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U.S. Citizenship
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Services

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[redacted]

File: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 10 2007
EAC-04-018-51052

In re: Petitioner:
Beneficiary: [redacted]

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:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the immigrant visa petition. The petitioner appealed the denial to the Administrative Appeals Office ("AAO"). The AAO affirmed the director's decision. The petitioner has now filed a Motion to Reopen and Reconsider the AAO decision. The motion to reconsider will be granted. The prior decision of the AAO will be affirmed.

The petitioner is a software design, development, and consulting business, and seeks to employ the beneficiary permanently in the United States as a software engineer ("Applications Programmer"). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the AAO's March 21, 2006 denial, the petition was denied for failure to document that the beneficiary met the degree requirements of the certified labor certification.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional or a skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The regulation at 8 C.F.R. § 204.5(l)(2), and 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. *See also* 8 C.F.R. § 204.5(l)(3)(ii)(b).

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.

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).

The history of the case is quite lengthy and complicated, but pertinent to the case as the petitioner filed two

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

prior I-140 Petitions on behalf of the beneficiary. The prior filings are summarized in a chronology as follows:

Application One:

- On October 23, 2000, the petitioner filed Form ETA 750 on behalf on the beneficiary for the position of an applications programmer. The ETA 750 provided that the beneficiary would be paid $65,000 per year, and that the position required a Master's degree or equivalent in Electronics, Engineering, Computer Science, or in a related field. The application further required "1 year experience in developing client server database applications using PowerBuilder and VC++;" "6 months experience in Superbase," and that the experience could be concurrent.
- The ETA 750 was approved on January 3, 2001, and the petitioner filed an I-140 on the beneficiary's behalf on March 8, 2001;
- The petitioner submitted an evaluation from of [redacted] & Associates, International Education Consultants. The evaluation provided that the beneficiary completed a Bachelor of Science degree in Chemistry at the University of Madras in India, which would be equivalent to three years of undergraduate studies in Chemistry at a U.S. school. Further, the beneficiary completed studies at Annamalai University in India from 1998 to 1999, which the evaluator determined would be equivalent to one year of undergraduate study by correspondence in Management Information Systems in the U.S. Together, "in summary, it is the judgment of [redacted] & Associates Inc., International Education Consultants, that [the beneficiary] has the equivalent of completion of three years of undergraduate study in Chemistry and related courses earned at a regionally accredited institution of higher education in the United States and one year of undergraduate study by correspondence in Management Information Systems and related courses at a regionally accredited institution of higher education in the United States."
- The petitioner submitted several experience letters attesting to over fifteen years of experience, which counsel contends between the evaluation and experience would equate under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) to an advanced degree (Master's) based on the formulation of a baccalaureate degree followed by at least five years of experience in the specialty occupation.
- On January 25, 2002, the director denied the petition on the basis that the beneficiary did not meet the qualifications of the certified ETA 750, in that the beneficiary did not have a bachelor's degree to meet the equivalent standard of a Bachelor's degree and five years of progressive experience.

Application Two:

- The petitioner filed a second I-140 on May 4, 2002 based on the labor certification filed on October 23, 2000, for an applications programmer, which required a Master's degree or equivalent in Electronics, Engineering, Computer Science, or a related field.
- The I-140 sought classification as a skilled or professional worker.
- Following a request for additional evidence and the petitioner's response, the director denied the petition on the basis that the petitioner failed to show that the beneficiary possessed the required education for the position.

Application Three:

- On October 22, 2003, the petitioner filed the third I-140 based on a different ETA 750. The petitioner filed the second ETA 750 on October 31, 2001 for the position of Applications Programmer, which was approved on May 9, 2003. The position paid $56,000 and required a Bachelor's degree or equivalent in Engineering, Computer Science or a related degree, along with "1 year experience in developing client server database applications using PowerBuilder and VC++;" "6 months experience in GUPTA/Centura SQL Windows," and that the experience could be concurrent. The position description was the same as the initial ETA 750, which required a Master's degree.
  Subsequent to a request for additional evidence and the petitioner's response, the director denied the petition on August 12, 2004 on the basis that the petitioner did not establish that the beneficiary had a bachelor's degree or equivalent as required by the certified ETA 750.
  The petitioner appealed to the AAO. On March 21, 2006, the AAO dismissed the petition finding that the petitioner had failed to establish that the beneficiary had the required bachelor's degree.

The petitioner has now filed a Motion to Reopen or Reconsider the AAO director's denial of the petitioner's third I-140 filed on behalf of the beneficiary. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. *See* 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3).

Counsel asserts that the AAO erred in its determination that the beneficiary did not meet the labor certification requirements. Further, counsel contends that the AAO was mistaken in questioning the evaluations submitted, and that the evaluations confirm the beneficiary has the required degree.

We will reconsider our prior decision as counsel has alleged an incorrect application of the law. We will reconsider the issue of whether the beneficiary meets the educational qualifications of the labor certification below.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The Form ETA 750 for an application programmer lists job duties as follows:

> Evaluation of client's business records, organization & operating structures to assess, recommend & develop application/database programs for database control; generation & storage/retrieval; analysis of existing business protocols & methodologies to maintain system compatibility; development of

> client-server database applications utilizing PowerBuilder & VC++ for compatibility with business management protocols.

The petitioner listed the education requirements in section 14 as follows: "Bachelor's degree or equiv.;" Major field of study: Engineering, Computer Science, or related. Further, the petitioner listed "other special requirements" in section 15 as: "one year experience in developing client server database applications using PowerBuilder & VC++; six months experience in GUPTA/Centura SQL Windows. Experience may be concurrent."

The regulations define professional under the third preference category as 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." *See* 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for professional classification that:

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

A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

The beneficiary listed the following information regarding his education on ETA 750B: (1) Government Arts College Ooty, Tamil Nadu, India; field of study: Chemistry, Math & Physics; from December 1980 to December 1983; Degree: Bachelor of Science degree; (2) Department of Computer Science and Engineering Annamalainagar, Tamil Nadu, India; field of study: Systems Analysis & Data Processing; from 1998 to 1999; Diploma; (3) I.T. Point Software Training, Ooty, Tamil Nadu, India; field of study: RDBMS (Oracle 7.1); from March 1996 to May 1996; Diploma; and (4) I.T. Point Software Training, Ooty, Tamil Nadu, India; field of study: PowerBuilder; from June 1996 to August 1996; Diploma.[2]

The petitioner submitted four different evaluations[3] of the beneficiary's education:

Evaluation One:

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[2] The beneficiary was employed by I.T. Point from January 1994 to December 1999, so that the last two courses and diplomas would appear to be in-house training as opposed to academic education.

[3] We note that two services that provided evaluations, [redacted] & Associates, Inc. and World Education Services Inc., are members of the National Association of Credential Evaluation Services (NACES), but that a third service, International Credentials Evaluations Inc., is not a NACES member. The U.S. Department of Education refers individuals to NACES, private credential evaluation services, to determine the equivalence of foreign degrees to American degrees. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector.

- Evaluation: [redacted] & Associates, International Education Consultants.
- The evaluation provided that the beneficiary completed a Bachelor of Science degree in Chemistry at the University of Madras in India, which would be equivalent to three years of undergraduate studies in Chemistry at a U.S. school. Further, the beneficiary completed studies at Annamalai University in India from 1998 to 1999, which the evaluator determined would be equivalent to one year of undergraduate study by correspondence in Management Information Systems in the U.S.
- Conclusion: "in summary, it is the judgment of [redacted] & Associates Inc., International Education Consultants, that [the beneficiary] has the equivalent of completion of three years of undergraduate study in Chemistry and related courses earned at a regionally accredited institution of higher education in the United States and one year of undergraduate study by correspondence in Management Information Systems and related courses at a regionally accredited institution of higher education in the United States."
- The first evaluation does not conclude that the studies, taken separately or together, are equivalent to a Bachelor's degree in any of the fields required.

Evaluation Two:

- Evaluation: Ph.D.[redacted] & Associates, International Education Consultants.
- The evaluation provided that based on the beneficiary's completed education: Bachelor of Science degree in Chemistry at the University of Madras in India; studies at Annamalai University in India from 1998 to 1999; and over six years of employment in the field of computers, that his combined education and experience would be equivalent to a bachelor's degree with a major in Computer Information Systems.
- The second evaluation does not conclude that the beneficiary's studies, taken alone, or together, are equivalent to a Bachelor's degree in any of the fields required. Rather, the evaluation relies on a combination of the beneficiary's education and experience.

Evaluation Three:

- Evaluation: [redacted] Inc.
- The evaluation provided that the beneficiary completed the U.S. equivalency of a high school diploma and four years of undergraduate study in chemistry and systems analysis at a regionally accredited institution.
- The evaluation does not conclude that the studies, taken together, are equivalent to a Bachelor's degree in any of the fields required, only that the education would represent four years of undergraduate study, similar to the first two evaluations.

Evaluation Four:

- Evaluation: International Credentials Evaluators.
- The evaluation provided that the beneficiary completed a Bachelor of Science degree in Chemistry at the University of Madras in India, which would be equivalent to three years of undergraduate studies in Chemistry at a U.S. school.
- The evaluation similarly concluded that the beneficiary's studies at Annamalai University in India from 1998 to 1999, would be equivalent to one year of post-secondary education in Computer Science.

- Conclusion: "it is the opinion of Dr. [redacted] and International Credential Evaluators that the **combined academic coursework of [the beneficiary] is the full equivalent of a Bachelor of Science** degree with *course work* in Computer Programming from an accredited university in the United States."
- We note that while the evaluation concludes that the two programs together would be equivalent to a Bachelor's degree, the evaluation specifies that the degree would include course work in Computer Programming, not that the beneficiary's education was sufficient to equal a degree with a major in Computer Programming.

Regarding the first evaluation, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree, and not combined with work experience.[4] The first evaluation does not conclude that the beneficiary's education viewed separately or together is equivalent to a U.S. Bachelor's degree.

[4] We are aware 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." We note that the AAO is not bound to follow the published decision of a United States district court in matters, which arise in another 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 other Circuit Court decisions discussed below. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth circuit stated:

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

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

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and

The second evaluation is based on a combination of work experience and education. The labor certification was not drafted to consider a Bachelor's degree or equivalent in "education, training, or experience." The ETA 750 did not define equivalency in this manner, and to argue that the ETA 750 should be read to include the equivalent in education and experience, or otherwise, would be unfair to U.S. workers without degrees, but with the equivalent in experience, that may not have responded to advertisements during the labor certification recruitment phase. Further, we note that the rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner did not set forth any alternative requirements or definition of equivalent to include a combination of education and experience.

See Francis Kellogg et al., 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc):

> We have held in *Francis Kellogg,* et al., 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 chose 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.] § 656.21(b)(5).

> 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, reached a similar decision in *Black Const. Corp. v. INS,* 746 F.2d 503, 504 (1984).

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). *See also Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

While we do not lightly reject the reasoning of a District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(2).

The third evaluation does not conclude that the studies, taken together, are equivalent to a Bachelor's degree in any of the fields required. The final evaluation does not conclude that the beneficiary's bachelor equivalency would result in a degree in a specified field, only that the beneficiary had completed course work in computer science.[5] Even if the beneficiary's education were combined, the combined "course work" would not result in the equivalent of a major in one of the required fields.

Based on a review of four evaluations, the petitioner has failed to demonstrate that the beneficiary has a Bachelor's degree or foreign equivalent thereof to qualify for the certified ETA 750. Therefore, the petition was properly decided.

Further, we note that the position requirements listed for the position on Form ETA 750 would be based on the position's minimum job requirements. Form ETA 750A instructions for item 14 provide that the petitioner should list the *Minimum Education, Training, and Experience Required to Perform the Job Duties.* The petitioner initially filed an ETA 750 for an applications programmer, and listed that the petitioner required a Master's degree. After two petitions were denied, the petitioner then filed for the same position, applications programmer, and required only a Bachelor's degree. Only one or two words were different in the requirements between the first and the second petitions. Further, the two positions have the same job descriptions, do not differ in the level of responsibility, and the pay differential is minimal and likely the result of DOL's change in the required prevailing wage rate. As the two position descriptions are the same, it raises the question, which is the accurate minimum educational requirement. Further, it may appear that the petitioner is impermissibly tailoring the requirements to the meet the beneficiary's qualifications rather than listing the position's actual or minimum job requirements. *See* 20 C.F.R. § 656.21(b)(5).

Counsel, in his motion to reconsider, focuses on the alleged errors in interpreting the evaluations. While we do not question the content of the evaluations, or the conclusions of the evaluations, the evaluations themselves do not demonstrate that the beneficiary has the required Bachelor's degree or equivalent in the required field based on education. Therefore, the petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750 and the petition was properly denied.

Accordingly, the petition will be denied. 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 motion to reconsider is granted. The prior AAO decision, dated March 21, 2006, is affirmed.

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[5] Counsel contends that the AAO is not qualified to examine credentials, and questions the citation to *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988) in the director's decision. 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); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). If we accept all the evaluations as valid, the evaluations still fail to demonstrate that the beneficiary had a bachelor's degree or equivalent based on education to qualify the beneficiary for the certified position.