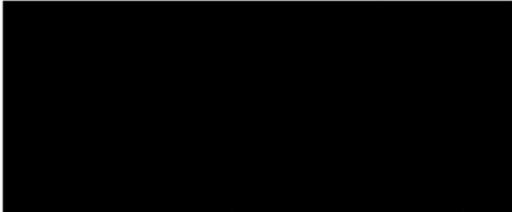


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FILE:

LIN-07-031-54218

Office: NEBRASKA SERVICE CENTER

Date: JUL 08 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, Nebraska Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner appealed that decision and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner is a consulting and software development business, and seeks to employ the beneficiary permanently in the United States as a computer systems analyst (“Programmer Analyst”). 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”). 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 meet the minimum qualifications 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.

According to the cover letter that accompanied the petition, the petitioner seeks to classify the beneficiary as a professional worker pursuant to section 203(b)(1)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). 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.”

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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on May 18, 2004.

On November 21, 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. The petitioner did not establish that the beneficiary had a U.S. Bachelor’s degree in Engineering, Computer Science, Mathematics, or MIS or the

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).

foreign equivalent based on one single course of study. The record indicated that the beneficiary only had a foreign three-year degree in Commerce, and a foreign one-year diploma in Systems Management, which would not meet the qualifications as listed on the Form ETA 750. The petitioner appealed that decision to the AAO.

On November 8, 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 determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner responded with the requested documents.

On appeal, counsel asserts that the beneficiary qualifies for the position based “on a permitted combination of education determined equivalent to a U.S. Bachelor’s Degree in Management Information Systems.”

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.

The proffered position 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.² DOL assigned the code of Computer Systems Analyst, 15-1051. According to DOL’s public online database at <http://online.onetcenter.org/link/summary/15-1051.00> (accessed May 25, 2008) and its extensive description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Four requiring “considerable preparation” for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” See <http://online.onetcenter.org/link/summary/15-1051.00#JobZone> (accessed May 25, 2008).³ 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 petitioner, however, initially requested that the beneficiary be classified under section 203(b)(3)(A)(ii) of the Act, which relates to professionals. As will be discussed below, however, even if we considered the petition under the skilled worker classification pursuant to section 203(b)(3)(A)(i) of the Act, the beneficiary does not meet the clear and unambiguous job requirements certified by DOL.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

² Section 101(a)(32) of the Act provides: “The term “profession” shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” This section does not include information technology or computer related positions in the category of professionals, or professional positions.

³ 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 Systems Analyst had a SVP of 7 allowing for two to four years of experience.

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 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 bachelor's degree in Commerce based on three years of education. He additionally completed a "diploma in Systems Management." Thus, the issues are whether the beneficiary's three-year foreign degree is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's additional education as well as his initial degree. 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).⁴ *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 (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).

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.

⁴ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.) Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word “degree” in relation to professionals. 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.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” from a college or university, 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.

While the petition was filed seeking classification under section 203(b)(3)(A)(ii) of the Act, the beneficiary is also not eligible for a third preference immigrant visa under the skilled worker category pursuant to section 203(b)(3)(A)(i) of the Act. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

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

(Emphasis added.)

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

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

determined that Citizenship & Immigration Services (“CIS”) properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor’s degree. Specifically, whereas the employers in both *Grace Korean* and *Snapnames.com, Inc.* indicated on the labor certification that they would accept a bachelor’s degree “or equivalent,” the petitioner in this matter did not use the phrase “or equivalent” or any similar phrase to indicate a bachelor’s degree might not be required.

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 Programmer Analyst provides:

Design, develop and implement customized software programs for industrial, high tech, advanced financial, business and scientific applications. Will use Oracle, VB, PL/SQL, SQL*Plus, Java, JDBC, Java Servlets, JavaScript, Java Beans, C/C++, Win NT/2000, MS Access 2002, UNIX, Shell Scripting, DBA, Dream weaver, Web logic, HTML, DHTML, ASP, XML, Rational Rose.

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: number of years specified; High School: number of years not specified; College: number of years not specified; College degree: Bachelors;
Major Field Study:	Engineering, Computer Science, Math, or MIS.
Experience:	2 years in the job offered, Programmer Analyst, or 2 years in the related occupation of a Systems Analyst.

Other special requirements: none listed.

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: (1) BJVM College, SP University; Field of Study: Commerce; from July 1987 to May 1990, for which he received a Bachelor's degree; and (2) NIIT, India; Field of Study: Systems Management; from 1992 to 1993, for which he listed he received a Diploma in Systems Management.

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:

- Evaluation: The Trustforte Corporation, New York, New York.
- The evaluation considered the beneficiary's studies, including his Bachelor of Commerce degree, which he completed at Sardar Patel University. Entrance to the university is based on graduation from high school and competitive entrance examinations. He completed three years of study and was awarded a Diploma for Bachelor of Commerce Degree in 1990.
- The evaluation provides that the beneficiary completed both generalized studies and specialized studies, and that he completed advanced-level coursework in his area of concentration, Commerce, Advanced Accounting & Auditing and related subjects.
- The evaluation further considers the beneficiary's post-secondary studies in Systems Management at the National Institute of Information Technology (NIIT) in Bombay, India. The evaluator provides that the NIIT program comprises one year of academic coursework, examination and training, which leads to a Diploma in Systems Management from the Institute. The evaluator provides that "the nature of the courses and the credit hours involved indicate that he satisfied substantially similar requirements to the completion of one year of academic studies toward the completion of a Bachelor of Science degree in Computer Science from an accredited institution of higher education in the United States."
- Based on the beneficiary's combined studies at Sardar Patel University and the National Institute of Information Technology, as well as the number of years of coursework, and the nature of the coursework, the evaluator concluded that the beneficiary "has completed a combination of commerce/management and computer science which is analogous to the attainment of a Bachelor of Science Degree in Management Information Systems."

The evaluation relies on the beneficiary's combined studies from two different schools, and failed to show that the beneficiary had a bachelor's degree or foreign equivalent degree in the required field, based on one program of study, as listed on Form ETA 750. The petitioner did not draft Form ETA 750 to include a degree based on the "equivalent" of a bachelor's degree, or any alternative combinations to include a combination of degrees or education and experience through which the beneficiary could demonstrate that he was qualified for the position.

Further, as stated in our November 8, 2007 notice, in determining whether the beneficiary's degree from Sardar Patel University, or NIIT, are foreign equivalent degrees, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who

represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science awarded in India represents the attainment of a level of education comparable to two or three years of university study in the United States. Based on information in the record, this degree would appear to be equivalent to three years of study towards completion of a bachelor’s degree in the U.S. The beneficiary further completed a Diploma in Systems Management. EDGE does not provide that a Diploma in Systems Management is a formally recognized credential. Further, a review of the All India Council for Technical Education, <http://www.nba.aicte-ernet.in/nmna.htm> accessed on October 16, 2007 does not list NIIT in Maharashtra State as an accredited institution. As the school is not accredited, there are insufficient controls over the course work to determine the academic merit, if any, of its U.S. equivalency. Accordingly, neither degree alone, would be sufficient to satisfy the stated requirements of a bachelor’s degree as listed on Form ETA 750.

On appeal, counsel⁵ provides that the beneficiary has the bachelor’s degree required, as exhibited by the evaluation, and that CIS routinely accepts such evaluations.

Initial counsel cited to and submitted copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from Efred Hernandez III of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). In the July 2003 letter, Mr. Hernandez states that he believes that the combination of a completed PONSIS-recognized post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor’s degree.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).⁶

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. Hernandez’

⁵ A different lawyer responded to the AAO’s RFE on the petitioner’s behalf, and provided a new Form G-28 for the petitioner’s representation. Separate counsel initially filed Form I-140 and its appeal on the petitioner’s behalf.

⁶ While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions, and letters 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).

correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree as asserted in the evaluation.

Further, counsel in his response to the AAO's RFE provides that the educational evaluation is trustworthy and reliable. He details that Sardar Patel University is an accredited institution of higher learning in India, which was established by the State Act in December 1955 and recognized by the University Grants Commission. Further, he provides that the NIIT is "a private company with an international reputation for providing advanced training in the field of Information Technology." He adds that NIIT coursework is "accepted by the Bachelor of Science degree programs at the accredited Indian universities of Karnataka State Open University ("KSOU") and the Dr. B.D. Ambdekar Open University of Hyderabad." He notes that KSOU accepts NIIT graduates into its bachelor's program since 2003 as lateral entries. Counsel concludes that since NIIT credits are accepted at Indian universities, that his NIIT diploma would have same value as his studies at Sardar Patel University. Counsel asserts that the evaluation is not in question and should be accepted by CIS. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

While the specifics of the beneficiary's educational evaluation are not in question, the evaluation itself relies on a combination of education and experience to conclude the beneficiary has the equivalent of a bachelor's degree. Form ETA 750 was not drafted to allow the candidate to meet the position requirements through the combination of education and/or education and experience. Further, as noted, NIIT is not an accredited institution and we cannot assess the value of the beneficiary's coursework completed. Additionally, Form ETA 750B lists that the beneficiary attended NIIT from 1992 to 1993, prior to any cited acceptance of NIIT credits by other Indian universities.⁷

Further, counsel cites to precedent cases where a combination of education and experience were accepted to qualify as EB3 skilled workers: *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967), and *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969).

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 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 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 school offering degrees in library science."

⁷ Counsel submitted a number of articles regarding NIIT's agreements with KSOU and a Report of the Central Advisory Board of Education on Autonomy of Higher Educational Institutions from the Ministry of Human Resource Development Department of Secondary and Higher Education, Government of India, dated June 2005, which relates to accreditation and recognition of schools in India. Counsel does not reference any portion of this document, which lists that NIIT is an accredited institution.

We note that based on the time period for the cases cited that the preference categories, and immigration framework was different. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job related basis: the third and sixth preferences under 8 U.S.C.A. § 1153(a) and (6). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended under 8 U.S.C.A. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled.

Further, prior to IMMACT 90, there was no definition of the term “professional.” Now, however, professional is defined at 101(a)(32) and 8 C.F.R. § 204.5(l)(3)(ii)(C) explicitly requires a bachelor’s degree. Therefore, the cases that counsel cites, which were all decided prior to IMMACT 90 and prior to the definition of professional, are irrelevant.

Initial counsel asserted that CIS is interpreting “degree” too stringently in requiring a “single” degree, and “it is our contention that anything that is equivalent to a bachelor’s degree should be considered to be a bachelor’s degree and this need not be spelt [sic] out on the 750A form.” Further, he contends that the petitioner listed the beneficiary’s education on Form ETA 750B, which demonstrated to DOL that the beneficiary qualified for the position offered, and that DOL certified the labor certification.

Counsel provides that DOL would have reviewed the beneficiary’s qualifications together with Part B of Form ETA 750 and the beneficiary’s submitted educational qualifications. Further, counsel provides that the petitioner submitted the beneficiary’s educational evaluation showing that the beneficiary had a bachelor’s degree based on an equivalency. Counsel asserts that as DOL requested nothing further, “the Petitioner’s recruitment efforts clearly demonstrated that no candidates applied for the position despite the Company’s willingness to accept educational equivalents in addition to a single-source Bachelor’s degree.”

Counsel contends that CIS should not now try to interpret the petitioner’s intent as the Form ETA 750 has been certified. Counsel cites to *SnapNames.com Inc.* that the CIS must defer to the employer’s interpretation. Counsel further cites to *Grace Korean United Methodist Church v. Chertoff* that “it is the responsibility of the employer, not CIS to establish the criteria for the open position.”

As noted above, the Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, provided that while DOL must certify that there are insufficient domestic workers available to perform the job, following certification, “INS [now CIS] 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). Further, the court provided, “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).

Related to these issues, is the question of how was the position’s actual minimum requirements were expressed to DOL, advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree 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 submitted a copy of the Form ETA 750 as sent to DOL, including a copy of the petitioner's posting notice, a copy of the recruitment ads underlying the labor certification, and the recruitment report.

The submitted materials contain a posting notice, which lists the requirements as "Bachelor's in Eng., Comp. Sci., Math, or MIS with 2 years of experience on the job or as a Systems Analyst; a copy of an ad from the Chicago Tribune, North Suburban Classified, dated April 7, 2004, and an ad from the Chicago Tribune dated Sunday, March 7, 2004, which served as recruitment for multiple positions: "Software Engineers, Programmer Analysts for IT Professionals with IL based IT firm. Will need bachelors plus 1 year exp. for junior level positions, and Masters plus 1 or 2 years exp. for senior level positions w/ various skills required." The recruitment report also provides that the petitioner advertised with America's Job Bank from March 7, 2004 to April 22, 2004, and from August 24, 2003 to August 10, 2003, as well as February 16, and 20, 2003, and February 27, 2003 to April 6, 2003.⁸ The petitioner provides that it received no responses to its recruitment efforts. The petitioner further provides in its recruitment report that it requires an individual with a bachelor's degree, and that this would be in accordance with industry standards, the Occupational Outlook Handbook, as well as the Dictionary of Occupational Titles. Counsel provides that "the requirements opened the job opportunity to candidates with a Bachelor's Degree without any limitations stated therein."

The petitioner does not express either in its posting notice, advertisements, or correspondence to DOL that it was willing to accept anything other than a candidate with a bachelor's degree. None of the recruitment specifically lists or contemplates any alternate combinations of education, training, and/or experience, instead, the ad is phrased "will need bachelors."

The petitioner specifically drafted the labor certification to require a Bachelor's degree. The petitioner did not list that the beneficiary, or any qualified U.S. worker could meet this standard through an alternate combination of education, training and experience. To read Form ETA 750 any other way at this juncture would be unfair to candidates without degrees, but with an alternate combination of education and experience that might have qualified, but did not respond to the ad as it listed "will need bachelor's."

Counsel asserts that CIS is required to consider the position under the skilled worker category and cites to *Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) in support that, CIS must "examine the certified job offer exactly as it was completed by the prospective employer." As stated above, initial counsel requested that the petitioner be considered pursuant to section 203(b)(3)(A)(ii) of the Act, relating to professionals. A petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Even if we did consider the petition pursuant to section 203(b)(3)(A)(i) of the Act relating to skilled workers, the beneficiary would still not meet the job requirements certified by DOL.

In reading Form ETA 750 before us, the form explicitly states that a bachelor's degree is required and it does not list any alternatives, or that the degree required can be met through an equivalent. Further, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750. The petitioner specifies that a bachelor's degree, is required, and the certified Form

⁸ As the labor certification was filed on May 18, 2004, only the advertisements six months prior to filing would be valid recruitment, so that the recruitment referenced in early 2003 would be beyond the six-month time frame for use with filing the instant labor certification. Further, the record does not contain copies of the recruitment conducted on America's Job Bank.

ETA 750 does not allow for meeting the degree requirement through any equivalency, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

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*. As also stated above, unlike the employer in *Grace Korean*, the petition in this matter did not use the phrase the *Grace Korean* court found to be ambiguous: "or equivalent." Specifically, the petitioner in the case at hand did not list "or equivalent" or use any similar language, but rather required a bachelor's degree.

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

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.

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.

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) of the Act. In addition, the

beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 not been met.

ORDER: The appeal is dismissed.