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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 17 200

EAC 04 261 51356

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.

Kevan S. Ponlos for

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a specialty software development & consultancy office. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the beneficiary's academic studies were only the equivalent of two years of college level academic studies in the United States. The director denied the petition accordingly.

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

As set forth in the director's December 15, 2004 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position.

In the instant petition, the petitioner submitted the I-140 petition identifying the beneficiary's classification as a professional or skilled 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 Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3) 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.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

> 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on August 23, 2001.

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).

The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. On appeal, former counsel submitted a third educational evaluation. This document is prepared by Professor [redacted], Department of Statistics and Computer Information Systems, Baruch College, New York and is dated September 7, 2005. Professor [redacted] prepared the evaluation for the Trustforte Corporation, New York, New York. In his evaluation, Professor [redacted] states that the beneficiary attained the equivalent of a bachelor of science degree in computer information systems based on his post secondary academic studies and his professional experience in the field of computing. Professor [redacted] stated that the beneficiary's studies at the University of the Punjab were the equivalent of two years of academic studies leading to a bachelor of a science degree from an accredited institution of higher education in the United States. Professor [redacted] then examined the beneficiary's approximately twenty six years of bachelor's level employment experience in the field of computer information systems, and concluded that, based upon letters of reference from his employers and a supplemental resume, the beneficiary completed approximately twenty-six years of work experience and training in positions of progressively increasing responsibility and sophistication, characterized by the theoretical and practical application of specialized knowledge under superiors, together with peers, with baccalaureate level training in computer information systems and related areas.

Using the equivalency ratio of three years of work experience for one year of college training that Professor [redacted] states was promulgated by Citizenship and Immigration Services (CIS), Professor [redacted] stated that the beneficiary had completed, in time equivalency, the years of training required in connection with the attainment of a bachelor's degree, in addition to his completion of a Bachelor of Science degree at the University of the Punjab. Professor [redacted] concluded that based on the reputation of the University of the Punjab, the number of years of coursework, the nature of the coursework, the grades attained in the courses, and the hours of academic coursework, as well as approximately twenty-six years of professional training and work experience in computer information systems and related areas, he judged that the beneficiary has the equivalent of a bachelor of science in computer information system for a U.S. accredited institution of higher

[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).

education. Former counsel also submitted a letter written by [redacted], Phd, Chairperson, School of Computer Sciences, dated August 2, 2004. In his letter, [redacted] stated that [redacted] had the qualifications to grant college-level credit for training and experience.

On March 9, 2006, current counsel stated that he had seen the brief previously filed with CIS and that it appeared supplementation was essential to the adjudication of the petition.

Counsel stated that CIS established for H-1B petition purposes that equivalence to a baccalaureate degree can be achieved with three years of specialized training and/or work experience for each year of college level training the alien lacks. Counsel stated that applying this standard to a I-140 petition, the beneficiary in the instant petition would need six years of specialized training and/or work experience whereas the beneficiary has many times that minimum specialized training and/or work experience. Counsel asserted that while the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) was specifically applicable to nonimmigrant H-1B petitions, the law had long been interpreted with less specific standards, to recognize a combination of university level education and experience as qualifying for an immigrant visa preference. Counsel cites *Matter of Bienkowski*, 12 I &N Dec. 17(DD 1966); *Matter of Yaakov*, 12 I&N Dec. 203(Reg. Comm. 1969); and *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), stating that CIS erred in finding that the beneficiary's formal education did not constitute the foreign degree equivalent to a U.S. bachelor's degree. Counsel states that while these cases do not impose the same three for one standard as the H-1B nonimmigrant petition does, the instant beneficiary clearly meets both standards.

Counsel resubmitted [redacted]s educational equivalency evaluation, along with two earlier educational equivalency reports submitted to the record. These two documents were from Multinational Evaluation and Translation Services, written by [redacted] and from the Center for Educational Research and Evaluation, Queens, New York, written by [redacted] and dated November 27, 1997. Counsel also submits a new educational equivalency document written by [redacted] dated January 3, 2005. In this document, [redacted] identified as [redacted], Central Michigan University, stated that a committee of academicians was formed to determine the beneficiary's United States educational equivalency. [redacted] identified the other members of the committee as [redacted]. Columbia University, New York, and [redacted], M.S., Clarion University, Pennsylvania. Based on [redacted]s report, the three individuals found that the beneficiary's educational qualifications along with his computer courses were equal to a bachelor of science in information technology from any accredited United States university.

Counsel also submitted copies of eleven various training certificates received by the beneficiary for courses undertaken in New York City or Pakistan from 1980 to 2002 that were not previously submitted to the record. Several of these certificates are for short training courses. One document submitted by counsel is a two page document from the National Bank of Pakistan written in 1997 that describes in detail the beneficiary's initial responsibilities as a trainee programmer from March 1978 to March 1980 and his final responsibilities as senior system analyst from June 1987 to February 1992 and as "manager" from March 1992 to the time the letter was written in 1997.

Counsel asserted that all three evaluation reports confirmed that the beneficiary has a bachelor's degree in fields characterized as computer information systems, information technology or mathematics and computer science. [2] Counsel also resubmitted the beneficiary's resume, letters of reference from four previous

[2] Counsel appeared to suggest all three evaluators found the beneficiary's combined university level studies and his extensive work experience in the fields named in the Form ETA 750 to be the equivalent of a

employers, as well as the current petitioner, the beneficiary's diploma for his bachelor of science degree from the University of the Punjab dated July 1973, with his test result card.

The record also contains seven training certificates submitted with the initial petition that primarily documented brief training courses at IBM World Trade Corporation or IBM Education Center in Karachi, Pakistan in 1997, a course in programming taken from the Meher Associates, Karachi during January to June 1998, and earlier training in 1978. The record does not contain any other evidence relevant to the beneficiary's qualifications.

In a supplemental letter to the record dated June 14, 2007, counsel submitted a copy of a 7th Circuit appellate decision, *Hoosier Care, Inc. vs. Michael Chertoff, Secretary of Homeland Security, et al.* 482 F.3d 987 (April 11, 2007). In a cover letter, counsel stated that in this decision, the court determined that the Department of Labor, not the Department of Homeland Security, determined the specifications of a proffered position and its educational requirements.

On July 23, 2007, the AAO issued a request for evidence to the petitioner. The AAO noted that an issue on appeal in the instant petition was whether the petitioner had demonstrated that the beneficiary is qualified to perform the duties of the proffered position as the petitioner have set forth on the Form ETA 750, Application for Alien Employment Certification (Form ETA 750 or labor certification application), that is, whether the beneficiary attended four years of college and possesses a U.S. bachelor's degree or a foreign equivalent degree in mathematics, engineering or science or computer science with two years of work experience in the proffered position or two years of work experience in the related occupation of systems analyst. The AAO stated that there was no evidence in the record of proceeding that the beneficiary ever enrolled in university-level classes beyond his two years of studies in mathematics.[3]

The AAO further stated that the petitioner did not specify on the Form ETA 750 that the minimum academic requirements of four years of college and a bachelor's degree or equivalent might be met through a combination of lesser degrees or a quantifiable amount of work experience. The labor certification application, as certified, did not demonstrate that the petitioner would accept a combination of a two-year degree, various training certificates, all that are less than a four-year U.S. bachelor's degree or its foreign equivalent, and, a quantifiable amount of work experience when it oversaw the petitioner's labor market test.[4]

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baccalaureate degree in these same fields.

[3] As stated previously, the record contains copies of 18 certificates for further training that the beneficiary attended in either New York or Pakistan.

[4] DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [CIS] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying

The AAO stated further that the documentation in the record of proceeding as currently constituted created ambiguity concerning the actual minimum requirements of the proffered position. Although the clearly stated requirements of the position on the certified labor certification application did not include alternatives to a four-year U.S. bachelor's degree, the AAO stated that it was the petitioner's contention now during the petition process before CIS that the actual minimum requirements do include at least what the beneficiary has achieved through education and work experience. Because of that ambiguity, the AAO issued the RFE to obtain evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. The AAO noted that such intent may have been illustrated through correspondence with DOL, amendments to the labor certification application initialed by DOL and the petitioner, results of recruitment, or other forms of evidence relevant and probative to illustrating the petitioner's organization's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

In response to the AAO's RFE, on December 10, 2007, counsel submitted the following evidence: a letter from [redacted]d, the petitioner's president dated December 10, 2007; a copy of the original Form ETA 750 Labor Certification Application submitted to the DOL; copy of one newspaper advertisement placed in *The New York Times* on Sunday, January 14, 2001; copies of the petitioner's recruitment reports from thirteen dates ranging from May 16, 1999 to April 24, 2001, based on advertisements placed in either *The New York Times*, *Computer World*, or America's Job Bank, a DOL website;[5] an excerpt from the DOL publication, *Occupational Outlook Handbook* (*Handbook*) that examines the position of computer systems analyst; and copies of the educational equivalency evaluations previously submitted to the record.

In his letter, [redacted]d stated that the AAO had questioned the petitioner's intent in recruiting for the position of programmer analyst and had questioned whether the petitioner had contemplated that the job qualifications would include not only a degree or a comparable degree, but also substantial education less than the degree and experience equivalent to the qualification of an individual with a degree. [redacted] stated that utilizing experience as a substitute for part of a degree not only opened up the position to additional U.S. workers, it also conformed to earlier professional standards in which experience was far more significant than classroom education. [redacted] also stated that many older U.S. workers qualify for the programmer analyst position with a combination of education and experience because they entered the profession under the earlier standard and had not completed their undergraduate degree.

[redacted] also noted that while the petitioner accepted and continues to accept the degree and experience or equivalent, including a partial degree and experience in both the software engineer and programmer positions advertised in *The New York Times* (NYT), the advertisement omitted that language in the programmer analyst position and included it in the description of software engineers. [redacted] concluded by stating that when the petitioner evaluated the qualifications of applicants for both positions, it specifically looked for either the degree or its equivalent in a combination of education and experience. [redacted] noted that this use of equivalence is not only a company standard, but also an industry standard.

Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

[5] The recruitment report sheet for the January 14, 2001 *The New York Times* advertisement is included in these reports.

The January 14, 2001 NYT job advertisement contains the following text, in pertinent part: "Integrated Computer System Management Inc. Consulting Comp. is seeking Software Engg. W/MS [and] 1 yr exp. or its equiv. [and] Progg. Analysts w/BS deg. [and] 2+ yrs exp in the foll. Areas . . . . Oracle DBA/Developer, Graphic Design, ASP, HTML, JavasScript, Photoshop, WEB, COBOL/400, RPG/400, CL/400, DB2/400, SQL/400."

The Recruitment Effort documents list various dates of advertisements with the responses received and results obtained. With regard to *The New York Times* job advertisement dated January 14, 2001, the petitioner received nine responses to this advertisement. In examining the reasons for disqualification of the applicants, the petitioner states clearly with regard to several applicants that they did not have the necessary skill sets for the advertised position. With one applicant, the recruiter explicitly noted that one applicant had just finished an associate degree and had no work experience, while the recruiter noted with two applicants that the job required a bachelor degree with a minimum two years of work experience. From this recruitment report, it is not clear whether the remaining applicants who responded to the January 2001 advertisement had, similar to the beneficiary, less than four years of university studies in the identified areas of studies, and their work experience was considered to be the equivalent of a bachelor's degree. The recruiter simply noted that either the petitioner did not require the applicants' skills, or the applicants were either J1 or HIB visa holders who would require the petitioner's sponsorship in order to be employed.

In his response to the AAO RFE, counsel noted that under prior interim decisions, legacy INS had accepted a combination of education and experience as qualifying for visa petition purposes. Counsel again cites to *Matter of Yaakov*, 13 I & N Dec. 203 (Reg. Comm. 1969), and *Matter of Sea, Inc.* 19 I&N 817, 819 (Comm. 1988). Counsel also cites for the first time *Matter of Arjani*, 12 I&N Dec. 649 (Reg. Comm. 1967) and *Matter of Caron Internatonal, Inc.*, 19 I&N Dec. 791 a t 798 (Comm. 1988). With regard to *Arjani,* counsel states that this decision is significant since it focused on the Indian educational system in which undergraduate degrees were commonly three years of academic study, rather than four years. Counsel states that the beneficiary's degree from Pakistan follows the same educational practice established in India before partition of India and the creation of Pakistan. Counsel also notes that *Arjani* relied in part on the job descriptions contained in the *Handbook.* Counsel notes that the 2006-2007 *Handbook* description of computer systems analyst, states the following: "Employers generally prefer applicants who have at least a bachelor's degree in computer science, information science or management information systems (MIS)." Counsel also quotes the following excerpt on training of systems analysts: "While there is no universally accepted way to prepare for a job as a systems analyst, most employers place a premium on some formal college education. Relevant work experience is also very important."

In citing *Matter of Sea*, counsel quotes the following excerpt: "case law accommodates to those instances where persons are recognized as members of the profession without the normally required academic degrees." With regard to *Matter of Caron International Inc.*, counsel notes that this decision held that a combination of education and experience might be considered the equivalent to a professional degree.

On April 22, 2008, counsel resubmitted the petitioner's RFE response and requested oral argument in the matter, stating that, based on the petition's long processing time, the issue in the instant matter is presumably novel. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Furthermore, CIS has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. Moreover, the written record of proceeding fully represents the facts and issues in this matter. Consequently, the request for oral argument is denied.

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). 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).

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 ot a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficairy must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

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 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 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.

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. *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. Regardless, that decision is easily distinguished because it involved a lesser classification, skilled workers as defined in section 203(b)(3)(A)(i) of the Act. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree.

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.*

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café,* 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Kong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

> We have held in *Francis Kellogg,* et als., 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

> In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

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. If we were to accept the employer's definition of "or equivalent," instead of the definition DOL uses, we would allow the employer to "unlawfully" tailor the job requirements to the alien's credentials after DOL has already made a determination on this issue based on its own definitions. We would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education "equivalent" to a degree at the recruitment stage as represented to DOL.

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.

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on us, runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, the AAO will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must ascertain whether the alien, is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, CIS must look to the job offered 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*, *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).

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.

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

14.	Education	
	Grade School	8
	High School	4
	College	4
	College Degree Required	Bachelors [sic]Degree
	Major Field of Study	**Math or Engg. or Sci.** or Comp Sci.

The applicant must also have two years of experience in the job offered, or two years in a related occupation of systems analyst. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A did not state any further special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he had attended Punjab University, Lahore, Pakistan studying math and physics from July 1971 to December 1973, and obtained a bachelor's degree. The beneficiary also indicated that he had attended the IBM World Trade Corporation, Karachi, Pakistan, from July 1978 to September 1978 and received programming certificates. The beneficiary also indicated he attended Meher Associates, Karachi, Pakistan studying programming from January 1998 to July 1998 and had received a certificate. The record reflects no evidence of degrees, or transcripts for further college level studies.

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes four years of college, a bachelor's of science degree in mathematics, engineering, science, or computer sciences and two years of experience in the proffered position of programmer analyst or two years of work experience in the related occupation of systems analyst.

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

Guidance on the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is

in any way questionable, it may be discounted or given less weight." The AAO notes that all three educational equivalency reports acknowledged that the beneficiary had university level studies in mathematics and physics that were equivalent to two years of university level studies at the baccalaureate level. All three reports then examined the beneficiary's extensive work history and his training certificates to conclude that the beneficiary had the equivalent of a U.S. baccalaureate degree in mathematics, engineering science or computer science based on both his university level education and his work experience. These reports as well as counsel on appeal suggest that the beneficiary's work experience should be evaluated using the three for one ratio used in nonimmigrant H-1B petitions in judging whether the beneficiary has the equivalent of a four-year U.S. baccalaureate degree. On appeal and in response to the AAO RFE, counsel also cites to precedent decisions, such as *Arjani, Yaakov*, and *Caron International,* that are not relevant to the immigrant petition adjudications. Contrary to counsel's assertions, unlike the temporary non-immigrant H-1B visa category which permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions. Thus the three educational equivalency reports submitted to the record are given limited weight in these proceedings. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(l)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.[6]

Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a "professional" because the regulation requires it and for a "skilled worker" because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

As previously stated, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the

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[6] Thus, the combination of a degree deemed less than the equivalent to a United States baccalaureate degree and several certificates does not meet the requirement that the beneficiary produce one degree that is determined to be the equivalent of a U.S. baccalaureate degree.

> 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

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

(Emphasis added).

The petitioner did not specify in any cover letter if it was classifying the instant petition as a professional or skilled worker.

The proffered position requires a four-year bachelor's degree. Although the petitioner in response to the AAO RFE, states that both education and experience are considered when hiring its employees, and the non-use of the term "or equivalent" was an omission, the employment recruitment sheet for the January 14, 2001 *New York Times* job announcement, twice states that the position requires a bachelor's degree with two years of experience. Because of those stated requirements by the petitioner's recruiter on the recruitment sheets, the proffered position is for a professional.

DOL assigned the occupational code of 030.162014 on the Form ETA 750 which translates to category 15-1031.00, software applications engineers, in the DOL's online database. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g+Go (accessed April 4, 2008) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, programmer analyst, 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 April 4, 2008). 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.

The proffered position may be properly analyzed as professional since the position requires a bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements.

However, regardless of the classification sought, the petitioner has to establish that the beneficiary's qualifications meet the stipulated educational requirements. For petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. *See* 8 C.F.R. § 204.5(l)(3). And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." *See* 8 C.F.R. §204.5(l)(3)(ii)(C). Thus, regardless of category sought, the beneficiary must have a bachelor's degree or its foreign equivalent.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent foreign degree to a U.S. bachelor's degree. The AAO notes that counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir., 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case. In the instant matter, the petitioner never indicated that it wished to have the instant I-140 petition considered in the skilled worker classification. Since the petitioner has never raised this issue when it initially submitted the ETA 750 to the Department of Labor, the AAO will not discuss it further in these proceedings.

The beneficiary was required to have a four year bachelor's degree on the Form ETA 750. The record indicates that the beneficiary does not hold a U.S. bachelor's degree or a foreign equivalent degree and that the beneficiary does not have the required number of years of college-level education. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. The recruitment materials submitted to the record in response to the AAO's request for further evidence as to the qualifications for the proffered position also did not establish that the petitioner would have accepted less than a four year baccalaureate degree plus the required two years of work experience, when it advertised the position. Since that was not done, the director's decision to deny the petition must be affirmed.

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