U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
Washington, DC 20529-2090

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 15 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology (IT) consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. An ETA Form 9089, Application for Permanent Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. The director also concluded that the petitioner failed to establish its continuing ability to pay the proffered wage and failed to sufficiently document that the beneficiary had obtained the requisite work experience set forth in the ETA Form 9089. He denied the petition on April 20, 2007.

On appeal, the petitioner, through counsel, submitted additional evidence and contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petitioner established that the beneficiary had obtained the requisite work experience and had demonstrated its continuing ability to pay the proffered wage.

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).

For the reasons discussed below, we concur with the director's denial of the petition, but would also note that various 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.

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, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or

> employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *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.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA Form 9089 was accepted for processing on April 19, 2006.[1] The proffered wage is stated as $60,000 per year.

The ETA Form 9089 does not indicate that the petitioner has employed the beneficiary. The Immigrant Petition for Alien Worker (I-140) was filed on July 19, 2006. Part 5 of the petition indicates that the petitioner was established in 2003, claims a gross annual income of $1,482,000, a net annual income of $42,942, and currently employs thirty-two workers.

The ETA Form 9089, Part H set forth the minimum requirements for the position of a Software Engineer. The proffered position requires a Bachelor's degree in Computer Science and 24 months

[1] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

of experience in the job offered. Part H, Item 7 indicates that the employer will not accept an alternate major field of study. Part H, Item 8 also reflects that the employer will not accept an alternative combination of education and experience. Part H, Item 9 reflects that a foreign educational equivalent is acceptable. Part H, Item 10-B indicates that 24 months experience in an alternate occupation is acceptable. Acceptable occupations are specified in Part 10-B as Systems Analyst or Programmer Analyst. Part H, Item 14 reflects that the employer will accept any suitable combination of education, training and experience. Part I, Item a-1, indicates that the petitioner considers the certified position as a professional occupation. The job duties are set forth on Part H, Item 11, and are described as "analyze, design, develop, implement, test and support computer software utilizing J2EE technologies, JAVA Oracle, and MySQL."

One of the issues raised by counsel on the notice of appeal was that he objected to the director's denial of the petition without issuing a request for additional evidence to the petitioner relevant to the deficiencies identified by the director in his denial. We do not concur. Relevant to the petitioner's ability to pay the proffered wage of $60,000 and the employment verification letters submitted to the underlying record, the director's denial was appropriately based on the 2005 federal income tax return that was submitted to the record showing insufficient net income of $38,742 to cover payment of the proffered wage of $60,000 per year. Further, the director accurately noted that the employment verification letter(s) intended to support the beneficiary's employment experience in an alternate occupation as a systems analyst or programmer analyst did not specify the job duties performed. The regulation at 8 C.F.R. § 103.2(b) (8), clearly allows the denial of an application or petition, notwithstanding any lack of required initial evidence, "if there is evidence of ineligibility in the record."

That said, the petitioner submitted additional documentation on appeal relating to the petitioner's ability to pay the proffered wage and verification of the beneficiary's qualifying work experience in an alternate occupation of a system analyst. Relevant to the latter, the petitioner provided a letter, dated May 25, 2007, from [redacted] of Birlasoft Limited who affirmed that the beneficiary worked there from August 31, 2000 to November 4, 2005 and was designated as a system analyst who analyzed, designed, developed, implemented and tested computer software applications using Java, J2EE, Oracle, MySQL, XML, XSLT and DHTML. This appears to satisfy the terms of the labor certification requiring that the beneficiary have two years of experience in the job offered or two years of experience in an alternate occupation designated as Systems Analyst or Programmer Analyst.

With respect to the petitioner's ability to pay the proffered wage of $60,000 per year, the petitioner provided a copy of its 2006 Form 1065, U.S. Return of Partnership Income on appeal, as well as a copy of its checking account statement as of May 31, 2007. The balance at that time was approximately $200,000. The tax return indicates that the petitioner is a domestic limited liability company and files its returns using a standard calendar year. The tax return also contains the following information:

Year		2006
Net Income[2]		$129, 238
Current Assets	(Sched. L)	$ 6,959
Current Liabilities	(Sched. L)	$ -0-
Net Current Assets		$ 6,959

As noted in the above table, besides net income, as an alternative method of reviewing a petitioner's ability to pay a proposed wage, U.S. Citizenship and Immigration Services (USCIS) will examine a petitioner's net current assets. Net current assets are the difference between the end current assets and current liabilities are shown on line(s) 1 through 6 and line(s) 15 through 17 of Schedule L of its partnership return. If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

In this case, the tax return provided on appeal covers the priority date of April 19, 2006 and reflects that the petitioner's net income of $129,238 was sufficient to cover payment of the proffered wage and demonstrates the petitioner's financial ability to pay a certified wage offer of $60,000 per year. Additionally, the May 2007 checking account balance of over $200,000 as indicated by the statement provided supports this conclusion. However, USCIS records reflect multiple filings.[3] Where a petitioner files I-140s for multiple beneficiaries, it is incumbent on the petitioner to establish its continuing financial ability to pay all proposed wage offers as of the respective priority

[2] It is noted that a limited liability company (LLC) is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship for tax purposes unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, as indicated by the record, the I-140 petitioner, an LLC formed under the laws of Delaware is considered as a partnership for tax reporting purposes. In this case, it reports additional income or additional deductions and credits on Schedule K. Its net income is reflected as a combined total of its ordinary business income as shown on line 22 of the Form 1065 and income, credits and deductions reflected on Schedule K. Here, the petitioner's net income is found on line 1 of Analysis of Net Income on page 4 of Form 1065. *See* Instructions for Form 1065, at http://www.irs.gov/pub/irs-pdf/i1065.pdf.

[3] USCIS electronic records reflect 322 petitions filed by the petitioner as of April 3, 2009. Most are non-immigrant (Form I-129) petitions. Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

date of each pending petition. Each petition must conform to the requirements of 8 C.F.R. § 204.5(g)(2) and be supported by pertinent financial documentation. The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one for each beneficiary that it sponsors. 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 or ETA Form 9089. The priority date is the date that Form ETA 750 or Form ETA 9089 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 each job offer was realistic as of the respective 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). Until this continuing ability to cover each sponsored beneficiary is established, the petitioner has not demonstrated the continuing ability to pay the proffered wage(s) in the instant matter.

In determining whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS 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, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

As stated on the labor certification, the proffered position of software engineer requires a bachelor's degree in computer science, as well as 24 months of experience in the job offered or 24 months in an alternate occupation specified as a systems analyst or programmer analyst.

DOL assigned the occupational code of 15-1031.00, 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 15-1031.00 for computer software engineers, applications at *http://online.onetcenter.org/link/summary/15-1031.00*[4] and extensive description of the position and requirements for the job, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

[4] (Accessed 4/29/09).

> 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.

More specific to this position, O*NET provides that 85 percent of responding computer software engineers, applications have a bachelor's degree or higher.[5] Further, DOL's Occupation Outlook Handbook, available online at http://www.bls.gov/oco/ocos267.htm, provides:

> **Education and Training.** Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for applications software engineers is computer science or software engineering. Systems software engineers often study computer science or computer information systems. Graduate degrees are preferred for some of the more complex jobs. In 2006, about 80 percent of workers had a bachelor's degree or higher.

Based on the position's job title, job duties, the educational requirements as set forth on the ETA Form 9089, the SVP identified by DOL, the majority percentage of respondents that have a bachelor's degree or higher, and the petitioner's designation on the ETA Form 9089 as a professional occupation, the job in this case would be characterized as a professional position.

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.

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[5] *See http://online.onetcenter.org/link/details/15-1031.00*

As noted above, the ETA Form 9089 in this matter is certified by DOL. 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). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful

> misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
>
> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

In this matter, in Part J, Item 11 of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is "Bachelor's." Part J, Item(s) 12, 13, and 14 of the ETA Form 9089 indicate that he completed relevant education in 1998 at the Versatile Solutions PTY LTD located at 3/3 Ramdas Garden, West Marretpally, in Secunderbabad, India.

As noted in the request for evidence issued by the AAO, in corroboration of the ETA Form 9089, the petitioner provided a copy the beneficiary's transcript and 1997 (3-year) Bachelor of Commerce degree from Osmania University and a copy of a certificate from Versatile Solutions (P) Ltd, dated February 15, 1998. The bachelor's diploma indicated that his concentration of study under Part II (Optionals), Group C was cost accountancy and income tax. The Versatile Solutions certificate reflects that this was a 12-month full-time certificate course in computer applications running from February 1997 to January 25, 1998.

A credentials evaluation from of The Trustforte Corporation, dated October 19, 2005, was also provided. He determines that the beneficiary's academic studies at Osmania University are the U.S. equivalent of three years of studies toward a bachelor's degree in Business Administration from an accredited college or university. [redacted] describes the beneficiary's studies at Versatile Solutions as a post-secondary program that is "indicative of his completion of a **bachelor's-level major concentration in the field of computer science." He concludes that a** combination of these two programs represents the U.S. equivalent of a "Bachelor of Science Degree, with a dual major in Computer Science and Business Administration, from an accredited U.S. college or university."

In the AAO's request for evidence, the petitioner was advised that the AAO had reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO).[6] 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

[6] It is noted that Mr. Silberzweig states that he is a member of AACRAO on The Trustforte evaluation.

student services." According to the registration page for EDGE, http://aacraoedge.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India, and 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. EDGE discusses both Post Secondary Diplomas, for which the entrance requirement is completion 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, provides:

> 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.

The AAO further advised the petitioner that the record did not contain any evidence showing that the Versatile Solutions (P) Ltd. certificate represents a post-graduate diploma issued by an accredited university or institution approved by the AICTE and requested the petitioner to provide evidence of this. The petitioner was also requested to provide evidence of its recruitment efforts in order to demonstrate whether it communicated to otherwise available qualified U.S. workers that some other kind of combination of certificates, diplomas or degrees were acceptable to qualify for the offered position.

The petitioner, through counsel, responded to the AAO's request for evidence but did not provide any of the documentation described above.

The director denied the petition on based, in part, on his determination that the petitioner had failed to establish that the beneficiary's combination of certificates and diplomas satisfied the terms of the labor certification requiring a bachelor's degree in computer science.

On appeal, contending that the beneficiary's credentials fulfilled the terms of the labor certification, counsel asserts that the language of the ETA Form 9089 indicating that the employer will accept a foreign educational equivalent was sufficient to establish that a combination of degrees or

certificates would suffice. If this is the petitioner's intent on the ETA Form 9089, it was not expressed as such. The petitioner failed to indicate in Part H, 8 of the ETA Form 9089 that there was an alternate combination of education and experience or an alternate level of education that would be acceptable. Moreover, with respect to the Trustforte evaluation, it is noted that it characterized the beneficiary's certificate from Versatile Solutions as representative of baccalaureate level studies and concluded that they can be combined with the three-year bachelor's degree in commerce to represent a U.S. equivalent of a bachelor's degree with a dual major of business administration and computer science. The AAO does not find this evaluation to be probative of the beneficiary's possession of a bachelor's degree in computer science as the ETA Form 9089 required. USCIS may, in its discretion, use advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). USCIS, however, is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

Further, it is noted that the petitioner failed to provide evidence that the Versatile Solutions certificate represented a post-graduate diploma as advised by AACRAO. The record fails to indicate that Versatile Solutions was empowered to confer university accredited hours at the time of the beneficiary's admission or attendance. Additionally, it is noted that based on a review of the AICTE listings (http://www.nba-aicte.ernet.in/nmna.htm site,[7] Versatile Solutions does not appear as an accredited institution.

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 combination of certificates and diplomas, 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). Under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Even if considering at most, the beneficiary's attainment of three years of undergraduate university studies represented by the bachelor of commerce degree, this would not qualify as full bachelor's degree in computer science as indicated on the ETA Form 9089. Moreover, as noted above, the petitioner affirmed in H-8 of the ETA Form 9089 that it would not accept an alternate combination of education and experience. If a defined alternate combination was acceptable, then the petitioner could have described this alternative in other provisions in part H-8 or even in H-14 where other requirements are also permitted to be delineated. Instead, in H-14, the petitioner merely stated that any suitable combination of education, training and experience would be accepted. The petitioner

[7] (Accessed April 29, 2009).

did not specifically define such a combination and specifically denied that an alternate combination of education and experience would be acceptable in Item, H-8.

As noted above, the petitioner designated this occupation as a professional position on the ETA Form 9089. Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act, and as advocated by counsel on appeal, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B). Additionally, in such a case, USCIS will also examine whether the petitioner's intent to accept some other form of an academic equivalency was communicated to DOL and to U.S. workers in the labor market test.

However, as noted above, the petitioner failed to submit any of its recruitment in response to the AAO's request for evidence to demonstrate that it communicated its intent to accept alternate combinations of education and/or experience to DOL and potential U.S. applicants. 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).

To qualify as a skilled worker, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides that:

> ***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.

The AAO is not persuaded that the beneficiary is eligible for a skilled worker classification in this case. As mentioned above, the record supports a finding that the certified position was appropriately classified as a professional, based on the job title, job duties, the educational requirements as set forth on the ETA Form 9089, the SVP identified by DOL, and the majority percentage of software engineering respondents that have a bachelor's degree or higher as indicated in O'Net.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d, 1174 (D. Or. 2005) which found that [USCIS] "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 USCIS, 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). In reaching this decision, the court also 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.[8]

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[8] 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 chose 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.

Additionally, we also note the subsequent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. November 30, 2006) that was rendered in the same district. In that case, the ETA 750 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 as a "specific level of *educational background.*". *Snapnames.com, Inc.* at *6. 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 [USCIS] properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

However, in *Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the ETA 750 described the educational requirement as Bachelor's or equivalent" and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien's other credentials with his three-year diploma to meet the requirements of the ETA 750. *Id* at *13-14. In this case, the beneficiary must possess a bachelor's degree in computer science. The petitioner failed to specify any defined equivalency on the ETA Form 9089. The beneficiary's formal education does not equate to a bachelor's degree in computer science. Rather it is a three-year bachelor of commerce degree in cost accountancy and income tax. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's degree from Osmania University cannot be considered a foreign equivalent degree for the purpose of meeting the bachelor's degree requirement. The record fails to indicate that the position should be considered in a skilled worker category. Even if it were, however, the beneficiary's course of instruction at Versatile Solutions was not accredited by the AICTE and was not a post-graduate diploma as characterized by EDGE such that it would be considered in combination with a three-year degree. Moreover, the petitioner failed to provide any evidence of any recruitment efforts that might have demonstrated its intent to otherwise qualified U.S. workers that it would accept a defined equivalency to a bachelor's degree in computer science. The beneficiary's qualifications do not satisfy the requirements of the labor certification in either a professional or skilled worker category.

It is noted that that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984), USCIS is obliged to "examine the certified job offer *exactly* as it is completed by the prospective employer." (Emphasis added) USCIS' 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).

As noted above, the petitioner failed to provide evidence as requested showing that the certificate from Versatile Solutions (P) Ltd. represents a recognized Indian post-graduate (rather than post-secondary) diploma such as could be used to calculate a foreign equivalency to a baccalaureate degree if considering the petition within a skilled worker classification. Further, the petitioner also failed to provide evidence of its recruitment advertisements in order to demonstrate if it communicated its intent to otherwise qualified U.S. workers that it would accept some kind of lesser combination of degrees, diplomas or certificates in lieu of a bachelor's degree in computer science as specified on Part H, 4 of the ETA 9089. 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 beneficiary does not have a bachelor's degree or equivalent foreign degree in computer science and does not meet the terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional or as a skilled worker under 203(b)(3)(i) of the Act.[9]

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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.

[9] A skilled worker category requires that a petitioner must show that a beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification."