

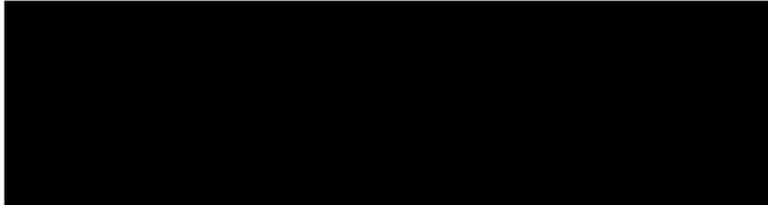
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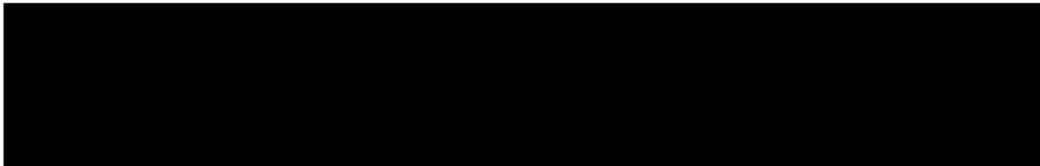
FILE: SRC 04 228 51562 Office: TEXAS SERVICE CENTER Date:

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 denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is an IT service provider. It seeks to employ the beneficiary permanently in the United States as an Oracle Database Administrator. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied and denied the position accordingly.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. As set forth in the director's decision of denial the sole issue in this case is whether or not the petitioner has demonstrated the continuing ability to pay the proffered wage beginning on the priority date.

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 granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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.

(C) *Professionals.* 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition.¹ *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor (DOL). Here, the request for labor certification was accepted for processing on January 30, 2002. The labor certification states that the position requires a "Bachelor's or equivalency" in "any field" and two years of experience in the job offered.²

On the Form ETA 750B the beneficiary indicated that he attended the University of Punjab in Lahore, Pakistan from March 1993 to March 1995 and obtained a bachelor's degree in "Science." The applicant also stated that he attended the Swiss Hospitality Institute, in Washington, Connecticut, from July 1995 to July 1997 and received an associate's degree in Hospitality Management.

In the instant case the record contains (1) a copy of the beneficiary's résumé, (2) a diploma from the University of Punjab in Pakistan in Lahore, Pakistan, (3) two diplomas from the Swiss Hospitality Institute, (4) various other certificates, and (5) an education/experience evaluation dated November 22, 2005. The record does not contain any other evidence relevant to the beneficiary's education.

The beneficiary's résumé states that the beneficiary has (1) a higher secondary school certificate awarded by Forman Christian College, Lahore, Pakistan in 1992, (2) a bachelor's degree from the University of Punjab, Lahore, Pakistan, awarded March 1995, (3) a diploma in administration from the Cesar Ritz Institute in Switzerland, awarded July 1996, and (4) an A.S. degree from "ICHM, Washington CT – USA"³ awarded during July 1997. That résumé also lists experience and certificates held by the beneficiary.

¹ To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is in fact qualified for the certified job. 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 v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

² That the beneficiary has the required experience has never been contested and, for the purpose of today's decision, is accepted as proven by this office.

³ This office notes that the International College of Hospitality Management is in Washington, Connecticut.

The diploma from the University of Punjab confirms that during February 1995 the beneficiary was awarded a Bachelor of Science.⁴ The major course of study is not stated. That diploma also notes that the beneficiary was previously a student at the Government F.C. College in Lahore.

The November 22, 2005 educational evaluation states that the beneficiary's degree from the University of Punjab, by itself, is equivalent to two years of college credit from an accredited U.S. college or university. That evaluation also characterized various certificates issued to the beneficiary as representing one semester of study in computer science. In conclusion, that evaluation found that the beneficiary's education and experience, taken together, they are the equivalent of a Bachelor of Science degree in Computer Science.

One of the diplomas from the Swiss Hospitality Institute shows that on July 11, 1997, in Washington, Connecticut, the beneficiary was awarded an Associate of Science degree in Hospitality Management.

The other diploma from the Swiss Hospitality Institute⁵ shows it awarded a two-year degree in Hotel Management to the beneficiary on April 17, 1998. That diploma states that the institution is accredited by the State of Valais in Switzerland and the ACICS⁶ in Washington, D.C.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on January 24, 2006, denied the petition.

On appeal, counsel asserted that the beneficiary has the equivalent of a U.S. bachelor's degree based on his education and experience combined. Counsel argued that the decision in *Grace Korean United Methodist*

⁴ In determining whether the bachelor's degree diploma from University of Punjab is equivalent to a U.S. bachelor's 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://accraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

As to a bachelor of science degree from Pakistan, EDGE states,

The Bachelor of Arts/Bachelor of Commerce/Bachelor of Science represents attainment of a level of education comparable to two to three years of university study in the United States. Credit may be awarded on a course-by-course basis.

⁵ On the second diploma the institution is identified as Institut Hotelier.

⁶ Reference to the internet reveals that acronym to stand for Accrediting Council for Independent Colleges and Schools. <<http://www.acics.org>> Reference to that website on January 25, 2008 indicated that neither the Swiss Hospitality Institute in Washington, Connecticut nor the Institute Hotelier in Switzerland is accredited by that council.

Church v. Michael Chertoff, CV 04-1849-PK (D. Ore. November 3, 2005) is precedent in this matter. Counsel did not urge that the beneficiary's education, in itself, is the equivalent of a bachelor's degree and in itself qualifies the beneficiary for the proffered position. This office considers that argument to have been abandoned and will not, therefore, address it.

Initially, we note that *Grace Korean United Methodist Church v. Michael Chertoff*, *Id.* is not controlling precedent. In contrast to the broad precedential authority of the case law of a United States Circuit Court of Appeals, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a federal 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, particularly, as in *Grace Korean*, where the case is unpublished. *Id.* at 719.

Counsel was free to note the reasoning of the court in *Grace Korean United Methodist Church*, to argue that it is compelling, and to urge its extension, but did not. Counsel's citation of that case as authority in the instant matter is of no effect.

We are cognizant, however, of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), in which the District Court found that CIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as was set forth in a labor certification." However, as was noted above, that decision is not controlling precedent. Further, cases that are controlling precedent are in opposition to counsel's position, as will be explained below.

In the instant case, the approved labor certification states that the proffered position requires "a Bachelor's [degree] or equivalency" [sic] in "any field." The issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(1)(3)(B) ("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"). 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) 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.

DOL has promulgated regulations to implement these duties. 20 C.F.R. § 656. None of the inquiries assigned to DOL by those regulations, however, involve a determination as to whether or not the alien is qualified for the job offered. This fact has not gone unnoticed by the Federal Circuit Courts of Appeals:

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) [currently found at 212(a)(5)(A)(i)]. *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).

Relying in part on this decision, the Ninth Circuit Court of Appeals 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 the 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.*

Id. at 1009. (Emphasis added.)

The Ninth Circuit reached a similar decision one year later in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*:

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.

736 F. 2d 1305, 1309 (9th Cir. 1984).

See also *Black Const. Corp. v. I.N.S.*, 746 F.2d 503 (9th Cir. (Guam) 1984) (rejecting argument that once employer's labor certifications had been approved by DOL it was error for INS to deny related immigrant petitions for failure to meet preference status requirements).

The court in *Grace Korean*, however made 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. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a). Moreover, at least two circuits have held that CIS does indeed have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions, and not *Grace Korean*, will be followed in this matter.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for that education and degree, the laws and regulations applicable to the visa category in the instant case sanction no such substitution of experience for education and a degree and provide no formula pursuant to which such experience might be credited in lieu of education and a degree.

The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree but did not. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one that pertains to professionals. That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree.

The U.S. Department of Labor (DOL) has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from [REDACTED], Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994).

In order to clarify the petitioner's intention when it stated on the Form ETA 750 that the position requires a four-year "Bachelor's or equivalency" in any field, this office sent the petitioner a request for evidence. The request for evidence asked that the petitioner to provide evidence to demonstrate precisely what it indicated to the DOL it would accept as equivalent to a bachelor's degree in no specific subject.

In response, counsel provided copies of classified advertisements of the proffered position. Those advertisements state that the position requires a “Bachelor’s Degree or its equivalency,” but do not specify what would be considered equivalent to a bachelor’s degree.

In a letter dated October 26, 2007, submitted in response to the request for evidence, counsel urged that other equivalents, including non-academic equivalents, are acceptable to the petitioner, but did not specify what those other equivalents are. No criterion exists pursuant to which the beneficiary’s education, absent a degree, may be analyzed to see whether it is equivalent to a bachelor’s degree.⁷

Whether the instant petition is analyzed as a position for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act or as a position for a professional pursuant to section 203(b)(3)(A)(ii) it necessarily fails. In either event, the petitioner is required to show that the beneficiary has the qualifications listed on the Form ETA 750.⁸

The Form ETA 750, as was noted above, requires a four-year bachelor’s degree in any subject “or equivalency.” The petitioner did not make clear when it conducted its search for a U.S. worker to fill the proffered position what would be considered equivalent to the otherwise mandatory four-year bachelor’s degree. As written, and not modified by any clear stipulation by the petitioner, this office finds that the Form ETA 750 indicates that the proffered position requires a four-year bachelor’s degree or an equivalent foreign degree.

The petitioner failed to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. The instant petition, submitted pursuant to 8 C.F.R. §204.5(l), may not be approved.

The record suggests additional issues that were not addressed in the decision of denial.

In a notice of intent to deny issued on December 14, 2005 the director, consistent with 8 C.F.R. § 204.5(g)(2), requested copies of annual reports, federal tax returns, or audited financial statements to demonstrate the petitioner’s continuing ability to pay the proffered wage from 2002 to 2004. No such documents were provided.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petition should have been denied on this additional basis.

Further, 8 C.F.R. § 204.5(g)(2) requires that the beneficiary demonstrate its continuing ability to pay the proffered wage beginning on the priority date with copies of annual reports, federal tax returns, or audited

⁷ Specifying an equivalent to a degree in no specific subject is especially problematic.

⁸ If the petition were considered as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act the petitioner would also be obliged to show that the position requires a bachelor’s degree awarded by an academic institution. In this instance, however, the petitioner is asserting that the position does not necessarily require such a degree.

financial statements. Because no such documents were provided, the petitioner has not satisfied that requirement. The petition should have been denied on this additional basis.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the three 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.