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U.S. Citizenship  
and Immigration  
Services

B6



FILE:

SRC-06-127-51427

Office: TEXAS 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, Texas 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 operates a gas station and convenience store, and seeks to employ the beneficiary permanently in the United States as a manager, retail store (“Operations Manager”). 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).<sup>1</sup>

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:

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<sup>1</sup> 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 March 11, 2002. The proffered wage as stated on the Form ETA 750 is \$393.60 per week,<sup>2</sup> which is equivalent to \$20,467.20 per year based on a 40 hour work week. The Form ETA 750 was certified on January 26, 2006, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 15, 2006. The petitioner listed the following information on the I-140 Petition: date established: 1996; gross annual income: \$2,278,005; net annual income: "see attached financial documents;" and current number of employees: 4.

On March 27, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence that the beneficiary met the required educational and work experience requirements as listed on the certified Form ETA 750, to include copies of the beneficiary's degrees, an evaluation if obtained abroad, transcripts, certificates, and letters to document the beneficiary's prior employment abroad. Additionally, the RFE requested that the petitioner provide evidence of its ability to pay the proffered wage in the form of federal tax returns, audited financial statements, or annual reports, as well as copies of all W-2 statements for individuals that the petitioner employed. The RFE also directed the petitioner to submit copies of quarterly wage statements, Forms 941, for each quarter in 2006. Finally, the RFE requested that the petitioner provide evidence that the beneficiary had complied with Special Registration requirements and the National Security Entry-Exit Registration System ("NSEERS"), as the beneficiary was a national of Pakistan.<sup>3</sup>

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<sup>2</sup> The petitioner initially listed the wage as \$300 per week, but increased the wage to \$393.60 prior to certification.

<sup>3</sup> NSEERS was established September 11, 2002 to monitor individuals entering and leaving the U.S. NSEERS required nonimmigrants from Iran, Iraq, Libya, Sudan, and Syria as designated by the Federal Register to comply with NSEERS registration at ports of entry, as well as nonimmigrants designated by the U.S. Department of State, and any other nonimmigrant regardless of nationality, identified by an immigration officer in accordance with 8 CFR § 264.1(f)(2). The NSEERS requirement was expanded to include other groups of nationals, and nationals from the designated groups were to report for Special Registration in four separate "call-in groups." Lebanon, the beneficiary's country of origin, was listed for call-in registration between January 27 and February, 7, 2003. *See* 68 Fed. Reg. 2366 (January 16, 2003). Group 2 additionally included: citizens or nationals of Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen. *Id.* at 2366. Group 3 included citizens or nationals of Pakistan or Saudi Arabia. *See* 68 Fed. Reg. 33 (February 19, 2003). Group 4 expanded NSEERS and Special Registration to include citizens or nationals of Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 33. On December 2, 2003, the Department of Homeland Security ("DHS") suspended the automatic 30-day and annual re-registration requirements for NSEERS. *See* <http://www.ice.gov/pi/specialregistration/index.htm>, accessed April 5, 2007.

On July 13, 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 the equivalent of a U.S. Bachelor's degree and Master's degree in Business Administration, which were listed as requirements on the certified labor certification. The petitioner appealed to the AAO.

On October 18, 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.<sup>4</sup> The petitioner responded.

On appeal, the petitioner provides that the beneficiary has a foreign bachelor's degree and M.B.A. and would qualify for the position. Further, the petitioner contends that the beneficiary has had two H-1B petitions approved on his behalf.

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, master's degree and one year and six months of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. DOL assigned the occupational code of 185.167-046, "Manager, Retail Store," 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 Two requiring "some preparation" for the occupation type closest to the proffered position. According to DOL, "employees in these occupations need anywhere from a few months to one year of working with experienced employees." DOL assigns a standard vocational preparation (SVP) range of 4-6 to the occupation, which means "these occupations usually require a high school diploma and may require some vocational or job related course work. In some cases, an associate's or bachelor's degree could be needed." See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed December 12, 2006).<sup>5</sup> Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Some previous work-related skill, knowledge, or experience may be helpful in these occupations, but usually is not needed. For example, a teller might benefit from experience working directly with the public, but an inexperienced person could still learn to be a teller with little difficulty.

These occupations usually require a high school diploma and may require some vocational training or job-related course work. In some cases, an associate's or bachelor's degree could be needed.

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<sup>4</sup> Additionally, the RFE requested that the petitioner provide information as to whether the beneficiary was related to the petitioner's owner. The petitioner's owner responded that he is not related to the beneficiary through blood or marriage, but rather his surname is a "common name in Pakistan."

<sup>5</sup> 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.

*See id.* Therefore, because of both the stated requirements on the labor certification and DOL's standardized occupational requirements, CIS will consider the position and the petition under both the professional and the skilled worker categories.

The regulation at 8 C.F.R. § 204.5(1)(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 bachelor's degree based on two years of education. He additionally has experience based on an "Articleship," as well as a foreign M.B.A. and prior work experience. Thus, the issues are whether the beneficiary's two-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 education as well as his initial degree. Additionally, the petitioner must show that the beneficiary has an M.B.A. as required by the certified Form ETA 750. 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).<sup>6</sup> *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).

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

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.

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

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

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

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

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

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> 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 (9<sup>th</sup> 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 an Operations Manager provides:

Directs and coordinates activities of subordinate managerial personnel involved in operating retail chain stores in assigned area: Interviews and selects individuals to fill managerial vacancies. Maintains employment records for each manager. Terminates employment of employees whose performance does not meet company standards. Directs, through subordinate managerial personnel, compliance of workers with established company policies, procedures and standards, such as safekeeping of company funds and property, personnel and grievance practices, and adherence to policies governing acceptance and processing of customer credit card charges. Inspects premises for adequate security, and compliance with environmental codes and ordinances. Analyzes marketing potential for company.

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: none listed; High School: none listed; College: 4 years; College degree: Bachelor’s degree & M.B.A.;
Major Field Study:	no field listed
Experience:	1 year and six months in the job offered, Operations Manager.

Other special requirements: “Must have checkable references.”

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 Punjab, Pakistan; Field of Study: Commerce; from September 1987 to November 1990, for which he received a Bachelor’s degree; and (2) College of Business Administration, Lahore, Pakistan; Field of Study: Finance; from September 1995 to March 1997, for which he listed he received a Master’s in Business Administration; and (3) the Institute of Chartered Accountancy, Lahore, Pakistan; Field of Study: Accounts; from November 1991 to November 1995, for which he listed he received a Certificate.

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: Center for Educational Research and Evaluation, New York, New York.
- The evaluation considered the beneficiary's studies, which included completion of a twelve year high school program, a two-year Bachelor of Commerce program of studies at the University of the Punjab, and a four-year "Articleship" program with the Institute of Chartered Accountants, which the evaluator notes was not completed
- The evaluation also considered a three-year program of study for a Master's of Business Administration at the College of Business in Lahore, Pakistan.
- The evaluation also considered the beneficiary's thirteen years of work experience.
- Based on all of the foregoing, the evaluator concluded that the beneficiary's education and experience combined were the equivalent of a bachelor's in business administration.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor's degree, as well as an M.B.A. and the beneficiary completed only a two-year degree, an "Articleship," and an M.B.A. at a separate school, which the evaluation did not provide was the U.S. equivalent of an M.B.A. Based on the 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 and experience, the petitioner did not demonstrate that the beneficiary had the required four years of education leading to a bachelor's degree as required by the terms of the labor certification.

The petitioner filed an appeal and provided a second evaluation.

**Evaluation Two:**

- Evaluation: Center for Educational Research and Evaluation, New York, New York.
- The evaluation considered the beneficiary's education: he completed twelve years of high school; a two-year Bachelor of Commerce program at Punjab University; and three years of study at the College of Business Administration, Lahore, Pakistan.
- The evaluation provides that the beneficiary requested an evaluation based on his education alone without consideration of his work experience.
- The evaluator, therefore, considered only the beneficiary's education and concluded that the two programs of study, the two-year bachelor's degree, and three-year master's degree, together were the equivalent of a U.S. bachelor's degree in business administration.

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, and an M.B.A. 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. Additionally, we stress that both evaluations considered the beneficiary's "M.B.A." combined with the beneficiary's bachelor's degree. Both evaluations considered the degrees together only to be equivalent to a bachelor's degree. Therefore, even if we were to accept that the beneficiary had the equivalent of a bachelor's degree for purposes of meeting the labor certification requirements, which we do not, neither of the evaluations confirm that the beneficiary has the required M.B.A. as listed on the certified Form ETA 750.

Further, in determining whether the beneficiary's degree from Punjab University, or the College of Business Administration, are foreign equivalent degrees, 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](http://www.aacrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science awarded in Pakistan represents the attainment of a level of education comparable to two years of university study in the United States. Based on information in the record, this degree would appear to be equivalent to two years of study towards completion of a bachelor's degree in the U.S. The beneficiary further lists that he completed a Master's in Business Administration. EDGE does not recognize that the educational system in Pakistan issues M.B.A. degrees. The program appears to have been completed in connection with other schools, and the bottom of the beneficiary's transcript provides that "the Charter is in process with the Education Department, Government of the Punjab." It is not clear from the information obtained from EDGE that this is an accredited program.<sup>7</sup> Regarding the beneficiary's certificate from the Institute of Chartered Accountancy, the petitioner provided a copy of a training contract for the beneficiary, but did not provide any evidence of a certificate or of passing a final exam. Passage of an ICAF exam, which is not provided, might represent one year of university study in the U.S.

Additionally, we note that the labor certification specifically designates that four years of education leading to a Bachelor's degree is required, and an additional M.B.A. The petitioner did not list that the beneficiary could have two years of education, or two years of education in combination with work, training, or other degrees, related or unrelated, to meet the standard of bachelor's degree and an M.B.A.

On appeal, the petitioner provides that the beneficiary qualifies for the position even though his degrees were completed in a foreign country and not in the U.S.

As noted above, the evaluations do not provide that the beneficiary's degrees individually, or combined would be equivalent of the required four-year bachelor's degree and M.B.A. as listed on the certified ETA 750. Based on the evaluations that the petitioner provided, neither evaluation concluded that the beneficiary has the equivalent of a U.S. M.B.A. degree, and the beneficiary would, therefore, not meet the qualifications listed on the certified ETA 750.

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<sup>7</sup> The petitioner provided evidence that the College of Business Administration established an affiliation with the Philippine School of Business Administration in 1993, as well as an agreement of "cooperation and association" with Sul Ross State University, a member of the Texas State University System," in Alpine, Texas. Despite these affiliations, neither evaluation provides that the beneficiary's M.B.A. is the equivalent of a U.S. M.B.A., and further, the evaluations consider the beneficiary's M.B.A. studies in connection with the beneficiary's bachelor's degree to determine the U.S. equivalency of the beneficiary's studies.

The petitioner further provides Form ETA 750 is not as specific as the new Form ETA 9089<sup>8</sup> in specifying whether the employer would accept a foreign equivalent degree, or any alternate combination of education, training, and experience. However, the petitioner provides that it only required the applicant to have verifiable references in Section 15 of Form ETA 750.

Form ETA 750, Box 15 allows more than adequate space for the petitioner to provide additional requirements, or any alternate combinations of education and/or experience that the employer would accept in lieu of a bachelor's degree. The petitioner did not list in Box 15, or anywhere else on the Form ETA 750 such as in an addendum or in any correspondence to DOL that it would accept any alternate combinations of education and/or experience.

The petitioner provides that:

There is no doubt that the Beneficiary possesses a B.A. degree and a M.B.A. degree, even though they are foreign degrees. The Beneficiary was twice granted H-1B status . . . which is for professional and university graduates with at least a Bachelor's degree and those with the work experience equivalent to that of a U.S.A. Bachelor's degree.

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). Therefore, the evaluation, which the petitioner provided that combined the beneficiary's education and work experience and determined that he had the equivalent of a bachelor's degree might be acceptable for a non-immigrant H-1B petition, but not for an immigrant visa petition.

The petitioner additionally asserts that the position is a professional position, one which "requires a university degree for the entry level," and cites to the Occupational Handbook, 2002-2003 Edition in support.

As noted above, the O\*Net description provides that some positions in the same "job zone" may required a bachelor's degree, some would require less. The O\*Net description does not require that an M.B.A. would be necessary for the position. *See* <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed February 29, 2008).

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

In the petitioner's response to the AAO's RFE, the petitioner provided that its intent was to hire an applicant with a degree, but provided alternatively that it would have considered hiring an individual without a degree.

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<sup>8</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

The submitted materials contain three copies of newspaper ads and a posting notice, which do not list a degree requirement for the position. However, we note that two of the ads are specifically listed in the “professional” section of the ads, and not in a section of the ads likely to reach all workers. Further, the record does not contain the petitioner’s submitted “recruitment report,” which would provide the candidates’ 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 and M.B.A. for the position. *See* § 212(a)(5)(A)(i). Further, the petitioner’s assertion that the position is for a professional conflicts with its claim that it would hire a person for the position without a degree.

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.

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

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) 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 considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750. The petitioner specifies that a bachelor’s degree, as well as an M.B.A. are 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.

Further, although not raised in the director’s decision, the petition should have been denied based on the petitioner’s failure to demonstrate that the beneficiary had the one year and six months of required experience. 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.

In evaluating the beneficiary’s qualifications, Citizenship and Immigration Services (“CIS”) must look to the job offer portion of the alien 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, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1<sup>st</sup> Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

As noted above, the Form ETA 750A, the “job offer” description for an Operations Manager provides:

Directs and coordinates activities of subordinate managerial personnel involved in operating retail chain stores in assigned area: Interviews and selects individuals to fill managerial vacancies. Maintains employment records for each manager. Terminates employment of employees whose performance does not meet company standards. Directs, through subordinate managerial personnel, compliance of workers with established company policies, procedures and standards, such as safekeeping of company funds and property, personnel and grievance practices, and adherence to policies governing acceptance and processing of customer credit card charges. Inspects premises for adequate security, and compliance with environmental codes and ordinances. Analyzes marketing potential for company.

Further, the job offered listed that the position required the following work experience:

Experience: 1 year and six months in the job offered, Operations Manager (Manager, Retail Store).

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) Tahir Enterprises, Inc., Miami, Florida, from August 2001 to present (date of signature: February 7, 2002), position: Assistant Manager; (2) International Finance Investment and Commerce Bank Ltd., Lahore, Pakistan, from April 1996 to September 2000, Assistant Manager or Credit Division.

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

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *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.

To document the beneficiary's experience, the petitioner submitted the following letter:

Letter from [signature unclear], International Finance Investment and Commerce Bank Limited, Lahore, Pakistan, December 26, 2000;  
Position title: Assistant Manager, Credit Division;  
Dates of employment: 1996 to September 2000;  
Description of duties: job description attached, duties, which partially include: preparation of proposals and monitoring customer credit lines; submission of proposals to head office; presentation of proposals to head office; preparation of offer letter; completion of documentation per requirements; obtaining advice from legal in the case of mortgaged property; liaison with Muccadamus;

disbursement of credit facility; keeping legal documents in safe; checking and preparing of various monthly statements.

Letter from [signature unclear], Doha Bank Limited, Lahore, Pakistan, April 4, 1996;  
Position title: not listed;  
Dates of employment: September 1, 1995 to date (of letter, April 4, 1996);  
Description of duties: not listed.

The letters fail to document in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(A) that the beneficiary has the required one year and six months of experience as a manager, retail store, wherein he “Directs and coordinates activities of subordinate managerial personnel involved in operating retail chain stores in assigned area: Interviews and selects individuals to fill managerial vacancies. Maintains employment records for each manager. Terminates employment of employees whose performance does not meet company standards.” The Form ETA 750 specifically required experience in the position offered. The beneficiary’s experience as documented might be considered experience in a related managerial occupation, but not in the position offered. The petitioner, however, did not allow for the candidate to meet the qualifications of the certified ETA 750 by gaining experience in a related occupation, such as Assistant Manager, or a Manager in any field, only in the job offered.

None of the beneficiary’s described experience provides that he managed, directed or coordinated other managerial employees, interviewed, terminated or kept relevant records for employees. Therefore, the petitioner has failed to document that the beneficiary has the required experience for the position, and the petition should have been denied on this basis as well.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Accordingly, 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.