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

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 01 2008

LIN-08-001-57726

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 financial services provider. It seeks to employ the beneficiary permanently in the United States as a database administrator (principal database consultant). As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 bachelor's degree or foreign equivalent degree as required on the Form ETA 750. The director denied the petition accordingly.

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.

As set forth in the director's March 14, 2008 decision, the primary issue in the current petition is whether the beneficiary possessed the requisite bachelor's degree for the proffered position.

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 also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On appeal counsel asserts that the beneficiary had the academic equivalent of a bachelor of science degree in computer science from one university on the date the application for labor certification was filed, and thus he met the requirements for classification as a professional; and that the petitioner was willing to accept any applicants with less than a bachelor of science degree if they had the equivalent of a bachelor of science degree through a combination of education, training or experience in compliance with DOL regulations and therefore, the beneficiary met the requirements for classification as a third preference skilled worker.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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*, *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).

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 principal database consultant. In the instant case, item 14 describes the requirements of the proffered position as follows:

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

14.	Education	
	Grade School	8 [years]
	High School	4 [years]
	College	4 [years]
	College Degree Required	B.S. or foreign equivalent
	Major Field of Study	Computer Science or related field

The applicant must also have three years of experience in the job offered or in the related occupation of software development. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and need not be recited in this decision. Item 15 of Form ETA 750A requires 3 years of experience with Oracle, J2EE and PL/SQL as other special requirements.

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.[2] On appeal, counsel submitted a brief, a letter dated January 7, 2003 from Efren Hernandez III, Director, Business and Trade Service (Hernandez January 7, 2003 letter), and a decision of the AAO dated May 13, 2008. Other relevant evidence in the record includes the beneficiary's bachelor of science degree in chemistry, transcripts and certificate in computer programming from Gujarat University, academic evaluations dated September 14, 1999 and December 12, 2007 respectively from the Trustforte Corporation (Trustforte) prepared by [redacted], who indicates he is a member of the American Association of Collegiate Registrars and Admissions Officer (AACRAO), a letter of recommendation dated March 31, 2000 from [redacted] Managing Director of Milacron Hitech Private Limited in India (Milacron March 31, 2000 letter), an employment letter dated January 16, 2003 from [redacted], Manager/Operations of Computech Corporation (Computech January 16, 2003 letter), a letter dated January 3, 2003 from [redacted] President of International Products, Inc. (IPI January 3, 2003 letter), a recruitment statement, internal posting, and a newspaper advertisement in the Boston Herald. Because the record did not contain any evidence that the beneficiary obtained a single four-year U.S. bachelor's degree or foreign equivalent degree in computer science or a related field prior to the priority date, the AAO issued a request for evidence (RFE) on August 11, 2008. In response, counsel submits a credential evaluation report dated August 29, 2008 from [redacted] of Career Consulting International (CCI), an expert opinion on educational evaluation dated August 28, 2008 from [redacted] of Marquess Educational Consultants (MEC), a transcript for the beneficiary's certificate in computer programming from Rollwala Computer Center, a letter dated August 22, 2008 from [redacted], Offg. Director of Rollwala Computer Center, Gujarat University (Rollwala Center August 22, 2008 letter) and a letter dated August 21, 2008 from [redacted], Managing Director of Milacron Hitech Private Limited in India (Milacron August 21, 2008 letter).

The original Form ETA 750 was accepted on March 26, 2003 and certified on July 25, 2007. The ETA 750 in the instant case was filed and certified for the position of principal database consultant. DOL assigned the

---

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

occupational code of 15-1061, database administrator, 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/find/result?s=15-1061.00&g=Go (accessed September 17, 2008) and its extensive description of the position and requirements for the position most analogous to the proffered position, the position falls within Job Zone Four requiring "considerable preparation." 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/15-1061.00#JobZone (accessed September 17, 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.

See id.

Therefore, according to DOL's normalized occupational requirements, a database administrator position could be properly analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.[3] In this case, the petitioner checked box e in Part 2 of the I-140 form, which is for either a professional or a skilled worker, but the director analyzed and denied the petition under the professional category. On appeal, the petitioner asserts that the petition should be also analyzed under the skilled worker category. However, the petitioner requires four years of college study, a bachelor's degree in computer science or related field and three years of experience in the job offered or software development for the principal database consultant position. Further, the proffered wage for the position is as high as $94,299 per year. In addition, the Form ETA 750 and submitted recruitment materials pertinent to the underlying labor certification do not indicate that the employer would accept any alternate requirements in lieu of the bachelor's degree requirement. Because of the job requirements and terms the petition's position is for a professional not skilled worker. Therefore, the AAO finds that the director properly analyzed this petition under the professional category.

For the professional category, 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

[3] A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that database administrator positions are not included in this section.

> 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 record of proceeding contains the beneficiary's bachelor's degree in chemistry issued on December 2, 1980 from Gujarat University in India. The transcripts for the beneficiary's bachelor of science degree in chemistry show that the beneficiary's bachelor of science in chemistry degree is a three-year bachelor's degree. In determining whether the beneficiary possessed a single U.S. bachelor's degree or a foreign equivalent degree in chemistry, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, http://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.aacrao.org/register, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE provides a great deal of information about the educational system in India. While it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's three-year bachelor of science degree in chemistry from Gujarat University in India cannot be considered a foreign equivalent degree.

The beneficiary also holds a certificate in computer programming issued on January 3, 1985 by Gujarat University in India. The certificate in computer programming in the record shows that this certificate is to certify that the beneficiary "passed the Certificate in Computer Programming Examination held by the Gujarat University in the month of October 1983." The certificate itself does not show that it is awarded as or results from a single bachelor's degree. The transcript shows that during the period from June 1982 to October 1983 the beneficiary took the subject of Certificate in Computer Programming at Rollwala Computer Center in three parts: 1. Computer Programming for 5 months in the lab practice or field work of drawing, 2. Oral for 5 months in the lab practice or field work of drawing, and 3. Project for 5 months in lectures receipt. It is not clear from the transcript whether the beneficiary received sufficient education at a senior level of college to be awarded a bachelor's degree in computer science. Although counsel also submits the Rollwala Center August 22, 2008 letter in which Director [redacted] certifies that the beneficiary "has successfully completed the Certificate in Computer Programming course in the month of October 1983" and that "the official entrance requirement of this course was the candidate should have a Bachelor's degree," the Rollwala Center August 22, 2008 letter does not establish that the beneficiary's certificate in computer programming is a single source academic degree in computer science. Further, the official websites of Gujarat University and its Rollwala Computer Centre do not support counsel's assertion based on Rollwala Center August 22, 2008

letter.[4] Therefore, the beneficiary's certificate in computer programming cannot be considered as a post-graduate diploma or senior year level of undergraduate diploma in computer science from an accredited institute following a three-year bachelor's degree, and thus, the beneficiary's three-year bachelor's degree plus his certificate are not equivalent to a U.S. baccalaureate in computer science.

Counsel asserts that the beneficiary possessed the equivalent to a U.S. bachelor's degree in computer science according to private credential evaluations from Trustforte, CCI and MEC. The Trustforte September 14, 1999 evaluation evaluated the beneficiary's bachelor of science degree from Gujarat University as equivalent to the completion of three years of academic studies leading to a Bachelor of Science Degree from an accredited institution of higher education in the United States and the certificate in computer programming from Gujarat University as equivalent to the completion of one year of academic studies toward the attainment of a Bachelor of Science Degree in Computer Science from an accredited U.S. institution of higher education, and therefore, concludes that the beneficiary attained the equivalent of a Bachelor of Science Degree in Computer Science from an accredited U.S. institution of higher education.

The Trustforte December 12, 2007 evaluation concluded that the beneficiary attained the foreign equivalent of a Bachelor of Science Degree in Computer Science from an accredited U.S. college or university based on the Certificate in Computer Programming at Gujarat University alone. However, the Trustforte evaluation did not provide any supporting evidence showing that the beneficiary's certificate in computer programming is a post-graduate diploma program. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The Trustforte December 12, 2007 evaluation did not explain how the beneficiary's one-year certificate in computer programming is equivalent to a four-year U.S. bachelor of science degree in computer science while a bachelor degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). As previously discussed, the record does not contain any evidence showing that the certificate in computer programming is a single source bachelor's degree or post-graduate diploma. Nor did the Trustforte September 14, 1999 evaluation explain how the beneficiary's three-year bachelor's degree in chemistry (with majority of courses in the field of chemistry) combined with a one-year certificate in computer programming (three courses in the field of computer application: computer programming, oral and project) can be evaluated as the equivalent of a U.S. bachelor of science degree in computer science. CIS will

---

[4] This office accessed Gujarat University website at http://www.gujaratuniversity.org.in (accessed on September 17, 2008). The website confirms that [redacted] is the director of Rollwala Computer Centre, however, the university website lists Rollwala Computer Centre as one of its administrative departments and provides the following descriptions about the Rollwala Computer Centre: the center was established in 1974; it serves the university as its central computer facility and for computer activities on the campus; the main function of the centre is to support and co-ordinate computer usage by Post-Graduate students, faculties and research departments, and to provide guidance, support and services to the faculties and research scholars of various academic institutions in performing statistical analysis for their research data. The center offers a 6- month certificate course in data entry for which any graduates are eligible and students are selected based on an entrance test.
This office also accessed the website of the Department of Computer Science, Rollwala Computer Centre, at Gujarat University at http://www.rollwala.org (accessed on September 17, 2008) which shows that the Gujarat University Department of Computer Science offers six-semester master of computer application degree program (MCA) and a two-semester post-graduate diploma in computer science and application course (PGDCSA). However, the certificate in computer programming is not listed as either a MCA program or a PGDCSA course.

not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. Therefore, the Trustforte evaluations did not establish that the beneficiary holds a single-source bachelor's degree in computer science or a foreign equivalent degree.

Counsel also submits evaluations from [redacted] of CCI and [redacted] of MEC in response to the AAO's RFE. Both Dr. [redacted] and [redacted] conclude that the beneficiary completed 120 credits in his bachelor of chemistry studies and certificate in computer programming at Gujarat University, 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 classroom into the credit hour determination.[7] The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable. Dr. [redacted] reaches this conclusion by assigning 5.45 credits to each course the beneficiary took in his bachelor in chemistry program and the certificate in computer programming. While she explains that her "process" includes using "unit credits" or "clock hours of instruction" from academic records to determine the number of credits, the beneficiary's transcript in the record does not include either figure. Both [redacted] and Dr. [redacted] conclude that, despite the far greater number of courses in Chemistry, Physics and Biology, the beneficiary has attained the equivalent of a Bachelor of Science Degree with a major in Computer Science from a regionally accredited college or university in the United States.

In his evaluation concluding that the beneficiary's three-year degree and one-year certificate program following 12 years of primary and secondary education is equivalent to 120 credits and a four-year degree in the United States, [redacted] relies on instruments produced by the United Nations Education Scientific and Cultural Organization (UNESCO), which provides that member states should "take all feasible steps" to provide recognition to qualifications in higher education awarded in other states. However, 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. 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). In addition, recognition of foreign studies and qualifications in higher education in the United States is not synonymous with acceptance of a foreign degree as an equivalent to a U.S. degree in immigration procedures under U.S. immigration laws. Further, both [redacted] and [redacted] do not explain how the beneficiary's three-year degree in chemistry combined with a one-year certificate in computer programming can be evaluated as an

---

[5] [redacted] indicates that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but does not indicate the field in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, Ecole Superieure Robert de Sorbon awards degrees based on past experience.

[6] [redacted] indicates he has a "canonical diploma of Sacræ Theologiæ Professor" from St. David's Oecumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

[7] 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 base 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.*

equivalent of a U.S. bachelor's degree in computer science and further, fail to establish that the beneficiary possessed a single bachelor's degree in computer science or a foreign equivalent degree in that required field.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. 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)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's ground denying the petition under the professional category must be affirmed.

As previously discussed, the AAO has found that the director properly analyzed this petition under the professional category. However, on appeal counsel asserts that the petitioner was willing to accept any applicants with less than a bachelor of science degree if they had the equivalent of a bachelor of science degree through a combination of education, training or experience in compliance with DOL regulations and therefore, the beneficiary met the requirements for classification as a third preference skilled worker. Therefore, the AAO will also discuss whether the beneficiary would meet the educational requirements set forth on the Form ETA 750 and thus be qualified for the proffered position as if the petition had been analyzed under the skilled worker category.

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.

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, and any other requirements of the individual labor certification."

The certified Form ETA 750 requires a bachelor of science degree or equivalent in computer science or related field as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary's education includes a three-year bachelor of science degree in chemistry and a one-year certificate in computer programming from Gajarat University in India. Thus, the issues are whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's certificate in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered position as set forth on the labor certification.

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

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

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

> Under § 212(a)(5)(A) of the Act 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.
>
> * * *
>
> 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 (now CIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

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

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

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

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

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

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

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

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

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

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* CV 04-1849-PK (D. Ore. November 3, 2005), which finds that 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*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' At the outset, the court stated that labor certification did not preclude the AAO from considering whether an alien meets the educational requirements. *Id.* at *5. The district court then determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Id.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, CIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7 Thus, the court concluded that where the plain language of those

requirements does not support the petitioner's asserted intent, CIS "does not err in applying the requirements as written." *Id.*

The key to determining the job qualifications specified in the labor certification 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.

Moreover, 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).

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. 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 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 chosen 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.

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

The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." As noted previously, the certified Form ETA 750 requires a bachelor of science degree or foreign equivalent in computer science or related filed. The petitioner clearly required a bachelor's degree or equivalent in computer science, however, the labor certification does not further define the degree equivalent. Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees, diplomas, and/or quantifiable amount of work experience. It is noted that the Form ETA 750 shows that after the initial filing the employer defined the bachelor's degree "equivalent" as "evaluation from U.S. Credentialing stating that the alien's education and experience is 'comparable to a BA degree' ..." on June 16, 2003, however, that definition was deleted, and the DOL regional office approved the correction on February 17, 2006.

Furthermore, the director's November 28, 2007 RFE requested the petitioner to submit documentary evidence to establish the definition of "equivalent" as it was defined in the labor certification process to demonstrate the employer's express intent about the actual minimum requirements of the proffered position to DOL. In response, counsel submitted a recruitment statement related to the relevant labor certification, the internal posting notice, and newspaper advertisements. All these recruitment documents require a "BS or equivalent in Computer Science or related field with three years of experience in the job or with software development." The record does not contain any documents indicating that the employer would accept a combination of lesser degree(s) and quantifiable amount of work experience as an "equivalent" to meet the minimum educational requirement of a bachelor's degree in computer science or related field. The AAO does not find that DOL or U.S. workers were on notice that a combination of lesser degree(s) and work experience as an equivalent would meet the minimum educational requirement of a bachelor's degree in computer science. Therefore, the petitioner failed to demonstrate its intent to accept a combination of lesser degree(s) and work experience as an equivalent of a bachelor's degree in computer science on the Form ETA 750 and the relevant recruitment materials.

Additionally, the court in *Snapnames.com, Inc.* 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. *See Snapnames.com, Inc.* at 11-13. In the instant case, the petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor's degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing.

As previously discussed, the beneficiary holds a three-year bachelor of science degree in chemistry, which alone represents attainment of a level of education comparable to three years of university study in chemistry in the United States, but cannot be deemed as an equivalent of a four-year U.S. bachelor's degree in computer science. The beneficiary also holds a certificate in computer programming from Gujarat University in India. The certificate was issued to the beneficiary for passing the Certificate in Computer Programming Examination held by Gujarat University in October 1983. The transcript shows that during the period from June 1982 to October 1983 the beneficiary took the subject of Certificate in Computer Programming at Rollwala Computer Center. This office accessed the official websites of Gujarat University and its Rollwala Computer Centre and did not find any information to support counsel's assertion that the certificate in computer programming is a single-source degree, senior-year level university courses or a post-graduate

diploma in computer science.[8] Therefore, the beneficiary's certificate in computer programming cannot be considered as a post-graduate diploma or senior year level of undergraduate diploma in computer science from an accredited institute following a three-year bachelor's degree, and thus, the beneficiary's three-year bachelor's degree in chemistry plus his certificate are not equivalent to a U.S. baccalaureate in computer science.

Therefore, the AAO finds that the petitioner would have failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date even if the petition had been analyzed under the skilled worker category.

Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position either under the professional category or the skilled worker category, and counsel's assertions on appeal cannot overcome the grounds of denial in the director's March 14, 2008 decision. Therefore, the director's ground for denying the petition must be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[8] *See* Footnote 4 above.