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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 0 4 2008

SRC 06 190 50693

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a marine fin fish farm and hatchery. It seeks to employ the beneficiary permanently in the United States as a marine engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary was qualified to perform the duties of the proffered position and denied the petition accordingly.

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.

As set forth in the director's October 2, 2006 denial, the primary issue in this case is whether or not the petitioner established that the beneficiary was qualified to perform the duties of the proffered position. In his decision, despite the fact that engineers are statutorily defined as professionals, the director evaluated the petition as a skilled worker petition. The director then stated that CIS will not accept degree equivalency or an unrelated degree when a Form ETA 750 plainly and expressly requires a candidate with a specific degree. The AAO, in a request for further evidence (RFE) sent to the petitioner dated January 8, 2008, also raised the issues of whether the petitioner had identified the correct prevailing wage, and whether the petitioner had the ability to pay the beneficiary the proffered wage identified on the ETA 750, or any corrected proffered wage based on the correct prevailing wage.

While the AAO raised additional concerns in its RFE, this decision will focus on whether the petitioner has established that the beneficiary is qualified to perform the duties of the position, statutorily defined as a professional position. For the reasons discussed below, the cases cited by counsel and the petitioner are not, in fact, favorable to their position. Rather, they deal with positions that are not statutorily defined as professions and the most recent decision cited by counsel expressly rejects several of the assertions made by counsel and the petitioner. Even if we were to conclude that it is appropriate to consider this petition under the skilled worker classification, and we do not, there is still little ambiguity in the job requirements certified by DOL, which are in conformity with DOL published materials regarding the proffered position. Thus, the petitioner's alleged intent regarding the job requirements is not consistent with the actual requirements certified by DOL.

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

In the instant petition, counsel, in the cover letter to the petition, requested classification of the beneficiary as an "EB-3 Professional Worker," also stating that the beneficiary qualified for classification as an EB-3 Professional/Skilled Worker as a result of his professional accomplishments and the requirements of the proffered position. In a cover letter dated May 25, 2006, [redacted] CEO, Aquaculture Center of the Florida Keys, Inc., utilized the term "EB-3 Professional Worker" in the subject line of his letter, stating that the position of marine engineer was a professional position, and further stating that based on the nature and

complexity of the duties of the position, the position required a bachelor's degree in marine engineering/aquaculture or experience equivalent to such a degree, plus four years experience in a related marine engineering/aquaculture occupation.[1]

As stated above, section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. Section 101(a)(32) of the Act provides that the term "profession" *shall* include engineers.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on January 7, 2003.

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).

On appeal, counsel submits a brief and a copy of *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Ore. Nov. 3, 2005). On the Form I-290B submitted with the appeal, counsel states the director improperly construed the phrase "BA or equivalent" to mean an earned baccalaureate degree or an equivalent foreign degree, even though the EB-3 skilled worker category does not require a degree and the petitioner's ETA 750 clearly demonstrates the petitioner's intent to accept either a degree or equivalent experience.

In his brief, counsel states that CIS abused its discretion when it denied the instant Form I-140 because it misunderstood the law, relied on factors that it should not have considered, and failed to consider that the minimum requirements as stated on the petitioner's Form ETA 750 were not limited to a foreign degree but rather included equivalent experience, as the petitioner intended. Counsel states that the facts of the instant petition are similar to those in the decision *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d at 1174. Counsel states that the petitioner in *Grace Korean* filed a Form ETA 750 that identified the minimum educational requirements for the position of Director of Adult Activities as four years of college and a bachelor's degree or its equivalent. Counsel also noted that the court said that the petitioner provided a credential evaluation report that confirmed the beneficiary had a combination of education and experience that was the equivalent of a bachelor's degree, although the beneficiary did not have an earned degree from either a United States or foreign university.[2]

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[1] The director in her RFE dated June 27, 2006 did not explicitly state which classification was utilized when the initial petition was examined. She simply requested a copy of the beneficiary's baccalaureate degree and an educational equivalency report from the petitioner. The director in her denial then evaluated the petition under the skilled worker classification, with no comment on the professional classification. The AAO in its RFE stated erroneously that the director evaluated the petitioner under the professional category. The AAO will comment further in these proceedings on both classifications and what category appears more appropriate for the instant petition.

[2] Counsel is incorrect in his interpretation of the beneficiary's education as described in *Grace Korean*.

Counsel states that the Oregon district court found that the CIS interpretation of the skilled worker status and regulations was contrary to the plain meaning of the statute and regulations as well as the clear Congressional intent underlying them because 8 C.F.R. § 204.5(I)(3)(ii)(B) states that the minimum requirements for the skilled worker classification are at least two years of training or experience. Counsel states that the *Grace Korean* court found that it was entirely appropriate for a position to require more than two years of training and experience and still fall within the skilled worker classification.[3]

Counsel also notes that the court concluded that it is the petitioner, working under the supervision and direction of the Department of Labor, that establishes the requirements for employment and that CIS should look to the education and experience requirements in the labor certification to determine whether the applicant falls within the skilled worker or professional classification. Counsel further notes that the *Grace Korean* decision states that it was clear that the petitioner intended the language BA or equivalent to include a degree equivalency because it drafted the labor certification with the beneficiary in mind. Counsel then states that in the instant petition, the reasoning in *Grace Korean* dictates that the instant petition be approved, as the law does not require a degree for classification as an EB-3 skilled worker. Counsel maintains that the requirement that the beneficiary possess an actual degree is contrary to the plain language of the statute and the clear Congressional intent that underlines the EB-3 immigrant visa category.

Counsel further states that it is clear the instant petitioner intended the language "BA or equivalent" to mean an earned degree or equivalent experience because it clearly filed the labor certification with the beneficiary in mind. Referring to the *Grace Korean* decision, counsel states that it would be implausible for a petitioner to file such an application on behalf of a foreign national who did not meet its own intended minimum requirements for the position.

The record also contains an education and work experience evaluation written by [redacted] Washington Evaluation Service, Washington, D.C., dated August 3, 2001.[4] In his evaluation, [redacted] examined the beneficiary's professional work experience and determined that the beneficiary's fourteen years of experience in the field of marine biology and technology demonstrated that he had attained a level of knowledge and ability equivalent to a Bachelor of Science in Marine Engineering with a specialization in aquaculture as awarded by an accredited U.S. university. [redacted] utilized what he described as the "three for one formula instituted by CIS," to reach his conclusion.[5] [redacted] also stated that the beneficiary's resume and employer's

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According to the court's decision, the beneficiary had a four year degree in Home Economics from the Catholic University of Korea, plus two years of theological seminary studies in Korea. *See* Footnote 1 in the decision. Moreover, the proffered position in that case was not statutorily defined as a profession.

[3] In a footnote, counsel states that the court also determined that visa petitioners may attempt classification under both professional and skilled worker classification. Counsel also notes that the court, citing to a 1993 unpublished AAO decision, stated that if an applicant is determined ineligible for classification as a professional, eligibility for classification as a skilled worker must also be considered.

[4] The petitioner submitted two evaluations from [redacted] The first with the initial Form I-140 petition and the second, an iteration of the contents of the first evaluation, in response to the director's request for further evidence dated June 27, 2006. The evaluations, based on the dates of the letters, appear to be in support of the beneficiary's H-IB visa non-immigrant petition which does permit the combination of education and experience in evaluating a beneficiary's academic credentials.

[5] Such equivalency is permitted under 8 C.F.R. § 214.2(h)(iii)(*5*). This regulation, however, applies only to nonimmigrant classifications. No similar rule appears in the regulations pertinent to the immigrant

declaration were evidence that "the beneficiary was performing duties at a highly sophisticated and professional level within the marine engineering profession, with strong evidence of his capabilities and competence that is far above the level of preparation of most recent graduates." [redacted] added that "[the beneficiary's] past work assignments were more than comparable to highly specialized work assignments which are normally entrusted to individuals holding at least a bachelor's degree and several years professional work experience."

As stated previously, on January 8, 2008, the AAO issued an RFE to the petitioner. In its RFE, the AAO stated that counsel requested consideration for the petition as a "professional /skilled worker" in the cover letter submitted with the Form I-140 petition, while the petitioner's letter of employment offer dated May 25, 2006, stated that the position of marine engineer is a professional position that requires a bachelor's degree or equivalent experience. The AAO erroneously stated that the Texas Service Center director evaluated the petition under the professional worker category and denied it on October 2, 2006 because the beneficiary did not have a four-year U.S. bachelor's degree or foreign degree equivalent required by the terms of the labor certification application and the professional regulation. The AAO also noted that on appeal, counsel states that there is no degree requirement for the classification of skilled worker, and that the petitioner's Form ETA 750 clearly demonstrated the petitioner's intent to accept either a baccalaureate degree or equivalent experience.

An issue on appeal in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth in the Form ETA 750, Application for Alien Employment Certification that is, whether the beneficiary attended four years of college and possesses a four-year U.S. bachelor's degree or a foreign equivalent degree in marine engineering/aquaculture.

At the outset, we emphasize that federal circuit courts have upheld our authority to inquire as to whether the alien is qualified for the classification sought.

> 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).

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). *See also Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984). 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).

In its RFE, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in classes beyond the high school level, or that the beneficiary received a diploma based on high school level studies.[6] The AAO also noted that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's of arts degree or equivalent might be met through a quantifiable amount of work experience, and that the labor certification application, as certified, did not demonstrate that the petitioner would accept a quantifiable amount of work experience when it oversaw the petitioner's labor market test. On the Form ETA 750, Part A, Item 21, the U.S. Department of

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classification sought in this matter.

[6] The petitioner submitted a Form ETA 750, Part B, that lists two schools attended by the beneficiary, but does not indicate the dates of attendance or whether any degree or certificate was received. All such entries on the Part B are marked "N/A."

Labor (DOL) requested information that describes "efforts to recruit U.S. workers and the results," "specify[ing] sources of the recruitment by name." This item requests recruitment information in order to allow DOL to determine whether the petitioner put forth good faith efforts to recruit U.S. workers which meet the regulatory guidelines found at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) or 20 C.F.R. § 656.21(j)(1)(i)-(iv), depending on whether or not the Form ETA 750 was submitted under a supervised or unsupervised advertising or recruitment process. The AAO found no document in the record addressing these efforts as required under 20 C.F.R. §§ 656.21(b) or (j).

For these reasons, the AAO requested that the petitioner provide probative evidence that it provided, *at the time it submitted to DOL its Form ETA 750 application and attachments*, the requisite "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. *See* 20 C.F.R. §§ 656.21(b) or (j). Specifically, the AAO requested that the petitioner submit a complete copy of the Form ETA 750 as certified by the DOL including any documentation that both reflects and summarizes the petitioner's organization's recruitment efforts. The AAO also asked the petitioner to provide a copy of all supporting documents summarizing its recruitment efforts, as previously presented to DOL, which might overcome any deficiencies or defects in the record outlined above.

In response, the petitioner's director, submitted a statement. [redacted] also submitted the following evidence pertinent to the beneficiary's eligibility for the proffered position:

> A copy of a document that the petitioner identifies as the SWA identified as a Job Bank Order that indicates the proffered job required 48 months of experience, 16 years of education, and offers a salary of $35,000;
>
> A copy of the petitioner's recruitment results report indicating the petitioner posted a job advertisement in the Key West newspaper, *The Citizen*, for three consecutive days from July 1, 2004 to July 3, 2004 and received no resumes. The newspaper ad submitted by the petitioner identified the position as marine engineer, and stated special requirements for the job as "Marine 4 yrs Bach Degree or Equivalent & 4 yrs exp engineering/aquaculture. The petitioner also submits a copy of the posting notice and correspondence from both the petitioner and the SWA office either no applicants applied for the position, or no referrals were received by the SWA;
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> Copies of *Castaneda-Gonzalez v. INS*, 564 F.2d 417 (May 27, 1977; *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006); *Grace Korean United Methodist Church V. Michael Chertoff*, 437 F. Supp.2d 1174 (U.S. District Court, D. Oregon Nov. 3, 2005); *Rosedale and Linden Park Company v. French*, 595 F. Supp. 829, (D.C. Cir. 1984); *Masonry Masters, Inc. v. Thornburgh*, 875 F.2nd 898 (D.C. Cir. 1989); *Matter of El Rio Grande,* 1998-INA-133 (1998 Board of Alien Labor Certification Appeals (BALCA); and *Matter of PPX,* 88-INA-25 BALCA (May 31, 1989).

In her letter in response to the AAO RFE [redacted] refers to *SnapNames.com v. Chertoff,* 2006 WL 3491005, (D. Or. 2006) for the premise that it is the visa petitioner who defines the labor certification requirements and where ambiguous, the certification requirement must be interpreted in light of the petitioner's intent.[7] The petitioner's director also cites to *Rosedale & Linden Park Co. v. Smith* , 595 F. Supp. 829, 833 (D.C 1984) for the

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[7] As will be discussed below, this case is not favorable to the petitioner's assertions that CIS must presume the petitioner's intent from the beneficiary's credentials and that the phrase "bachelor's or equivalent" includes experience in addition to education.

premise that CIS is obligated to examine the certified job offer exactly as it is completed by the prospective employer [redacted] also states that while the petitioner recognizes that these cases are not binding on the AAO, they do constitute considerable persuasive authority. [redacted] then requests that the "petitioner-sensitive" intent approaches be adopted in the instant petition. [redacted] states that the petitioner for five years had conducted a bona fide recruitment campaign for the proffered position and the record demonstrates a long-standing forthright effort to entertain any minimally qualified U.S. worker with an earned academic bachelor's degree or the equivalent based on professional experience.

[redacted] then notes that the DOL guidance letters and agency memoranda, cited in the AAO RFE, are also non-binding on CIS. The director refers to a letter from Certification Officer, US DOL to [redacted] legacy INS, dated October 27, 1992 that stated the interpretation of the word "equivalent" as in "bachelor's degree or equivalent," should be interpreted to mean the employer is willing to accept a U.S. degree or an equivalent foreign degree, but not experience equivalent to a bachelor's degree. [redacted] states that within the crosshairs of the federal courts and DOL's guidance letter and agency memoranda, the intended meaning of the petitioner's phrase "bachelor's degree or equivalent" plays out against a legal backdrop that is somewhat contradictory, and that while case law demands that the petitioner's intended meaning of the phrase "bachelor or equivalent" be given considerable weight in examining a beneficiary's qualifications for a proffered position, DOL guidance is more narrow. [redacted] states that since neither the case law nor DOL guidance is binding on CIS, CIS' authority to decide the instant matter should be "imbued with flexibility" to find that "equivalent" in the instant matter means equivalent experience.

[redacted] also states that the older DOL guidance cited in the AAO RFE seeks an archaic exactitude not in line with present labor recruitment campaigns that use truncated classified ads., and further that the time to have debated the meaning of the petitioner's intent was five years ago when the Florida State Workforce Agency would have or should have requested clarification of the term "equivalent" if it found the petitioner's use of the term to be ambiguous. The petitioner's director states that its ETA Form 750, Part B clearly identified a foreign national beneficiary who had professional experience equivalent to a bachelor's degree but not an academically earned degree. [redacted] states that at the present stage of the adjudication of the instant petition, all alleged ambiguity as to the meaning of the petitioner's recruitment campaign language should be equitably estopped.

[redacted] requests that the AAO exercise its independent regulatory discretion in the instant matter based on the totality of the circumstances to find that the petitioner's intent in filing the labor certification was to accept experience as equivalent to a bachelor's degree, based on the DOL acceptance of the terms of the ETA Form 750, based on the fact that no clarification was ever sought and the case was ultimately certified; and by recent federal case law that signals a trend towards a more expansive interpretation of the phrase "bachelor's degree or equivalent" than the narrow view espoused in DOL guidance and memoranda.

With regard to the request from the AAO for the academic qualifications of other candidates for the position who did not get the proffered position, [redacted] states that the petitioner cannot show that other candidates with experience equivalent to a bachelor's degree responded to its advertising because there were no applicants either from the Florida SWA posting or the advertised job position. [redacted] asserts that it is clear from the documentation submitted that the petitioner had a clear intent to accept either a bachelor's degree or equivalent experience because all advertising was fully consistent with the Florida SWA recruitment instructions; every advertisement and posting used the same terminology regarding this requirement, and the Form ETA 750 makes clear that the beneficiary does not have a bachelor's degree, thus demonstrating a clear intent that experience in lieu of a degree would be acceptable.

[redacted] then notes that the AAO RFE stated that the Texas Service Center evaluated and denied the instant petition under the EB-3 professional worker category[8] and that on appeal the petitioner asked for consideration in the EB-3 skilled worker category. The petitioner's director states that as explained in the petitioner's brief, the court in *Grace Korean United Methodist Church* noted that since Form I-140 does not technically require an employer to designate whether a petitioner is seeking classification as a skilled worker or professional, a petitioner may attempt classification under both categories, and that if an applicant is determined ineligible for classification as a profession, eligibility for classification as a skilled worker must also be considered. In support of this assertion, [redacted] refers to a reference made in *Grace Korean* to a 1993 unpublished AAO decision. The petitioner's director then states that if the applicant does not qualify as an EB-3 professional, CIS must consider whether the applicant qualifies as a skilled worker.

In her response to the AAO RFE, the petitioner's director states that the AAO consideration of the petitioner's use of the phrase "BA or equivalent" in its recruitment campaign materials should be estopped. Estoppel is an equitable form of relief that is available only through the courts. The jurisdiction of the Administrative Appeals Office is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The jurisdiction of the AAO is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel claim.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner did not clearly establish whether it was filing the instant petition under the employment-based professional or skilled worker classification. In his cover letter, counsel merged the two classifications into the category of "professional worker," or stated that the position was a professional one. The petitioner's CEO, at the time of filing the petition, also stated that the position was a professional one, noting that the nature and complexity of the duties required at a minimum, a bachelor's degree in marine engineering/aquaculture, or experience equivalent to such a degree, and four years experience in a related marine engineering/aquaculture occupation. Thus the petitioner appears to require a professional position, with credentials of either a bachelor's degree or the equivalent of such a degree. This conclusion is consistent with section 101(a)(32) of the Act which includes engineers within the definition of profession. The petitioner and Dr. Erb both cite the beneficiary's work experience as the only basis for equivalency with the required baccalaureate degree in marine engineering/aquaculture.

The director in her request for further evidence appears to consider the petition under the professional classification because she requested a copy of the beneficiary's college degree and an educational

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[8] The AAO erroneously determined that the director had evaluated the petition under the professional category while the director's denial stated she was evaluating the petition under the skilled worker classification, with no comment whatsoever on the petition being considered under the professional category.

equivalency, although the Form ETA 750, as [redacted] correctly points out, establishes that the beneficiary has no university level studies. In response, the petitioner stated the beneficiary had no college degree and submitted [redacted] educational equivalency report that stated the beneficiary's work experience was equivalent to a four-year baccalaureate degree. The director in her denial evaluated the petition under the skilled worker category, with no consideration of whether the proffered position was more appropriately classified a professional or skilled worker position. The director denied the petition stating that the beneficiary's qualifications based on his work experience was neither a bachelor's degree nor the equivalent of a baccalaureate degree. As previously stated the AAO in error stated that the director had examined the position in the professional category. The petitioner then responded to the AAO RFE focusing on the professional classification and requesting that the petition also be considered under the skilled worker classification. Therefore the AAO will comment on the requisites of both classifications in these proceedings.

The regulations define a third preference category "professional" 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 uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. The petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. In the instant petition, the Form ETA 750 stipulates a four-year bachelor degree.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," 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.

(Emphasis added.)

It is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement in of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that member of the profession must have a *degree* gained through college or university education, not merely lengthy experience.

The petitioner has not demonstrated that the beneficiary was awarded any credential by a college or university. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider the beneficiary's experience as education towards such a degree.

On appeal and in response to the AAO's RFE, the petitioner relies on *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Ore. 2005) and *Snapnames.com, Inc. v. Chertoff,* 2006 WL 3491005 (D. Ore Nov. 30, 2006). 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. Neither case, however, is helpful to the petitioner.

In *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d at 1179, the court found 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." The court accepted that both education and experience could be considered as equivalent to a required degree in the skilled worker context. *Id.* at 1178. As stated above, this matter involves a position statutorily defined as a profession.

Significantly, the other case on which the petitioner relies, *Snapnames.com, Inc.,* arising in the same district as *Grace Korean* after that decision was issued, held that DOL certification does not preclude CIS from considering whether the alien meets the educational requirements specified in the labor certification. *Snapnames.com, Inc.,* 2006 WL 3491005 at *5. The court acknowledged the decision in *Grace Korean* and then stated:

> Here, SnapNames also filled out the labor certification with [redacted] in mind. However, CIS has an independent role in determining whether the alien meets the labor certification requirements, and where the plain language of those requirements does not support the petitioner's asserted intent, the agency does not err in applying the requirements as written. In fact, the agency is obligated to "examine the job offer *exactly as it is completed* by the prospective employer." *Rosedale & Linden Park Co.,* 595 F. Supp. at 833 (emphasis added).

The decision in *Snapnames.com, Inc.*, on which the petitioner purports to rely, further found that CIS was justified in requiring a single degree for a professional. *Id.* at *10-11. As stated above, the position at issue in this matter is statutorily defined as a profession. Section 101(a)(32). Finally, while the court concluded that it was not reasonable to require a single degree as equivalent to a bachelor's degree for skilled workers, the court found that it *was* reasonable for CIS to consider only education as equivalent to a degree. *Id.* at *8-9. In this matter, the petitioner requests that CIS consider experience only as equivalent to the "4" years of college and "BA or equivalent" requirements certified by DOL. For all of the above reasons, *Snapnames.com, Inc.* is not favorable to the petitioner. *See also Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree).

The following information further supports our conclusion that the proffered position is a profession. Counsel in his brief and the petitioner's director in her response to the AAO RFE both state that CIS must consider the petition as a skilled worker if the beneficiary is not found qualified under the professional classification. CIS has no such requirement. Counsel in making this assertion cites an unpublished AAO decision. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the

Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The Department of Labor (DOL) assigned the occupational code of [redacted] marine engineer, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/crosswalk/DOT?s=014.061-014+&g+Go (accessed December 12, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four 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." *See* http://online.onetcenter.org/link/summary/JobZone (accessed December 12, 2007). 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. These requirements, however, relate to all job zone four positions. More specific to this position, O*NET provides that 78 percent of responding marine engineers have a bachelor's degree or higher, 18 percent have some college and zero percent have only high school education or less. *See* http://online.onetcenter.org/link/details/17-2121.01 (accessed July 31, 2008). The beneficiary has no college education.

Finally, DOL's Occupational Outlook Handbook, available online at www.bls.gov/oco/pdf/ocos027.pdf (accessed July 31, 2008) provides:

> Engineers typically enter the occupation with a bachelor's degree in an engineering specialty, but some basic research positions may require a graduate degree. Engineers offering their services directly to the public must be licensed. Continuing education to keep current with rapidly changing technology is important for engineers.
>
> ***Education and training.*** A bachelor's degree in engineering is required for almost all entry-level engineering jobs. College graduates with a degree in a natural science or mathematics occasionally may qualify for some engineering jobs, especially in specialties in high demand. Most engineering degrees are granted in electrical, electronics, mechanical, or civil engineering. However, engineers trained in one branch may work in related branches. For example, many aerospace engineers have training in mechanical engineering. This flexibility allows employers to meet staffing needs in new technologies and specialties in which engineers may be in short supply. It also allows engineers to shift to fields with better employment prospects or to those that more closely match their interests.

As stated in its RFE, based on the DOL description of the job duties of the position, the AAO thus considers the proffered position to be a profession. Furthermore, the position is a profession since the position requires a four-year bachelor's degree and four years of experience in the related occupation of marine

engineering/aquaculture, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. Further the AAO reiterates that engineering is statutorily defined as a profession in section 101(a)(32) of the Act, and thus the AAO would not consider the proffered position to fall within the skilled worker classification. Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Even if we were to consider the alien as a skilled worker, and we reiterate that the proffered position is for a profession, the petition is not approvable. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, the beneficiary must have a four year bachelor's degree or its foreign equivalent in marine engineering, with four years of work experience in marine engineering/aquaculture.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a four year bachelor's degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent three year foreign degree to a U.S. bachelor's degree.[9]

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of marine engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	8
	High School	4

[9] Under the skilled worker classification, the petitioner would also have to establish that the beneficiary had two years of relevant experience. The record contains no letters of work verification to establish the beneficiary's requisite two years of work experience, although the beneficiary's work with the petitioner prior to the 2003 filing date establishes the beneficiary's requisite two years of work experience.

College	4
College Degree Required	**B**A or Equivalent
Major Field of Study	Marine Engineering/Aquaculture

The applicant must also have four years of experience in the job offered, or four years of work experience in the relation occupations of marine engineering/aquaculture. Item 15 of Form ETA 750A did not state any further special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he attended Dartington Hall School/Institution, Devon, United Kingdom, for his English A level, with no times of studies or degrees or certificates received noted. The beneficiary also indicated that he had attended Island School/Institution, in Hong Kong, also with no dates of attendance or certificates received noted.

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 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."

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes four years of college, with a bachelor's degree or equivalent in marine engineering, with a specialization in aquacultures, and four years of work experience in the proffered position, or in marine engineering,/aquaculture.

On Part 15, eliciting information of the beneficiary's work experience, he represented that he had held the following jobs:

Employer	Time of Employment	Length of Employment	Position Title
The petitioner	2/2002 to 11/12/2002[10]	10 months	Marine Engineer
The petitioner	4/1999 to 9/2000	18 months	Hatchery Co-Manager
Blue Revolution Aquafarms, Ltd	10/2000 to 10/2001	12 months	Consultant/Director
Snapper Farm Inc. Harbor Branch	6/2000 to 7/2001	13 months	Consultant
Oceanographic	6/1998 to 3/1999	9 months	Hatchery Technician
Ocean Tech Marine Services, Ltd., Hong Kong	1997 to 1998	12 months[11]	Managing Director

In total, the beneficiary at a maximum, as of the date the beneficiary signed the Form ETA 750 in November 2002, had 74 months of relevant work experience, and as of January 7, 2003 priority date, had 76 months of relevant work experience.[12]

The petitioner clearly delineated four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A. It is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah,* at 245.

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[10] This is the date the beneficiary signed part B of the Form ETA 750.

[11] The beneficiary did not specify the actual period of time he worked at Ocean Tech Marine Services Ltd, on the ETA 750, Part B, or on his curriculum vitae submitted with the petition. For purposes of these proceedings, the AAO will consider the beneficiary's employment at Ocean Tech to be one year. However, the actual period of employment would have to be clarified if any three to one educational equivalency were to be allowed in immigrant petitioner.

[12] 76 months equals 6 years and four months of relevant work experience.

Evaluating the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight." With regard to the educational equivalency document submitted to the record, although [redacted] states that his evaluation is based on the beneficiary's education and work experience, the beneficiary has no relevant postsecondary educational credits in the field of marine engineering with a specialization in aquaculture.

The AAO notes that several court cases cited by counsel and by the petitioner's director pertain to determinations of whether a beneficiary with less than a four year baccalaureate degree, or with a bachelor degree in an unrelated field with relevant additional education experience would have sufficient educational background to fulfill the terms of Forms ETA 750 that stated "bachelor or equivalent." [redacted] bases his evaluation on the beneficiary's extensive work experience. Thus, in the instant matter, the petitioner is asking that the beneficiary's work experience solely be evaluated to determine whether this experience is the equivalent to a baccalaureate degree. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Further, [redacted] in his evaluation states the beneficiary has 14 years of relevant work experience, including three positions in the shipbrokering business from 1987 to 1995. He also included the beneficiary's work with Oceania Diving Ltd., Hong Kong, from 1996 to 1997, and with Universal Nets (Pty) Ltd., Hong Kong.[13] Dr. [redacted] identifies the former business as a commercial diving concern and the latter as a net manufacturer and fish farming business, where the beneficiary held the position of operations deputy manager. While the previous jobs listed by both [redacted] and the beneficiary with Oceania Diving Ltd. and Universal Nets in Hong Kong do appear to be relevant work as far as the proffered position, the beneficiary's employment in the shipbroking business does not appear to be relevant work.

The AAO further notes that if the two positions held by the beneficiary from 1995 to 1997 in Hong Kong were considered relevant work experience for the proffered position in marine engineering and aquaculture, the sum total of the beneficiary's relevant work experience would be an additional two years, or eight years and four months of relevant work experience prior to the January 7, 2003 priority date. Thus, the AAO questions [redacted]'s explanation of how he arrived at the conclusion that the beneficiary has fourteen years of relevant work experience, and notes that even under [redacted] schema of three years of relevant work experience for one year of university level studies, the beneficiary would not have sufficient work experience equivalent to [redacted] analysis, much less the additional four years of work experience in marine engineering and aquaculture. Therefore, [redacted] evaluation is given little weight in these proceedings.

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[13] The AAO notes that none of the beneficiary's employment with these two concerns in Hong Kong or with the shipbroking firms in the United Kingdom or Hong Kong are listed on the ETA Form 750, Part B.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a "professional" because the regulation requires it and for a "skilled worker" because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of four years of employment experience. Thus, counsel's assertion that the regulations do not establish that the skilled worker classification also requires a baccalaureate degree is correct. However, even if we accepted that the position could be classified as a skilled worker position, and we do not, the petitioner has to establish that the beneficiary qualifies for the proffered position based on the terms of the labor certification application, not on the basis of CIS regulations on educational levels for skilled workers. Based on the terms of the labor certification and the recruitment materials submitted in response to the AAO RFE, the AAO does not find the beneficiary qualified to perform the duties of the proffered position either in the professional or skilled worker category.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.