualifications." The record additionally contains statements of marks for the Institution of Engineers' program exhibiting the beneficiary's studies in: Engineering Mathematics, Engineering Mechanics & Strength of Materials, Materials Science, Elements of Electrical & Mechanical Engineering, Design and Production Process, Management of Systems, Communication Engineering, and other courses. As noted by counsel, the AACRAO evaluation concludes that this education is equivalent to a bachelor's degree based on the passage of Sections A and B of the Institution of Engineers Examination.¹⁰

Regarding the beneficiary's three year program of study resulting in a diploma, several of the evaluations note that these studies would be equivalent to one year of course work, however, passage of Sections A and B examinations following course work are the relevant studies through which the beneficiary would seek to meet the bachelor's equivalent standard.¹¹

Counsel cites to two Board of Alien Labor Certification Appeals (BALCA) cases in support, *Syscorp International*, 98-INA-212 (BALCA 1991), and *Matter of Hawaii Medical Service Association*, 2002-INA-248 (BALCA 2003).

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). Counsel does not state how the Department of Labor's (DOL) Bureau of Alien Labor Certification Appeals (BALCA) precedent is binding on the AAO, but suggests that the cases would be relevant to DOL's interpretation of "equivalent."¹²

¹⁰ The evaluation does condition that ABET would probably preclude the beneficiary from obtaining an advanced degree in the U.S.

¹¹ We note that in order to be considered the equivalent of a degree, the individual must pass both Sections A and B of the Examinations. Passage of only one section is insufficient to be considered the equivalent of a foreign degree.

¹² Counsel suggests that a BALCA case "is a more reliable guide to DOL policy than the private correspondence of one of the certifying officers whose decisions it reviews and often reverses.

Counsel asserts that in *Matter of Hawaii Medical Service Association*, 2002-INA-248, BALCA agreed with the certifying officer's equivalency determination. The officer considered a bachelor's degree to be equivalent to about two years of experience had any U.S. worker applied, and that a U.S. worker could show two years of experience as an alternative to a "BS or equivalent" requirement. Accordingly, counsel asserts that it is not DOL policy to only allow satisfaction of the bachelor's degree requirement with only a single four-year degree.¹³ Counsel further asserts that this BALCA case exhibits that a "U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers." 20 C.F.R. 656.24(b)(2)(ii). This case, however, involved evaluating a U.S. applicant's credentials. See *Hong Video Technology*, 1998 INA 202 (BALCA 2001) for a different outcome involving an evaluation of the alien's credentials.

Syscorp International, 98-INA-212, involved a case filed prior to the passage of the Act, which mandates a "degree" for professionals. Thus, it has little persuasive value. In that case, BALCA did not feel bound by, but was persuaded by, legacy Immigration and Naturalization Service acceptance of combinations of education and experience for nonimmigrants. Significantly, the employer in that case argued that the determination of whether the alien is qualified for the job "is to be made by the Immigration and Naturalization Service (INS)," a position that has been adopted by federal circuit courts. *Tongatapu*, 736 F. 2d at 1309; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1008; In *Syscorp International*, BALCA was ultimately concerned with whether the employer had rejected U.S. workers with similar credentials.

It is counsel's contention that that it was the employer's intent to require credentials equivalent to a U.S. baccalaureate rather than a foreign equivalent degree. Related to this issue, is the question of how was the position advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree in Science, Computer Science, or Engineering have known that his or her combination of education and experience would qualify them for the position. To ascertain the petitioner's expressed intent in advertising the position requirements, the AAO sent the petitioner an RFE.

In the petitioner's response to the AAO's RFE, counsel provides that the recruitment would demonstrate that the petitioner considered workers with the equivalent of a Bachelor's degree.

The submitted materials contain: correspondence with the state workforce agency that no resumes were received in response to a job order; an ad placed in *Computer World* listing the full ETA 750 job description and section 15 requirements, as well as specifying "B.S. in Comp. Sci., Engr'g or Sci. (or equiv.); a second advertisement also listing the full ETA 750 job description and section 15 requirements, as well as specifying "B.S. in Comp. Sci., Engr'g or Sci. (or equiv.); a posting notice listing the requirements as "B.S. in Computer Science, Engineering, or Science (or equiv.)," as well as all other requirements.

The advertisements do specifically list "or equivalent." Based on the recruitment completed and position as it was advertised to U.S. workers, we would conclude that the petitioner's intent concerning the actual minimum requirements of the proffered position would include equivalency alternatives to a four-year bachelor's degree and that the petitioner would have considered candidates with an equivalent degree.¹⁴

¹³ We note that in *Matter of Hawaii Medical Service Association*, the labor certification was denied as the employer failed to establish a valid job-related reason for not considering a U.S. applicant qualified.

¹⁴ Passage of Sections A & B of the Institution of Engineers Examinations is considered the equivalent of a foreign degree, but not a degree itself.

The beneficiary, however, does not have a “United States baccalaureate degree or a foreign equivalent degree,” but rather the equivalent of a foreign equivalent degree based on education, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved as a professional.

However, the question remains whether the petition should be considered under the skilled worker category. Considered under this category, the beneficiary would meet the requirements of the certified ETA 750. While the petitioner specifies that a bachelor’s degree is required, the beneficiary can show that he has the equivalent of a bachelor’s degree based on passage of Sections A & B of the Institution of Engineers Examinations. In looking at the totality of what the petitioner considered, in examining the ads, which required a bachelor’s degree or equivalent, we would determine that the petitioner considered all candidates with or without degrees for the position offered.

Based on the foregoing, the petitioner has established that the beneficiary met the qualifications of the certified labor certification. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained.