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

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 11 2008

LIN-04-150-51092

IN RE: Petitioner:
Beneficiary: [redacted]

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner provides hospitality services. It seeks to employ the beneficiary permanently in the United States as a management analyst (operation director). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner did not demonstrate that the beneficiary met the minimum requirements at the time Form ETA 750 was accepted. The director denied the petition accordingly.

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

As set forth in the director's November 2, 2005 denial, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary possessed the requisite bachelor's degree or its foreign equivalent for the proffered position.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

On appeal, counsel submitted a brief arguing that the beneficiary met the bachelor's degree or equivalent requirements at the time of the filing and that he is qualified under the skilled worker category without any additional evidence. Other relevant evidence in the record includes the beneficiary's High School Certificate issued by the Michigan State Board of Education, an affidavit from the beneficiary regarding his high school diploma, two experience letters from AlAkitr Palace Hotel and Restaurant and Tedmur Hotel, an affidavit from the beneficiary for his self-employment with [redacted] for Import/Export trading in Baghdad, Iraq from August 1986 to January 1995, and an evaluation of education and work experience report from Globe Language Services, Inc. (Globe). The record does not contain any further evidence concerning the beneficiary's educational qualifications. Because the record does not contain any evidence that the beneficiary obtained a four-year bachelor's degree or equivalent in business administration or management

[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).

other than a high school certificate, the AAO issued a request for evidence (RFE) on July 19, 2007 granting 12 weeks to respond. However, to date, more than twelve months, no response from the petitioner has been received. This office will adjudicate the appeal based on evidence in the record.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The Form ETA 750 was accepted on May 6, 2002.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

14.	Education	
	Grade School	
	High School	
	College	4 [years]
	College Degree Required	Bachelor or equivalent
	Major Field of Study	Business Administration or Management

The Form ETA 750 does not require any experience in the job offered or any related occupations for the proffered position. Item 15 of Form ETA 750A does not reflect any other special requirements.

The petitioner checked Part 2. e. on the Form I-140, which is for either a skilled worker or professional. The director analyzed and denied the petition under the skilled worker category and on appeal counsel argued that the beneficiary is qualified under the skilled worker category. Therefore, the AAO will review the evidence submitted to see whether the beneficiary is qualified under the skilled worker category.

Counsel asserted that the beneficiary possessed the equivalent to a U.S. bachelor's degree according to the private credential evaluation from Globe. The evaluation report from Globe concluded the following after reviewing the beneficiary's education and work experience:

> In summary, it is the judgement[sic] of Globe Language Services, Inc. that [the beneficiary] has the equivalent of a High School Diploma through formal study and four years of undergraduate study by way of employment and the practice of a profession, that together represent the equivalent of a Bachelor's Degree in Business Administration and Management from a regionally accredited institution of higher education in the United States.

The evaluation in the record 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 CFR § 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, the Service 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).

On appeal counsel argues that the petitioner utilized the language "B.A. or equivalent" to set its own criteria for the level of education and experience it would accept for its open position.

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 four years of college studies and a bachelor's degree or equivalent in business administration or management. The certified labor certification did not provide explicit and specific explanation of what was equivalent to the bachelor's degree requirement, and did not state the petitioner would accept any combination of education and experience or experience to meet the degree requirement. Although this office specifically and clearly requested in the RFE that the petitioner submit evidence of its intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirement as set forth on the certified labor certification application in the form of correspondence with the DOL, amendments to the labor certification application, results of recruitment, or other forms of evidence relevant and probative to illustrating the petitioner's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test, the petitioner declined to respond the RFE. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The plain meaning of the language on the Form ETA 750 is that the petitioner requires a four-year U.S. bachelor's degree in business administration or management or a foreign equivalent to a U.S. bachelor's degree in one of these areas from four years of college studies. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). As mentioned above, the rule to equate three years of experience for one year of education does not apply to immigrant petitions. Therefore, the beneficiary's 15 years of experience does not meet the bachelor's degree requirement of the individual labor certification in the instant case. In addition, the beneficiary does not meet the four years of college studies requirement. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the DOL. Since that was not done, the director's decision to deny the petition must be affirmed.

Counsel cited *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp.2d 1174 (D. Ore. November 3, 2005) on appeal. We are aware of the recent decision in *Grace Korean United Methodist Church*, which finds that CIS "does not have the authority or expertise to impose its strained definition of

'B.A. or equivalent' on that term as set forth in the labor certification." We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in 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 other Circuit Court decisions discussed below. 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 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. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), 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 the 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, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

The 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). *See also Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

While we do not lightly reject the reasoning of a District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(2).

The AAO finds that the director has correctly reviewed and considered the instant petition under the third preference as a skilled worker. The AAO concurs with the director's findings that the petitioner did not establish that the beneficiary possessed the requisite educational requirement for the proffered position prior to the priority date. Counsel's assertions on appeal cannot overcome the ground of denying the petition. The AAO thus affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary is qualified for the proffered position.

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.