

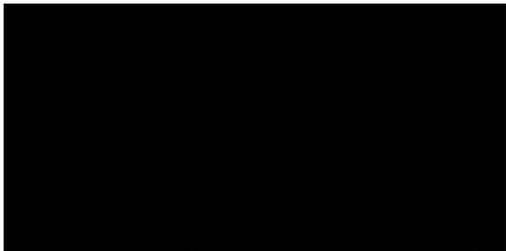
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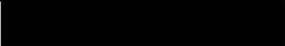
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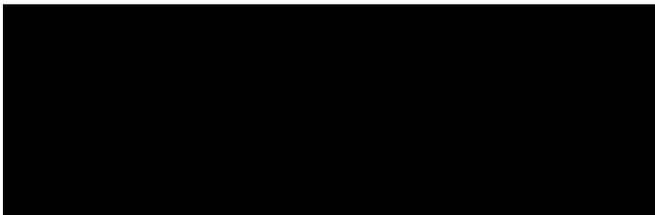
Petitioner:



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 Acting Director, Vermont 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’s business relates to computer software engineering and systems development. The petitioner seeks to employ the beneficiary permanently in the United States as a programmer analyst (“Programmer Analyst – Unix Networking/Systems Administration and Systems Programming”). 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 bachelor’s degree or equivalent 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), Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (“the Act”), and 8 U.S.C. § 1153(b)(3)(A)(ii), provide 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. The regulation at 8 C.F.R. § 204.5(l)(2), Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), and 8 U.S.C. § 1153(b)(3)(A)(i), provide 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).

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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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on December 3, 1998.<sup>2</sup> The Form ETA 750 was certified on February 8, 1999, and the petitioner filed the I-140 petition on the beneficiary's behalf on June 30, 2005.

On October 28, 2005, the director issued a Request for Evidence for the petitioner to submit that the beneficiary had the required qualifications for the position offered as the evaluation that the petitioner had initially submitted failed to establish that the beneficiary had the required education. The petitioner responded.

On February 6, 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 required Bachelor's degree or foreign equivalent degree as listed on the certified labor certification. The petitioner appealed that decision to the AAO.

On August 23, 2007, the AAO Chief 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 actual minimum requirements of the position to DOL and to the public in its labor certification supporting documentation. The petitioner did not respond.<sup>3</sup>

On appeal, counsel argues that the director failed to consider the beneficiary under the skilled worker category, and that he "does possess 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.

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

<sup>3</sup> The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The 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 proffered position requires a Bachelor's degree and one year of prior experience. Because of those requirements, the proffered position is for a professional,<sup>4</sup> but might also be considered under the skilled worker category. If considered under the skilled worker category, the petitioner would need to demonstrate the beneficiary meets the requirements of that category. 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, ONET, 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, as a Computer Systems Analyst, 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."<sup>5</sup> See <http://online.onetcenter.org/link/summary/15-1051.00#JobZone> (accessed October 6, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

*See id.* Because of those requirements and DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

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.

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<sup>4</sup> 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.

<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. Under the DOT code, the position of programmer analyst has a SVP of 7 allowing for over two years to up to four years of experience.

The beneficiary in this matter possesses a Bachelor of Science degree in Chemistry based on three years of study as well as an "Advanced Diploma" in Software Engineering. He additionally has computer related experience. Thus, the issues are whether the beneficiary's three-year diploma is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's other education and work experience in addition to his initial 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).<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).

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

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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.

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*, 437 F. Supp. 2d 1174 (D. Or. 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.



- Major Field Study: College degree: "Bachelor's degree or equivalent;"  
Computer Science, Math, Engineering, or Science.
- Experience: 1 year in the position offered, as a Programmer Analyst, or 1 year in the related occupation of Software Engineer or Systems Analyst.
- Other special requirements: A) Operating System: IBM AIX, HP-UX, Sun Solaris, DEC Open VMS/Ultrix, SCO Unix/ODT, USL Unix SVR4, UnixWare.
- B) LAN/WAN Connectivity/Networking Protocols: TCP/IP, IPX/SPX, NFS, Bridges, Routers, Gateways, X.25, X.400, ISDN, ATM.
- C) Systems/Network Programming: Perl, Korn Shell, C Shell, RPC, TLI, Streams, SOCKETS, API & toolkits, DDK, AWK, SED, LEX, YACC.
- D) Networking Technologies: Ethernet, Token Ring, FDDI.
- Qualifying Criteria: 1 of A and 2 of B and 1 of D; or 1 of A and 2 of B and 2 of C; or 1 of A and 2 of C and 2 of D; and high mobility preferred.

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) DataPro Infoworld, Computer Education Division, Mumbai, India; Field of Study: Software Engineering; from November 1995 to August 1998, for which he received an "Advanced Diploma in Software Engineering;" and (2) the University of Mumbai, Mumbai, India; Field of Study: Chemistry; from August 1995 to May 1998, for which he received a Bachelor of Science degree.

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

**Evaluation:**

- Evaluator: The Trustforte Corporation, New York, New York.
- The evaluation considered the beneficiary's course of study at the University of Mumbai where he completed a Bachelor of Science degree in Chemistry. He was awarded a degree in May 1998 following the completion of exams.

- The evaluator concluded that based on these studies, the beneficiary had completed the equivalent of three years of academic studies toward a Bachelor of Science degree in Chemistry from an accredited college or university in the United States.
- The evaluator also considered the beneficiary's Advanced Diploma in Software Engineering from DataPro Infoworld Ltd. in India. The evaluator states that entrance into the program is based on completion of secondary level studies and competitive entrance exams.
- The beneficiary's coursework at Datapro included: Visual Basic, OOPS, Unix Operating Systems, C Programming Language, Foxpro Principles and Programming, RDBMS and Oracle, and related subjects.
- The evaluator states that the beneficiary completed the required coursework and examinations and received an Advanced Diploma in August 1998. The evaluator does not separately assign or address any U.S. academic equivalency to these studies.
- The evaluator concludes that, "based on the reputation of the academic programs of the University of Mumbai, the number of years of coursework, the nature of the coursework, the grades attained in the courses, and the hours of academic coursework, it is the judgment of the Trustforte Corporation that Mr. Mann completed the equivalent of three years of academic studies toward a Bachelor of Science Degree in Chemistry from an accredited university in the United States."

The director noted in the RFE that the Trustforte evaluation was deficient as it only states that the beneficiary has "three years of academic studies towards a bachelor of science degree in chemistry," and not that the beneficiary had completed the required degree.

The petitioner submitted a second evaluation in response to the director's RFE:

#### **Evaluation Two:**

- Evaluator: Education International Inc., Wellesley, MA.
- The evaluation considered the beneficiary's education at the University of Mumbai resulting in the award of a Bachelor of Science degree in 2000 for studies completed in 1998.
- The evaluator concludes that the beneficiary, "has achieved the functional equivalent of a Bachelor's degree in Chemistry at an accredited institution in the United States."
- The evaluator provided a separate statement that explained: "By 'functional equivalent' I mean a degree equivalency which is not a 'full equivalency' of four years but which nevertheless covers the essentials. What is lacking are non-major, liberal arts courses; in [the beneficiary's] case, he lacks one year of such courses."

The second evaluation does not conclude that the beneficiary has the "equivalent" of a bachelor's degree, but rather a "functional equivalent" of a degree. Based on the evaluation, the beneficiary's studies standing alone would not be the "equivalent" of a Bachelor's degree in the required field of study.<sup>7</sup>

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<sup>7</sup> Further, in determining whether the beneficiary's diploma 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](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,

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

On appeal, counsel asserts that the director should have considered the petition under both the professional category, as well as the skilled worker category, but failed to do so.

Counsel cites to *Grace Korean*, discussed above, for the proposition that the “employer chose the education requirement with the education credentials of the alien beneficiary clearly in mind” and that it is the employer, “not CIS, [that] establish[es] the criteria for the position.”

On appeal, counsel resubmitted the second educational evaluation, which states that the beneficiary has the “functional equivalent” of a Bachelor’s degree in Chemistry, and asserts that the beneficiary would qualify as a skilled worker.

As noted above, a “functional equivalent” of a degree is not the “equivalent” of a Bachelor’s degree in the required field of study.

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. The AAO issued an RFE to determine how the minimum requirements were expressed to DOL and applicants for the position during the labor certification process. The petitioner did not respond. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been

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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 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. The beneficiary’s diploma indicates that the program was three years of study.

The beneficiary further completed an “Advanced Diploma” in Software Engineering at DataPro Infoworld, Mumbai, India. The first evaluation that the petitioner submitted does not assign any academic value to this program. The second evaluation does not address this program of study. According to EDGE, attainment of a post graduate diploma following a three-year bachelor’s degree would represent attainment of education comparable to a bachelor’s degree. However, EDGE does not provide that an “Advanced Diploma in Software Engineering” is recognized as an official credential, or that it would have any U.S. educational equivalent. The National Board of Accreditation (NBA), <http://www.nba-aicte.ernet.in/nmna.htm> (accessed on October 6, 2008), does not list that DataPro Infoworld is an accredited institution within the state of Maharashtra, India. As the program is unaccredited, its comparable U.S. equivalency cannot be adequately assessed.

As EDGE confirms, none of the beneficiary’s individual degrees are equivalent to a four-year U.S. bachelor’s degree as required by the certified ETA 750.

established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The 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). As the petitioner failed to respond to the RFE, we cannot determine whether the petitioner clearly stated its intent about the actual minimum requirements for the position consistently throughout the labor certification and petitioning process, and that it would accept a degree based on an equivalent, or what would be the parameters of an acceptable equivalence.

As the beneficiary does not have a degree, which is evaluated as the foreign equivalent of a U.S. Bachelor's degree, the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree." Thus, the beneficiary does not qualify as a professional under 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(ii) of the Act.

In viewing the beneficiary's education under the skilled worker category, the petitioner cannot demonstrate that the beneficiary meets the educational requirements of the certified labor certification. The first evaluation states only that the beneficiary has completed the U.S. equivalent of three years of schooling toward a degree in Chemistry. The second evaluation states that the beneficiary has the "functional equivalent" of a bachelor's degree. The evaluator states that it "is not a 'full equivalency'" and does not assert that the degree is the equivalent of a Bachelor's degree in Chemistry at an accredited institution in the United States. Additionally, Chemistry is not a required field of study listed on the certified Form ETA 750. The petitioner did not provide any further evaluations to demonstrate that the beneficiary had the required education to meet the terms of the certified ETA 750. Accordingly, the petitioner cannot demonstrate that the beneficiary has the required degree or its equivalent and that he meets the requirements of the position offered.

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.

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 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.

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.