



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

B6



FILE: LIN-06-028-51696 Office: NEBRASKA SERVICE CENTER Date: **MAR 20 2008**

IN RE: Petitioner:
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner has a business related to marketing, E-Commerce, and associated activities, 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 30, 2003. The proffered wage as stated on the Form ETA 750 is \$69,009.93 per year based on a 40 hour work week. The Form ETA 750 was certified on October 13, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on November 4, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1996; gross annual income: \$34,750,000; net annual income: not listed; and current number of employees: 41.

On January 3, 2006, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not establish that the beneficiary had a four-year Bachelor's degree, which was listed as a requirement on the certified labor certification.

The petitioner filed a Motion to Reopen and submitted a second educational evaluation seeking to demonstrate that the beneficiary met the requirements of the certified labor certification.² The director determined that the petitioner did not overcome the basis for the denial and affirmed his prior decision. The petitioner appealed to the AAO.

On August 23, 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 Citizenship & Immigration Services ("CIS") was in error, as the beneficiary had an equivalent bachelor's degree and as exhibited by the evaluation that the petitioner submitted. Further, counsel provides that judicial precedent would allow for the combination of degrees as the equivalent of a bachelor's degree.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

The proffered position requires a four-year bachelor's degree and one year of experience.³ Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled

² The petitioner obtained different legal representation for the filing of its Motion to Reopen and subsequent appeal. Prior counsel represented the petitioner with respect to filing Form ETA 750, and Form I-140.

³ The petitioner initially had listed that the position required five years of experience, and that the position title was as a "Senior Programmer Analyst." In correspondence with DOL, DOL agreed to allow the petitioner to change the job title to just "Programmer Analyst," and reduce the amount of experience required to one year. As a position requiring a four-year bachelor's degree and five years of experience, the position would more properly be analyzed as a professional position.

worker category.⁴ 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).⁵ Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

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

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

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

The beneficiary possesses a foreign three-year bachelor's degree, as well as a diploma 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 and/or

⁴ Section 101(a)(32) of the Act provides: "The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." This section does not include information technology or computer related positions in the category of professionals, or professional positions.

⁵ 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.

additional diploma as well as his three-year 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).⁶ *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

⁶ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

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

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

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

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

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

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

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

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

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

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

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

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

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

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in

the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services ("CIS") properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor's degree.

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

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

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

Design, develop and lead development team to deliver leading-edge Internet applications for employer/customers. Provide leadership in technical design, team development and project management. Prepare system specifications and requirements to satisfy system needs. Work with key users to define and plan solutions to business problems utilizing computer based systems. Design system that meets department approval standards and procedures. Evaluate and modify existing applications to accommodate changes in system requirements. Provide technical guidance to development team. Prepare test plans and conduct system testing/training. Utilize PowerBuilder, SQL Server, Visual Basic, Active X, COM, DCOM, Java, JavaScript, IIS 4.0, ADO 2.0, Windows NT, ASP.Net, C# and others to perform job duties.

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: Bachelor's degree; |
| Major Field Study: | Computer Science or related field |
| Experience: | 1 year in the job offered, programmer analyst, or 1 year in the related occupation ⁷ of Analyst/Programmer, Software Consultant, Software |

⁷ The petitioner initially listed that the position required five years in the job offered or the related occupation, however, the petitioner reduced the amount of experience required with DOL's approval prior to certification.

Engineer, or related position that included the use of PowerBuilder or SQL Server.

Other special requirements: none listed.

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

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) University of Mumbai, Mumbai, India; Field of Study: Statistics; from June 1987 to April 1991, for which he received a Bachelor's degree; and (2) National Institute of Information Technology, New Delhi, India; Field of Study: Information Technology; from October 1991 to December 1992, for which he received a Diploma in Systems Management.

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: Cambridge Education Consultants, Inc., Framington, MI.
- The evaluation considered the beneficiary's Bachelor of Science degree, from the University of Mumbai, completed in 1996 after three years of full-time study. Admission to the University of Mumbai is based on completion of the secondary/intermediate examination.
- The evaluation also considered the beneficiary's post-graduate Diploma in Systems Management from the National Institute of Information Technology ("NIIT") in 1997 based on one additional year of study. The evaluator provided that this would be the equivalent of one year of university study in Computer Science from an accredited school in the U.S.
- The evaluator determined that based on the beneficiary's educational programs combined, he completed the equivalent of a Bachelor's degree in Computer Science from an accredited institution of higher education in the U.S.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor's degree, and the beneficiary completed only a three-year degree and an additional diploma at a separate school. Based on Form ETA 750, the petitioner did not demonstrate that the beneficiary met the requirements of the position. As the evaluation relied on a combination of education, the petitioner did not demonstrate that the beneficiary had the required four years of education leading to a bachelor's degree.

The petitioner filed a Motion to Reopen and provided a second evaluation.

Evaluation Two:

- Evaluation: The Trustforte Corporation, New York, New York.
- The evaluation provides that the beneficiary has the equivalent of a Bachelor of Science degree in Computer Science and Statistics from a regionally accredited institution of higher learning in the U.S. based on his degree from the University of Bombay, India, and his program of study at NIIT.
- In making this determination, the evaluator did a course-by-course evaluation and provided that the beneficiary completed 128 credits and attained a grade point average of 2.166.
- The evaluator determined that the beneficiary's studies combined from the University of Bombay, and NIIT were the equivalent of a Bachelor's degree.

The second evaluation similarly relied on the beneficiary's combined studies from two different schools, and failed to show that the beneficiary had a four-year bachelor's degree as listed on Form ETA 750. The petitioner did not draft Form ETA 750 to include alternative combinations through which the beneficiary could demonstrate that he was qualified for the position.

The director considered the new evidence and determined that the petitioner had failed to demonstrate that the beneficiary met the minimum requirements 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 Mumbai, 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 Statistics.

Regarding the beneficiary's second program of study at NIIT, the record only contains a document that states that the beneficiary had "registered for the course title Diploma in Systems Management with NIIT." The petitioner did not submit any documentation that he received a degree or a diploma based on these studies.

Based on a review of the All India Council for Technical Education <http://www.nba-aicte.ernet.in/nmna.htm> site, accessed on February 5, 2008, the National Institute of Information Technology ("NIIT"), in New Delhi, India, is not an accredited institution within the state of Delhi, India. Therefore, a "Diploma in Systems Management" from NIIT would not represent attainment of a degree based on which the beneficiary could

qualify for the position. As the school is not accredited, there are insufficient controls over the course work to determine the academic merit, if any, of its U.S. equivalency.

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 other degrees, related or unrelated, to meet the standard of bachelor's degree.

On appeal, counsel provides that the director initially rejected the first educational evaluation concluding that, "neither the evaluator nor the petitioner has submitted evidence corroborating the evaluation's assertion regarding the beneficiary's educational credentials." Counsel further provides that the director "makes no effort at all to discredit the new educational evaluation, which is fully supported by the evidence of the beneficiary's qualifications . . . the NSC Director appears to believe that if he ignores the educational credential evaluation, it will go away."

As noted above, the second evaluation combines the beneficiary's educational programs, which is not listed as an acceptable alternative based on the certified Form ETA 750. Additionally, also as noted above, the beneficiary's program of study at NIIT was at an unaccredited institution in India, so that we would dispute a course-by-course determination could be made based on studies at an institution where there are no controls over content, or quality.

Counsel provides that the director's decision "relied heavily upon *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977) for the proposition that a degree program which only requires 3 years of university level study is not the equivalent of a U.S. bachelor's degree." Counsel asserts, however, that *Shah* did not consider the relevant issue of the case at hand of whether foreign academic programs combined could be the equivalent of a U.S. bachelor's degree.

Counsel cites to *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988) and asserts that *Sea* would allow for finding a bachelor's degree through a combination of education or otherwise. In *Sea* the Commissioner determined that the beneficiary's education, experience and professional attainments would be equivalent to a bachelor's degree in electrical engineering, and that the beneficiary would therefore qualify as a member of the professions for a nonimmigrant petition.

Counsel asserts that *Sea* is directly relevant as "the issue in *Sea* was precisely the same as in *Shah*, which is whether the beneficiary qualified as a member of the professions base upon his possession of knowledge or learning, not merely skill, of an advanced type."

The director noted in his decision that the *Sea* case applied to the nonimmigrant category. *Matter of Sea, Inc.* relates to meeting the professional standard for a nonimmigrant petition, and would be relevant to whether education and experience could be combined to obtain nonimmigrant H-1B approval. The rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5).

Counsel continues that the director failed to address why the standard would be different for a nonimmigrant petition than it would be for an immigrant petition. The AAO must apply the regulations as written. Nothing contained in the regulations related to the professional category parallels the nonimmigrant provision at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) that would allow us to interpret this matter differently. A regulation change

would be required so that the nonimmigrant provision and the immigrant professional category are parallel. Such a change is beyond the scope of, and not within the jurisdiction of, the AAO.

The specific difference relates to how the form was drafted. Based on how the petitioner drafted the Form ETA 750, the beneficiary was required to have a four-year bachelor's degree. The petitioner did not set forth any alternative requirements or equivalents to meet the degree, such as to include a combination of education and experience.

The petitioner cites to a number of other cases, which counsel asserts supports the combination of education leading to the equivalent of a bachelor's degree. The cases may be briefly summarized as follows:

In *Matter of Bienkowski*, 12 I&N Dec. 17 (D.D. 1966), the District Director determined that the individual was a professional economist and qualified for an immigrant visa based on his extensive employment experience, and high level of occupational attainment, despite his lack of a degree in the field of economics, although he had completed coursework at several universities.

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

In *Matter of Sun*, 12 I&N Dec. 535 (D.D. 1966), the district director determined that the position of a hotel manager is a profession based on the complexity of the duties involved, not the existence of a degree.

In *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969), the Regional Commissioner determined that the beneficiary would qualify as a professional librarian under Section 101(a)(32) of the Act based on a combination of her education, three and a half years, and her experience, over twelve years. Part of the decision was based on "it is recognized that in a few areas of the professions, it is not always possible to obtain the usual formal education. In this case, it has been pointed out that in Israel, at the time the subject resided there, there were no school offering degrees in library science."

In *Matter of Devnani*, 11 I&N Dec. 800 (Acting D.D. 1966), the Acting District Director determined that the beneficiary's high level of education, a master's degree from a U.S. university, combined with the beneficiary's "extensive specialized experience in the chemical industry qualifies him for professional status as an organic chemist." The beneficiary completed a bachelor of science in chemistry in India, determined to be the equivalent of two years of U.S. studies, as well as a master of business administration completed at a U.S. university. He additionally had over ten years of experience in the chemical industry.

We note that based on the time period for the cases cited that the preference categories, and immigration framework was different. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job related basis: the third and sixth preferences under 8 U.S.C.A. § 1153(a) and (6). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended under 8 U.S.C.A. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled.

Further, prior to IMMACT 90, there was no definition of the term “professional.” Now, however, professional is defined at 101(a)(32) and 8 C.F.R. § 204.5(l)(3)(ii)(C) explicitly requires a bachelor’s degree. Therefore, the cases that counsel cites, which were all decided prior to IMMACT 90, are irrelevant.

Counsel focuses on the definition of professional. The relevant question here is whether the beneficiary met the qualifications of the certified labor certification. The Form ETA 750 as certified required that the beneficiary have a four-year bachelor’s degree. The Form ETA 750 did not provide that the position requirements could be met through a “bachelor’s degree or an equivalent based on education, training and/or experience.” Thus, potential U.S. applicants were not aware of the actual minimum requirements of the proffered position and how they might qualify.

Counsel also submits copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from [REDACTED] of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). In the July 2003 letter, [REDACTED] states that he believes that the combination of a completed PONSI-recognized post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor’s degree.

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

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in [REDACTED] correspondence, permits a certain combination of progressive work experience and a bachelor’s degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. We do not find the determination of the credentials evaluation probative in this matter. Again *Matter of Shah*, 17 I&N Dec. 244, generally provides that a bachelor’s degree requires four years of education.

Related to these issues, is the question of how was the position advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree in Computer Science have known that his or her combination of education and experience would qualify them for the position. To ascertain the petitioner’s expressed intent to DOL during the labor market test in advertising the position requirements, the AAO sent the petitioner an RFE.

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

In the petitioner's response to the AAO's RFE, counsel submitted a "complete copy of the Form ETA 750 as certified by DOL including any attachments which DOL incorporated into that form, a copy of all supporting documents summarizing the petitioner's recruitment efforts" along with a copy of the petitioner's posting notice and a copy of the recruitment ads underlying the labor certification.

The submitted materials contain two posting notices: the original posting notice, which lists the requirements as "Bachelor's Degree in Computer Science or related field plus 5 years of experience in job offered or as: analyst/programmer, software consultant, software engineer or related position that included the use of PowerBuilder and SQL Server;" and a revised posting notice to reflect changes approved by DOL prior to certification of Form ETA 750; the revised posting notice lists the requirements as: "Bachelor's degree in Computer Science or related field plus 1 year of experience in job offered or as analyst/programmer, software consultant, software engineer or related position that included the use of PowerBuilder and SQL Server."

Correspondence contained within the record shows that DOL assessed the position at a higher wage rate, \$86,826.16, and found that the position requirements exceeded the position's assigned SVP of 7. As a result, with DOL's permission, the petitioner lowered the experience requirement from five years to one year, which would also allow for the lower wage that the petitioner originally listed on Form ETA 750. The petitioner then reposted the notice internally for workers to reflect the reduced experience requirement. Other correspondence acknowledges that the petitioner may be asked to re-advertise the position requirements, however, nothing contained within the record demonstrates that the petitioner re-advertised the position in any print sources available to the public at large.

The record further contains an Internet job posting that the petitioner had listed for a "senior programmer analyst," which required a "4 year college degree in technical discipline," and "8 or more years of Application Development experience." The petitioner provided copies of the completed newspaper print ads, which listed the requirements as: "B.S. in Computer Science or related field + 5 yrs. Exp. in job offered or as: analyst/programmer, software consultant, software eng. or related position."

None of the recruitment specifically lists or contemplates any alternate combinations of education, training, and/or experience. Further, the record does not contain any evidence to demonstrate that the petitioner re-advertised the position with the reduced requirements of a Bachelor's degree and one year of experience. U.S. workers were apparently on notice of a higher work experience requirement, that they would need to have both a bachelor's degree and five years of experience to meet the position requirements.

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.

Further, the record does not contain the petitioner's submitted "recruitment report," which would provide the candidate's names who responded and their resumes. Therefore, we cannot determine whether the petitioner considered other applicants with less than a four year bachelor's degree for the position, and whether candidates with only one year of work experience were considered for the position, based on the reduced position requirements, and whether there were no qualified U.S. workers. *See* § 212(a)(5)(A).

Based on the recruitment completed and position as it was advertised to U.S. workers, we would not conclude that the petitioner's intent concerning the actual minimum requirements of the proffered position would include equivalency alternatives to a four-year bachelor's degree.

Counsel further asserts that *Grace Korean* is relevant, and hinges on the language of "B.A. or equivalent." Further, the petitioner asserts that it would have contemplated a combined degree when drafting Form ETA 750 with the beneficiary in mind.

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.

The petitioner in the case at hand did not list "or equivalent," only that the beneficiary must have a bachelor's degree. Further, the petitioner did not clearly express what it had in mind about an unstated equivalency to the potential U.S. workforce responding to the recruitment ads. From the record, we further cannot determine whether any potential U.S. workers were properly informed that the position only required the candidate to have one year of experience and not five.

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 *Snapnames* 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)(A)(ii) 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,⁹ 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. 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. In looking at the totality of what the petitioner initially considered, a worker with a four-year degree, in examining the ads, which required a bachelor’s degree and a higher level of work experience, five years, we cannot determine that the petitioner considered all candidates with or without degrees for the position offered.

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

ORDER: The appeal is dismissed.

⁹ A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

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