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

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 14 2008

LIN-07-079-53267

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:

SELF-REPRESENTED

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.[1] The appeal will be dismissed.

The petitioner is an IT software consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750,[2] Application for Alien Employment Certification (Form ETA 750 or labor certification application), 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.

The petitioner was represented by [redacted] and the appeal was filed with a Form G-28, Notice of Entry of Appearance as Attorney or Representative, properly executed by the petitioner and [redacted] of [redacted]. However, the petitioner submits its response to the AAO's request for evidence (RFE) dated June 30, 2008 without any assistance from [redacted] Thus, the petitioner is considered self-represented in this matter.

As set forth in the director's August 9, 2007 decision, the primary issue in the current petition is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position as set forth on the Form ETA 750, that is, whether the beneficiary possesses a 4-year U.S. bachelor's degree or a foreign equivalent degree in computer science or MIS and one year of experience in the job offered or in the related occupation of programming or software engineering.

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 asserted that the petitioner meant to accept a combination of education and work experience that is equivalent to a Bachelor Degree by using the term "equivalent."

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[1] The instant appeal was filed on August 31, 2007. While the appeal was pending with the AAO, the petitioner filed another I-140 immigrant petition (SRC-08-073-52673) on January 2, 2008 with the Texas Service Center. The new petition is currently pending.

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

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

14.	Education	
	Grade School	xx
	High School	xx
	College	xx
	College Degree Required	**B**.S. or equivalent
	Major Field of Study	Computer Science or MIS (Management of Information Systems)

The applicant must also have one year of experience in the job offered or in the related occupation of programming or software engineering. 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 programming languages: Visual Basic 6.0, ASP, JavaScript and databases: SQL Server, Oracle 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.[3] On appeal, counsel did not submit any new or additional evidence. Other relevant evidence in the record includes the beneficiary's bachelor of commerce degree and transcripts from the University of Bombay (now called the University of Mumbai), an International Diploma in Computer Programming and Applications and transcripts from The National Centre for Information Technology (NCC), United Kingdom and Apple Industries Ltd., a Certificate of Participation for Trainers Training Program on Lotus SmartSuite from Lotus, and an education evaluation dated May 7, 2004 from [redacted] of Multinational Education & Information Services, Inc. (MEIS May 7, 2004 evaluation). Because the record does not contain any evidence that the beneficiary obtained a

[3] 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).

four-year U.S. bachelor's degree or foreign equivalent degree in computer science or MIS prior to the priority date, the AAO issued an RFE on June 30, 2008. In response, the petitioner submits copies of advertisements placed in the Washington Post and the internet, internal posting notice and recruitment report for the underlying labor certification processing. The record does not contain any other documentary evidence about the petitioner's educational requirements and the beneficiary's educational qualifications.

The original Form ETA 750 was accepted on June 14, 2004 and certified on December 5, 2006. The ETA 750 in the instant case was filed and certified for the position of programmer analyst. DOL assigned the occupational code of 030.162-014, programmer-analyst, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/crosswalk/DOT?s=030.162-014&g=Go (accessed September 25, 2008) and its extensive description of the programmer analyst 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/15-1051.00#JobZone (accessed September 25, 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, a programmer analyst 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.[4] 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, and the former counsel for the petitioner requested in his submission letter dated January 16, 2007 for "3rd Preference (E31)." The Nebraska Service Center director evaluated the petition under the professional category and denied it on August 9, 2007. On appeal, the petitioner asserted that it meant to accept a combination of education and work experience that is equivalent to a Bachelor Degree by using the term "equivalent" and requested the petition's consideration under the skilled worker category. Therefore, the AAO finds that the petition will be properly analyzed under both the professional category and the skilled worker category.

[4] 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 programmer analyst positions are not included in this section.

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 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 holds a bachelor of commerce degree from the University of Mumbai, an International Diploma in Computer Programming and Applications from NCC and Apple Industries Ltd., and a Certificate of Participation from Lotus. The degree and transcripts from the University of Mumbai show that the beneficiary's bachelor of commerce degree program is a three-year program. The international diploma in computer programming and applications, record of achievement and certificate of marks from NCC and Apple Industries Ltd. show that the beneficiary attended a course moderated by NCC and given by Computer Education by Apple Industries Ltd in Mala, India and completed four courses: Basic Computer Principles, Computer Programming, Computer Accountancy and Programming Project in September 1991. The certificate of Participation from Lotus shows that the beneficiary participated in a trainers training program on Lotus SmartSuite held by Lotus. The NCC diploma and the Lotus certificate do not indicate the length of the courses or trainings. A U.S. 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 record does not establish that the beneficiary's degree, diploma or certificate can be considered a single source foreign equivalent degree.

The petitioner asserted that the beneficiary possessed the equivalent to a U.S. bachelor's degree in computer science or MIS according to a private credential evaluation from MEIS. The MEIS May 7, 2004 evaluation evaluated the beneficiary's bachelor of commerce degree from the University of Mumbai as equivalent to a three-year program of academic studies in Business Administration (Marketing) transferable to an accredited university in the United States. The evaluation further stated that:

> Based on the reputation of the The University of Bombay, National Centre for Information Technology, Bureau of Information Technology Services (India) Private Limited,[5] Apple Industries, Ltd. India, Lotus, the number of years of course work, the nature of course work, the grade earned in these courses, hours of academic course work, and admission

[5] The evaluation stated that the beneficiary was awarded a Certificate in Computer Awareness Programme from the Bureau of Information Technology Services (India) Private Limited in 1996. However, the evaluator did not submit or attach any documentary evidence to support his statements in the evaluation.

> requirements for the awards, [the beneficiary]'s degree of Bachelor of Commerce, Diploma in Computer Programming and Applications, International Diploma in Computer Programming and Applications,[6] Certificate in Computer Awareness Programme, Certificate in Lotus SmartSuite, and over ten years of extensive training and experience in software engineering, system analysis, and computer program design and development are equivalent to an individual with a Bachelor degree in Management Information Systems from an accredited University in the United States.

The MEIS May 7, 2004 evaluation states that the beneficiary obtained a three-year bachelor of commerce degree, and has, as a result of progressively more responsible employment experiences, an educational background the equivalent of an individual with a bachelor's degree in management information systems from an accredited university in the United States. The evaluation used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*). 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); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (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 position, and the director's ground for denying the petition under the professional category must be affirmed.

The AAO will also discuss whether the beneficiary meets the educational requirements set forth on the Form ETA 750 and is qualified for the proffered position 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."

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[6] The evaluation erred in stating that the beneficiary was awarded a Diploma in Computer Programming and Applications from Apple Industries, Ltd. and an International Diploma in Computer Programming and Applications from NCC separately. The evaluator did not submit two separate diplomas to support his assertion. In fact, the diploma in the record indicates that the same course was moderated by NCC and given by Apple Industries, Ltd., and both transcripts from NCC and Apple Industries, Ltd. listed the same four courses, the same grades for the four courses and the same date, September 1991, as the completion time.

As previously discussed, the beneficiary holds a three-year bachelor of commerce degree, which alone represents attainment of a level of education comparable to three years of university study in commerce or business administration in the United States, but cannot be deemed an equivalent of a four-year U.S. bachelor's degree in computer science or MIS. The record shows that the beneficiary also holds a diploma in computer programming and applications from NCC and Apple Industries Ltd.(Apple), and a certificate in Lotus SmartSuite from Lotus. In determining whether the beneficiary possessed a U.S. bachelor's degree or equivalent in computer science or MIS through a combination of the three-year bachelor of commerce degree, the diploma from NCC and Apple, and the certificate from Lotus, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to the registration page for EDGE, http://aacraoedge.aacrao.org/register/index/php, 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 commerce 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. In addition, a bachelor 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 commerce degree from the University of Mumbai cannot be considered a foreign equivalent degree.

EDGE also discusses both Post Secondary Diplomas, for which the entrance requirement is competition of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provide:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

However, the record does not contain any evidence to demonstrate that either the diploma or the certificate is from senior level courses or a post-graduate diploma in computer science. Nor is there any evidence showing that either NCC, Apple or Lotus is an AICTE approved college or institute who has the authorization to grant bachelor's degrees. Therefore, the beneficiary's diploma in computer programming and applications and certificate in Lotus SmartSuite 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 of commerce degree plus his diploma and certificate are not equivalent to a U.S. baccalaureate in computer science or MIS.

The certified Form ETA 750 requires a bachelor of science degree or equivalent in computer science or MIS as the minimum educational requirement for the proffered position. The petitioner asserted that it meant to

accept a combination of education and work experience that is equivalent to a Bachelor Degree by using the term "equivalent." Thus, the issue is whether it is appropriate to consider the beneficiary's experience in addition to her 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.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (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 at *7. In that case, the labor certification application specified an educational requirement of four years of college and a 'B.S. or foreign equivalent.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at 11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated.

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 equivalent in computer science or MIS. The petitioner clearly required a bachelor's degree or equivalent in computer science or MIS, 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 during the 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, certificates and/or quantifiable amount of work experience.

Furthermore, this office issued a RFE requesting the petitioner to submit documentary evidence to establish the definition of "equivalent" as it was defined in the labor certification process to demonstrate that the employer's express intent about the actual minimum requirements of the proffered position to DOL. In

response, the petitioner submits a recruitment statement related to the relevant labor certification, the internal posting notice, and newspaper and internet advertisements. The internal posting notice requires a "B.S. or equivalent in Computer Science or MIS, plus 1 year experience in Programming /Software Engineering" as the minimum requirement. However, the internal posting notice does not define the "equivalent," nor does it indicate 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 MIS.

In response to the RFE, the petitioner argues that advertisements without the minimum education requirements for the position could be the evidence 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. It is noted that the newspaper advertisements and the internet advertisements submitted in response to the AAO's RFE do not contain an educational requirement. However, advertisements without educational requirements do not automatically establish that the petitioner clearly expressed its intent to accept a combination of a lesser degree and quantifiable amount of work experience as "equivalent" to meet the requirements for the proffered position. This office also notes that the advertisements were for many different positions and they did not require the one year experience requirement either. However, the advertisements clearly indicated that the employer was seeking qualified computer *professionals* (emphasis added). It is unlikely that the petitioner sought applicants with no education or experience but only some skills listed in the advertisements to work as a computer professional. There is no evidence that the petitioner considered applicants without four-year bachelor degrees. In addition, the submitted H-1B petitions filed by the petitioner on behalf of the beneficiary in the proffered position show that the petitioner has been clearly indicating that the proffered position is a professional position which requires a bachelor's degree in computer science or related field as minimum requirements. The AAO does not find that DOL and 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 or MIS for the proffered position. 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 or MIS 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.

Therefore, the AAO finds that the petitioner has failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date under the skilled worker category. The petitioner failed to demonstrate that the beneficiary is qualified for the proffered position either under the professional category or the skilled worker category. The petition must be denied.

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.