

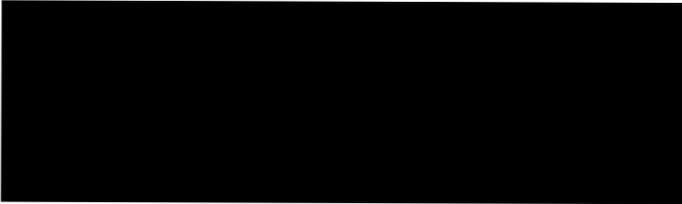
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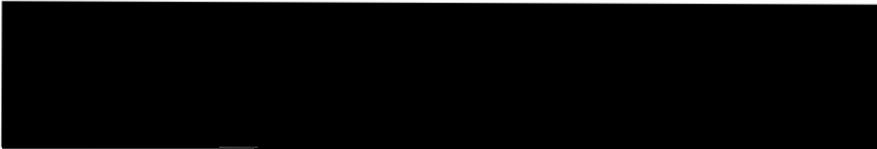


File: WAC-03-262-53705 Office: CALIFORNIA SERVICE CENTER Date: **JUL 23 2008**

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 Director, California Service Center, denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a systems integration and software development company, and seeks to employ the beneficiary permanently in the United States as a computer programmer. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's May 19, 2005 decision, the petition was denied for failure to document that the beneficiary met the position requirements of the certified labor certification.

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 or a skilled 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." The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on October 15, 2001.

On March 30, 2005, the director issued a Notice of Intent to Deny ("NOID"). The NOID requested that the petitioner submit additional evidence to demonstrate that the beneficiary possessed the required Bachelor's degree, or a Bachelor's degree sufficiently similar to be classified as a related field as required by the labor certification. The petitioner responded. The director determined that the evidence submitted in response to the NOID was insufficient to overcome the deficiencies in the petition. Therefore, the director denied the petition as the petitioner failed to demonstrate that the beneficiary met the petition's degree requirements, and accordingly, the beneficiary did not meet the requirements of the labor certification. The director found that

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

the beneficiary's field of study was "insufficiently similar" to be classified as a related field. Accordingly, the director denied the petition on May 19, 2005. The petitioner appealed that decision and the matter is now before the AAO.

On August 23, 2007, the AAO director issued a Request for Evidence ("RFE") for 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.

On appeal, the petitioner argues that the beneficiary had the equivalent of a bachelor's degree and that Citizenship and Immigration Services ("CIS") has in the past found such combinations acceptable.

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 one year 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 15-1021, "Computer Programmer," 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/15-1031.00#JobZone> (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.* Therefore, because of both the stated requirements on the labor certification and DOL's standardized occupational requirements, Citizenship and Immigration Services ("CIS") will consider the position and 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

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

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 foreign Bachelor of Science's degree in Mathematics, Physics and Chemistry, and a post-graduate diploma in Business Administration, with courses in Information Technology, as well as relevant work experience. Thus, the issues are whether the beneficiary's foreign bachelor's degree 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 degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

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

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

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

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

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

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

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).³ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a 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.

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

The petition and the beneficiary are also not eligible for a third preference immigrant visa under the skilled worker category. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

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

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

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

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

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

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

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

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

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

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

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

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services (“CIS”) properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. 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 computer programmer provides:

Enter program codes into computer system, inputs test data into computer, observes computer monitor screen to interpret program operating codes. Corrects program errors using methods such as modifying program or altering sequence of program steps. Primarily responsible for computer programming database design, development and testing, including coding in Oracle and Oracle development tools with commonly utilized operating system environments, such

as UNIX and/or Windows NT. Write program code for software which functions or relational database and over a variety of computer network configurations.

Further, the job offered listed that the position required:

Education:	College: 4 years; College degree: Bachelor of Science or equivalent degree;
Major Field Study:	Engineering, Computer Science, Information Systems, Physics, Mathematics, or equivalent.
Experience:	1 year in the job offered, Computer Programmer, or 1 year as a Programmer, programmer analyst, consultant or related.

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 the Form ETA 750B, signed by the beneficiary, the beneficiary listed prior education as: (1) Chaudhary Charasingh University, Meerut, India; Field of Study: Mathematics, Physics, Chemistry; from May 1994 to May 1997, for which he received a Bachelor of Science degree; and (2) ICFAI Business School, New Dehli, India; Field of Study: Information Technology; from May 1997 to May 1999, for which he received a "Post Graduate Diploma" in Business Administration.

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

Evaluation One:

- Evaluation: [REDACTED], Executive Director, Education Evaluations International, Inc., Los Alamitos, California.
- The evaluation provided that the beneficiary completed a Bachelor of Science degree in Mathematics, Physics, and Chemistry at Chaudhary Charansignh University in India.
- Additionally, the beneficiary completed studies at the Institute of Chartered Financial Analysts of India ("ICFAI") in Hyderabad, India, where he earned a Post Graduate diploma in Business Administration.
- The evaluation concludes that the combined studies are "equivalent in level to a Master of Business Administration awarded by regionally accredited colleges and universities in the United States."

Business Administration is not listed as one of the required fields of study on the certified ETA 750. Based on the first evaluation, the petitioner cannot demonstrate that the beneficiary meets the position's requirements as set forth in the certified ETA 750. Further, we note that the beneficiary's Bachelor's degree standing alone, as a three-year program, would be insufficient to meet the required four years of college for the certified Form ETA 750 requirements.

In response to the director's NOID, the petitioner submitted a second evaluation:

Evaluation Two:

- Evaluation: also by [REDACTED] Executive Director, Education Evaluations International, Inc., Los Alamitos, California.
- The evaluation considered the beneficiary's Bachelor of Science degree in Mathematics, Physics, and Chemistry, Chaudhary Charansignh University in India.
- The evaluation further considered the beneficiary's studies at ICFAI, where he earned a Post Graduate diploma in Business Administration.
- The evaluation concludes that the beneficiary's combined studies are equivalent to a Bachelor of Science degree in Mathematical Physics.

The second evaluation concludes that the beneficiary's combined studies are equivalent to a Bachelor of Science degree in Mathematical Physics. The beneficiary's undergraduate degree was awarded for a combination of studies in Mathematics, Physics, and Chemistry. The beneficiary's graduate degree reflected studies in Business Administration. A review of the beneficiary's graduate transcript shows mainly business related coursework such as: Microeconomics, Principles of Management, Organizational Behavior, Macroeconomics, Financial Management, Financial Accounting, Project Management, Financial Services, Human Resources Management, Operations Management, as well as some information technology-related course work. The post-graduate work does not reflect any physics courses, and reflects more business related courses, than courses in the area of mathematics. Accordingly, the evaluation's determination of a degree in Mathematical Physics appears to be an attempt to conform the beneficiary's education to the field of studies required on the certified ETA 750.

The second evaluation similarly combines the beneficiary's studies. Educational programs cannot be combined to meet the Bachelor's degree standard. *See* 8 C.F.R. § 204.5(l)(3)(ii). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree.

The director found that the beneficiary's education was insufficiently similar to the required fields of study on the labor certification, and that the petitioner failed to demonstrate that the beneficiary met the requirements of the labor certification.

On appeal, the petitioner submitted an explanatory evaluation of the beneficiary's education.

Explanatory Evaluation:

- Evaluation: [REDACTED], Ph.D., President, Education Evaluations International, Inc., Los Alamitos, California.
- The explanation provides:
Since Mr. [REDACTED] is missing one year of the United States traditional four year Bachelor's degree with his three year Bachelor of Science degree, he needs to provide evidence of one additional year of postsecondary studies to have the equivalent of a U.S. Bachelor's degree. The two year postgraduate diploma that Mr. [REDACTED] completed at the Institute of Chartered Financial Analysts of India . . . requires the completion of a prior Indian bachelor's degree, which clearly makes these studies post-secondary in India and around the world. In addition,

many Indian universities accept the two year Postgraduate Diploma for admission to a Doctor of Philosophy program which, in essence, means that the universities consider it to be equivalent to an Indian master's degree.

The issue in the matter is that the first evaluation found the combined education to be in wrong field of study, and the second evaluation combined the beneficiary's studies to determine that his degree was in a field that the director determined to be insufficiently similar to be considered a related field of study. Accordingly, the petitioner failed to demonstrate that the beneficiary met the qualifications of the certified labor certification.

On appeal, the petitioner contends that 8 C.F.R. § 204.5(l)(3)(ii) requires only "that the candidate hold the foreign equivalent of the U.S. degree required by the position as listed on the certified labor certification application and does not, contrary to the denial state that the education must have been completed within a 4-year degree context It is the height of hubris to expect that every country in the world subscribes to the U.S. 4-year program."

The petitioner specifically drafted the ETA 750 to require four years of college, and a bachelor's degree.

The petitioner asserts that all relative factors must be considered individually and collectively. *Matter of Anderson*, 16 I&N Dec. 596 (BIA). The petitioner questioned that the director's decision did not reference the beneficiary's Master's degree from the University of Mumbai, and, therefore asserts that CIS did not consider all the factors of the petition.

The record of proceeding before us does not contain a copy of any Master's degree from the University of Mumbai. The beneficiary did not list on the completed Form ETA 750 that he attended the University of Mumbai, or that he obtained a Master's degree in a related field from the University of Mumbai. The petitioner did not provide a copy of any such documentation on appeal. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, none of the evaluations that the petitioner submitted considers, or addresses any program of study or Master's degree that the beneficiary completed at the University of Mumbai.

Counsel further contends that prior letters from CIS allow for the combination of degrees. In support, counsel submitted copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from Efren Hernandez III of the legacy INS Office of Adjudications (now CIS) to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). At the outset, we note that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N Dec. 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).

In his January 2003 letter, Mr. Hernandez addresses issues related to I-140 petitions for members of the professions holding advanced degrees. We note that the Hernandez letter addresses a different preference category than the instant matter before us. Mr. Hernandez states in the letter that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree. Mr. Hernandez further notes that while "five years of progressive

experience in the specialty,” in 8 C.F.R. § 204.5(k)(2), can be obtained outside the U.S., he further provides that “in this context education and experience may not be combined to satisfy the degree requirement. An actual degree is required.”

Similarly, the July 2003 Hernandez letter addresses issues related to I-140 petitions for members of the professions holding advanced degrees. “You ask if the completion of a three-year university course of study resulting in a bachelor’s degree, followed by completion of a PONSI-recognized post-graduate program may be deemed to be the equivalent of a four-year U.S. bachelor’s degree. In my opinion, such a combination may be deemed the equivalent of a four-year U.S. bachelor’s degree.” We further note that Mr. Hernandez adds a caveat regarding some of his interpretations in the letter, “While it is my personal opinion that this should be the case, this is not currently contemplated in the regulations and I cannot state that a case should currently be treated this way.”

The petitioner argues that despite the category difference, the Hernandez letters should apply to the situation at hand.

As noted above, the Hernandez letters are not binding, and they were written in reference to a different preference category. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language’s plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree. Had the petitioner presented a singular post-graduate Master’s degree in one of the relevant fields of study, such as a Master’s degree in Engineering, Computer Science, Physics, or Mathematics, this would have been accepted to meet the requirements. In the case at hand, the beneficiary’s post-graduate diploma in Business Administration would not qualify him for the position based on that degree alone. The petitioner instead seeks to rely on the combination of the beneficiary’s post-graduate work with his undergraduate studies, which fails to meet the singular degree requirement, and combined results in a field of study not listed on the ETA 750.

The petitioner further raises the issue that the denial states that the combination of work and education is not allowed to meet a Bachelor’s degree in the EB-3 standard. The petitioner contends that it did not seek to qualify based on a work equivalency. The petitioner looks to the definition of equivalent in Black’s Law Dictionary, which defines “equivalent” as “equal in value.”

The petitioner could have defined Bachelor’s or “equivalent” on the Form ETA 750 to specify what the petitioner would accept as “equivalent,” such as the equivalent in education, training, or experience, but did not do so. By the petitioner defining equivalency, the position requirements would be clear to any potential U.S. workers who might qualify for the position.

Related to this issue is the question of how the position’s actual minimum requirements were expressed to DOL, 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. To ascertain the petitioner’s expressed intent in advertising the position requirements, the AAO sent the petitioner an RFE. However, the petitioner did not respond to the RFE, and did not provide any of the requested evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

As the petitioner failed to respond to the RFE, we cannot determine whether the petitioner expressed in its recruitment that it would accept qualified U.S. workers with less than a bachelor's degree, or its equivalent based on a combination of education, or a combination of education and experience.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Further, even if we were to consider the petition under the skilled worker category,⁴ the beneficiary would not meet the requirements of the certified ETA 750. The petitioner itself requested consideration under the professional category and not as a skilled worker. Additionally, as the petitioner specifies that a bachelor's degree is required, and the certified Form ETA 750 does not specify the criteria for meeting any equivalency, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

Once again, we are cognizant of the recent holding in *Grace Korean*, which held that CIS is bound by the employer's definition of "bachelor or equivalent." In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993), at 719. In this matter, the court's reasoning cannot be followed as it is inconsistent with the actual practice at DOL. Regardless, that decision is easily distinguished because it involved a lesser classification, skilled workers as defined in section 203(b)(3)(A)(i) of the Act. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree, whereas the classification sought in this matter does.

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

⁴ 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.

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA 750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind CIS in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with the Ninth Circuit Court of Appeals.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition's beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on CIS, are inconsistent with Circuit Court decisions that are binding on CIS, and are inconsistent with the actual labor certification process performed by DOL.

The petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750 and the petition was properly denied. 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.