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

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 11 2008

EAC-04-171-53125

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 ("director"), denied the employment-based immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is a provider of integrated business and technology solutions. The petitioner seeks to employ the beneficiary permanently in the United States as a programmer analyst ("Internet Developer"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree in the required field of Computer Engineering as listed on Form ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).[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 worker pursuant to section 203(b)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i). 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." Section 203(b)(3)(A)(i) of the Act 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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on November 9, 2001.[2,3] The Form ETA 750 was certified on February 13, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on May 14, 2004.

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[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). 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).

[2] The applicant listed on Form ETA 750 is "Paradigm Holding Co. d/b/a Paradigm Direct." The applicant's

On April 1, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence that the beneficiary had the required Bachelor of Science or foreign equivalent in Computer Engineering or a related field by the time of the priority date. The petitioner responded.

On June 7, 2005, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not establish that the beneficiary had the required Bachelor's degree or foreign equivalent degree in Computer Engineering or a related field as listed on the certified labor certification. The petitioner appealed to the AAO.

On appeal, counsel asserts that the beneficiary had the required education by the time of the priority date, and that the beneficiary's degree in Civil Engineering would be related to the position.

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.

The proffered position requires a four-year bachelor's degree and two years of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. DOL assigned the occupational code of ([redacted] 'Programmer Analyst," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database, O*Net, 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*

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name was changed to "Tranzact" prior to certification, and the labor certification was issued on behalf of Tranzact.

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

http://online.onetcenter.org/link/summary/15-1021.00#JobZone (accessed August 11, 2008).[4] 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.

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.

The beneficiary in this matter possesses a "Bachelor's degree in Technology" in an unrelated field of Civil Engineering based on four years of education. He additionally has a "Post Graduate Diploma in Computer Applications," and computer related experience. Thus, the issues are whether the beneficiary's four-year degree is equivalent to a U.S. baccalaureate degree in the required field of Computer Engineering or a closely related field, or, if not, whether it is appropriate to consider the beneficiary's Post Graduate Diploma and work experience in addition. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Authority to Evaluate Whether the Alien is Eligible for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

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[4] DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O*Net. Under the DOT code, the position of Programmer Analyst had a SVP of 7 allowing for two to four years of experience.

> (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
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

> There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two **determinations listed in section 212(a)(14).**[5] **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.
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> 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).

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[5] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

The petition is also not approvable for a third preference immigrant visa under the skilled worker category. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

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

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

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

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

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

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> 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 (9th Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that Citizenship and Immigration Services (CIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715, 719 (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.

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 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.' At the outset, the court stated that labor certification did not preclude the AAO from considering whether an alien meets the educational requirements. *Id.* at *5. The district court then 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. *Id.* 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. *Id.* 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 Citizenship & Immigration Services ("CIS") properly concluded that a single foreign degree or its equivalent is required. *Id.* 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 and does not include alternatives to a bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, CIS has an

independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7 Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, CIS "does not err in applying the requirements as written." *Id.*

The key to determining the job qualifications 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 reflects the following requirements:

Education:	Grade School: none listed; High School: none listed; College: 4 years; College degree: "B.S. or foreign equivalent;"
Major Field Study:	Computer Engineering or closely related field.
Experience:	2 years in the position offered as an Internet Developer, or 2 years as a Senior Programmer.
Other special requirements:	Experience which may have been obtained concurrently must include: 2 years experience in the use of HTML, ASP, SQL, and Windows NT; 2 years experience using Microsoft Visual Studio; and 1 year experience in designing and developing enterprise-level solutions using MTS and Distributed Inter-Network Applications Architecture.

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) Nagarjuna University, Nagarjuna, India; Field of Study: Technology (Civil); from December 1991 to January 1997, for which he received a Bachelor's Degree Technology (Civil); and (2) Vivekanda Institute of Engineering and Information Technology, Parasupet, India; Field of Study: Computer Applications; from August 1995 to August 1996, for which he received a Post Graduate Diploma in Computer Applications.

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

Evaluation One:

- Evaluation: Foundation for International Services, Inc., Bothell, Washington, dated January 28, 1999.
- The evaluation considered the beneficiary's educational documents, including documents which evidenced completion of high school, as well as the beneficiary's Degree of Bachelor of Technology (Civil) from Nagarjuna University, Nagarjuna, Nagar, India. The evaluation also considered the beneficiary's Certificate from the Vivekananda Institute of Engineering, which demonstrated that the beneficiary completed the requirements for completion of study for a Post Graduate Diploma in Computer Applications during the time period August 1995 to July 1996. The evaluator found that the course of study at the Vivekananda Institute would be equivalent to "one year of professional training offered at a non-regionally accredited institute in the United States."
- The evaluator also considered the beneficiary's resume which listed the beneficiary's employment in the field of computer science from January 1997 to January 1999 (2 years). The beneficiary provided the evaluator with a letter from his former employer to verify his experience.
- The evaluator concluded that the beneficiary had the equivalent of a bachelor's degree in civil engineering from an accredited college or university in the United States. Further, the evaluator concluded that, "as a result of his educational background, professional training and employment experiences (3 years of experience = 1 year of university level credit), [the beneficiary had] an educational background the equivalent of an individual with a bachelor's degree in software engineering from an accredited college or university in the United States.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor's degree in Computer Engineering. The evaluation found that the beneficiary had a degree in the field of Civil Engineering, and not in the required field of Computer Engineering. The director did not consider Civil Engineering to be a closely related field. Secondarily, the evaluation relied on a combination of education and experience to determine that the beneficiary had the equivalent of a bachelor's degree in Software Engineering. The Form ETA 750 did not allow for a combination of education and experience.

In response to the director's RFE, the petitioner submitted a second evaluation from the same organization. The second evaluation considered similar documents as the first evaluation, with the exception that the second did not include the beneficiary's work experience in its determination -- the second evaluation was based solely on education.

Evaluation Two:

- Evaluation: Foundation for International Services, Inc., Bothell, Washington, dated April 13, 2005.
- The evaluator examined a copy of the beneficiary's educational documents, including documents which evidenced completion of high school, the beneficiary's Degree of Bachelor of Technology (Civil) from Nagarjuna University, and the beneficiary's Post Graduate Diploma in Computer Applications from the Vivekananda Institute of Engineering.
- The evaluator concluded that the beneficiary had the equivalent of a bachelor's degree in civil engineering from an accredited college or university in the United States.

While the second evaluation was based solely on education alone, the director denied the petition as the petitioner failed to demonstrate that the beneficiary had the required four-year bachelor's degree in the field of study, Computer Engineering, listed on the certified Form ETA 750. Further, the director determined that Civil Engineering would not be a closely related field to Computer Engineering.

The petitioner did not list that the beneficiary could meet the requirements of the petition through any field of Engineering, or through any alternate combinations of education and experience.

On appeal, counsel asserts that the petition should be approved as the position requires "basic engineering skills." Specifically, counsel states that, "the creation of specifications necessary to develop tools and standards are common to all engineering professions. Designing and modeling new computer tools requires the knowledge of basic engineering principles common to all engineers with a bachelor's degree or equivalent in educational coursework." Counsel continues that the beneficiary has a Bachelor of Technology degree concentrated in Civil Engineering, and that the beneficiary took courses in Engineering Mechanics, Engineering Graphics, Mathematics, Physics, Solid and Fluid Mechanics, Structural Analysis, as well as coursework in Design and Drawing. Further, counsel states that the beneficiary completed a post graduate program of study in Computer Applications. His two educational programs combined would qualify him for the position.

While some of the beneficiary's coursework might be relevant, the petitioner specifically listed that a degree in Computer Engineering was required. The petitioner did not provide that a degree in any field of Engineering would be accepted, such as Civil or Mechanical Engineering, or any other field of Engineering. The beneficiary's transcript reflects that he took a lot of very directed coursework, which would not appear to be relevant to the specific field of Computer Engineering: Building Construction and Drawing, Building Material & Concrete Technology, Surveying, Engineering Geology, Construction Management and Building Economics, Water Resource Engineering and Drawing, Environmental Engineering, and other courses. Based on his coursework completed, we would not conclude that a degree in Civil Engineering is closely related to a program of study in Computer Engineering. Regarding the beneficiary's studies in Computer Applications, the evaluation that the petitioner submitted described this education as "one year of professional training offered at a non-regionally accredited institute in the United States." The coursework would be professional training and not education. Further, the petitioner did not draft Form ETA 750 to allow for an "equivalent" based on any alternate combinations of education and/or experience.

Related to these issues, is the question of how the position's actual minimum requirements were expressed to DOL, advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position.

The AAO issued an RFE to the petitioner to determine its intent. The petitioner did not respond to the RFE. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, we cannot determine whether the petitioner expressed the intention clearly to any U.S. candidates in its recruitment efforts that it would accept any equivalent degrees based on a combination of education or education and experience.

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. *Matter of 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. Moreover, a subsequent case in the same district, *Snapnames.com, Inc.*, held that CIS has an independent role in determining whether the alien meets the requirements certified by DOL. 2006 WL 3491005 at *7.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (*citing Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition 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 beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" in the required field of study, or a closely related field, and, thus, does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Further, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750. The petitioner specifies that a bachelor's degree in Computer Engineering, or a closely related field is required, and the certified Form ETA 750 does not allow for meeting

the degree requirement through any equivalency, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

Further, although not raised in the director's decision, the petition should have been denied based on the petitioner's failure to demonstrate that the beneficiary had the required prior experience to meet the terms of the certified labor certification. 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*, 229 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 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.

In examining the issue of the beneficiary's experience, 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. at 406. *See also, Madany v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d at 1. 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 priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires two years experience in the job offered, as an Internet Developer, or two years of experience as a Senior Programmer. The offer also requires that the candidate have: two years experience in the use of HTML, ASP, SQL, and Windows NT; two years experience using Microsoft Visual Studio; and one year experience in designing and developing enterprise-level solutions using MTS and Distributed Inter-Network Applications Architecture.

On the Form ETA 750B, signed by the beneficiary on April 26, 2004, the beneficiary listed his prior experience as: (1) the petitioner, April 2004 to the present (date of signature), Senior Developer; (2) Accurate Software International, Wilmington, DE, November 2002 to April 2004, Senior Programmer; (3) Reliable Software Solutions, Inc., Freehold, NJ, February 2000 to October 2002, Senior Programmer; (4) TIPS Infotek (P) Ltd., Ameerpet, Hyderabad, India, from June 1999 to December 1999, Programmer/Analyst; and (5) EeaSa Informatics, Ameerpet, Hyderabad, India, from January 1997 to May 1999, Software Programmer.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers

> giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letter:

> Letter from [redacted] President, Accurate Softwares International Inc., dated April 15, 2004;
> Position title: Senior Programmer;
> Dates of employment: November 1, 2002 to April 15, 2004 on a full-time basis;
> Description of duties: not listed.

The experience listed from Accurate Software addresses experience that the beneficiary gained subsequent to the November 9, 2001 priority date. Further, while the petitioner provided several W-2 Forms for the beneficiary, which list paying employers in the computer field, it is not clear from the documentation that the beneficiary's employment with those employers was full-time, or in the required position.[6] Further, the experience letter provided on behalf of the beneficiary does not evidence that the beneficiary obtained skills in the other special requirements listed in section 15 of Form ETA 750A. Accordingly, the petitioner did not document that the beneficiary has the required "2 years experience in the use of HTML, ASP, SQL, and Windows NT;" as well as the required "2 years experience using Microsoft Visual Studio," and the required "1 year experience in designing and developing enterprise solutions using MTS and Distributed inter-Network Applications Architecture."

The AAO's RFE requested that the petitioner provide evidence to document that the beneficiary had the required experience by the time of the priority date. However, as noted above, the petitioner failed to respond to the RFE. *See* 8 C.F.R. §§ 103.2(b)(8) and (12); 8 C.F.R. § 103.2(b)(14).

Therefore, the petitioner has failed to adequately document that the beneficiary had the required prior two years of experience in the position offered as an Internet Developer, or alternatively that the beneficiary had two years of prior experience in the related occupation of a Senior Programmer obtained prior November 9, 2001.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Accordingly, 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.

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[6] The beneficiary's 2000 W-2 Form from Reliable Software Solutions shows wages in the amount of $27,532, which would not clearly exhibit full-time employment in the computer field.