

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

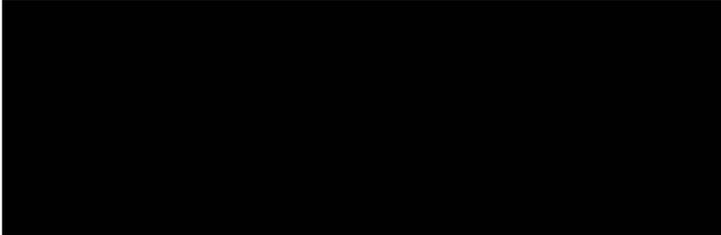
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: EAC-06-079-50916 Office: NEBRASKA SERVICE CENTER Date: **JUL 23 2008**

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

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center (“director”),¹ 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 is an international management consulting firm, and seeks to employ the beneficiary permanently in the United States as a database administrator (“Notes Hub Administrator”). 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 possess a four-year bachelor’s degree as listed on Form ETA 750.

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

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 classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on June 21, 2002.

On August 1, 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 completed four years of college and earned a United States Baccalaureate degree, or its foreign academic equivalent in Computer Science. The petitioner appealed to the AAO.

On March 6, 2008, the AAO issued a Request for Evidence (“RFE”) requesting the petitioner to 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.

¹ The petitioner initially filed its petition with the Vermont Service Center. The petition was transferred to the Nebraska Service Center for a decision in accordance with new procedures related to bi-specialization.

² 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).

On appeal, the petitioner argues that the beneficiary had the equivalent of a bachelor's degree in the field of Information Systems, and, therefore, the beneficiary met the requirements of the labor certification.

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. DOL assigned the occupational code of "Database Administrator" 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/15-1061.00> (accessed July 23, 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 id.*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. Although the stated requirements on the labor certification clearly show that this petition is for a professional position, Citizenship and Immigration Services ("CIS") will consider the petition under both the professional and the skilled worker categories.

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

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

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

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 Database Administrator had a SVP of 8 allowing for four to ten years of experience.

The beneficiary possesses a foreign diploma in Industrial Electronics, and a “higher diploma” in Software Engineering, as well as relevant work experience. Thus, the issues are whether the beneficiary’s foreign diploma is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary’s additional education, and/or work experience, as well as his initial diploma. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

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

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

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

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two

determinations listed in section 212(a)(14).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 (November 29, 1991)(emphasis added).

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. 1289m 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 different type of credential.

The petitioner has not demonstrated that the beneficiary's postgraduate diploma or higher diploma was awarded by a college or a university. Thus, even if CIS did not require "a" single degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider the beneficiary's postgraduate diploma as education towards such a degree.

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

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," 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.

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

The beneficiary is 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.

(Emphasis added.)

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 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.

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 Notes Hub Administrator states:

Manage large scale global Notes Domino infrastructure with 15,000+ users and 200+ servers in multiple sites using Tivoli product suite and managing Domino connections through Firewalls.

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: “completed;”
 High School: “completed;”
 College: 4 years;
 College degree: Bachelor’s;
Major Field Study: Computer Science, Information Systems or related field.

Experience: 2 years in the job offered, Notes Hub Administrator, or 2 years in the related occupation of a Network Engineer.

Other special requirements: Experience must include designing and administering in a global large-scale (minimum 15,000 users/100 servers) Notes Domino environment using Notes Domino WAN clustering, mail routing and replication technologies, Tivoli and Firewalls.

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) Board of Technical Examinations, Maharashtra State, India; Field of Study: Industrial Electronics; from June 1990 to April 1994, for which he received a Diploma; and (2) Aptech Computer Education, Bombay, India; Field of Study: Software Engineering; from August 1990 to October 1992, for which he indicated that he received a Higher Diploma.

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

Evaluation One:

- Evaluation: Foundation for International Services, Inc., Bothell, Washington.
- The evaluator considered the beneficiary's educational documents, including a copy of the beneficiary's Diploma in Industrial Electronics from the Board of Technical Examinations in Maharashtra State, India. The beneficiary passed in the Second Class and awarded a Diploma on April 8, 1994. Completion of this program "is equivalent to graduation from high school in the United States and an associate of arts degree (two years of university-level credit) in industrial engineering technology from an accredited community college in the United States.
- The evaluator also considered the beneficiary's diploma from Aptech Computer Education in Bombay, India. The beneficiary received a "Higher Diploma" in Software Engineering based on an examination following a two-year course. The evaluator found that this would be equivalent to a "professional training course from a private computer school in the United States."
- The evaluator additionally considered the beneficiary's resume, which listed that the beneficiary had six years of computer experience.
- Based on the beneficiary's education and employment, the evaluator determined that the beneficiary had the equivalent of a bachelor's degree in computer science from an accredited college or university in the United States.

The director stated in his decision that the evaluation did not demonstrate that the beneficiary completed four years of college, and earned a United States baccalaureate or a foreign academic equivalent as required by the labor certification. Accordingly, the director determined that the petitioner failed to demonstrate that the beneficiary met the qualifications of the certified labor certification.

On appeal, the petitioner provided an additional evaluation.

Evaluation Two:

- Evaluation: Fielding Graduate University, Santa Barbara, CA.
- The evaluation considered the beneficiary's education: that he completed three years of academic and technical coursework and passed the required examinations administered by the Faculty of Maharashtra State, Board of Technical Education in Mumbai, India in April 1994 for which he received a Diploma in Industrial Electronics.
- The evaluation also considered the beneficiary's additional program of study and passed examinations at APTECH Computer Education in October 1992. The beneficiary was awarded a Higher Diploma in Software Engineering for this program.
- The beneficiary also completed "no fewer than seventeen continuing education courses and professional development workshops/seminars in information systems and computer science during his career." The evaluator notes that the beneficiary received a certification as a Novell Authorized Master CNE in December 1995 and certification as a Certified Lotus Professional in December 1997. For both certifications, the beneficiary would have received specialized academic training and passed a series of exams.

- Based on the foregoing, the evaluator concluded that the beneficiary's educational credentials were the equivalent of a Bachelor's degree in Information Systems as awarded by an accredited institution of post-secondary education in the United States.

On appeal, counsel asserts that the beneficiary has the educational equivalent of a U.S. baccalaureate degree in Information Systems as corroborated by the second evaluation. The beneficiary would have completed the educational equivalent of a bachelor's degree by the priority date, and, therefore, he met the terms of the labor certification.

The second evaluation relied on the beneficiary's combined studies from two programs, and additional continuing education courses. The second evaluation fails to show that the beneficiary has a bachelor's degree or foreign equivalent degree in Computer Science, Info Systems, or a related field, based on four years of college, as required on Form ETA 750. The petitioner did not draft the Form ETA 750 to include alternative combinations of degrees or education and/or experience to meet the stated requirement of a bachelor's degree. The labor certification specifically designates that four years of education leading to a bachelor's degree is required.

Further, in determining whether any of the beneficiary's educational programs are individually 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>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE states that a post-secondary diploma is awarded upon the completion of one or two years of tertiary study beyond the Higher Secondary Certificate (or equivalent). EDGE does not provide that such education represents an equivalent level of university study in the United States.

EDGE does not find that a "Higher Diploma" is recognized as an official credential, or that it would have any U.S. educational equivalent. Further, we note that based on a review of the All India Council for Technical Education <http://www.nba-aicte.ernet.in/nmna.htm> site, accessed on July 23, 2008, APTECH, India, is not an accredited institution within the state of Maharashtra, India. EDGE confirms that none of the beneficiary's individual educational programs or diplomas are equivalent to a four-year U.S. bachelor's degree as required by the certified ETA 750.

On appeal, counsel argues that the beneficiary does have the required Bachelor's degree in Information Systems, and that "[CIS] unfairly prejudiced the Petitioner by not issuing an RFE in this case." Counsel argues that CIS miscalculated the beneficiary's education, which led to a "materially incorrect basis for the Denial." Counsel quotes the denial:

The evidence of record establishes that the beneficiary completed a **two-year** Associate's arts degree (Industrial Electronics) from Maharashtra State in India, [and] completed a **two-year** course from APTECH Computer Education in Bombay, India. However, a **three-year** bachelor's degree will not be considered to be [a] "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). [Emphasis Added].

Specifically, counsel asserts that the beneficiary completed three years of coursework at Maharashtra State from June 1990 to April 1994, but CIS counted this program as only two years of coursework. Further, counsel states that the beneficiary completed two further years of study at APTECH Computer Education, which combined with the beneficiary's prior studies would result in five years of study. Similarly, in response to the AAO's RFE, counsel provides that the beneficiary completed "five years of college-level education in Information Systems," and provides that both evaluations rely on education, not on professional experience.

The first evaluation that the petitioner provided stated that the beneficiary's course of study and exams from the Board of Maharashtra was "equivalent to graduation from high school in the United States and an associate of arts degree (two years of university-level credit) in industrial engineering technology from an accredited community college in the United States." The petitioner did not document whether the beneficiary completed ten years of high school, or a full twelve years of high school. The evaluator appears to have attributed part of the beneficiary's studies towards his completion of the equivalent of twelve grades of high school, and the additional time would represent the two years of study as expressed in the evaluation that the petitioner submitted. Regarding the beneficiary's education at APTECH Computer Education, the first evaluation that the petitioner submitted assessed this education as equivalent to a "professional training course from a private computer school in the United States." The first evaluation did not consider the training to be equivalent to two years of college education. Further, the first evaluation did rely on the beneficiary's coursework, and his "training," as well as the experience listed on the beneficiary's resume to reach the degree determination in contrast to counsel's assertion that the evaluation was based only on education.

While the second evaluation references the length of time that the beneficiary studied to take the examinations administered by the Faculty of Maharashtra State, Board of Technical Education as three years, that evaluation does not assess each program of study for its U.S. equivalency, but instead considers the two programs together along with the beneficiary's training received while employed, not solely on education as counsel asserts. Neither evaluation, however, collectively evaluated the beneficiary's education to equivalent to five years of academic studies at an accredited university in the U.S. Neither evaluation provided that the beneficiary completed one program of studies at a college, four-years in length, resulting in the award of a bachelor's degree that would be the equivalent of a U.S. bachelor's degree in one of the required fields of study as listed on the certified labor certification.

Further, counsel misreads the director's decision. The language referring to a three-year bachelor's degree appears to apply generally to bachelor's degrees from India, where a Bachelor of Science, Commerce, or Arts is, according to EDGE, generally equivalent to two or three years of study at an accredited U.S. academic institution of higher learning. The director did not consider or find the beneficiary's education to be a three-year bachelor's degree.

Counsel also seeks to contrast *Matter of Shah*, 17 I&N Dec. 244, and asserts that the beneficiary in the instant matter completed four years of study as required by the labor certification, where in *Matter of Shah*, the beneficiary completed only three years of study and didn't complete any post-graduate studies.

Neither of the evaluations that the petitioner submitted provides that the beneficiary's education at APTECH Computer Education is equivalent to two years of education at an accredited U.S. institution of higher

learning. Further, the beneficiary's "post-graduate" studies were evaluated as professional training, and not education. The beneficiary's education, therefore, is not equivalent to four years of education at an accredited U.S. institution of higher learning.

Counsel additionally argues that CIS should have issued an RFE and cites to the February 16, 2005 William R. Yates, Associate Director for Operations, Memorandum, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*. Counsel contends that while CIS may deny a petition without an RFE if there is clear evidence of ineligibility, in the instant matter that there was no case of clear ineligibility.

Form ETA 750 listed that the requirements of the petition could only be met through a four-year bachelor's degree. The education listed on Form ETA 750B did not show that the beneficiary had a four-year bachelor's degree. The documentation submitted regarding the beneficiary's education relied on a combination of education and experience. Based on these factors, CIS determined that the petition was clearly not approvable.

The AAO, however, has issued an RFE to allow the petitioner to clarify its intent related to the position's minimum requirements. Specifically pertinent, is how the position's actual minimum requirements were expressed to DOL, how they were 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.

In response to the AAO's RFE, counsel provides that the petitioner's minimum intent was a bachelor's degree or its equivalent and two years of prior experience. Counsel provides that the petitioner did not limit its search to solely those candidates with bachelor's degrees, "but instead took a broader more sensible approach and considered individuals that completed Bachelors degree level studies through at least four years of education, which may have been acquired at one institution or multiple institutions." Counsel asserts that the absence of "or equivalent" on the labor certification did not impact the petitioner's test of the U.S. job market, or the petitioner's review of applicant responses. Counsel further asserts that the petitioner went "above and beyond the regulatory requirements" in its attempt to find qualified U.S. workers through the use of recruiters specialized in hiring information technology workers based on the difficulty of finding IT workers in 2002 when the labor certification was filed.

In support, the petitioner provided copies of ads placed in the New York Times, dated March 10, 2002, March 15, 2002, and April 12, 2002, which listed the position requirements as: "applicants must have at least a Bachelor's degree in Computer Science, Information Systems or related field and at least two years of work experience."

The petitioner also provided letters from five recruiters attesting to the petitioner's hiring practices. The letter does not set forth specific educational requirements for any one position, but provides that the petitioner's hiring practices "are standard to the industry." Another letter refers to the petitioner's "high standards in ... recruiting efforts," and that they follow "best practice[s]." The other letters similarly relate that the petitioner follows industry standard practices, which are not specifically defined in any of the letters. The letters are all dated in early October 1998.

The petitioner also provided a list of job opportunities with the petitioner that appear to have been listed on their website [exact dates not provided]. The position listings served as recruitment for multiple positions within the company's New York City office. The general qualifications listed that "Candidates should have . . . an undergraduate degree (graduate degree a plus) and at least 2 years experience (5 years for management

positions).” The specific list included an IT Engineer position, which required a master’s degree; a Network Engineer position LAN/WAN that listed a master’s degree as the requirement; a Project Manager position which required a bachelor’s degree; a Junior Notes Administrator position that required a bachelor’s degree; a Junior Voice Analyst with the requirement of a bachelor’s degree; a Voice Engineer, requiring a bachelor’s degree; and a Network Administrator (New Jersey), no degree requirement listed. The petitioner also attached two other internet posting lists, one dated April 30, 1998, the other undated, which similarly listed that the petitioner was seeking individuals with “an undergraduate degree (graduate degree a plus) and at least two years of experience (5 years for management).” The specific jobs on these posting lists did not provide separate educational requirements. The petitioner additionally submitted a copy of its internal posting notice, which listed the requirements as: “Bachelor’s degree in Computer Science, Information Systems or related field. At least two years work experience.” As several of the Internet postings were dated in 1998, or undated, it was not clear that any of these ads were used specifically for recruitment related to the instant labor certification, or if the ads were submitted as evidence of the petitioner’s general advertising practices.

Despite the petitioner’s contention that it considered applicants with or without a bachelor’s degree, the petitioner’s specific newspaper ads, posting notice, and many of its internet postings specifically list that a bachelor’s is required for the position, and a master’s degree would be required for a number of positions. The letters from recruiters are all dated three or more years prior to filing the labor certification, and only state that the petitioner follows “industry standards” without explaining those standards. The relevance of these letters has not been established. Although counsel provides that the petitioner was willing to consider applicants with a degree based on an equivalency, the lack of “or equivalent” in the advertisements may have dissuaded U.S. workers without bachelor’s degrees from applying. We would not conclude based on the recruitment documents submitted that the petitioner’s intent was to consider applicants without a bachelor’s degree.

Counsel contends that the use of “or equivalent” in ads is not critical and would be “legal fiction.” Further, counsel provides that the Board of Alien Labor Certification Appeals (“BALCA”) “has previously agreed that applicants may not have an understanding of the language and are not deterred from applying in this circumstance.” *In the Matter of*, 95-INA-00062, 1996 WL 768996 (BALCA).

While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Counsel has not shown how the BALCA decision would be binding on CIS.

In reviewing the specific case that counsel cites to, we disagree with counsel’s interpretation that “or equivalent” would not matter. The DOL Certifying Officer (“CO”) in the cited BALCA decision denied the labor certification as the beneficiary did not have the degree as provided on Form ETA 750, but had an equivalent degree. *In the Matter of*, 1996 WL 768996*2. The employer did not indicate that an equivalent degree would be acceptable. The CO concluded that the employer failed to advertise the position’s minimum requirements and denied the labor certification. On appeal before BALCA, the employer provided, “We did not put ‘or equivalent’ on the ETA 750 because this is always understood by job seekers – if their university gave the same degree a different name, they are not reluctant to apply.” *Id.*, 1996 WL 768996*3. The decision continues that “some applicants do have such an understanding and are not reluctant to apply. However such an understanding does not comply with the provisions of 20 C.F.R. § 656.21(b)(5), which requires that an Employer’s actual minimum requirements be stated.” *Id.* BALCA affirmed the CO’s denial of the labor certification.

The labor certification as drafted does not allow an applicant to qualify for the position through a combination of education and/or experience to show a bachelor's degree to meet the requirements of Form ETA 750A. The petitioner specifically drafted the labor certification to require four years of education and 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 in 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 were dissuaded from applying for the position based on the newspaper ad's statement that the position required "at least a bachelor's degree." We would not conclude that the petitioner's intent concerning the actual minimum requirements of the proffered position would include equivalency alternatives to a four-year bachelor's degree.

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 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. The beneficiary cannot qualify as either a skilled worker or a professional based on the certified ETA 750. Therefore, the petition may not be approved.

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.