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

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: OCT 17 2008

EAC-04-031-53461

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner provides business to business software and services, and seeks to employ the beneficiary permanently in the United States as a BaaN Systems Project Director. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). The director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification, and, therefore, the beneficiary did not meet the minimum qualifications as listed on Form ETA 750.

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

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

The petitioner seeks to classify the beneficiary as a professional worker or skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2), provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." 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.

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

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 27, 2001. The proffered wage as stated on the Form ETA 750 is $87,000 to $110,000 per

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

year based on a 40 hour work week.[2] The Form ETA 750 was certified on April 24, 2003, and the petitioner filed the I-140 petition on the beneficiary's behalf on November 25, 2003.[3] The petitioner listed the following information on the I-140 Petition: date established: 2002; gross annual income: "please see attached;" net annual income: "please see attached;" and current number of employees: 70.

On January 19, 2005, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not establish that the beneficiary had the required education. The petitioner relied on a combination of the beneficiary's education, a foreign three-year degree in Commerce, and a foreign Advanced Diploma in Systems Management. The combined education would not meet the qualifications as listed on the Form ETA 750. The petitioner appealed that decision to the AAO.

On October 9, 2007, the AAO Chief issued a Request for Evidence ("RFE"), which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner responded.

On appeal, counsel provides that the beneficiary qualifies for the position as he has an equivalent of a bachelor's degree, and that the petition should be approved 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.

The proffered position requires either a Master's degree or equivalent in Computer Science or Management Information Systems and three years of experience. Alternatively, the petitioner listed that it would accept "alternate education/experience" of a Bachelor's degree in Computer Science or a Bachelor's degree in Management Information Systems, and five years of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.[4] DOL assigned the code of "Managers, All Others," 11-9199. According to DOL's public online database at http://online.onetcenter.org/link/summary/11-9199.00 (accessed August 27, 2008) and its description and requirements for the position most analogous to the petitioner's proffered position, the position does not have a set education or training code.

Because of both the stated requirements on the labor certification and DOL's standardized occupational requirements, CIS will consider the position and the petition under both the professional and the skilled worker categories.

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

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[2] The petitioner provided in an annotation that it pays the beneficiary $110,000.

[3] The petitioner previously filed Form I-140 on the beneficiary's behalf for the same position requesting classification under the advanced degree category. That petition was denied as the petitioner failed to demonstrate that the beneficiary had the education required to meet the terms of the certified labor certification.

[4] Section 101(a)(32) of the Act provides: "The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." This section does not include information technology or computer related positions in the category of professionals, or professional positions.

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

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

The beneficiary possesses a foreign bachelor's degree in Commerce based on three years of education. He additionally completed an "Advanced Diploma in Systems Management." Thus, the issues are whether the beneficiary's three-year foreign degree is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's additional education as well as his initial degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

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

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

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

> (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[5] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

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

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

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

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

The petition and the beneficiary are also not eligible for a third preference immigrant visa under the skilled worker category. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

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

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

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

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

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

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

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

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

> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 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,* 437 F. Supp. 2d at 1179 (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.' The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services ("CIS") properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.,* the petitioner's intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor's degree.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

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

On the Form ETA 750A, the "job offer" position description for a BaaN Systems Project Director provides:

Responsible for BaaN ERP (enterprise wide) software projects. Plan, design & direct BaaN projects, customizing/implementing, linking to web-based custom order processing, inventory management, distribution services, virtual and actual warehousing. Oversee customizing BaaN Finance, Admin and Distribution modules. Provide project management (develop budget, time schedule, evaluate projects), training, supervise consultants & contractors.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Education:	Grade School: none listed; High School: none listed; College: none listed; College degree: Master's or equivalent;**
Major Field Study:	Computer Science, or MIS. ** "Alternate education/experience requirements: BSCS or Bachelor's in MIS and 5 years large database design, development and implementation including 3 years BaaN systems project development."
Experience:	3 years in the job offered, BaaN Systems Project Director, or 3 years in the related occupation of BaaN systems project development.
Other special requirements:	Experience to include 2 years project management or leader for enterprise-wide BaaN implementation; demonstrated ability to implement BaaN Finance, BaaN Admin, BaaN Distribution modules; to implement BaaN on Windows NT and MS SQL-Server; to link BaaN with standard EDI translators. Knowledge of BaaN Advanced Tools.

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) National Institute of Information Technology, Hyderabad, India; Field of Study: Business software and systems management;[6] from July 1992 to June 1995, for which he received an Advanced Diploma in Systems Management; and (2) Osmania University, Hyderabad, India, Field of Study: Business: accounting major; from June 1991 to May 1994, for which he listed he received a Bachelor of Commerce degree in Accounting; and (3) Boards of Secondary/Intermediate Education, Andra Pradesh, India, Field of Study: general subjects, completed 1990, for which he received a High School Diploma.

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[6] The petitioner indicated in a footnote that a course-by-course evaluation determined that the beneficiary's studies were equivalent to one year of U.S. studies.

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

Evaluation One:

- Evaluation: The Trustforte Corporation, New York, New York.
- The evaluation considered the beneficiary's studies, including his Bachelor of Commerce degree, which he completed at Osmania University. Entrance to the university is based on completion of secondary studies and competitive entrance examinations.
- The evaluation states that the beneficiary completed both generalized studies and specialized studies. The beneficiary completed specialized studies in Cost Accounting, Income Tax, and related subjects.
- He was awarded a Diploma for Bachelor of Commerce Degree in 1994.
- The evaluator found that the beneficiary's studies at Osmania University would be equivalent to three years of academic studies toward a Bachelor's degree in the area of Business at an accredited institution of higher education in the United States.
- The evaluation further considered the beneficiary's post-secondary studies in Systems Management at the National Institute of Information Technology (NIIT) in Hyderabad, India.
- The beneficiary completed four semesters of academic coursework, examinations, and training leading to an Advanced Diploma in Systems Management. He took coursework in Computer Programming, Databases, Structured Systems Development, Operating Systems, Relational Database Management Systems, and other subjects.
- The evaluator states that, "the nature of the courses completed by [the beneficiary] indicate that he satisfied substantially similar requirements to the completion of two years of concentrated studies in the computer field, following his completion of three years of bachelor's studies in Business at Osmania University, the candidate attained the equivalent of a Bachelor of Science degree in the interdisciplinary field of Management Information Systems at a US university."
- Based on the beneficiary's combined studies at Osmania University and the National Institute of Information Technology, as well as the number of years of coursework, and the nature of the coursework, the evaluator concluded that the beneficiary, "has attained the equivalent of a Bachelor of Science Degree in the interdisciplinary field of Management Information Systems."

The evaluation relied on the beneficiary's combined studies from two different schools, and failed to show that the beneficiary had a bachelor's degree or foreign equivalent degree in the required field, based on one program of study, as listed on Form ETA 750. The petitioner did not draft Form ETA 750 to include a degree based on the "equivalent" of a bachelor's degree.[7]

The petitioner provided a second evaluation:

Evaluation Two:

- Evaluation: [redacted], Ph.D., Assistant Professor, CIS, Idaho State University, Pocatello, Idaho.

[7] The petitioner specifies "Master's or equivalent," and provides that the allowed alternative education would be a Bachelor's degree and five years of experience.

- Dr. reviewed a course-by-course comparison of the beneficiary's education at NIIT.[8] Specifically, the evaluator found that the beneficiary "has equivalencies" for ten courses.
- Based on those ten courses, the evaluator concluded that the beneficiary's coursework at NIIT, "totaled at least a year of college level credit in Computer Information Systems."

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

EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science degree awarded in India represents the attainment of a level of education comparable to two or three years of university study in the United States. Based on information in the record, the beneficiary's degree would appear to be equivalent to three years of study towards completion of a bachelor's degree in the U.S. The beneficiary further completed an Advanced Diploma in Systems Management. EDGE does not provide that an Advanced Diploma in Systems Management is a formally recognized credential. Further, a review of the All India Council for Technical Education, http://www.nba.aicte-ernet.in/nmna.htm (accessed on October 3, 2007), does not list NIIT in the state of Andhra Pradesh as an accredited institution. As the school is not accredited, there are insufficient controls over the course work to determine the academic merit, if any, of its U.S. equivalency. Accordingly, neither degree alone, would be sufficient to satisfy the stated requirements of a bachelor's degree as listed on Form ETA 750.

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). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

On appeal, counsel contends that the beneficiary has the equivalent of a bachelor's degree as exhibited by the evaluation provided. Further, counsel states that the beneficiary attended accredited institutions of higher learning in India, and that an evaluation was completed by a well-known and established credentialing organization. Further, counsel states that the evaluation considered only the beneficiary's education, and did not include work experience. Counsel provides that the Government of India established the University Grants Commission (UGC) to develop minimum standards on education. Additionally, counsel provides that the National Assessment and Accreditation Council (NAAC) recently revised its methodology, assessment and accreditation for Indian Universities. According to counsel, as a result of the revisions, the university where the beneficiary completed his bachelor's degree was rated as a "five star" university.

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[8] The evaluation considered only the beneficiary's coursework at NIIT

The petitioner submitted a "Peer Team Report on Institutional Accreditation of Osmania University, Hyderabad," dated April 2nd to 5th, 2001, which summarized the history and status of Osmania University.

The rating level of the university does not change the determination that the beneficiary's three year bachelor's degree is only equivalent to three years of U.S. university level credit. Even the petitioner's own evaluation that counsel cites to does not suggest that the three-year bachelor's degree would be evaluated differently. Further, the beneficiary received a Bachelor of Commerce degree from Osmania. The beneficiary took coursework in Business Economics, Accountancy, Business Statistics, Currency & Banking, Cost Accountancy, and other business related courses. His Bachelor of Commerce degree standing alone would not qualify him for the position as it is only equivalent to three years of study, and is in the wrong field of study.

Counsel additionally notes that the beneficiary completed a two-year Advanced Diploma at NIIT, which she states is, "a private company with an international reputation for providing advanced IT training." The petitioner provided an evaluation that assessed this education as equivalent to one year of educational studies. Additionally, she provides that NIIT has "entered into academic partnership with several international universities to permit 'admission with advanced standing' and the transfer of credits based on their successful completion of NIIT coursework." Counsel attached documentation from NIIT that it issues degrees, a B.SC. (IT) degree, or M.Sc. (IT) degree, in connection with Karnataka Open University. The material is dated December 11, 2007.

The beneficiary completed his program of study at NIIT in June 1995. He listed that he received an "Advanced Diploma," and not a B.Sc. or a M.Sc. The petitioner did not provide evidence that NIIT was accredited to rebut the information provided by EDGE. Further, the documentation related to NIIT does not reference an "Advanced Diploma option." Additionally, the documentation did not establish that links between accredited universities and NIIT existed at the time that the beneficiary completed his Advanced Diploma in June 1995. Rather, the documentation states that the "NIIT Academy," with links to five international universities, was established in July 1998, after the beneficiary graduated. A petitioner must establish the elements for the approval of the petition at the time of filing. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel states that Karnataka Open University is an accredited and recognized university, and that it issues "Advanced Diplomas" to rebut the information provided by EDGE that an Advanced Diploma is not an officially recognized credential.

Neither of the petitioner's evaluations assessed the beneficiary's "Advanced Diploma" as equivalent to a bachelor's degree individually, or any advanced degree, but instead determined that the studies would be equivalent to one year of U.S. studies.

Counsel submits documentation related to the Indian credentialing system in support, "Report of the Central Advisory Board of Education (CABE) Committee," dated June 2005. The CABE Committee was established to address specific concerns in education, including to suggest measures for enhancing the autonomy of higher education institutions, and to institutionalize regulatory provisions for promoting autonomy and accountability of higher education institutions. The Report contains an overview of the Indian academic system and breaks the system down between: (1) Universities, which are established by an Act of Parliament or State Legislature; (2) Deemed to be Universities, institutions which are given university status by the Central Government on recommendation of the University Grants Commission ("UGC") and issue degrees; (3) Private Universities, established by various State Governments through their own legislation; (4) Institutes

of National Importance, declared as such by government or Parliament and issue degrees; and (5) Premier Institutes of Management, which have been set up by the Central Government and are outside the formal university system. The Premier Institutes of Management offer Post-Graduate Diploma programs equivalent to Master's degree in management.

The CABE Report contains a list of degrees "specified by the UGC under section 22 of the UGC Act (As on May, 2005)." The CABE list, Annexure 12, contains no reference to an Advanced Diploma. The Report also contains an annex of UGC recognized Central Universities, State Universities, Deemed Universities, Private Universities, Institutes of National Importance and Institutions as Annexures 6 to 11. The list shows that Osmania University is a recognized State University since 1918. None of the lists, however, show that NIIT is a recognized school or recognized degree granting institution.

Counsel asserts that the petition was filed as a skilled worker petition, and that there is no requirement for a skilled worker to meet the degree standard through a single degree. Counsel further cites to and submits copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from Efren Hernandez III of the INS Office of Adjudications to counsel in other cases. The Hernandez letters express his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2). In the July 2003 letter, Mr. Hernandez states that he believes that the combination of a completed PONSI-recognized post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

At the outset, we note that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi,* 22 I&N 169, 196-197 (Comm. 1968); *see also,* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).[9]

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. Hernandez' correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. We do not find the determination of the credentials evaluation probative in this matter. Again *Matter of Shah,* 17 I&N Dec. 244, generally provides that a bachelor's degree requires four years of education.

Counsel asserts that a skilled worker petition only requires that a worker have at least two years of experience, and meet the terms of the labor certification. Counsel further states that a skilled worker petition will often also have an educational requirement, and that the petitioner's requirements in the present matter are consistent with

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[9] While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions, and letters are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

the foregoing. Counsel asserts that the petitioner "is open to any kind of education that equals a bachelor's degree. The petitioner has not placed limiting language as to the equivalent education it will accept."

The Form ETA 750 allowed for a Master's degree or equivalent. Alternatively, Form ETA 750 allowed for a bachelor's degree and five years of experience. The petitioner's language related to a bachelor's degree did not include a "bachelor's or equivalent." We would not agree that the petitioner's language suggests that it is "open to any kind of education."

Counsel argues that CIS "improperly viewed this case as a professional rather than as a skilled worker," but that the beneficiary "holds the full equivalent to a U.S. bachelor's degree, not a functional equivalent."

As the evaluations the petitioner submitted make clear, the beneficiary's education was only determined to be the "equivalent" of the required field of study based on a combination of two programs of study, which would result in the equivalent degree, not a "foreign equivalent degree." However, whether equivalent, or a "functional equivalent," the beneficiary's education does not meet the terms of the petitioner's labor certification as drafted.

Counsel asserts that the beneficiary has the required education and contends that the "single degree" policy would exclude students who complete lesser degrees from qualifying. She contends, for example, that someone with an associate's degree would be unable to combine that degree with other programs of study to qualify.

Counsel is mistaken. The specific issue in this matter is the way that the petitioner drafted the labor certification. The petitioner did not specify that it would accept the equivalent of a Bachelor's degree through a combination of education and/or experience, but rather that a bachelor's degree would be the alternate education accepted in lieu of a master's degree.

Related to these issues, is the question of how the petitioner expressed its intent about its stated minimum educational requirements for the position. CIS can review that intent by reviewing how the position's actual minimum requirements were expressed to DOL, advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position. To ascertain the petitioner's expressed intent in advertising the position requirements, the AAO sent the petitioner an RFE.

In the petitioner's response to the AAO's RFE, counsel submitted a copy of the Form ETA 750 as sent to DOL, including a copy of the petitioner's posting notice, and a copy of the recruitment ads underlying the labor certification.

Both the petitioner's posting notice and the recruitment ad from Computerworld, dated June 10, 2002, listed the requirements as, "MS in CS or MIS & 3 yrs exp BaaN systems proj. dvlpmnt; or BS CS or MIS & 5 yrs exp large database design, dvpmnt, & implementation," as well as listing the other special requirements in section 15 of the labor certification. The petitioner does not express either in its posting notice, or its advertisements that it was willing to accept the equivalent of a bachelor's degree.

In a letter the petitioner submitted to DOL outlining the position requirements, the petitioner stated that it "requires a Master's Degree in Computer Science or Management Information Systems and three years of experience in the job offered or in BaaN systems project development, or the equivalent. Acceptable as equivalent, alternative education and experience requirements would be a Bachelor's Degree in Computer Science or Management Information Systems and five years of experience with large database design, development, and implementation, including three years of BaaN systems project development." The

petitioner lists that the alternative educational requirement to a Master's degree, or equivalent, is a Bachelor's degree and five years of experience. The petitioner does not specify in relation to the Bachelor's degree that it is willing to similarly accept an equivalent.

In response to the AAO's RFE, the petitioner provides several articles related to the growth of the computer industry and the need for information technology workers. Counsel asserts that the demand for skilled workers in the computer field "establishes that no matter the criteria, at the time the labor certification was filed in April 2001 the IT professional shortage was so substantial that in general companies would have taken anyone that was even remotely qualified for the position." Counsel states that it would have been the DOL Certifying Officer's duty to evaluate the recruitment and position requirements in the context of the labor market. Counsel references DOL's Memo from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994) (Hall Memo) cited in the AAO's RFE and contends that the Hall Memo does not "remove the ultimate discretionary responsibility from the Certifying Officer." Further, counsel states that the Hall Memo "places the burden for defining 'equivalent' on employer, yet fails to identify a potential consequence."

The petitioner did not list or define equivalent in its recruitment efforts to the public. From the materials submitted, we would not conclude that the petitioner clearly expressed to any potential qualified U.S. workers that it would accept the equivalent of a bachelor's degree in addition to candidates with bachelor's degrees.

Counsel provides a copy of a decision from the Board of Alien Labor Certification Appeals (BALCA), *Syscorp*, 98-INA-212 (BALCA 1991). In *Syscorp* BALCA reversed the decision on a denied labor certification as the employer accepted the beneficiary's qualifications as meeting the equivalent, and the petitioner had not rejected any U.S. workers based on an equivalent qualification.

The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, however, BALCA decisions are not similarly binding.

In *Syscorp* a petitioner filed a labor certification for which the requirements were either an M.S. or equivalent with no job experience or a B.S. or equivalent with two years of experience in mathematics or computer science. **At issue was whether the beneficiary met the requirements of the labor certification.** Two evaluations provided that the beneficiary's studies at Fudan University did not meet the standard of a bachelor's degree [as some of the credits were earned during the Cultural Revolution in China between 1966 and 1970 when most of the schools had shut down]. A third evaluation concluded that the beneficiary did meet the requirements of the labor certification based on the beneficiary's combined education and experience. The labor certification was denied as the alien beneficiary did not meet the stated requirements of the labor certification. BALCA determined that the labor certification should be granted as "the employer has accepted the alien as meeting its requirements for a bachelor degree or equivalent. It is not shown that it has rejected a U.S. worker as meeting its equivalency requirements."

In *Syscorp,* the petitioner specifically provided in relation to both the Master's degree and the Bachelor's degree that it would accept an equivalent degree. The petitioner in the present matter listed that it would accept a Master's degree or equivalent, and that the equivalent could be met by a Bachelor's degree. The beneficiary in the present matter has the equivalent of a Bachelor's degree, but not a Bachelor's degree in the relevant field based on one program of study.

Counsel additionally cites to the Letter from [redacted], Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [redacted] INS (October 27, 1992) (Nelson Letter) cited in the AAO's RFE. Counsel asserts that while the Nelson Letter states DOL would read "MS Degree or equivalent to mean an equivalent foreign degree, it acknowledged that the term 'equivalent' could 'be defined by the employer to mean either education, experience or a combination of the two,' and that it would review employer definitions of equivalency on a 'case by case business.'

The petitioner clearly stated what it meant by equivalent in its correspondence to DOL, a Master's degree or equivalent and three years of experience, and that the accepted alternate education and work experience would be a Bachelor's degree and five years of experience. The petitioner did not state that it would accept an equivalent degree at the Bachelor's level. The petitioner did not express in its supporting labor certification evidence that it would accept an equivalent degree.

As noted above, the Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, provided that while DOL must certify that there are insufficient domestic workers available to perform the job, following certification, "INS [now CIS] 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). Further, the court provided, "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).

Counsel asserts that CIS is required to consider the position under the skilled worker category and cites to *Rosedale & Linden Park Co. v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) in support.
If we considered the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750. As the petitioner specifies that a bachelor's degree, is required, and the certified Form ETA 750 does not allow for meeting the degree requirement through any equivalency at the bachelor's level, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

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.

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.*

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

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

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on us, the reasoning in those cases runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL.
The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Additionally, the AAO's RFE noted that the petitioner filed a second Form ETA 750 on behalf of the beneficiary for the position of a BaaN Project Director, which provided for essentially the same position duties. However, in the second application, the petitioner listed that the position required experience only in the amount of 5 years of experience in the position offered, or 5 years in a related position. The petitioner did not list any educational requirement. As the positions certified appear to be the same, it would appear that the petitioner has tailored the educational requirements so that the beneficiary qualifies for the position. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). *See* 20 C.F.R. § 656.17. The AAO's RFE requested that the petitioner address the reason for the differing educational standards between the two applications.

The petitioner states that the difference is as a result of an inherited labor certification based on a "successor-in-interest" situation.[10] Further, counsel notes that the initial labor certification was coded as 11-9199,

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[10] Although not raised in the director's decision, should the petitioner pursue this matter further, there may be an issue as to whether the initial petitioner had the ability to pay the proffered wage.

In its filing, the petitioner, The Shamrock Acquisition Company, with an address of [redacted] Westlake, Ohio, asserted that it is the successor-in-interest to the original petitioner on the labor certification,

Managers, all others, but that in the subsequently filed labor certification, DOL coded the position as a "Software Engineer," 15-1032. The new labor certification provides a different worksite location. The first filing was for a work location of Acton, Massachusetts, and the second filing listed a worksite of Westlake, Ohio and "various unanticipated locations throughout the U.S."

We note that the Software Engineer position requires additional technical duties, in addition to project management, and coordination responsibilities, and, therefore, would presumably require equal or the same education.[11] The petitioner drastically reduced the education from the required master's degree. While we find the similarities in the job descriptions and positions incongruous, DOL has certified that the position requires no education.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Versient, Inc. f/k/a Uniform Information Services, with an address of [redacted] Hunt Vally, MD 21031.

To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

The petitioner submitted a "Secured Party Assignment and Bill of Sale," which evidenced that the petitioner purchased the assets of Versient from Comerica Bank. If Versient was in bankruptcy, or subject to any liens or receivership, there may be an issue of whether it could pay the proffered wage.

[11] We additionally note that if the petitioner filed a Petition for a Nonimmigrant Worker, Form I-129, pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b),for the beneficiary to work in the same position as set forth in the second labor certification, the lack of degree would be inconsistent with the H-1B filing.