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U.S. Citizenship
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FILE: LIN-06-057-51681 Office: NEBRASKA SERVICE CENTER Date: **MAR 06 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 preference visa petition was denied¹ by the Director, Nebraska Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The petitioner is a computer consulting firm. It seeks to employ the beneficiary permanently in the United States as an engineering and scientific programmer (engineering programmer). As required by statute, a Form ETA 750,² Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 required on the Form ETA 750. Accordingly, the director denied the petition on February 17, 2006.

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.

On appeal, counsel asserts that evaluation reports of the beneficiary's education find that, based on the beneficiary's three-year diploma of mechanical engineering from the State Board of Technical Education and Training alone, the beneficiary has the equivalent of a U.S. bachelor of science degree with a major in mechanical engineering from a regional accredited institution of higher learning in the United States. However, the record does not contain any evidence showing that the beneficiary's three-year diploma from India is the equivalent to a U.S. bachelor's degree, or that the petitioner specified on the Form ETA 750 that the minimum academic requirements of a bachelor's degree in computer science or related fields³ might be met through a combination of lesser degrees and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. In order to determine whether the instant petition could be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on September 7, 2007 granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. The AAO received the response on November 22, 2007.

¹ The instant petition was denied on February 17, 2006 and the petitioner filed an appeal on March 15, 2006. CIS records show that while the instant petition was pending with the Administrative Appeals Office, on June 29, 2006 the petitioner filed another immigrant petition (LIN-06-202-52077) on behalf of the instant beneficiary based on a new labor certification with a priority date of June 5, 2006. The new petition was approved on December 1, 2006, and the beneficiary filed his adjustment of status application on July 25, 2007, which is still pending with the Nebraska Service Center.

After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

³ Item 14 of the Form ETA 750A requires four years of college studies and a Bachelor's degree. The employer, now the petitioner, states "See addendum to Part A" for the "Major field of Study". In the addendum to Part A, the petitioner states the major field of studies as follows: "Computer Science, Systems Analysis, Computer Information Systems, Management Information Systems, Business Administration, Computer Applications, Computer Engineering, Electrical Engineering, Electronic Engineering, Mechanical Engineering, Civil Engineering, Industrial Engineering, Physics, Statistics or Mathematics or its foreign education equivalent. Hereinafter it will be referred as "computer science or related fields."

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal and in response to the AAO's RFE.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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The Form ETA 750 was accepted on January 27, 2003 and approved on August 1, 2005. The approved labor certification in the instant case requires four-year college studies, a Bachelor's degree in computer science or related fields and one year of experience in the job offered or in related occupations such as programmer, Programmer analyst, systems analyst, software engineer, industrial engineer or consultant. Because of those requirements, the director analyzed the petition under the professional category. DOL assigned the occupational code of 030.162-018, computer programmer, to engineering and scientific programmer, the same type of occupation as 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/crosswalk/DOT?s=030.162-018+&g+Go](http://online.onetcenter.org/crosswalk/DOT?s=030.162-018+&g+Go) (accessed February 14, 2008) and its extensive description of the position and requirements for the position most analogous to programmer analyst position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to programmer analyst 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/15-1021.00#JobZone> (accessed February 14, 2008). 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

⁴ 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).

occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

Therefore, a computer programmer position may be analyzed as a professional position or as skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.⁵ In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A) of the Act by checking box e in Part 2 of the I-140 form. The box e is for either a professional or a skilled worker. In response to the AAO's RFE, counsel argues that the beneficiary is qualified for the proffered position as a skilled worker indicating that the petitioner would also request the instant petition be analyzed under the skilled worker category. Therefore, CIS will examine the petition under the professional and skilled worker categories, which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application.

For the professional category, 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is January 14, 2002. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended Software Technology Group International Ltd., in Madras, India in the field of "Oracle with Developer 2000 (Forms 4.5 and Reports 2.5)" from October 30, 1997 to October 30, 1997, culminating in the receipt of a "Certificate;" that he attended the Institution of Engineers (India) in Calcutta,

⁵ A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that IT positions are not included in this section.

India in the field of "Mechanical Engineering" from January 1987 to September 1990, culminating in the receipt of a "Certificate of Passing Sections A and B;" and that he attended State Board of Technical Education and Training in Madras, India in the field of "Mechanical Engineering" from June 1983 to April 1986, culminating in the receipt of "Diploma." He provides no further information concerning his educational background on this form, which is signed by the beneficiary under penalty of perjury that the information was true and correct.

In corroboration of the beneficiary's educational background, the petitioner provided copies of the beneficiary's Secondary School Leaving Certificate and Higher Secondary Course Certificate issued under the authority of the Government of Tamil Nadu in 1980 and 1982 respectively, Diploma of Mechanical Engineering and transcripts from the State Board of Technical Education and Training in Madras, India, Certificate of passing Sections A and B of the Institution Examinations and Result of Examinations from the Institution of Engineers (India) (IEI), Certificate of Completion of a course in Oracle with Devp.2000(Forms 4.5 & Reports2.5) on October 30, 1997 issued by Software Technology Group International Ltd., and evaluation reports from International Education Evaluations, Inc. (IEE), Career Consulting International (CCI), and Marquess Educational Consultants (MEC).

The beneficiary possesses a foreign three-year diploma, certificate of passing sections A and B of the IEI examination and a certificate of one-day course from a private organization. Thus, the first issue is whether the beneficiary's single three-year diploma is a foreign degree equivalent to a U.S. baccalaureate degree. In determining whether the beneficiary possessed a U.S. bachelor's degree in computer science or related fields, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, <http://www.aacrao.org>, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE provides a great deal of information about the educational system in India. It confirms that a diploma in engineering is awarded upon completion of three years of tertiary study beyond the Secondary School Certificate (or equivalent) and represents attainment of a level of education comparable to up to one year of university study in the United States. It does not suggest that a three-year diploma in engineering from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

On appeal, the petitioner asserts that the beneficiary's three-year diploma alone, without combination of degrees or work experience, is equivalent to a U.S. bachelor's degree according to private credential evaluations. The evaluation report from IEE indicates that passing of Sections A & B of the IEI examination compares to completing the U.S.A. major in mechanical engineering. The evaluation report from CCI states that Diploma of Mechanical Engineering from the State Board of Technical Education and Training alone, without a combination of degrees, without a combination of work experience and education, is a single source degree equivalent of a bachelor of science with major in mechanical engineering from a regional accredited

institution of higher education in the United States. The MEC's evaluation also evaluates the beneficiary's Diploma of Mechanical Engineering from the State Board of Technical Education and Training as equivalent to a BS degree awarded in the United States. However, the IEI is not an academic institution that can confer an actual degree with an official college or university record and a three-year diploma from India cannot be deemed a foreign equivalent degree to a U.S. four-year bachelor's degree. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Secondly, in response to the AAO's RFE, counsel asserts that the record contains credible initial evidence to establish that the beneficiary's Certificate of passing Sections A and B of the IEI Examination alone is substantively the foreign educational equivalent of a bachelor of science degree with a major in mechanical engineering from a regionally accredited institution of higher education in the United States. While EDGE does not provide evaluation information about the IEI and its examination, the IEI website indicates that it is the pioneer body to introduce non-formal engineering education program, successful completion of which is recognized as equivalent to a degree in engineering by the Government of India, the Union Public Service Commission, State Governments and public/ private sector organizations. In certain circumstances, the IEI membership upon passing its relevant examination, like the Institute of Chartered Accountant of India (ICAI), may represent attainment of a level of education comparable to a bachelor's degree in the United States. However, the professional regulation contains a degree requirement in the form of an official college or university record. The IEI is not an academic institution that can confer an actual degree with an official college or university record.

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. 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. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's ground denying the petition under professional category must be affirmed.

However, as previously noted, the AAO will also discuss whether the beneficiary would meet the educational requirements set forth on the Form ETA 750 and thus be qualified for the proffered position as if the petitioner had requested the proffered position be analyzed under the skilled worker category.

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 certified Form ETA 750 requires a bachelor's degree in computer science or related fields as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary's education includes a three-year diploma of mechanical engineering and a certificate of passing sections A and B of the IEI examination.

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, and any other requirements of the individual labor certification.”

The beneficiary possesses a foreign three-year diploma and a certificate of passing sections A and B of the IEI examination. Thus, the issues are whether that diploma is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary’s certificate of passing the IEI examination in addition to that diploma. We must also consider whether the beneficiary meets the job requirements of the proffered position 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 Act 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). *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 (now CIS), 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 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.

The key to determining the job qualifications specified in the labor certification 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.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification, as filled in by the petitioner, reflects the following requirements:

- | | | |
|-----|-------------------------|------------------------------------|
| 14. | EDUCATION | |
| | Grade School | |
| | High School | |
| | College | 4 [years] |
| | College Degree Required | Bachelor’s |
| | Major Field of Study | Computer Science or related fields |

The applicant must also have one (1) year of employment experience in the job offered or in a related occupation of programmer, programmer analyst, systems analyst, software engineering, industrial engineer or consultant. Item 15 does not reflect any special requirements.

Moreover, 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).

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

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

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's

qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

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

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

The regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in the skilled worker classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." As noted previously, the certified Form ETA 750 requires a Bachelor's degree and one year of experience in the job offered or related profession. In response to the AAO's RFE, counsel differs foreign equivalent from foreign equivalent degree and argues that the labor certification in the instant case requires a bachelor's degree or foreign equivalent instead of foreign equivalent degree, and therefore, the beneficiary should be qualified for the minimum education requirement without a single foreign degree.

Furthermore, in response to the AAO's RFE counsel submits recruitment efforts conducted related to the relevant labor certification, including the internal posting notice, newspaper advertisements and internet job posting. The posting notice posted from December 30, 2002 to January 15, 2003 indicated that the employer requires a bachelor's degree or its foreign educational equivalent plus one year of experience; both the internet posting and newspaper advertisements were for multiple positions which stated as follows: "For positions requiring degree, we also accept foreign education equivalent of the degree, or the degree equivalent in education & experience." These recruitment documents clearly stated that the minimum educational requirements of a bachelor's degree might be met through a combination of lesser degrees, diplomas, or certificates. The AAO finds that U.S. workers were on notice that a combination of lesser degrees, diplomas

or certificates plus one year of experience would meet the degree requirement. However, the AAO also notes that neither the Form ETA 750 nor any recruitment efforts stated that a combination of education and quantifiable amount of work experience would meet the degree requirement. Therefore, although the minimum education requirement can be met through a combination of less degrees, diplomas, certificates, or foreign educational equivalent, however, cannot be met through a combination of education and experience.

The record contains an experience letter from S [REDACTED] the president of [REDACTED] in New Jersey verifying that the beneficiary worked as a consultant on a full time basis with [REDACTED] from May 2000 to February 2002. The experience letter from the beneficiary's former employers demonstrates that the beneficiary possessed the requisite one years of experience in one of the related occupation required prior to the priority date in the instant case. Therefore, the beneficiary meets the experience requirement for the proffered position set forth on the Form ETA 750A.

The record shows that the beneficiary possesses a three-year diploma of mechanical engineering from the State Board of Technical Education and Training in Madras, India. As previously discussed, EDGE confirms that a diploma in engineering is awarded upon completion of three years of tertiary study beyond the Secondary School Certificate (or equivalent) and represents attainment of a level of education comparable to up to one year of university study in the United States. The beneficiary also possesses a certificate of passing sections A and B of the IEI examinations. AACRAO recognizes that the membership of a professional association in India, such as the Institute of Chartered Accountant of India (ICAI), upon passing that organization's final examination represents attainment of a level of education comparable to a bachelor's degree in the United States. This office accessed IEI website at <http://www.ieindia.org> and finds that successful completion of the IEI's engineering education program is recognized as equivalent to a degree in engineering by the Government of India, the Union Public Service Commission, State Governments and public/ private sector organizations and only can a candidate who is found eligible for enrollment as a member sit for the Institutions Examination. The record contains evidence showing that the beneficiary passed Sections A and B of the IEI examination in 1987 and 1990 respectively, therefore, the beneficiary should be reasonably assumed that he held the membership with IEI and passed both sections A and B of the institution examination. The beneficiary attained a level of education comparable to a bachelor's degree in the United States and thus, met the minimum education requirement as set forth by the Form ETA 750. Therefore, the beneficiary's qualifications are approved under the skilled worker category and the portion of the director's decision with respect to the beneficiary's qualifications is withdrawn.

However, beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. See 8 CFR § 204.5(d). The priority date in this case is January 27, 2003. The proffered wage as stated on the Form ETA 750 is \$57,500 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) allows the director accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage for the petitioner with more than 100 workers. The petitioner submitted a letter from [REDACTED], the vice president of the petitioner stating that the petitioner employs 200 employees and has annual revenues of approximately \$20 million to establish its ability to pay the proffered wage in the instant case. However, the statement is from a vice president of the petitioner. It is not clear whether the vice president is in charge of the petitioner's finances and the letter is considered as a statement from a financial officer of the petitioner.

In addition, given the record as a whole and the petitioner's history of filing petitions, we also find that CIS need not exercise its discretion to accept the letter from [REDACTED]. CIS records indicate that the petitioner has filed over 96 Form I-140 petitions with service centers. In addition, the petitioner has also filed 211 Form I-129 nonimmigrant petitions. Consequently, CIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the I-140 petitions filed in 2003 (the year of the priority date in the instant case), 2004, 2005, and 2006, the petitioner would be need to establish that it has the ability to pay at least nine proffered wages in 2003, eleven in 2004, seven in 2005 and fifteen in 2006. Given that the number of immigrant and nonimmigrant petitions reflects an increase of 200 percent of the petitioner's workforce, we cannot rely on a letter from [REDACTED] referencing the ability to pay a single unnamed beneficiary.

The record of proceeding does not contain any regulatory-prescribed evidence, such as tax returns, annual reports, audited financial statements or W-2 forms, 1099 forms or any other documentary evidence showing the beneficiary received compensation from the petitioner during the relevant years from 2003 and the present.

Therefore, the petitioner had not established that it had the ability to pay all the beneficiaries of the approved and pending petitions, including the instant petition, the proffered wage for the years 2003 through the present through an examination of wages paid to the beneficiary, or its net income or its net current assets.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request any additional evidence to consider whether the petitioner had the ability to pay all the beneficiaries in 2003 and continues to the present. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The petition is remanded to the director for further action consistent with this decision.