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U.S. Citizenship and Immigration Services

[redacted]

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FILE: LIN-05-800-59532 Office: NEBRASKA SERVICE CENTER Date: MAR 06 2008

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a software development and computer consulting company, and seeks to employ the beneficiary permanently in the United States as a software engineer ("Software Consultant"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as listed on Form ETA 750.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).[1]

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

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2), and Section 203(b)(3)(A)(i) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1153(b)(3)(A)(i), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The

[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).

> petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on March 4, 2002. The proffered wage as stated on the Form ETA 750 is $76,482 per year based on a 40 hour work week. The Form ETA 750 was certified on October 21, 2003, and the petitioner filed the I-140 petition on the beneficiary's behalf on July 15, 2005. The petitioner listed the following information on the I-140 Petition: date established: June 5, 1997; gross annual income: $450,000.00; net annual income: $100,000.00; and current number of employees: 3.

On September 21, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence of its ability to pay the proffered wage; the original of Form ETA 750, Parts A & B; and evidence that the beneficiary met the educational, training and experience requirements of the certified labor certification. The petitioner responded. On February 18, 2006, 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 as the petitioner relied on a combination of the beneficiary's studies, training and work experience to meet the requirements of the labor certification. However, neither the regulations or the terms of the labor certification allow for the combination of lesser or unrelated degrees to meet the requirements.

The petitioner appealed to the AAO. On August 23, 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.

On appeal, the petitioner provides that the beneficiary met the requirements of the certified labor certification by the time of the priority date. Specifically, the petitioner provides that based on a newly obtained "course by course" evaluation, the beneficiary has the equivalent of a U.S. bachelor's degree in Mathematics based on his three-year undergraduate degree alone, and not in combination with either his training or prior work experience.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

The proffered position requires a four-year bachelor's degree and two years of experience. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 030.062-010, "Software Engineer," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/link/summary/15-1032.00 (accessed July 14, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See http://online.onetcenter.org/link/summary/15-1031.00#JobZone* (accessed December 12, 2006).[2]

[2] DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required

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.

Further, the petitioner specifically requests consideration as a "professional" in its filing letter of December 2, 2005, and subsequently on appeal.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary possesses a foreign three-year bachelor's degree, and a Master's degree in an unrelated field, as well as training certificates and prior work experience. Thus, the issues are whether the beneficiary's three year foreign degree is equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's other education or work experience in addition to that 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-

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for a position. The DOT was replaced by O*Net. Under the DOT code, the position of software engineer has a SVP of 8 allowing for four or more years of experience.

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

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

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

> There is no doubt that the authority to make preference classification decisions rests with INS. **The language of section 204 cannot be read otherwise.** ***See Castaneda-Gonzalez v. INS***, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two **determinations listed in section 212(a)(14).**[3] **Id. at 423.** The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

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

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

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

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

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

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

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

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

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

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

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

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (CIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (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. Form ETA 750 does not even include the phrase "or equivalent."

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job

offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

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

> Design, develop, test and integrate financial software programs in Oracle (7.x/8.x/9.1) using Java, XML, XSL, Developer 2000 and Discover 2000 tools, implementing Oracle Financials modules including Account Receivable (AR), Account Payable (AP), General Ledger (GL), preparing user manuals and providing end user training.

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:

Further, the job offer listed that the position required:

Education:	College: 4 years; College degree: Bachelors;[4]
Major Field Study:	Computer Science, Mathematics, Engineering, or Science.
Experience:	2 years in the job offered, Software Consultant, or 2 years as a Software Engineer, Programmer/Analyst, or Systems Analyst.
Other special requirements:	Overall experience must include at least one year experience in designing and developing financial software programs in Oracle using Developer 2000 and Discover 2000 tools, implementing Oracle Financials modules including Account Receivable, Account Payable, and General Ledger, and at least six months experience in Java and XML.

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).

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[4] We note specifically that the petitioner did not include "or equivalent" and further did not list any alternate combinations of education, training, and experience in lieu of a four-year bachelor's degree.

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) University of Delhi, Delhi, India; Field of Study: Mathematics; from July 1998 to May 1991, for which he received a Bachelor of Science degree; (2) National Institute of Information Technology, India; Field of Study: Computer Tech. and Applications; from December 1990 to May 1991, for which he received a "Diploma;"and (3) University of Poona, Poona, India; Field of Study: Business Administration; from July 1991 to May 1993, for which he received a Master's degree.

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

Evaluation One:

- Evaluation: Multinational Education & Information Services, Inc., Atlanta, GA.
- The evaluation provided that the beneficiary completed a Bachelor of Science degree at the University of Delhi in India. The evaluator determined that this was "equivalent to a three-year program of academic studies in Mathematics and transferable to an accredited University in the United States.
- Additionally, the beneficiary completed a Master of Business Administration, which "is equivalent to a two-year program of academic studies in Business Administration and transferable to an accredited University in the United States."
- The evaluation also provided that he was awarded certificates in Oracle Financials from the Oracle Education in India in 1998; in Basic Computer Principles, Programming in dBase III and Lotus 1-2-3, Wordstar from the Apple Information Technology Division, India in 1989, in Programming Logic & Techniques, Structured Cobol, Computer Concepts & Simple from the NIIT, India; and Oracle 7.1 with Developer 2000 Forms 4.5 & Reports from the Software Technology Group International Ltd., India in 1997.
- The evaluator also lists that the beneficiary has "extensive training and experience in system analysis and computer program design and development for over five years."
- The evaluation concludes that a combination of the beneficiary's studies, including his Bachelor of Science degree, one year of his Master of Business Administration, and his various certificates would be equivalent to a "Bachelor degree in Mathematics and Computer Science from an accredited University in the United States."

On appeal, the petitioner submitted the following evaluations:

Evaluation Two:

- Evaluation: Career Consulting International, Sunrise, Florida.
- The evaluation provides that the beneficiary has the equivalent of a Bachelor of Science degree in Mathematics from a regionally accredited institution of higher learning in the U.S. based on his degree from the University of Delhi, India.
- In making this determination, the evaluator considers that the beneficiary had 120 "contact hours" using the "Carnegie Unit," similar to a semester hour credit.
- The evaluator cites to UNESCO (the United Nations Education Scientific and Cultural Organization) and that UNESCO recommends that 3 and 4 year degrees should be treated as the equivalent of a

bachelor's degree by all UNESCO members and that the U.S., England, and India are all UNESCO members.[5]

- The evaluator cites to a number of U.S., and U.K. universities that issue bachelor's degrees based on three-year programs.

Evaluation Three:

- Evaluation: Marquess Educational Consultants, London, England.
- The evaluation concludes that the beneficiary's education is the equivalent of a U.S. Bachelor's degree.
- The evaluator reaches this determination based on the number of "contact hours" completed during the three-year program.
- Based on the contact hours completed, the evaluator concludes that the beneficiary's degree would be equivalent to 120 hours of study when converted to the U.S. system.
- The evaluator contends that the Indian bachelor's degree would be accepted by U.S. universities for entry into their master's degree programs.
- The evaluator concludes that there is "substantial functional and academic equivalency between [the beneficiary's degree] and a U.S. four-year baccalaureate, and thus it is our opinion that they should be regarded as equivalent."
- The evaluator, therefore, concludes that the beneficiary's three year degree is the equivalent of a four-year U.S. bachelor's degree.

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

EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science degree awarded in India represents the attainment of a level of education comparable to two or three years of university study in the

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[5] We note that the record of proceeding does not include the UNESCO report. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. *See* http://www.unesco.org (accessed January 16, 2007).

United States.[6] Based on information in the record, this degree would appear to be equivalent to three years of study towards completion of a bachelor's degree in the U.S. Further, EDGE does not provide that India issues a "Master of Business Administration" degree. The record contains a transcript for MBA studies and a certificate from the University of Poona that the beneficiary passed an "M.B.A." examination. The record also contains a transcript for one semester of studies at NIIT. A review of the All India Council for Technical Education, http://www.nba.aicte-ernet.in/nmna.htm accessed on October 16, 2007 does not list NIIT in the State of Delhi as an accredited institution. EDGE provides that "an important aspect of the Indian educational system is the role of authorities established by statute for the regulation and maintenance of uniform standards of education and training in professional subjects." Accreditation provides that the program has received the requisite oversight to ensure uniform educational standards are met.

Further, we note that the labor certification specifically designates that four years of education leading to a Bachelor's degree is required. The petitioner did not list that the beneficiary could have three years, or three years of education in combination with work, training, or unrelated degrees to meet the standard of bachelor's degree.

The petitioner argues that the evaluations submitted on appeal show that the beneficiary has the equivalent of a U.S. bachelor's degree based solely on his Indian bachelor's degree. Further, the petitioner provides that it submitted the recruitment report to DOL and that the Secretary of Labor determined that the beneficiary was qualified.[7]

As noted above, DOL determines whether there are any qualified U.S. workers for the position, and the role of CIS is to determine whether the beneficiary meets the qualifications of the certified labor certification. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1008.

Counsel provides that the evaluations show that the beneficiary completed 120 credit hours in three years, which would be equivalent to the completion of 120 credits for a U.S. bachelor's degree, and that the time spent to complete the degree is, therefore, irrelevant.

The evaluations provide that the beneficiary's Indian education would include "120 contact hours" and that these would be equivalent to 120 U.S. credit hours, which would be the normal course requirement for a U.S. Bachelor's degree. From the information provided, it is not clear that a "contact hour" would be the same or directly equivalent to a U.S. "credit hour." In the Indian system, students spend more time in the classroom providing more "contact hours," whereas the U.S. system calculates time spent studying outside the

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[6] EDGE does not provide that an "Honours" degree equates to additional schooling, or that it is any different than a Bachelor of Science degree without such designation.

[7] The petitioner submitted a copy of the recruitment report to the AAO, which was originally filed with DOL. The ads provide that the candidates should have a "B.S. Degree in Computer Science, Mathematics, Engineering or Science." The ad does not contemplate "or equivalent" or that anyone responding to the ad could meet the qualifications through an alternate combination of education, training, and/or experience. Similarly, the internal job posting provides that the candidates should have a "B.S. Degree in Computer Science, Mathematics, Engineering or Science." The posting does not contemplate any alternate combinations of education, training, and/or experience. Therefore, the petitioner's intent concerning the actual minimum requirements of the proffered position do not include equivalency alternatives to a four-year bachelor's degree and U.S. applicants with qualifications less than a four-year U.S. bachelor's degree may not have had notice that they could have applied for the proffered position.

classroom into the credit hour determination.[8] The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable.

Further, the petitioner specifically drafted Form ETA 750 to include four years of education leading to a Bachelor's degree.

Counsel also provides that the beneficiary also possesses two years of college "towards Computer Technology and Application, and two years of college education towards master degree."

The education related to computer technology and application was obtained at an unaccredited institution. The education related to the "MBA" based on the transcript provided related to general business courses, which do not appear relevant to the present position. Further, consideration of other educational programs, or unrelated degrees would result in the combination of degrees, which, as noted above, is not contemplated by the regulations, or the express terms of the labor certification or the petitioner's expressed intent to DOL during the labor certification process.

The petitioner specifically drafted the labor certification to require four-years of education to obtain a Bachelor's degree. The petitioner did not list that the beneficiary, or any qualified U.S. worker could meet this standard through an alternate combination of education, training and experience. To read Form ETA 750 any other way at this juncture would be unfair to candidates without degrees, but with an alternate combination of education and experience that might have qualified, but who did not respond to the ad based on how it was drafted.

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, whereas the classification sought in this matter does.

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

[8] U.S. students "are assumed to spend two hours of outside preparation for every 1 hour of lecture." Robert A. Watkins, The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," from http:www.handouts.accrao.org/am07/finished/F034p_M_Donahue.pdf (accessed February 19, 2008). As the Indian system is not based on credits, but is exam based, transfer credits are based on a calculation of the number of exams taken multiplied to reach "a base line of 30" for credit conversion as the systems do not readily equate. *Id.*

process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (*citing Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

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

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

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, and runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Further, even if we were to consider the petition under the skilled worker category,[9] the beneficiary would not meet the requirements of the certified ETA 750. First, we note that the skilled worker category would not be appropriate for the position as it is an engineering position with an SVP of 7-8 as discussed above, and

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[9] 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. *See also* 8 C.F.R. § 204.5(l)(2). Additionally, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that 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 . . . The minimum requirements for this classification are at least two years of training or experience."

additionally requires two years of prior experience for the position. The petitioner itself requested consideration under the professional category. Additionally, as the petitioner specifies that a bachelor's degree is required, and the certified Form ETA 750 does not allow for meeting the degree requirement through any equivalency, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

Further, although not raised in the director's decision, the petition should have been denied based on the petitioner's failure to demonstrate its ability to pay the proffered wage. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

First, in determining the petitioner's ability to pay the proffered wage during a given period, Citizenship & Immigration Services ("CIS") will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the case at hand, on Form ETA 750, signed by the beneficiary and dated February 14, 2002, the beneficiary listed that he was employed with the petitioner from May 2000 to May 2001. The petitioner did not provide evidence of payment of wages to the beneficiary. As the petitioner is unable to provide proof that it paid the beneficiary, the petitioner cannot establish its ability to pay the proffered wage through prior wage payment.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is an S corporation. Where an S corporation's income is exclusively from a trade or business, CIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's Form 1120S. The instructions on the Form 1120S, U.S. Income Tax Return for an S Corporation, state on page one, "Caution, Include only trade or business income and expenses on lines 1a through 21." Where an S corporation has income from sources other than from a trade or business, net income is found on Schedule K. The Schedule K form related to the Form 1120 states that an S corporation's total income from its various sources are to be shown not on page one of the Form 1120S, but on lines 1 through 6 of the Schedule K, Shareholders' Shares of Income, Credits, Deductions, etc. *See* Internal Revenue Service, Instructions for Form 1120S, 2003, at http://www.irsgov/pub/irs-03/i1120s.pdf, Instructions for Form

1120S, 2002, at http://www.irs.gov/pub/irs-02/i1120s.pdf, (accessed February 15, 2005). The petitioner lists only income from its business and, thus, CIS evaluates the petitioner's net income based on line 21:

Tax year	Net income or (loss)
2005	not provided[10]
2004	$131,293
2003	$8,890
2002	$16,252

The petitioner's net income would allow for payment of the beneficiary's proffered wage in 2004, but not in any of the other years.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18 on the Forms 1120S. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and evidences the petitioner's ability to pay. The net current assets would be converted to cash as the proffered wage becomes due.

Tax year	Net current assets
2005	not provided
2004	$142,016
2003	$21,093
2002	$29,391

Following this analysis, the petitioner's federal tax returns show that the petitioner similarly lacks the ability to pay the proffered wage in all of the above years with the exception of 2001.

As additional evidence, the petitioner submitted copies of its bank statements for the year 2002. We note that bank statements are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." As the petitioner has not established that the bank balances represent funds in addition to cash assets listed on Schedule L, already considered in calculating the petitioner's net current assets, the bank statements would not demonstrate the petitioner's ability to pay the proffered wage. Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. If we were to examine the statements specifically, the balances range from a low balance of $4,972.28 in July 2002 to a high balance of $38,256.78 in January 2002.

In response to the RFE, the petitioner asserted that the beneficiary would replace a worker identified as [redacted], and that Mr. [redacted] was hired in December 2001, and left the petitioner's employment in July 2005. In general, wages already paid to others are not available to prove the ability to pay the wage

[10] The petitioner did not provide its 2005 federal tax return, which would likely not have been available at the time of filing the I-140 Petition or at the time of its response to the RFE.

proffered to the beneficiary at the priority date of the petition and continuing to the present. The petitioner has not provided requisite evidence in the Form of W-2 statements to adequately document the wages paid to the prior employee and that these funds would be available to pay the beneficiary the proffered wage.

The petitioner also asserts that it paid $167,465 in salaries and wages in 2002. This figure consists of both salaries and officer compensation. Salaries paid to workers based on the petitioner's tax returns for 2002 was: $71,465; in 2003: $75,000; and in 2004: $84,875. While the petitioner provides that its owner is the sole shareholder, and withdrew compensation for favorable taxation purposes, the petitioner did not provide any evidence or statement from its shareholder that the shareholder was willing or able to waive part or all of his compensation to pay the proffered wage.

The petitioner also provided evidence that it had a $50,000 line of credit available from a bank through, which it could pay the beneficiary the proffered wage.

In calculating the ability to pay the proffered salary, CIS will not augment the petitioner's net income or net current assets by adding in the corporation's credit limits, bank lines, or lines of credit. A "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and investment Terms*, 45 (1998). Further, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977).

In reviewing the petitioner's federal tax returns, the returns reflect low gross receipts: 2004: $346,067; 2003: $195,459; and 2001: $213,070, in consideration of the beneficiary's $76,482 annual salary.

Accordingly, the petitioner has failed to establish its ability to pay the proffered wage, and the petition should have been denied on this basis as well.

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.