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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER
LIN-04-023-50523

Date: JUL 23 2008

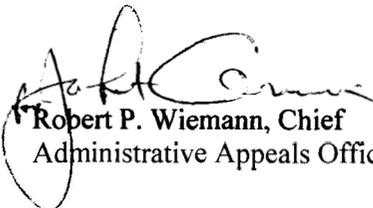
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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 Director, Nebraska Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner filed a Motion to Reopen the decision. The director affirmed his prior decision. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

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

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

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a 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.

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).

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

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).

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 either 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 January 22, 2003. The proffered wage as stated on the Form ETA 750 is \$55,000.00 per year based on a 40 hour work week. The Form ETA 750 was certified on May 2, 2003, and the petitioner filed the I-140 petition on the beneficiary's behalf on October 30, 2003. The petitioner listed the following information on the I-140 Petition: date established: 1998; gross annual income: \$3 million; net annual income: not listed; and current number of employees: 30.

On March 31, 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 a four-year Bachelor's degree, which was listed as a requirement on the certified labor certification.

The petitioner filed a Motion to Reopen and asserted that the beneficiary was qualified and had the equivalent of a bachelor's degree evidenced by the credential evaluation that the petitioner submitted. The petitioner submitted three additional evaluations with its Motion to Reopen. Further, the petitioner contended that there was no official policy that a single degree was required as the director had provided. The petitioner cited to cases where it was determined that education and experience could be combined. The petitioner further argued that it had intended to accept a combination of education and experience based on its use of the phrase "equivalent."

The acting director dismissed the motion as the director found that the petitioner's motion did not present any new evidence, or provide relevant precedents to consider. The petitioner appealed to the AAO.

On July 25, 2007, the AAO director issued a Request for Evidence ("RFE") for the petitioner to provide a copy of the entire recruitment file submitted to DOL. On November 19, 2007, the AAO issued a second RFE for the petitioner to provide evidence that the institution where the beneficiary completed his post-graduate diploma was an accredited institution in India. The petitioner responded to both RFEs.

On appeal, counsel provides that Citizenship & Immigration Services ("CIS") was in error in its prior denial and dismissal of the petitioner's Motion to Reopen, as the beneficiary had an equivalent bachelor's degree as exhibited by the evaluations that the petitioner submitted.

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 or equivalent and one year of experience in the position offered or one year of experience in the related occupation of a programmer or an engineer. 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 030.162-010, "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 22, 2008) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1032.00#menu> (accessed July 22, 2008).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(l)(3)(ii)(C) states the following:

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

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

The beneficiary possesses a three-year bachelor of science degree based on studies at a foreign institution. Additionally, the beneficiary holds a second three-year bachelor's degree in an unrelated field, a post-graduate diploma, several certificates, as well as having prior work experience. Thus, the issues are whether the beneficiary's foreign program of study 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. 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:

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.

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).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

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

“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).

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.

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

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

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

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

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way*

indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.

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

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

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

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

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

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services (“CIS”) properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor’s degree.

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

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

On the Form ETA 750A, the "job offer" position description for a software engineer provides:

Design, develop, test, code & implement software and computer systems to meet client's requirements; develop, implement and maintain Test Plans, Test Scenarios, Test Cases and Test Scripts; conduct Regression and Functionality testing; use SQL Queries and TOAD to perform backend testing; automate testing using QA Run; use Java, Oracle, TIBCO.

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: College: 4 years;
College degree: "BS or equivalent;"
Major Field Study: Computer Science or math or statistics;
Experience: 1 year in the job offered, or 1 year in the related occupation of Programmer or Engineer.
Other special requirements: none listed.

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: Osmania University, Hyderabad, A.P., India; Field of Study: Science; from May 1989 to April 1992, for which he received a bachelor's degree.

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

Evaluation One:

- Evaluation: U.S. Evaluations, Elizabeth, New Jersey.

- The evaluation considered the beneficiary's Bachelor of Science degree from Osmania University, which he received in 1992. Osmania University is an accredited institution of higher education in India, which requires completion of 12 years of school prior to admission.
- The beneficiary's Bachelor of Science studies required three years of higher education, including courses in his concentration of Mathematics. The beneficiary additionally took courses in Physics, Statistics and related subjects.
- The evaluator provides that this education would be equivalent to three years of university studies at an accredited institution in the United States.
- The beneficiary then enrolled in a one-year Postgraduate Diploma program in Computer Applications at BCIT Hyderabad,⁴ where he completed advanced level undergraduate coursework, research, and examinations in Computer Science, Computer Applications, Computer Programming and related subjects. In 1994, BCIT issued the beneficiary a Postgraduate Diploma in Computer Applications, which the evaluator found would equate to one year of "Advanced Undergraduate Academic Studies."⁵
- The evaluator concluded that based on the two programs of study that the beneficiary would have the equivalent of a Bachelor of Science degree in Computer Science from an accredited institution 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, and the beneficiary's degree equivalency was based on a combination of educational programs, which did not meet the standard of 8 C.F.R. § 204.5(1)(3)(ii)(c). Based on Form ETA 750, the petitioner did not demonstrate that the beneficiary met the requirements of the position. As the evaluation relied on a combination of educational programs, the petitioner did not demonstrate that the beneficiary had the required four years of education leading to a bachelor's degree.

The petitioner filed a Motion to Reopen and provided three new educational evaluations.

Evaluation Two:

- Evaluation: Park Evaluations & Translations, New York, New York.
- The evaluation considered the beneficiary's Bachelor of Science degree from Osmania University, which he received in 1992, as well as the beneficiary's Bachelor of Laws also received from Osmania University in 1996.⁶
- Based on the beneficiary's education, the evaluator provided that the beneficiary would have the equivalent of a U.S. Bachelor of Science degree in Mathematics.

⁴ The beneficiary did not list this program of study on the Form ETA 750B submitted to DOL. The petitioner submitted a revised Form ETA 750B, signed by the beneficiary, with its Motion to Reopen. The revised Form ETA 750B listed this additional program of study.

⁵ In response to the AAO's November 19, 2007 RFE, counsel provided that BCIT was not an accredited institution in India. Counsel provides additionally that the beneficiary completed a three-year Bachelor of Laws program also from Osmania University.

⁶ The beneficiary did not list this program of study on the Form ETA 750B submitted to DOL. The beneficiary did list this program of study on the revised Form ETA 750B submitted with the petitioner's Motion to Reopen.

- The evaluation also provided that the beneficiary had over three years of work experience and training, which combined with his education would result in a Bachelor of Science in Computer Science.
- The evaluation considered the beneficiary's studies undertaken to receive the Bachelor of Science degree, including concentrated coursework in Mathematics, Physics, and Statistics, as well as general studies. The Bachelor of Laws program was concentrated in law courses and related subjects. Based on the two programs together, the evaluator found that the beneficiary completed requirements, which would be substantially similar to those required for the completion of a bachelor's degree in Mathematics from an accredited institution of higher learning in the United States.
- The evaluator then considered that the beneficiary had over three years of experience as a software engineer in positions of increasing responsibility. Through his work experience, the evaluator provides that the beneficiary gained knowledge in areas that would be considered the equivalent of coursework in Fundamentals of Programming, Internet Technology, Object-Oriented Programming, Systems Analysis and Design, among other areas. As a result, following the formula of three years of experience as equivalent to one-year of education, the beneficiary's education and experience combined would result in the equivalent of a Bachelor's degree in Computer Science.

Evaluation Three:

- Evaluation: Morningside Evaluations and Consulting, New York, New York.
- The evaluation considered the beneficiary's three-year Bachelor of Science degree from Osmania University in 1992, as well as the beneficiary's three-year Bachelor of Laws also received from Osmania University in 1996.
- Based on the two programs of study, the credibility of Osmania University, and the hours of academic coursework, the evaluator determined that the beneficiary's completion of the programs were equivalent to a U.S. Bachelor of Science degree in Mathematics and Statistics.

Evaluation Four:

- Evaluation: Multinational Education & Information Services, Atlanta, GA.
- The evaluation considered the beneficiary's three-year Bachelor of Science degree from Osmania University in 1992, which the evaluator considered to be the equivalent of three years of academic studies in Mathematics and transferable to an accredited university in the U.S.
- Additionally, the beneficiary was awarded an Advanced Diploma in Computer Programming from the Swal Innovation Experts Computer Academy, India, and a Post-Graduate Diploma in Computer Applications from the Blue Chip Info Tech Ltd., India in 1994. The evaluator found this to be equivalent to one year of training and studies in Computer Science.
- The evaluator further considered that the beneficiary had over three years of extensive training and studies in software engineering, systems analysis, and computer program design and development.
- As a result of his combined studies and work experience, the evaluator found that the beneficiary would have the equivalent of a Bachelor's degree in Mathematics and Computer Science from an accredited university in the U.S.

All of the additional evaluations that the petitioner provided rely either on a combination of the beneficiary's educational programs, or a combination of education and experience and do not demonstrate that the beneficiary has a bachelor's degree based on four years of study.

The director did not consider the new evaluations that the petitioner submitted with its Motion to Reopen, but instead dismissed the petition on the basis that the petitioner failed to present new evidence or cite to relevant precedent.⁷

The petitioner appealed the director's dismissal and asserted that the director improperly dismissed its Motion to Reopen as the petitioner had provided new evidence in the form of the additional evaluations. Further, the petitioner contended that the director's decision was erroneous as it failed to provide official policy for not accepting a combination of education and experience, which is accepted in the H-1B context. Counsel also asserts that as "degree equivalence" is not defined for the professional category, that the H-1B regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would be helpful by analogy.

8 C.F.R. § 214.2(h)(4)(iii)(D)(5) relates to meeting the standard for a nonimmigrant H-1B petition, and is relevant to using a combination of education and experience to obtain a nonimmigrant H-1B approval. The rule to equate three years of experience for one year of education does not apply to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). CIS follows its own regulations as its official policy. As the nonimmigrant regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) do not apply to the immigrant category, the petitioner's analogy to the H-1B regulations is not instructive. The regulations would have to be changed to apply 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) to the immigrant context. Such actions are beyond the scope of the AAO.

Counsel further contends that, "no official policy requires a single degree." Counsel cites to a letter dated July 23, 2003 from Efren Hernandez III of the INS Office of Adjudications to counsel in another case, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2). In the July 2003 letter, Mr. Hernandez states that he believes that the combination of a completed PONSI-recognized post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

The director rejected this argument as private discussions and correspondence solicited to obtain advice from CIS are not binding on CIS adjudicators (or the AAO) and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).⁸

Further, as counsel acknowledges, the beneficiary did not complete his post-graduate studies at an accredited institution in India.

⁷ A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

⁸ While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions, and letters are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel provides that the director dismissed the letter from Mr. Hernandez without offering any “countervailing policy.”

The regulation at 8 C.F.R. § 204.5(l)(2) does not specifically provide for a combination of education and experience as contemplated by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). CIS follows the regulations as its policy.

The petitioner further provides that the beneficiary attained the equivalent of a bachelor’s degree through his education based on his two foreign bachelor’s degrees, or alternatively could show that he had the equivalent of a bachelor’s degree based on his education and experience.

Counsel cites to a number of cases where she asserts that a combination of education and experience were found to be the equivalent of a bachelor’s degree.

Counsel cites to *Matter of Rajagopalamenon*, 13 I&N Dec. 110 (Dist. Dir. 1968) where the beneficiary had a three-year bachelor’s degree and had completed some master’s level coursework, as well as some Ph.D. level coursework in Anthropology. Counsel argues that the Board of Immigration Appeals (“BIA”) [sic] accepted that the beneficiary’s coursework would be the equivalent of a Bachelor’s degree in Anthropology, but that the petition was denied as a master’s degree was required for the position, which the beneficiary did not have.⁹

Counsel additionally cites to *Matter of X*, (no file number provided) (AAO Jan. 9, 2004), 9-10 Bender’s Immigr. Bull 22 (2004). In *Matter of X*, the AAO approved an immigrant visa petition where the beneficiary had a foreign bachelor’s degree in mechanical engineering and a decade of post-graduate experience in computer science. The AAO found that the beneficiary had the equivalent of the required “Master’s or equivalent” in the required field of Computer Science as the regulations at 8 C.F.R. § 204.5(k)(3)(i)(B) – allow that five years of progressive post-baccalaureate experience is the functional equivalent of a master’s degree.

Counsel asserts that *Matter of X* would represent the allowance of a combination of education and experience to meet the labor certification requirements. We note that *Matter of X* relates to a different preference category, and the regulations cited specifically allow that a foreign bachelor’s degree and five years of progressively responsible post-graduate experience would be the equivalent of a Master’s degree. The regulations for the professional category do not provide for any equivalency to meet the standard of a bachelor’s degree.

Counsel additionally cites to *Matter of Arjani*, 12 I&N Dec. 649 (Reg. Comm. 1967). In *Arjani*, the Regional Commissioner determined that the beneficiary’s education, including a bachelor of commerce degree in accounting with postgraduate work toward a master of commerce degree, combined with nine years of specialized experience in accounting would “collectively” be equivalent to a bachelor’s degree in accounting and that the beneficiary would qualify as a member of the professions within the meaning of section 101(a)(32) of the Act.

⁹ The AAO disagrees with counsel’s interpretation. The District Director (not the BIA) references an evaluation submitted in the case that concludes the beneficiary’s education is equivalent to a Bachelor’s degree in Anthropology. The District Director does not address or challenge this aspect of the case, as the petition requires the candidate to have a Master’s degree, which the beneficiary did not have. The petitioner’s evaluation, since it showed less than a Master’s degree, was not central to the case.

Matter of Arjani was based on statute and regulations that are no longer in effect, and that decision has no bearing on this case. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job-related basis: the third and sixth preferences under 8 U.S.C. § 1153(a). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended 8 U.S.C. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled. The implementing regulations for the current immigrant classification sought by the petitioner in this case are not the same as those in effect in 1967 at the time of *Matter of Arjani*. The current regulations at 8 C.F.R. § 204.5(l)(3)(ii)(C) explicitly require a bachelor's degree. The cases that counsel cites, which were all decided prior to IMMACT 90, are irrelevant.

The relevant question here is whether the beneficiary met the qualifications of the certified labor certification. The Form ETA 750 as certified required that the beneficiary have a four-year bachelor's degree or equivalent. Further, as the Form ETA 750 did not provide that the position requirements could be met through a "bachelor's degree or an equivalent based on education, training and/or experience," the question is whether potential U.S. applicants were aware of the actual minimum requirements of the proffered position and how they might qualify. To ascertain the petitioner's expressed intent in advertising the position requirements, the AAO sent the petitioner a request for evidence (RFE).

In response to the RFE, the petitioner provided documentation submitted to DOL. The petitioner provided a copy of its internal posting notice, which provided that the position requirements were: "Bachelor's or equivalent degree in computer science or math or statistics" and one year of experience; an ad in a computer journal for multiple positions at various levels dated September 2, 2002, which listed the requirements as: "BS with 1-year exp.;" and the ads in the Herald-Sun, Durham, North Carolina, for the following dates: February 7, 2002, February 28, 2002, March 11, 2002, June 25, 2000, July 16, 2000. The ads state that the petitioner is hiring for positions at different levels and the position would require: "Bachelor's or Master's degree required, depending on position. We also accept the foreign equivalent of the degree, or the degree equivalent in education and experience." The cover letter submitted to DOL also references an ongoing company website posting. The record does not contain that document.

As the ads would have six-months validity for the filing of the labor certification, only the September 2, 2002 journal ad and internal posting notice would have been placed within the six months prior to January 22, 2003, and valid for filing the instant labor certification. It appears that the petitioner submitted additional prior ads for multiple positions within the company that the petitioner previously ran in publications.

While the advertisements submitted used language that was more expansive than what the petitioner listed on Form ETA 750, we note that the specific recruitment used for the labor certification six months prior to filing only provided for a bachelor's degree in the journal ad, and a bachelor's or equivalent in the internal posting. Therefore, 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.

As the beneficiary cannot show that he has a United States bachelor's degree or a foreign degree equivalent to a United States bachelor's degree, the beneficiary would not qualify as a professional or under the skilled worker category. Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. The regulation at 8

C.F.R. § 204.5(l)(3)(ii)(B) provides that 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”

Based on the foregoing, the petitioner has not established that the beneficiary met the qualifications of the certified labor certification. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.