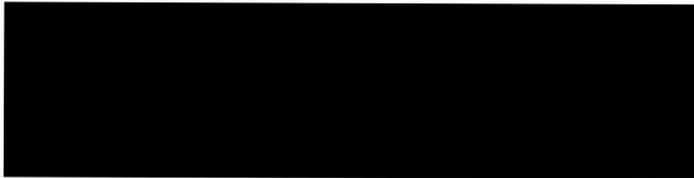




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FILE: WAC-05-109-50258 Office: CALIFORNIA SERVICE CENTER Date: MAR 06 2008

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:
[Redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

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

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

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

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

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

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

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

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on January 29, 2001.² The proffered wage as stated on the Form ETA 750 is \$65,000 per year based on a 40 hour work week. The Form ETA 750 was certified on February 16, 2001, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 9, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1999; gross annual income: \$15.3 million; net annual income: \$2.3 million; and current number of employees: 225.

On July 21, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence of its ability to pay the proffered wage from 2001 onward in the form of federal tax returns, audited financial statements, or annual reports;³ to provide evidence that the petitioner would employ the beneficiary to fill a specific vacancy, including the contract between the employer and the prospective employee, and to provide

² We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was formerly permitted by the DOL. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. See 56 Fed. Reg. 54925, 54930 (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The *Kooritzky* decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the *Kooritzky* decision, DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to Citizenship and Immigration Services ("CIS") based on a Memorandum of Understanding, which was recently rescinded. See 72 Fed. Reg. 27904 (May 17, 2007) (to be codified at 20 C.F.R. § 656). DOL's final rule becomes effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition.

³ The petitioner provided a letter stating that it employed over 100 individuals and that therefore it has the ability to pay the proffered wage. We find the letter by itself insufficient to demonstrate the petitioner's ability to pay from the time of the priority date to the present as will be addressed in more detail later in the decision. As the petition was filed in 2001 after the petitioner's 1999 formation, it is not clear that the petitioner employed over 100 individuals in 2001, and the letter would therefore be insufficient to document the petitioner's ability to pay from the time of the priority date until the beneficiary obtains permanent residence. Further, CIS records reflect that the petitioner had filed for a high number of workers since its formation. The petitioner would need to demonstrate that it could pay for all sponsored beneficiaries. The record does not establish that the petitioner could demonstrate this ability in 2001, 2002, or 2003.

evidence where the beneficiary will work. Further, as Form ETA 750 listed that the petitioner employed the beneficiary, the RFE requested that the petitioner provide copies of the beneficiary's Forms W-2 for the years 2001 through 2004. The RFE also requested that the petitioner provide an evaluation of the beneficiary's educational background to determine its U.S. equivalency; and to provide evidence that the beneficiary had the skills as required on the certified Form ETA 750, including Java, EJB, and Java Script. The petitioner responded.

On November 30, 2005, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification as the petitioner did not establish that the beneficiary had a four-year Bachelor's degree, which was listed as a requirement on the certified labor certification. The petitioner appealed to the AAO.

On September 10, 2007, the AAO director issued an RFE, which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner responded.

On appeal, counsel provides that CIS was in error, as the beneficiary had an equivalent bachelor's degree and over seven years of experience. Further, counsel provided that some countries issue three-year bachelor's degrees, and that many leading schools and universities recognize such degrees.

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 six months of experience. DOL assigned the occupational code of 030.162-014, "Programmer Analyst," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1032.00> (accessed July 14, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed December 12, 2006).⁴ 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. Because of those requirements and DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

⁴ 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 regulation at 8 C.F.R. § 204.5(I)(3)(ii)(C) states the following:

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

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

The beneficiary possesses a foreign three-year bachelor's degree, as well as training certificates and prior work experience. Thus, the issues are whether the beneficiary's three year foreign degree is equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's work experience in addition to that 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).⁵ *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

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

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 *Madamy*, 696 F.2d at 1008, the Ninth circuit stated:

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

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

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

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

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

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

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (CIS) “does

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

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

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

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

On the Form ETA 750A, the “job offer” position description for a software consultant provides:

Analyze business and technical problems. Gather data from clients and prepare software requirements and specifications. Devise solutions based on information technology. Prepare flow charts. Design and develop commercial client/server applications using Java, EJB, Javascripts. Perform life cycle development. Participate in system and database design meetings.

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

Education:	Grade School: 8 years; High School: 4 years; College: 4 years; College degree: B.S. or equiv. degree;
Major Field Study:	Computer Science, Engineering, Math, or equiv.
Experience:	6 months in the job offered, programmer analyst, or 6 months in the related occupation of GUI Programmer or equiv.

Other special requirements: Experience must comprise designing and developing software using Java, EJB, and JavaScripts. Relocation Possible.

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

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: University of Bombay, India; Field of Study: Science; from July 1986 to July 1989, for which he received a Bachelor's degree.

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

Evaluation One:

- Evaluation: Universal Evaluations and Consulting, Inc., Fremont, CA.
- The evaluation considered the beneficiary's Bachelor of Science degree, from the University of Bombay, completed in 1989. Admission to the University of Bombay is based on graduation from high school.
- The evaluation also considered the beneficiary's 7.6 years of progressively responsible work experience, and training in Computer Information Systems.
- The evaluator determined that based on the beneficiary's education completed at the University of Bombay, the number of years of education, the nature of his course work, and over 7.6 years of work experience and training in the area of Computer Information Systems, using a formula of three years of experience is equal to one year of education, that the beneficiary would have the equivalent of a Bachelor's degree in Computer Information Systems from a regionally accredited college or university in the United States.

As the evaluation relied on a combination of education and work experience, the petitioner did not demonstrate that the beneficiary had the required four years of education leading to a bachelor's degree and the director denied the petition.

On appeal, in response to the AAO's RFE, the petitioner provided the following evaluations, which conclude that the beneficiary has a Bachelor of Science degree based on the one individual program of study.

Evaluation Two:

- Evaluation: Career Consulting International, Sunrise, Florida.
- The evaluation provides that the beneficiary has the equivalent of a Bachelor of Science degree in Chemistry from a regionally accredited institution of higher learning in the U.S. based on his degree from the University of Bombay, India.
- In making this determination, the evaluator considers that the beneficiary had 120 "contact hours" using the "Carnegie Unit," similar to a semester hour credit.
- The evaluator cites to UNESCO (the United Nations Education Scientific and Cultural Organization) and that UNESCO recommends that 3 and 4 year degrees should be treated as the equivalent of a bachelor's degree by all UNESCO members and that the U.S., England, and India are all UNESCO members.⁶
- The evaluator cites to a number of U.S., and U.K. universities that issue bachelor's degrees based on three-year programs.

Evaluation Three:

- Evaluation: Marquess Educational Consultants, London, England.
- The evaluation concludes that the beneficiary's education is the equivalent of a U.S. Bachelor's degree.
- The evaluator quotes the Nebraska Service Center in response to an AILA liaison visit on April 19, 2006;⁷

⁶ We note that the record of proceeding does not include the UNESCO report. Further, UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed January 16, 2007).

⁷ While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Similarly, AILA teleconference notes or information from liaison visits are not binding.

We are aware that some countries (i.e., many European countries) have educational systems that have the equivalent of 13 years education prior to university, and that education plus a university degree is the equivalent of a Bachelor's degree in the U.S. However, many other countries' educational systems have only 12 years of education prior to university, and then only three years of university coursework. With respect to such a degree, we need evidence that the beneficiary has the required degree... a simple credential evaluation stating that the degree is equivalent may not be sufficient. It should be supported by a detailed explanation of how that conclusion was made and the transcripts of the beneficiary's schooling to support the explanation and to document where the evaluator found coursework equating a four-year degree.

- The evaluator provides that in the Nebraska Service Center's response, it "acknowledges that a degree issued in a 12+3 educational system, such as that pertaining in India, may be accepted as the equivalent of a United States four year bachelor's degree provided coursework is demonstrated that equates to a four year degree." Further, the evaluator provides that, "in this expert opinion we will present a detailed explanation referencing comprehensive evidence that will conclude that on the basis of the comparison of coursework the Indian 3 year bachelor's degree is equivalent to the United States 4 year bachelor's degree."
- The evaluator reaches his determination based on the number of "contact hours" completed during the three-year program.
- Based on the contact hours completed, the evaluator concludes that the beneficiary's degree would be equivalent to 120 hours of study when converted to the U.S. system. The evaluator contends that the Indian bachelor's degree would be accepted by U.S. universities for entry into their master's degree programs.
- The evaluator concludes that there is "substantial functional and academic equivalency between [the beneficiary's degree] and a U.S. four-year baccalaureate, and thus it is our opinion that they should be regarded as equivalent."
- The evaluator, therefore, concludes that the beneficiary's three year degree is the equivalent of a four-year U.S. bachelor's degree in Chemistry.

Both the evaluations that were submitted on appeal rely solely on the beneficiary's education individually, and are not combined with other programs of study, or work experience. Even if we were to accept the theory of the second and third evaluations that a three-year bachelor's degree is equivalent to a four-year U.S. bachelor's degree, which we do not, the beneficiary's program of study was in Chemistry. Chemistry is not an area of study listed as an accepted field of study on Form ETA 750. The petitioner listed only that Computer Science, Engineering, Math, or the equivalent thereof were accepted fields. Chemistry is not an accepted field. Therefore, the beneficiary's education would not meet the qualifications of the certified labor certification.

Further, in determining whether the beneficiary's diploma from the University of Bombay, India, is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the

registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

Form ETA 750B lists that the beneficiary has a bachelor’s degree in Science from the University of Bombay, India. The documentation in the record reflects that the degree is a Bachelor of Science degree. EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science degree awarded in India represents the attainment of a level of education comparable to two or three years of university study in the United States. Based on information in the record, the beneficiary has completed a three-year course of study and was awarded a Bachelor of Science degree, which would appear to be equivalent to three years of study towards a bachelor’s degree in the U.S. We note that the degree lists the field of study as Chemistry.

Additionally, we note that the labor certification specifically designates that four years of education leading to a Bachelor’s degree is required. The petitioner did not list that the beneficiary could have three years, or three years of education in combination with work, training, or unrelated degrees to meet the standard of bachelor’s degree.

Further, in response to the AAO’s RFE, counsel provides that “the petitioner and Department of Labor had made it clear that they will consider the Bachelor’s Degree from Foreign country [sic] as long as the person has graduated with bachelor’s Degree in Computer Science or Engineering or Math or equivalent.”

The record demonstrates that the beneficiary completed a foreign bachelor’s degree in Chemistry. Therefore, based on counsel’s statement, the beneficiary does not qualify for the position. A degree in Chemistry would not be “equivalent” or related, or closely related to a degree in Computer Science, Engineering, or Math.

Counsel further provides that:

We called the Department of Labor for an explanation with the interpretation of the term certified, and Officer Jenny at the Backlog Center in Chicago Office, clearly stated that they have certified the application with the consideration of the requirement of the Petitioner, which is Bachelor’s degree or equivalent that is Bachelor’s Degree in foreign country. Further, Officer Jenny stated that the case is certified with that in mind what petitioner requirement are [sic].

The petitioner initially filed the Form ETA 750 on behalf of another beneficiary. The initial beneficiary completed a four-year program of study resulting in a Bachelor of Engineering degree in Computer Science. This is the degree that the petitioner would have considered, and what the petitioner “had in mind” when it submitted the Form ETA 750 for filing. EDGE provides that a Bachelor of Engineering degree awarded in India represents the attainment of a level of education comparable to four years of university study in the United States. The initial beneficiary qualified for the position based on his education alone. These are the qualifications that the petitioner had in mind when DOL examined the labor certification.

Counsel further cites to the evaluations, that the Indian three-year degree systems was based on the British system, and that some U.S. universities will consider holders of such degrees for their master’s degree programs.

The British system provides an additional year of education, the “A” levels, following twelve years of education, in contrast to the Indian system of only twelve years of education. Related to acceptance into U.S. master’s degree programs, the information provided does not distinguish whether the schools would admit

these students fully to immediately begin Master's level studies, or whether the schools would admit the three-year degree holders provisionally with the need to complete another year of studies prior to beginning the Master's level studies.

We are not persuaded that the beneficiary's three-year program of study would be sufficient. Further, the present beneficiary's education in Chemistry does not meet the stated requirements of the labor certification. As the present beneficiary was "substituted" into the labor certification, DOL did not review or certify the beneficiary's Form ETA 750B, and would not have considered his qualifications in certifying the labor certification.

In the petitioner's response to the AAO's RFE, counsel seeks to rely solely on the beneficiary's education to contend that the beneficiary meets the educational requirements of the labor certification. Based on the evaluations provided on appeal, which state that the beneficiary has the equivalent of a U.S. "Bachelor's degree in Chemistry," the beneficiary would not meet the qualifications of the certified labor certification as the beneficiary's field of study does not meet one of the required fields listed on the labor certification of Computer Science, Engineering, or Math.

The petitioner also submitted a copy of the recruitment ads underlying the labor certification. The ads are generic recruiting for a number of positions: "multiple positions for Software Developers, Computer Programmers, Software Engineers, Systems Analysts, Quality Assurance Engineers, Programmer Analyst, GUI Programmers, Technical Recruiter." The ads do not list the specific position requirements. The petitioner did not include the recruitment chart, so that we are unable to determine whether the petitioner considered candidates with a combination of education and experience. Additionally, as the ads encompass recruitment for multiple positions, some of the positions might require degrees, while others may not. Conceivably, an applicant without a degree might be considered for one position, such as a Technical Recruiter, but not for other positions, such as a Software Engineer, however, we cannot determine this from the documentation that the petitioner submitted. The internal job posting provides that the candidates should have a "Bachelor's or equivalent degree in Computer Science, Engineering, or Math or equivalent." The posting does not specifically contemplate any alternate combinations of education, training, and/or experience. Therefore, we would not conclude that the petitioner's intent as explicitly expressed to DOL during the LC process concerning the actual minimum requirements of the proffered position would include equivalency alternatives to a four-year bachelor's degree.

The petitioner specifically drafted the labor certification to require four-years of education to obtain a Bachelor's degree. The petitioner did not list that the beneficiary, or any qualified U.S. worker could meet this standard through an alternate combination of education, training and experience. To read Form ETA 750 any other way at this juncture would be unfair to candidates without degrees, but with an alternate combination of education and experience that might have qualified.

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. 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.

If we considered the logic of *Grace Korean* as the petitioner suggests should be done, the petitioner specifically drafted the petition with the initial labor certification beneficiary in mind, who had a four-year Bachelor's degree in Engineering, which would be the equivalent of a U.S. Bachelor's 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.*

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 professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition 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 *Snappnames* decisions are not binding on us, the reasoning in those cases runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL.

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, as the petitioner argues should be done based on the logic of *Grace Korean*, the beneficiary would not meet the requirements of the certified ETA 750. 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(1)(2). **Additionally, the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(B) provides that if the petition is for a skilled worker, “the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification . . . The minimum requirements for this classification are at least two years of training or experience.”**

As the petitioner specifies that a bachelor’s degree is required, and the certified Form ETA 750 does not allow for meeting the degree requirement through any equivalency, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750. The petitioner contends that “Bachelor’s degree or equivalent” is sufficient to allow consideration as a skilled worker based on equivalency. We do not agree. In looking at the totality of what the petitioner initially considered, a worker with a four-year degree, in examining the ads, which were vague and covered multiple positions, we cannot determine that the petitioner considered all candidates with or without degrees for the position offered.

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

First, in determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship & Immigration Services (“CIS”) will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. In the case at hand, on Form ETA 750, signed by the beneficiary and dated February 11, 2005, the beneficiary listed that he was employed with the petitioner from May 2003 to the present. The petitioner did provide the beneficiary’s 2003 W-2 Form, which exhibited payment in the amount of \$38,827.63, and 2004 W-2 Form wages in the amount of \$103,593.84.

While the petitioner could demonstrate its ability to pay the proffered wage in 2004 based on the wages paid to the beneficiary, the petitioner would need to show that it could pay the full proffered wage in 2001, 2002, and the difference between the wages paid to the beneficiary and the proffered wage in 2003.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner’s federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner’s ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*,

632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In the present matter, the petitioner did not submit its tax returns, but instead provided a letter from the petitioner's President, dated September 7, 2005, which provided that the petitioner was founded in 1999, and "currently has 275 employees and gross annual revenue of \$20 Million."

The regulation at 8 C.F.R. § 204.5(g)(2) does provide that:

In a case where the prospective 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. In appropriate cases, additional evidence . . . may be . . . requested by [CIS].

The petitioner was formed in 1999. The labor certification was filed in 2001. The petitioner would need to demonstrate its ability to pay from the 2001 priority date onward. From the record, it is not clear that the petitioner employed over 100 individuals in 2001, or what the petitioner's finances were in 2001. Therefore, additional documentation beyond a simple letter statement would be required. Additionally, the statement was not from the petitioner's financial officer as required by 8 C.F.R. § 204.5(g)(2), but instead from the petitioner's President. Further, CIS records reflect that as of February 5, 2008 the petitioner has filed for 1,169 workers since its formation.⁸ The petitioner would need to demonstrate that it could pay for all sponsored beneficiaries. The record does not establish that the petitioner could demonstrate this ability in 2001, 2002, or 2003.

Accordingly, the petitioner has failed to establish its ability to pay the proffered wage, and the petition should have been denied on this basis as well.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

⁸ The petitions are either nonimmigrant H-1B petitions, or I-140 petitions filed since the year 1999. Also, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. See 20 C.F.R. § 655.715.