U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 10 2008
SRC-04-138-52285

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, Texas Service Center ("director"), denied the employment-based immigrant visa petition and certified the decision to the Administrative Appeals Office ("AAO").[1] As the director's decision contained the name of the wrong petitioner and beneficiary, the AAO remanded the petition to the director to provide proper notice to the petitioner. On August 4, 2006, the director issued a decision and denied the petition. The petitioner appealed and the matter is now before the AAO. The appeal will be dismissed.

The petitioner is a distributor of materials handling equipment, and seeks to employ the beneficiary permanently in the United States as an Account Executive. 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 level of education stated on the labor certification as the beneficiary did not have a four-year degree in the field of commerce.

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 professional worker. 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 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.

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[1] *See* 8 C.F.R. § 103.4(5). The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). *See* DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

Certifications by regional service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

[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).

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). Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on May 14, 2002.

On November 8, 2004, the director issued a Request for Evidence ("RFE") for the petitioner to provide an evaluation of the beneficiary's foreign education to show its U.S. equivalency and whether the beneficiary met the qualifications of the certified labor certification. The petitioner responded.

On December 16, 2004, the director denied the petition and certified the petition to the AAO for review. 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. Specifically, the petition required a four-year bachelor's degree in Commerce and the beneficiary had a Canadian degree in Sociology indicated by a credentials evaluator as the equivalent of three years of study at an accredited college in the United States. Further, the educational evaluation relied on a combination of education and experience, including experience obtained after the priority date, as well as experience gained while employed with the petitioner in H-1B status. Accordingly, the director found that the beneficiary did not meet the requirements of the certified labor certification. Further, the director provided that:

> At the time the beneficiary began working for the petitioner, the beneficiary held three years of university-level credit from a regionally accredited U.S. college or university and two years of work experience. The occupation the beneficiary entered with is the same occupation as being petitioned for: account executive. It appears the minimum for entry into the occupation is less than a minimum of a baccalaureate degree and the alien was not a member of the professions for immigrant purposes at the time of hire as an account executive.

On July 24, 2006, the AAO remanded the petition to the director as the initial decision and certification listed the wrong petitioner and beneficiary. Petitioner's counsel asserted that it had not filed an appeal, as it had not received any decision from the director in the instant matter. The AAO remanded the petition to the director for transmittal of the decision to the attorney of record.

On August 4, 2006, the director issued a decision in which she denied the petition for the reasons stated in her December 16, 2004 certification. The petitioner appealed and the matter is now before the AAO.

On appeal, the petitioner provides that Citizenship & Immigration Services' ("CIS") decision, "contains errors of fact and law which will be more particularly described in our brief, to be filed."

On October 18, 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 responded.[3]

[3] Counsel indicated in his RFE response to the AAO RFE that, "we are not aware of the reasons for the Service Center's denial at that time (the Service Center never sent us their decision), we could not provide our supporting evidence (at the time of filing)."

Counsel's RFE response, however, conflicts with the information provided with the appeal form, which clearly states that counsel's firm received CIS' decision: "We are in receipt of your decision dated August 4,

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 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 164.167-010, "Account Executive," 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/11-2011.00 (accessed July 9, 2008) 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 id.*[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. Because of both the stated requirements on the labor certification and DOL's standardized occupational requirements, CIS will consider the position and the petition under both the professional and the skilled worker categories.

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.

2006 and provide herewith our Notice of Appeal to the AAO."

As the petitioner did not submit a brief on appeal, it has not addressed the director's reasons for the petition's denial. 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).

[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 account executive has a SVP of 8 allowing for four or more years of experience.

The above regulation uses 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 possesses a foreign bachelor's degree based on the equivalent of three years of education in a field of study not listed on the certified Form ETA 750. He additionally has prior work experience. Thus, the issues are whether the beneficiary's foreign degree in an unrelated field is equivalent to a U.S. baccalaureate degree, and if not, whether it is appropriate to consider the beneficiary's work experience in addition to his degree. 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-
>
> > (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).[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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> * * *
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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 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 and the beneficiary are also not eligible 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:

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

> *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).
>
> 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. November 3, 2005), which finds that CIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same

district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services ("CIS") properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor's degree.

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 an Account Executive states:

Create and develop markets for product lines; Consult with clients to ascertain material handling requirements, budgetary restrictions and to develop product pricing formulas in order to perform cost-benefit analysis for the benefit of the client; Prepare market and budget plans on a monthly basis utilizing historical quotation data; Create "Cube Studies" in order to determine client mathematical storage needs and cost-benefit analysis of storage, as well as retrieval systems; Plan, develop and compose industrial racking designs for the purpose of storage and material flow solutions in written format for presentation to clients utilizing "AutoCAD" software.

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: 8; High School: 4; College: 4 years; College degree: Bachelors or equivalent;
Major Field Study:	Commerce
Experience:	1 year in the job offered, Account Executive.

Other special requirements: None.

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: Laurentian University, Sudbury, Ontario, Canada; Field of Study: Sociology; from September 1991 to June 1995, for which he received a Bachelor's degree.

The beneficiary listed his prior work experience as: (1) the petitioner, Houston, TX, from May 2000 to present (date of signature: April 4, 2002), position: Account Executive; (2) G.N. Johnston Equipment Co., Markham, Ontario, Canada, from November 1999 to May 2000, Core Sales Account Manager; (3) G.N. Johnston Equipment Co., Markham, Ontario, Canada, from June 1998 to November 1999, Raymond Rebuilt Account Manager; and (4) Xerox, Peterborough, Ontario, Canada, from August 1997 to June 1998, Account Manager.

In response to the director's RFE, the petitioner submitted the following evaluation of the beneficiary's education:

Evaluation:

- Evaluation: Foundation for International Services, Inc., Bothell, Washington.
- The evaluator considered a copy of the beneficiary's diploma from Laurentian University in Sudbury, Ontario, Canada, which conferred a Bachelor of Arts degree on the beneficiary. The evaluator found that this was equivalent to three years of university-level credit from a regionally accredited college or university in the United States.
- The evaluator also considered two letters, which verified the beneficiary's employment experience with Johnston Equipment as an Account Manager from June 1998 to May 2000, and his experience with Malin [the petitioner] as an account executive from May 2000 to the present (date of evaluation December 10, 2004) equating to six and one-half years of experience.
- The evaluator concluded that the beneficiary had the equivalent of three years of university level credit, and based on his employment experience (factored as three years of experience equivalent to one year of university-level credit), that the beneficiary had the equivalent of a bachelor's degree in

> business administration with a specialization in marketing from a regionally accredited college or university in the U.S.

The rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). Therefore, the evaluation, which the petitioner provided that combined the beneficiary's education and work experience and determined that he had the equivalent of a bachelor's degree might be acceptable for a non-immigrant H-1B petition, but not for an immigrant visa petition.

Additionally, the director provided in her decision that:

> At the time the beneficiary began working for the petitioner, the beneficiary held three years of university-level credit from a regionally accredited U.S. college or university and two years of work experience. The occupation the beneficiary entered with is the same occupation as being petitioned for: account executive. It appears the minimum for entry into the occupation is less than a minimum of a baccalaureate degree and the alien was not a member of the professions for immigrant purposes at the time of hire as an account executive.

The evaluation considered the beneficiary's equivalency to three years of education, and in order to show three years of work experience, the evaluation would have calculated the beneficiary's experience with G.N. Johnston for two years, and would have also included one year of the beneficiary's experience while employed with the petitioner. This would reach the three years of experience to equate to one year of education to find that the beneficiary had the equivalent of a degree. As the director notes, the petitioner hired the beneficiary to work as an account executive, a position which requires a degree, without the beneficiary having a degree or its equivalent. Even if we were to accept the evaluation and its educational formulation, and we cannot, this would pose a second problem that the beneficiary does not have the one year of experience as an Account Executive to meet the experience requirements of the position offered before the priority date. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). While the beneficiary lists some additional experience from employment with Xerox, the evaluation does not consider this experience and the petitioner did not provide any letters to document this experience.

We note that the record contains a copy of the beneficiary's diploma, but does not contain any transcripts for the beneficiary's program of study to show how many years of study he completed. The diploma does not list the beneficiary's area of study. His diploma only lists that he was granted a "Bachelor of Arts." Additionally, while the beneficiary lists that he completed his studies in June 1995, the diploma was issued on May 16, 1996. The reason for this difference is unclear.

As the petitioner failed to document that the beneficiary met the requirements of the certified labor certification, the director denied the petition. Form ETA 750 required that the petitioner have a four-year bachelor's degree in Commerce, and the beneficiary had completed the educational equivalent of only three years of study in Sociology. Further, the evaluation was based on a combination of education and experience. The evaluation determined that the beneficiary had a degree in business administration, not in the field of commerce. While the Form ETA 750 stated that it would accept an "equivalent," it did not indicate that the petitioner would accept a combination of education and experience to meet the requirements of a four-year bachelor's degree. As the evaluation relied on a combination of education and experience, the petitioner did

not demonstrate that the beneficiary had the required four years of education leading to a bachelor's degree as required by the terms of the labor certification.

Counsel did not provide any brief on appeal, but did respond to the AAO's RFE. Counsel asserts that throughout the petitioner's recruitment it did seek a candidate with either a bachelor's degree or an equivalent in commerce.

Related to these issues are how the position's actual minimum requirements were expressed to DOL and advertised to U.S. workers, and whether a U.S. worker with the equivalency of a degree would have known that his or her combination of education and experience would qualify them for the position. The AAO's RFE sought to ascertain the petitioner's expressed intent in advertising the position requirements.

In the petitioner's response to the AAO's RFE, the petitioner provided that its intent was to hire an applicant with a degree or an equivalent thereof in Commerce or a related field.[6] Counsel asserts that equivalency meant "an individual possessing qualifications that are either combined with experience or are a combination of academic credentials." Further, counsel asserts that the old Form ETA 750 did not allow a section to clearly indicate these requirements.[7] Counsel additionally asserts that the petitioner's recruitment report reflects that "all of the candidates who applied for the position offered were disqualified as they either lacked the requisite degree equivalency or the requisite 1-year of experience in the position offered."

We note that "Box 15" of Form ETA 750 completed by the petitioner is empty and would have allowed sufficient space for the petitioner to specify any equivalency formulation as a carry-over space from Box 14. The petitioner, however, did not define equivalency in that space or in any other space on Form ETA 750.

The petitioner's submitted materials include a journal ad, which provides "must have BA (or equiv) in business or related field with 1 yr. applicable experience;" an internet posting, which provides "prefer BA or equiv. in business or related field;" an internal posting, which provides "must have Bachelors Degree or equivalent in Commerce and 1 years [sic] of experience in the position offered;" and two additional postings in the "Dallas Job Connection," which provided "Must have BA (or equiv.) in business or related field with 1 yr. applicable experience."

While the petitioner did advertise and list, "or equivalent" in its ads, thereby supporting the petitoner's claim that it would accept candidates with more than just a degree alone,[8] the petitioner failed to address the director's points on appeal. Specifically, the director found that the petitioner hired the beneficiary as an account executive, a position which required a degree, but the beneficiary did not have a degree or its equivalent by his date of hire based on the evaluation that the petitioner provided. The petitioner did not provide any other evaluations on appeal. So, while we would accept that the petitioner considered hiring a

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[6] Form ETA 750 lists only the field of Commerce. It does not provide for any alternative fields of study.

[7] On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

[8] Further, the petitioner listed in some ads that it would accept a degree in Business and in others a degree in Commerce, so that it appears to use the fields somewhat interchangeably and that it would accept either field of study despite restricting the field to Commerce on Form ETA 750.

candidate with an equivalent degree, the beneficiary did not have a degree, or its equivalent, at the time that the petitioner hired the beneficiary to work as an Account Executive. As a result, it appears that the position would not require a degree and more accurately should have been open to candidates without a degree.

Even if we were able to accept the evaluation and that the petitioner would allow for an equivalency, the beneficiary does not meet the job requirements on the labor certification.

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

The job offer stated that the position required the following work experience:

Experience: 1 year in the job offered, Account Executive.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which provides:

(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.

The petitioner did not submit any documentation of the beneficiary's prior experience to evidence the beneficiary's employment with any of the entities that the beneficiary listed on Form ETA 750B. The petitioner did submit a letter summarizing the beneficiary's prior experience, however, that is inadequate to meet the requirements of 8 C.F.R. § 204.5(l)(3). The petitioner's letter did indicate that it had employed the beneficiary since April 2000 in the position of an account executive. However, as noted above, the evaluation relied on part of the beneficiary's experience with the petitioner to show that he had the equivalent bachelor's degree. The evaluation considered the beneficiary's experience from June 1998 to June 2001 to meet three years of work experience to equate to one year of education. This would leave less than one year of experience from June 2001 to the priority date of May 14, 2002. Further, the beneficiary's exact day of the month start date in June 1998 is

unclear, so that we cannot determine precisely how much experience the beneficiary is lacking. Additionally, the beneficiary would have obtained his experience on the job. An employer cannot require experience in the job where it previously provided on-the-job training. 20 C.F.R. § 656.21(b)(5).

Accordingly, the petitioner failed to document that the beneficiary had the experience required for the position offered.

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.