

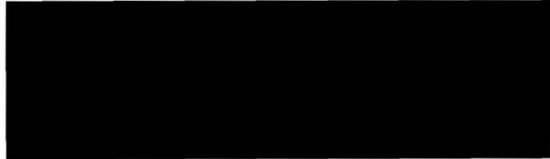
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U.S. Citizenship  
and Immigration  
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FILE: [REDACTED]  
SRC-07-055-51721

Office: TEXAS SERVICE CENTER

Date SEP 29 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 preference visa petition was denied by the Director, Texas Service Center, and now is before the Administrative Appeals Office (AAO) on appeal.<sup>1</sup> The appeal will be dismissed.

The petitioner is an open-source software solutions company. It seeks to employ the beneficiary permanently in the United States as a general and operations manager (channel marketing manager). As required by statute, a Form ETA 750,<sup>2</sup> Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 U.S. bachelor's degree or foreign equivalent degree in business, marketing or related field as required on the Form ETA 750. Accordingly, the director denied the petition on April 12, 2007.

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.

On appeal counsel asserts that the beneficiary's degree from the National Institute for Labor/Spanish-German Association for Technical Studies is directly equivalent to a U.S. bachelor of business administration degree, and that with the phrase "Bachelor's degree or equivalent" the petitioner intended to accept education or experience less than a single bachelor's degree in business, marketing or related field and thus, the beneficiary is qualified for the proffered position under the skilled worker category.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>3</sup> On appeal, counsel submitted a brief, a new academic equivalency evaluation dated May 11, 2007 from [REDACTED] of The Trustforte Corporation (Trustforte May 11, 2007 evaluation) and copies of documents previously submitted. The relevant evidence in the record includes the beneficiary's diploma-regionalwissenschaftlerin, certificate of diploma examination and transcripts for semesters September 1991-February 1992, March 1992-August 1992, September 1992-February 1993, March 1993-August 1993, September 1993-February 1994, March 1994-August 1994, September 1994-February 1995, March 1995-August 1995 from the University of Cologne on April 29, 1997, the beneficiary's diploma of professional formation and certificate of examination from Spanish-German Association for Technical Studies (ASET) and the National Institute for Labor

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<sup>1</sup> While the instant appeal is pending with the AAO, the petitioner filed an identical immigrant petition (LIN-08-002-53830) on behalf of the beneficiary with the Nebraska Service Center on August 16, 2007. The petition is currently pending.

<sup>2</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

<sup>3</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).

(INEM)/German Chamber of Commerce for Spain on June 28, 1991, final certificate issued by Free and Hanseatic City of Hamburg State School for Foreign Language on July 14, 1989 for attending the Professional School for Business Assistants from August 15, 1988 until June 28, 1989 and passing the final examination, diploma for modern French Studies from Alliance Française International School of French Language and Civilization on June 30, 1988, and academic equivalency evaluations dated February 19, 2004 from [REDACTED] of The Trustforte Corporation (Trustforte February 19, 2004 evaluation) and dated January 29, 2007 from [REDACTED] Assistant Professor, [REDACTED] School of Business, Hofstra University (Prof. Spieler January 29, 2007 evaluation).

However, the record does not contain any evidence showing that the beneficiary possesses a single U.S. bachelor's degree or a single foreign equivalent degree in business, marketing or related field, or showing that the petitioner specified on the Form ETA 750 that the minimum academic requirements of a bachelor's degree in business, marketing or related field might be met through a combination of lesser degrees and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. In order to determine whether the instant petition could be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on January 29, 2008 granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. However, to date, more than seven months later, no response from the petitioner has been received. This office will adjudicate the appeal based on evidence in the record.

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

The original Form ETA 750 was accepted on October 31, 2002 and approved on August 25, 2006. The approved labor certification in the instant case requires a "Bachelor's or equivalent" degree in business, marketing or related field. DOL assigned the occupational code of 11-1021, general and operations manager, the closest type of occupation as 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/find/result?s=11-1021.00&g=Go> (accessed August 29, 2008) and its extensive description of the position and requirements for the position most analogous to general and operations manager position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to general and operations manager position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but

some do not.” See <http://online.onetcenter.org/link/summary/11-1021.00#JobZone> (accessed August 29, 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.*

Therefore, a general and operations manager position could be properly analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor’s degree but a minimum of two to four years of work-related experience.<sup>4</sup> In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A) of the Act by checking box e in Part 2 of the I-140 form. The box e is for either a professional or a skilled worker. Therefore, Citizenship and Immigration Services (CIS) will examine the petition under the professional and skilled worker categories, the latter of which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application. 8 C.F.R. § 204.5(l)(3)(ii)(B).

For the professional 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> A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to “architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.” It is noted that general and operations manager positions are not included in this section.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is October 31, 2002. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The beneficiary set forth her credentials on Form ETA-750B. On Part 11 of the Form ETA 750B, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), the beneficiary indicated that she attended the University of Cologne in Germany in the field of "Regional Studies of Latin America" from September 1991 through April 1997, culminating in the receipt of a "Diploma;" attended Spanish-German Association for Technical Studies in Spain in the field of "Industrial Commercial Administration" from September 1989 through June 1991, culminating in the receipt of a "Diploma;" attended Professional School for Business Assistants in Germany in the field of "Business Asst for Foreign Lang." from August 1988 through July 1989, culminating in the receipt of a "Diploma;" and attended Alliance Française in Paris, France in the field of "French Literature" from September 1987 through June 1988, culminating in the receipt of a "Diploma." The beneficiary signed the form on October 30, 2002 under a declaration under penalty of perjury that the information was true and correct. In corroboration of the Form ETA-750B, the petitioner provided the beneficiary's diploma – Regionalwissenschaftlerin awarded by the University of Cologne on April 29, 1997 upon passing the diploma examination in the course of studies "Regional Studies of Latin America," and the transcripts for eight semesters; diploma of professional formation issued by the Spanish-German Association for Technical Studies (ASET) and the National Institute for Labor (INEM) on June 28, 1991, and certificate of examination from the German Chamber of Commerce for Spain for passing the final examination as commercial administrator for the industry; final certificate from Free and Hanseatic City of Hamburg State School for Foreign Language for attending the Professional School for Business Assistants from August 15, 1988 until June 28, 1989 and passing the final examination on July 14, 1989; and Diploma for Modern French Studies awarded by Alliance Française International School of French Language and Civilization on June 30, 1988.

In corroboration of the beneficiary's educational background, the petitioner provided a copy of the beneficiary's certificate of passing examination to obtain the diploma for modern French studies from Alliance Française International School of French Language and Civilization, Final Certificate issued by Free and Hanseatic City of Hamburg State School for Foreign Language, Diploma of Professional Formation and Certificate of Examination from ASET and INEM/German Chamber of Commerce for Spain, and Diploma-Regionalwissenschaftlerin and transcripts from the University of Cologne. The petitioner did not provide information or documents about the beneficiary's education prior to September 1987. The evidence in the record shows that the beneficiary passed the written and oral examinations prescribed to obtain the Diploma for Modern French Studies on June 30, 1988, and that she attended the Professional School for Business Assistants from August 15, 1988 to June 28, 1989, passed the final examination and was awarded the final certificate for passing examination by Alliance Française on July 14, 1989. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's one-year certificate in foreign language correspondence cannot be considered a foreign equivalent degree. In addition, the record does not contain any evidence showing that Alliance Française is a college or university granting a bachelor's degree.

The Diploma of Professional Formation and Certificate of Examination from ASET and INEM/German Chamber of Commerce for Spain show that the beneficiary passed the final examination for the professional formation: commercial administrator for the industry on June 28, 1991; the examination subjects include Industrial economy, Accounting/Organization/Data processing, Economics, Oral examinations, and additional subject: commercial English. However, these documents do not indicate how many courses the beneficiary took during the period from July 14, 1989 to prior to her final examination for the professional formation, what the level of education she obtained during this period, and whether ASET or INEM was an educational institute which was authorized to provide college or university level education. Further, the diploma was issued on June 28, 1991 and the beneficiary passed her final examination at Alliance Française on July 14, 1989, and therefore, the beneficiary's two years of studies, training or experience at ASET and INEM alone cannot be considered a foreign equivalent degree.

Although the Diploma-Regionalwissenschaftlerin from the University of Cologne indicates that it is equivalent to "Master of Arts, Regional Studies of Latin America," the submitted transcripts for eight semesters show that the beneficiary completed a four-year program in regional studies of Latin America at that university. The record does not contain any evidence showing that it was a post-graduate program upon completion of her bachelor's degree program, nor does the record contain any evidence showing that the beneficiary's diploma studies were in business, marketing or related field as required by the certified ETA 750. The beneficiary's Diploma-Regionalwissenschaftlerin from the University of Cologne may be considered a foreign equivalent bachelor degree in regional studies of Latin America, however, it cannot be a foreign equivalent bachelor degree in business, marketing or related field. 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.

Counsel asserts that the beneficiary's four-year diploma in regional studies of Latin America from the University of Cologne, diploma of professional formation and certificate of examination from ASET and INEM/German Chamber of Commerce for Spain and final certificate issued by Free and Hanseatic City of Hamburg State School for Foreign Language are equivalent to a U.S. bachelor's degree in business, marketing or related field according to private credential evaluations from The Trustforte Corporation and Assistant Professor, [REDACTED] School of Business, Hofstra University.

The relevant evidence in the record includes the beneficiary's diploma-regionalwissenschaftlerin, from the University of Cologne on April 29, 1997, the beneficiary's diploma of professional formation and certificate of examination from Spanish-German Association for Technical Studies (ASET) and the National Institute for Labor (INEM)/German Chamber of Commerce for Spain on June 28, 1991, final certificate issued by Free and Hanseatic City of Hamburg State School for Foreign Language on July 14, 1989 for attending the Professional School for Business Assistants from August 15, 1988 till June 28, 1989 and passing the final examination, diploma for modern French Studies from Alliance Française International School of French Language and Civilization on June 30, 1988, and academic equivalency evaluations dated February 19, 2004 from [REDACTED] of The Trustforte Corporation and dated January 29, 2007 from [REDACTED] Assistant Professor, [REDACTED] School of Business, Hofstra University.

Both the Trustforte February 19, 2004 and Prof. Spieler January 29, 2007 evaluations evaluate the beneficiary's diploma of modern French studies at International School of French Languages and Civilization in France as equivalent to two years of academic studies toward a U.S. bachelor's degree in French, the diploma from Professional School for Business Assistants in Germany as equivalent to one year of academic studies toward a U.S. bachelor's degree in business administration and the diploma of professional formation from the National Institute for Labor of Spain as equivalent to a U.S. bachelor's of business administration degree with concentration of economics. The evaluations also evaluate the beneficiary's diploma-regionalwissenschaftlerin from the University of Cologne as equivalent to a U.S. Master of Arts degree in Latin American studies. The Trustforte May 11, 2007 evaluation re-evaluates the beneficiary's diploma-regionalwissenschaftlerin from the University of Cologne as the equivalent of a Master of Arts degree in Latin American Studies, with a concentration in economics and political science, from an accredited U.S. university. However, these evaluations do not contain any objective evidence to support that the beneficiary's diploma of modern French studies from the International School of French Languages and Civilization in France, the diploma from Professional School for Business Assistants in Germany and the diploma of professional formation from the National Institute for Labor of Spain were the college/university level education, that the issuers were educational institutes granting bachelor's degrees and that the studies were in business, marketing or related field. The evaluations do not establish that any of these diplomas is a single foreign degree which is equivalent to a U.S. bachelor's degree in business, marketing or related field. The evaluations also do not support their conclusion that the beneficiary's diploma-regionalwissenschaftlerin from the University of Cologne is the equivalent of a Master of Arts degree in Latin American Studies, with a concentration in economics and political science, from an accredited U.S. university with any objective evidence. Nor do the evaluations explain how a four-year diploma in regional studies of Latin America at a university in Germany be evaluated as the equivalent of a U.S. master of arts degree. 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, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree in a required field to be qualified as a professional for third preference visa category purposes. Although the beneficiary's diploma-regionalwissenschaftlerin from the University of Cologne can be considered a single source foreign equivalent degree to a U.S. bachelor's degree, the four-year diploma in the filed of regional studies in Latin America cannot be considered as the equivalent of a bachelor's degree in business, marketing or related field from an accredited college or university in the United States. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree in business, marketing or related field," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act as she does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's ground denying the petition under professional category must be affirmed.

As previously noted, the AAO will also discuss whether the beneficiary would meet the educational requirements set forth on the Form ETA 750 and thus be qualified for the proffered position as if the petitioner had requested the proffered position be analyzed under the skilled worker category.

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.

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, and any other requirements of the individual labor certification.”

The certified Form ETA 750 requires a bachelor’s degree or equivalent in business, marketing or related field as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary’s education includes a four-year diploma in regional studies of Latin America from University of Cologne in German, certificate of passing examination to obtain the diploma for modern French studies from Alliance Française International School of French Language and Civilization, final certificate issued by Free and Hanseatic City of Hamburg State School for Foreign Language, and diploma of professional formation and certificate of examination from ASET and INEM/German Chamber of Commerce for Spain. Thus, the issue is whether it is appropriate to consider the beneficiary’s diplomas/certificates in addition to the beneficiary’s four-year diploma in regional studies of Latin America from University of Cologne since as previously discussed the beneficiary’s four-year diploma alone cannot be considered as a foreign degree equivalent to a U.S. baccalaureate degree in business, marketing or related field. We must also consider whether the beneficiary meets the job requirements of the proffered position 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 Act 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). *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 (now CIS), 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 she does not have the minimum level of education required for the equivalent of a bachelor's degree.

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

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

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

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

The key to determining the job qualifications specified in the labor certification 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.

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

- |                         |                                      |
|-------------------------|--------------------------------------|
| 14. EDUCATION           |                                      |
| Grade School            | Y[es]                                |
| High School             | Y[es]                                |
| College                 | Y[es]                                |
| College Degree Required | Bachelor's or equivalent             |
| Major Field of Study    | Business. Marketing or related field |

The applicant must also possess three (3) years of experience in the job offered or in marketing computers or related products. Item 15 reflects other special requirements as follows: "Experience in marketing operating systems and domestic and international channel programs."

Moreover, 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).

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.

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.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a

labor certification that required a “B.S. or equivalent.” The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer’s attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that “a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers.” BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer’s stated minimum requirement was a “B.S. or equivalent” degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

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 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.

The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification “must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.” As noted previously, the certified Form ETA 750 requires a Bachelor’s degree or equivalent in business, marketing or related field. The petitioner clearly required a bachelor’s degree or equivalent in business, marketing or related field, however, the labor certification does not further define the degree equivalent. Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. bachelor’s degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner’s labor market test.

The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees, diplomas, and/or quantifiable amount of work experience.

Furthermore, the AAO's RFE dated January 29, 2008 requested the petitioner to submit evidence showing that the petitioner specified that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees and/or quantifiable amount of work experience in the petitioner's labor market test. The AAO specifically requested evidence demonstrating that the petitioner communicated its express intent about the actual minimum requirements of the proffered position to DOL during the labor certification process. However, the petitioner declined to provide such evidence, and the AAO has not received the response as of the date, seven months later. The record does not contain any documents indicating that the employer would accept a combination of lesser diplomas, certificates and quantifiable amount of work experience as an "equivalent" to meet the minimum educational requirement of a bachelor's degree in business, marketing or related field. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The AAO does not find that DOL and U.S. workers were on notice that a combination of lesser diplomas, certificates and work experience as an equivalent would meet the minimum educational requirement of a bachelor's degree in business, marketing or related field. Therefore, the petitioner failed to demonstrate its intent to accept a combination of lesser diplomas, certificates and work experience as an equivalent of a bachelor's degree in business, marketing or related field on the Form ETA 750 and the relevant recruitment materials.

Additionally, the court in *Snapnames.com, Inc.* 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. *See Snapnames.com, Inc.* at 11-13. In the instant case, the petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor's degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing.

As previously discussed, the beneficiary holds a four-year diploma, which alone represents attainment of an equivalent to a U.S. bachelor's degree in Latin American studies, but cannot be deemed as an equivalent of a U.S. bachelor's degree in business, marketing or related field. The beneficiary also holds a certificate from Alliance Française International School of French Language and Civilization, final certificate issued by Free and Hanseatic City of Hamburg State School for Foreign Language, and diploma of professional formation and certificate of examination from ASET and INEM/German Chamber of Commerce for Spain. However, the record does not contain any evidence showing that any of these certificates and/or diplomas was from junior and senior level education in business, marketing or related field from a college, university or any higher educational institutes. No admission requirements were provided in the record for these programs to establish that these institutes provide bachelor's degree program junior and senior level education. Therefore, the beneficiary's certificates/diplomas cannot be considered as a college third and fourth year education in business, marketing or related field from an accredited institute, and thus, the beneficiary's four-year diploma in Latin American studies from the University of Cologne plus her certificates and diploma of professional formation are not equivalent to a U.S. baccalaureate in business, marketing or related field.

Therefore, the AAO finds that the petitioner failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date under the skilled worker category. The director's April 12, 2007 decision is affirmed.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*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. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 CFR § 204.5(d). The priority date in this case is October 31, 2002. The proffered wage as stated on the Form ETA 750 is \$83,000 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) allows the director accept a statement from a financial officer of the organization which established the prospective employer's ability to pay the proffered wage for the petitioner with more than 100 workers. On petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$30,000,000 and to currently employ 160 workers. The petitioner submitted a letter from Sanjay Uppal, Chief Financial Officer (CFO), to establish its ability to pay the proffered wage. Although the regulation at 8 C.F.R. § 204.5(g)(2) allows the director to accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage in a case, in which the prospective employer employs 100 employees or more, given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from the CFO in the instant case. CIS records indicate that the petitioner has filed over eight Form I-140 petitions in the recent two years. In addition, the petitioner has also filed 32 Form I-129 nonimmigrant petitions since 2000. Consequently, CIS must also take into account the petitioner's ability to pay the

petitioner's wages in the context of its overall recruitment efforts. Therefore, we cannot rely on a letter from the CFO referencing the ability to pay a single unnamed beneficiary. In addition, the CFO established the petitioner's ability to pay the proffered wage based on an incorrect calculation of net current assets.<sup>5</sup>

As we decline to rely on the CFO's letter, we will examine the other financial documentation submitted. In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. However, in the instant case, the petitioner did not submit the beneficiary's W-2 forms for the relevant years 2002 through the present. Therefore, the petitioner failed to establish that it paid the beneficiary the full proffered wage from the priority date in 2002 to the present, and thus failed to establish its ability to pay through the examination of wages actually paid to the beneficiary.

The record contains the petitioner's audited financial statements for 2002 through 2005 and unaudited financial statements for 2006. The audited financial statements show that the petitioner had a net loss in 2002 through 2005 and net current assets of \$9,993,000 in 2002, \$1,115,000 in 2003, \$1,601,000 in 2004 and \$(806,000) in 2005. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. The unaudited financial statements for 2006 are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Therefore, the petitioner failed to establish its ability to pay the instant beneficiary the proffered wage in 2005 and 2006.

If the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore, that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Mater of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and ETA Form 9089). *See also* 8 C.F.R. § 204.5(g)(2). CIS records show that the petitioner filed three immigrant petitions in 2006 and five more in 2007. Since the beneficiaries of the petitions filed in 2006 had not obtained permanent residence yet, the petitioner must establish that it had the ability to pay all

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<sup>5</sup> CIS reviews the petitioner's assets. We reject, however, the idea the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities. According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118. However, the CFO of the petitioner relied on the total assets and the total liabilities in his letter instead of the current assets and current liabilities.

the eight beneficiaries the proffered wages. If we examine the salary requirements relating to the eight I-140 petitions and assume that petitioner offered the same rate of salaries as the instant beneficiary to the other seven beneficiaries, the petitioner would be need to establish that it had the ability to pay combined salaries of \$664,000 in 2007. The record does not contain any evidence showing that the petitioner paid the proffered wages to all other beneficiaries, nor does the petitioner submit any regulatory-prescribed evidence to establish its ability to pay the proffered wages to all beneficiaries in 2006 and 2007. Therefore, the petitioner failed to establish its ability to pay all proffered wages in relevant years from 2002 to 2007, and the petitioner even failed to establish its ability to pay the single proffered wage to the instant beneficiary for 2005 through 2007.

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.