U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 02 2008

LIN-03-204-53548

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[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.

for

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center ("director"), denied the employment-based immigrant visa petition.[1] The petitioner filed an appeal to the Administrative Appeals Office ("AAO"). On November 22, 2006, the AAO dismissed the appeal. The AAO reopened the petition on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for entry of a new decision. The appeal will be dismissed.

The petitioner is a computer consulting and software developer, and seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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 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).[2]

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 skilled worker or professional worker pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3). 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 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.

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

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[1] The petitioner has also filed a prior I-140 petition on the beneficiary's behalf, which was denied as the petitioner failed to establish that the beneficiary had the required educational background to meet the requirements of the certified labor certification.

[2] 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).

beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on November 1, 2001. The proffered wage as stated on the Form ETA 750 is $69,200 per year based on a 40 hour work week. The Form ETA 750 was certified on November 18, 2002, and the petitioner filed the Form I-140 petition on the beneficiary's behalf on June 19, 2003.

On May 27, 2004, 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 a Bachelor's degree or equivalent, which was listed as a requirement on the certified labor certification. The petitioner appealed that decision to the AAO.

On September 13, 2005, the beneficiary filed a "MOTION TO REOPEN Permanent residence Concurrent file." The beneficiary cites no authority that would allow a single motion to seek to reopen multiple petitions/applications. **Moreover, the beneficiary was not an affected party to the petition. 8 C.F.R.** § 103.3(a)(1)(iii). On March 6, 2006, the director dismissed the motion as untimely and because the beneficiary was not an affected party.

On November 22, 2005, the AAO director dismissed the petitioner's appeal as the degree was not a "foreign equivalent degree," and therefore did not meet the stated qualifications of the certified ETA 750.

On December 20, 1996, the beneficiary filed a complaint in the United States District Court for the District of Columbia, asking the court to set aside the AAO's decision.

On March 7, 2007, the AAO reopened the petition on motion pursuant to 8 C.F.R. § 103.5(a)(5)(ii) for entry of a new decision, and allowed the petitioner thirty days in which to submit additional information. This notice was mistakenly sent to the beneficiary's litigation attorney in addition to the petitioner, although the beneficiary is not an affected party in this matter. 8 C.F.R. § 103.3(a)(1)(iii). The petitioner did not respond.

On June 4, 2007, the AAO issued a Notice of Adverse Information. The Notice provided that the Institution of Engineers is a professional association, and therefore, the beneficiary would not have attended classes there as he had listed on Form ETA 750B. On another Form ETA 750 with a different filing, the beneficiary indicated that he had received a bachelor's degree based on studies at the Institute. Further, the beneficiary inconsistently listed his program of study for which he earned a diploma from the State Board of Technical Education and Training in 1990. Further, between the two filings, several evaluations appeared to be discrepant, as some seemed to rely on both the beneficiary's three-year diploma, and the passage of Section A & B examinations to reach the determination that the beneficiary had a bachelor's degree, while others did not. A copy of this notice was not sent to the petitioner's counsel; however, counsel appears to be in-house. Regardless, as discussed below, the information in the June 4, 2007 notice does not form the basis of this decision. The petitioner did not respond.

On September 17, 2007, the AAO director issued an RFE, which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner did not respond to this request. On this basis alone, the petition may be denied. 8 C.F.R. § 103.2(b)(13).

On March 26, 2008, the U.S. District Court for the District of Columbia granted summary judgment in Citizenship and Immigration Services' (CIS') favor. *Maramjaya v. United States Citizenship and Immigration Services*, 1:06-cv-02158-RCL, (D.D.C. March 26, 2008). Nevertheless, as we have already reopened the matter, we will review the issues with deference to the court's decision.

On appeal, counsel asserted that the beneficiary had the educational equivalent of a bachelor's degree and the petition should have been approved.

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. In this matter, the petitioner has not demonstrated that it would have accepted less than a four-year baccalaureate.

The proffered position, as described on the Form ETA 750, requires a four-year bachelor's degree and one year 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 030.162-014, "Programmer Analyst," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/link/summary/15-1032.00 (accessed July 14, 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/15-1031.00#JobZone* (accessed December 12, 2006).[3] 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

[3] 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.

> 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.) 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.

It is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and the regulation quoted above use the word "degree" in relation to professionals, with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) specifying that the evidence of a degree "shall" be in the form a an official record "from a college or university." 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* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential.

The beneficiary provided a certificate to show that he had passed Sections A and B of the Institution of Engineers Exams in the field of Electronics and Communications Engineering in the winter of 1991 and the winter of 1995. He additionally completed a three-year "diploma" following ten years of high school, and has relevant work experience. Thus, the issues are whether the beneficiary's passage of Sections A and B of the Institution of Engineering Exams is equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's work experience and/or additional diploma. 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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> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

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

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

> There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** ***See Castaneda-Gonzalez v. INS***, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two **determinations listed in section 212(a)(14).**[4] **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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> * * *
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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)

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

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

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 (Nov. 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 as a professional under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education from a college or university required for the equivalent of a bachelor's degree.

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

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

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

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (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,* CV 04-1849-PK (D. Ore. Nov. 3, 2005), submitted in support of the beneficiary's Motion to Reopen. This decision 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." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

More significantly, the United States District Court for the District of Columbia in *Maramjaya v. United States Citizenship and Immigration Services*, 1:06-cv-02158-RCL, recognized that a single degree is required both for classification as a professional and in accordance with the job requirements certified by DOL:

> At issue in this case is USCIS's determination that plaintiff did not meet the minimum requirements listed on Covansys's Form ETA 750. USCIS based this determination on plaintiff's not possessing the equivalent of a four-year bachelor's degree because he had not obtained a single four-year degree. Plaintiff essentially asks this Court to find that USCIS abused its discretion by refusing to allow other relevant education or experience to supplement plaintiff's three-year degree so as to be equivalent to a four-year degree. As explained below, when giving proper deference to USCIS's decision, this Court finds that it was not arbitrary, capricious, an abuse of discretion, contrary to law, or unsupported by substantial evidence.
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> The Form I-140 in question indicates that Covansys sought to qualify plaintiff as either a professional or skilled worker. By statute *professionals* "hold baccalaureate degrees and [ ] are members of the professions." 8 U.S.C. § 1153(b)(3)(A)(ii). And, the applicable USCIS regulation indicates that a professional "holds at least *a* United States baccalaureate degree or *a* foreign equivalent degree and [ ] is a member of the professions." 8 C.F.R. § 204.5(l)(2) (emphasis added). The use of the singular "*a*" in this regulation is significant, particularly

> when a regulation for a different type of visa explicitly allows for the combination of educational experiences to meet a bachelor's degree requirement. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C)-(D) (stating that to qualify for a "specialty occupation" an alien may have "education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate . . . degree.). The Court finds entirely reasonable USCIS's determination that a four-year degree was required.[5] Thus, to the extent plaintiff seeks qualification as a professional, USCIS's denial for lack of a four-year bachelor's degree was well within its discretion.
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> Here, the Form ETA-750 clearly states that a "Bachelor's or equivalent" is the minimum required education and that this is a four-year education requirement. It is also clear that plaintiff only meets this requirement if his three-year diploma may be combined with other credentials such as his "Sections A&B Examinations" documentation. [Footnote omitted.] USCIS determined that the language in question required a single four-year degree equivalent to a United States bachelor's degree and consequently denied the petition. This court finds that this conclusion is reasonable and that the denial displays the requisite rational connection between the facts and USCIS's action; thus defendant acted within its discretion.

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.

On the Form ETA 750A, the "job offer" position description for a Programmer Analyst provides:

> Carry out the program analysis, program design, coding and testing of software application systems utilizing JAVA, WINDOWS, DB2.

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: not listed; High School: not listed; College: 4 years;

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[5] The court does not view the applicable statutory language as particularly ambiguous, but even if it were, USCIS's reasonable interpretation of an ambiguity within a statutory definition would be entitled to this Court's deference. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).

Major Field Study:	College degree: Bachelor's or equivalent; Computer Science, or MIS or Engineering.
Experience:	1 year in the job offered, Programmer Analyst, or 1 year in the related occupation of Systems Analysis &/or Programmer &/or Software Engineering &/or Computer Consulting.
Other special requirements:	Work experience with JAVA and DB2. Employer is a software consulting firm. Relocation to various client sites throughout the U.S. for periods of 6 months to 2 years required.

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) State Board of Technical Education and Training, Andhra Pradesh, India; Field of Study: Electronics and Communications Engineering; from September 1986 to February 1990, for which he received a Diploma; and (2) The Institution of Engineers, India; Field of Study: Electronics and Communications Engineering; from November 1991 to November 1995, for which he received a "Bachelor's."

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:

- Evaluator: International Credentials Evaluation and Translation Services.
- The evaluation provides that the beneficiary's passage of Sections A & B of the Institutions of Engineers of India Examinations, in 1991 and 1995 would be the U.S. degree equivalent of a Bachelor of Science degree in Electronics Engineering.
- The evaluation considers that the beneficiary was awarded a Sections A & B Examination Certificate in Electronics and Communication Engineering from the Institution of Engineers in India for passing exams in 1991 and 1995. Further, the evaluation provides that the Institution of Engineers is a nationally recognized professional association for the Engineering profession, which grants membership to individuals who have achieved advanced standing in the profession and have passed the requisite qualifying examinations.
- The evaluation provides that the beneficiary completed the academic requirements of Sections A & B, and students in these sections complete sufficient specialized coursework in Electronics, Systems Management, Communication Engineering, Circuit and Field Theory, Pulse and Digital Circuits, among other relevant courses.

- The evaluation further provides that the Institution of Engineers is a regionally accredited institution of higher education in India, and that its academic criterion in the Section A & B Exam Certificate program "significantly parallels those parameters upheld by accredited colleges and universities of precedence in the United States."

On appeal, the petitioner submitted:

Letter from Osmania University that passage of Sections A & B of the Institute of Engineers Examination is the equivalent of a Bachelor's degree in Engineering from Osmania University, Hyderabad, India.

Letter from the Government Ministry of Education and Social Welfare that passage of Sections A & B of the Institute of Engineers Examination is the equivalent of a Bachelor's degree in Engineering from a recognized university "for purpose of recruitment to superior posts and services under the Central Government."

Letter from the Institute of Engineers that passage of Sections A & B of the Institute of Engineers Examination is the equivalent of a Bachelor's degree in Engineering or Bachelor's in Technology from an Indian university.

Evaluation Two:

- Evaluator: Multinational Education & Information Services, Inc., Atlanta, GA.
- The evaluation considered the beneficiary's completion of the Sections A & B Examinations of the Institution of Engineers (India) in 1995.
- The evaluator found passage of the two sections equivalent to completion of a "four-year program of post-secondary academic studies in Electrical and Electronics & Communication Engineering and transferable to an accredited university in the United States."
- The evaluator additionally noted that during the beneficiary's studies that he had taken various courses, including Mathematics, Engineering Drawing, Engineering Graphics, Machine Design & Drawing, Computer Engineering, and such.
- Based on the beneficiary's completion of Sections A & B of the Institution of Engineers Examination, the evaluator concluded that the beneficiary had the equivalent of a Bachelor of Engineering degree in Electronics Engineering from an accredited university in the U.S.

Evaluation Three:

- Evaluator: Foundation for International Services, Inc., Bothell, Washington.
- The evaluation considered the three-year full-time Diploma Course of study under New Curriculum at the Govt. Polytechnic Warangal, and that he was awarded a Diploma in Electronics and Communication Engineering dated February 28, 1990 signed by the Principal of the Polytechnic. The evaluator found this to be the equivalent of graduation from high school plus one year of university level credit in electronics and communication from an accredited community college in the United States.
- The evaluation also considered the Certificate awarded by the Institution of Engineers (India), which provided that the beneficiary became an Associate of the Institution on May 27, 1996. The evaluator considered this to be the equivalent of a bachelor's degree in electrical engineering with a

specialization in electronics and communication engineering based on passage of Sections A and B in the Electronics and Communication Engineering Branch.

- The evaluator considered the beneficiary's studies to be the equivalent of a Bachelor's degree in electrical engineering with a specialization in electronics and communication engineering from an accredited college or university in the United States.

The petitioner additionally submitted letters from Efren Hernandez dated January 7, 2003 and July 23, 2003, respectively, of the INS Office of Adjudications. The letters are in response to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the July 2003 letter, Mr. Hernandez states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi,* 22 I&N 169, 196-197 (Comm. 1968); *see also,* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. Hernandez' correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. We do not find the determination of the credentials evaluation probative in this matter. It is further 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.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor's degree or the foreign equivalent to a U.S. Bachelor's degree, and not based on combination of experience, a series of diplomas, or certificates.

Further, in determining whether the beneficiary's education, is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). ACCRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE,

http://accraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."[6]

Form ETA 750B lists that the beneficiary obtained a "Bachelor's" from the Institution of Engineers, Calcutta, India, based on studies in the field of Electronics and Communications Engineering from November 1991 to November 1995. Form ETA 750 also provides that the beneficiary received a Diploma based on studies at the State Board of Technical Education and Training, Andhra Pradesh, India in Electronics and Communications Engineering from September 1986 to February 1990. The petitioner has provided a copy reflecting that the beneficiary passed Sections A and B of the Institution of Engineers Examinations.

Regarding the beneficiary's three year program of study resulting in a diploma, several of the evaluations note that these studies would be equivalent to one year of course work, however, passage of Sections A and B examinations following course work are the relevant studies through which the beneficiary would seek to meet the bachelor's equivalent standard.[7]

On appeal, counsel had asserted that the issue hinged on the definition of equivalent and that the ETA 750 would allow for a Bachelor's degree or equivalent, and that the beneficiary's passage of section A & B of the examinations would establish that he qualifies based on equivalency and thus does meet the qualifications as stated on Form ETA 750.

We note that the labor certification did not list that any qualified U.S. worker could meet this standard through an alternate combination of education, training and experience. It is counsel's contention that that it was the employer's intent to require credentials equivalent to a U.S. baccalaureate rather than a foreign equivalent degree.

Related to this issue, is the question of how was the position advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree in Science, Computer Science, or Engineering have known that his or her combination of education and experience would qualify them for the position. To ascertain the petitioner's expressed intent in advertising the position requirements, the AAO sent the petitioner the September 17, 2007 RFE.

The petitioner did not respond to the AAO's RFE. As stated above, this failure alone is sufficient basis to deny the petition. 8 C.F.R. § 103.2(b)(13). As the petitioner has not responded, we cannot assess how the position was advertised to U.S. workers to determine if the petitioner's intent concerning the actual minimum

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[6] Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

[7] We note that in order to be considered the equivalent of a degree, the individual must pass both Sections A and B of the Examinations. Passage of only one section is insufficient to be considered the equivalent of a foreign degree.

requirements of the proffered position would include equivalency alternatives to a four-year bachelor's degree.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," but rather the equivalent of a foreign degree through education and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.[8] 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.

However, the question remains whether the petition should be considered under the skilled worker category. 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. Even considered under this category, however,, the beneficiary still would not meet the requirements of the certified ETA 750. The AAO tried to ascertain whether the petitioner would accept any alternatives to a four-year degree. The petitioner did not respond at all, and the record therefore does not include its recruitment in response. Therefore, we cannot determine that the petitioner considered all candidates with or without degrees for the position offered.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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[8] *Maramjaya v. United States Citizenship and Immigration Services*, 1:06-cv-02158-RCL recognized that CIS reasonably determined that the beneficiary did not have a single four-year degree as required by the Form ETA 750.