

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

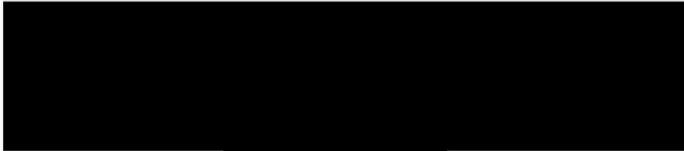
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

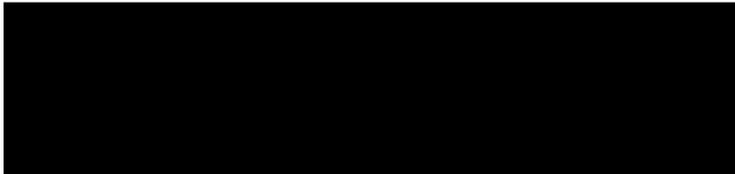


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 08 2008
WAC-05-068-51126

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

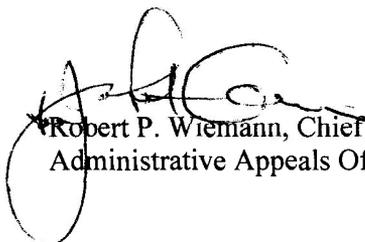
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 dismissed.

The petitioner’s business relates to providing credit card services. The petitioner seeks to employ the beneficiary permanently in the United States as a software engineer (“Internet Development Business Systems 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. Further, the petitioner failed to document that the beneficiary had the experience and skills required 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 professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), 8 U.S.C. § 1153(b)(3)(A)(ii), 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).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on October 10, 2003. The proffered wage as stated on the Form ETA 750 is \$74,000 per year based on a 40 hour work week. The Form ETA 750 was certified on December 6, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on December 29, 2004. The petitioner listed the following information on the I-140 Petition: date established: 1995; gross annual income: "approximately" \$2 million; net annual income: not listed; and current number of employees: "approximately" 830.

On July 20, 2005, 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 the required Bachelor's degree or foreign equivalent degree in Computer Science or a related field as listed on the certified labor certification. Further, the petitioner failed to document that the beneficiary had the required work experience and skills necessary for the position as listed on the certified Form ETA 750. The petitioner appealed to the AAO.

On September 10, 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.

On appeal, the petitioner argues that the beneficiary qualifies under the skilled worker category, and that the beneficiary should have been considered on this basis as well.

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 four years of prior 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 not." See <http://online.onetcenter.org/link/summary/15->

1031.00#JobZone (accessed December 12, 2006).² 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(I)(3)(ii)(C) states the following:

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

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

The beneficiary in this matter possesses a Bachelor of Commerce degree based on three years of study as well as a Master of Business Administration degree. He additionally has computer related experience. Thus, the issues are whether the beneficiary's three-year diploma is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's other education and work experience in addition to 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

² 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.

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).³ *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

³ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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 (November 29, 1991)(emphasis added).

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

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

The petition and the beneficiary are also not eligible for a third preference immigrant visa under the skilled worker category. 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.

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.

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 an Internet Development Business Systems Engineer provides:

Performs technical systems analysis, software development, systems design and integration, construction, implementation, and maintenance activities in support of web-based applications.

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: none listed; High School: none listed; College: 4 years; College degree: "Bachelor's degree or equiv.[alent];"
Major Field Study:	Computer Science or related field.
Experience:	4 years in the position offered, as an Internet Development Business Systems Engineer, or 4 years in the related occupation of a programmer or a software engineer.

Other special requirements: Must have four years experience in business application systems design and development with two years in the banking/credit card industry.

Prior experience must include two years Microsoft technologies, VB 5.0/6.0, Active Server Pages, C++ or C Sharp, MS SQL Server, and web development.

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) Madurai Kamaraj University, Madurai, India; Field of Study: Accounting/Computers; from May 1993 to May 1996, for which he received a Bachelor of Commerce degree; and (2) Bharathiar University, India; Field of Study: Business Administration; from June 1996 to June 1998.

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:

- Evaluation: The Trusteforte Corporation, New York, New York.
- The evaluation considered the beneficiary's educational documents, including his three-year course of study resulting in the award of a Bachelor of Commerce degree in 1996 from Madurai Kamaraj University. The university is accredited and entrance is based on graduation from high school and competitive entrance examinations. The beneficiary completed both general studies and specialized studies.
- The evaluator also considered the beneficiary's three years and seven months of experience (as of January 28, 2000, the date of the evaluation) and training in "progressively increasing responsibility and sophistication."
- The evaluator concluded that based on the beneficiary's studies, and three years of experience (equating three years of experience to one year of university studies), that the beneficiary had the equivalent of an individual with a bachelor's degree in management information systems from an accredited college or university in the United States.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor's degree. As the evaluation relied on a combination of education and experience, the petitioner did not demonstrate that the beneficiary had the required four years of education leading to a bachelor's degree as required by the terms of the labor certification.

Further, in determining whether the beneficiary's diploma is a foreign equivalent degree, 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 degree awarded in India represents the attainment of a level of education comparable to two or three years of university study in the United States. The record does not contain the beneficiary's yearly statement of marks so that we cannot determine whether the beneficiary's studies were based on two years of study or three. The record also

contains a copy of the beneficiary's Master of Business Administration degree and transcript copy from Bharathiar University where he studied.⁴

We note that the labor certification specifically designates that four years of education leading to a Bachelor's degree is required. The petitioner did not list that the beneficiary could have education in combination with work experience, and/or training.

On appeal, counsel provides that the beneficiary has the required education and work experience for the position as exhibited by DOL's certification of the labor certification.⁵

Counsel further provides that CIS should have considered the beneficiary under the skilled worker category in addition to the professional category as the position requires at least two years of experience and the beneficiary has the required experience. Specifically, counsel provides that for H-1B purposes, a beneficiary may substitute three years of experience for one year of education so that twelve years of experience would be equivalent to a bachelor's degree. Counsel cites to the regulation related to professionals, 8 C.F.R. § 204.5(l)(3)(ii)(C):

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.

⁴ EDGE does not provide that Indian universities issue "Master of Business Administration" degrees. Further, the educational evaluation does not reference the beneficiary's MBA degree in consideration of his educational credentials.

⁵ As noted above, the Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, provided:

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

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

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

The fact that DOL certified the labor certification does not evidence that the beneficiary meets the qualifications of the certified job offer.

Counsel argues that despite CIS' decision and language that education and experience cannot be combined to meet the degree requirement for a professional, that nothing in the language cited would "preclude using a combination of education and experience," and that "there is no rational [sic] for the disparate treatment of the equivalency test between immigrant and nonimmigrant petitions."

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). Nothing contained in the regulations related to the professional category parallels the nonimmigrant provision at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) that would allow CIS to interpret this matter differently. A regulation change would be required so that the nonimmigrant provision and the immigrant professional category are parallel. Such a change is beyond the scope of this decision and not within the jurisdiction of the AAO.

Counsel further asserts that CIS' policy is discrepant between employment-based 2nd preference workers ("EB2"), those with advanced degrees, and employment-based 3rd preference workers ("EB3"). Specifically, he notes that 8 C.F.R. § 204.5(k)(2):

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree.

Counsel notes that the regulations would allow a beneficiary to meet the EB2 category through utilizing experience, and, therefore, it is inconsistent not to allow EB3 applicants to meet the skilled worker category through using experience.

Nothing contained in the regulations would allow the AAO to interpret the professional regulation in the same manner. A regulation change would be required. Such a change is beyond the scope of this decision and not within the jurisdiction of the AAO.

Counsel additionally argues that CIS "has readily approved similar cases in the past," and, therefore, he contends that it would be "arbitrary and capricious in light of prior approvals . . . involving similar circumstances."

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988); *see also Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988). Additionally, we are unable to speculate why other petitions not before the AAO might have been approved, and as the other petitions are not before the AAO, cannot determine that the petition approvals involved "similar circumstances."

Related to these issues is the question of how the position's actual minimum requirements were expressed to DOL and advertised to U.S. workers, and whether a U.S. worker with the equivalency of a degree would have known that his or her combination of education and experience would qualify them for the position. The AAO issued an RFE to determine how the minimum requirements were expressed to U.S. workers.

Counsel provided in its RFE response to the AAO that:

The AAO is requesting evidence to establish the Petitioner's intent regarding the minimum requirements for the position at the time of the Petitioner's labor certification and 'that those minimum requirements were clear to potential qualified candidates during the labor market test.' In regard to employer-based immigration, [CIS's] responsibility is limited to determining if the alien is qualified for the job. *Hoosier Care, Inc. v. Michael Chertoff, et al.* 482 F.3d 987,991 (7th Cir. 2007) citing *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). Thus, [CIS] and AAO's evaluation into the labor certification process is limited to whether the alien is qualified to fill the certified job offer. The evaluation does not permit an examination into whether the minimum requirements were clear to potential qualified candidates during the labor market test.

The court in *Snapnames.com, Inc.* 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. Therefore, the AAO requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to understand the petitioner's intent.

Further, counsel argues that the petitioner clearly stated its minimum requirements on Form ETA 750 as a "Bachelor's degree or equivalent." Counsel contends that the petitioner would have listed the requirement differently had the petitioner sought a candidate with solely a bachelor's degree or the foreign equivalent thereof, but instead listed specifically a "bachelor's degree or equivalent," to mean a degree or its equivalent using "the equivalency standard." Counsel provides that DOL has consistently found that a beneficiary can meet the degree requirement as "equivalent" through a combination of education and experience. In support, he cites *Syscorp International*, 98-INA-212 (BALCA 1991).⁶

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, however, are not similarly binding on CIS.

Counsel further cites to *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK, stating that the court in *Grace* determined that "or equivalent" should not be construed so strictly, and that in conformance with *Grace*, the petitioner would have had the beneficiary's qualifications in mind when it drafted the labor certification.

⁶ In *Syscorp* a petitioner filed a labor certification for which the requirements were either an M.S. or equivalent with no job experience or a B.S. or equivalent with two years of experience in mathematics or computer science. At issue was whether the beneficiary met the requirements of the labor certification. Two evaluations provided that the beneficiary's studies at Fudan University did not meet the standard of a bachelor's degree [as some of the credits were earned during the Cultural Revolution in China between 1966 and 1970 when most of the schools had shut down]. A third evaluation concluded that the beneficiary did meet the requirements of the labor certification based on the beneficiary's combined education and experience. The labor certification was denied as the alien beneficiary did not meet the stated requirements of the labor certification. BALCA determined that the labor certification should be granted as "the employer here has accepted the alien as meeting its requirements for a bachelor degree or equivalent. It is not shown that it has rejected a U.S. worker as meeting its equivalency requirements."

In response to the RFE, the petitioner submitted a copy of the recruitment conducted underlying the labor certification. The submitted materials contain a copy of an ad placed in the Las Vegas Review Journal and Las Vegas Sun Classified, which provided that the position required: "a Bachelor's degree or equivalent in Computer Science or related field," as well as listing the additional work experience requirements; a copy of an ad in a computer journal, Computerworld, which listed: "a Bachelor's degree or equivalent in Computer Science or related field," as well as the additional experience requirements; a copy of a "job bank" posting listed on "America's Job Bank" and required: "a Bachelor's degree or equivalent in Computer Science or related field," as well as the additional experience requirements; and a posting notice, which listed the requirements as: "a Bachelor's degree or equivalent in Computer Science or related field" as well as the additional experience requirements. The petitioner also provided a chart of forty-six applicants for the position, which listed in grid fashion, the applicant, and each required skill. The chart demonstrates that the petitioner examined each applicant to determine whether they had all the required skills to meet the position requirements.

All the recruitment materials listed that a "Bachelor's degree or equivalent" was required. We find that the petitioner did express its intent to potential applicants that it would consider more than strictly a four-year degree to meet the bachelor's degree requirement.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify as a professional under 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(ii). However, we will consider the petition under the skilled worker category, as the beneficiary can only demonstrate that he has the requisite degree through a combination of education and experience. In viewing the beneficiary's education under the skilled worker category, the petitioner can demonstrate that the beneficiary meets the educational requirements of the certified labor certification using counsel's interpretation of "equivalent." However, the petitioner has failed to demonstrate that the beneficiary has the required work experience for the position.⁷ The director noted in his decision that the petitioner failed to document that the beneficiary had the experience required for the position as listed on the certified Form ETA 750.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea*

⁷ 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.

While the petition required four years of experience, and therefore, might be considered under the skilled worker category, the petitioner did not provide any evidence to document the beneficiary's prior work experience as will be discussed below.

House, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

As noted above, the Form ETA 750A “job offer” description for an Internet Development Business Systems Engineer provides:

Performs technical systems analysis, software development, systems design and integration, construction, implementation, and maintenance activities in support of web-based applications.

Further, the job offer required the following experience:

Experience: 4 years in the position offered, as an Internet Development Business Systems Engineer, or 4 years in the related occupation of a programmer or a software engineer.

Other special requirements: Must have four years experience in business application systems design and development with two years in the banking/credit card industry.

Prior experience must include two years Microsoft technologies, VB 5.0/6.0, Active Server Pages, C++ or C Sharp, MS SQL Server, and web development.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) the petitioner, Las Vegas, NV, from June 2001 to present (date of signature: September 19, 2003), position: Internet Development Business Systems Engineer; (2) CG-VAK Software USA, Inc., Iselin, NJ, from June 2000 to May 2001, Software Engineer; (3) CG-VAK Software & Exports Ltd., Coimbatore, India, from March 1999 to June 2000, Software Engineer; (4) Viswabharathi Investments Pvt. Ltd., from June 1998 to February 1999, Software Engineer; and (5) Computer Care, Coimbatore, India; from June 1996 to April 1998, Programmer.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(1)(3), which provides:

(ii) *Other documentation*—

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

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

The petitioner submitted the beneficiary's resume, however, the petitioner did not provide any letters or evidence in accordance with 8 C.F.R. § 204.5(l)(3) to document that the beneficiary had the experience required as listed on Form ETA 750.

The director's decision noted that the petitioner failed to document that the beneficiary had the required skills or experience. The petitioner did not provide any evidence, or address this issue on appeal. The petitioner was advised of the deficiency. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petitioner has failed to demonstrate that the beneficiary has the required experience as listed on the certified Form ETA 750.

Further, although not raised in the director's decision, the petition should have been denied based on the petitioner's failure to demonstrate that it had the ability to pay the beneficiary the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The regulation additionally provides that:

In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate its continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment system of the U.S. Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is October 10, 2003.

The petitioner did not provide any evidence of its ability to pay the beneficiary. Further, the petitioner did not provide any annual reports, or audited financial statements.

While Form I-140 identifies that the petitioner employs "approximately 830" employees, the petitioner did not provide any statement in accordance with 8 C.F.R. § 204.5(g)(2) regarding its ability to pay the proffered

wage. As the record contains no evidence regarding the petitioner's ability to pay, the petition should have been denied on this basis as well.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification, and further failed to demonstrate its ability to pay the proffered wage. 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.