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U.S. Citizenship and Immigration Services

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[redacted]

MAR 03 2009

FILE: LIN-06-105-53127 Office: NEBRASKA SERVICE CENTER Date:

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 AAO will withdraw the director's decision; however, we will remand the petition to the director for further action and consideration as set forth below.

The petitioner's business relates to the management and administration of tax preparation operations. The petitioner seeks to employ the beneficiary permanently in the United States as a programmer analyst ("Senior Quality Assurance (QA) Analyst"). 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"). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree in the required field 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 has filed to obtain permanent residence and classify the beneficiary as a professional 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

[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).

within the employment service system of the Department of Labor. *See* 8 C.F.R. § 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 March 23, 2004. The Form ETA 750 was certified on January 19, 2006, and the petitioner filed the I-140 petition on the beneficiary's behalf on February 27, 2006.

On May 10, 2006, 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 Bachelor's degree or foreign equivalent degree in the required field as listed on the certified labor certification. The petitioner appealed to the AAO.

On November 1, 2007, the AAO director issued a Request for Evidence ("RFE") for the petitioner to provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position's actual minimum requirements to DOL and the public in its labor certification supporting documents. The petitioner responded.

On appeal, counsel asserts that the beneficiary had the required education and met the requirements of the certified labor certification.

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 a four-year bachelor's degree and three years of experience. The petitioner also listed that it would accept a master's degree or equivalent and one-year of experience in lieu of a bachelor's degree and three years of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. DOL assigned the occupational code of 030.162-014, "Programmer Analyst," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database, O*Net, and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, 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* http://online.onetcenter.org/link/summary/15-

1051.00#JobZone (accessed October 1, 2008).[2] Additionally, DOL states the following concerning the training and overall experience required for these occupations:

> A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

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

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

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

The beneficiary in this matter possesses a Bachelor's degree in Commerce based on three years of education. She additionally has a "Post Graduate Diploma in Computer Applications," and computer related experience. Thus, the issues are whether the beneficiary's three-year degree is equivalent to a U.S. baccalaureate degree in the required field, or, if not, whether it is appropriate to consider the beneficiary's Post Graduate Diploma and work experience in addition. 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:

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[2] DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O*Net. Under the DOT code, the position of Programmer Analyst had a SVP of 7 allowing for two to four years of experience.

> 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).[3] 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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[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

* * *

> 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.

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 she does not have the minimum level of education required for the equivalent of a bachelor's degree.

The petition and the beneficiary are 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 U.S. Citizenship and Immigration Services (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*, 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 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).

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. *Id.* at *8. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Id.* at *8-9. 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 ("USCIS") properly concluded that a single foreign degree or its equivalent is required. *Id.* at *9-10. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence 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 Senior Quality Assurance (QA) Analyst provides:

> Design and execute test plans/designs and cases to verify the reliability, accuracy and compatibility of the On-line Tax Program application. Update prior year test plans/designs as changes to software applications are implemented and issues are discovered.

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: 6 years; High School: 6 years; College: 4 years; College degree: "Bachelor's degree or equivalent;"
Major Field Study:	Quality Assurance, Software Support, Tax Preparation, Quality Control, Software Development, Business Applications or related field.
Experience:	3 years in the position offered as a Senior Quality Assurance (QA) Analyst, or 3 years in a related occupation of quality assurance, quality control and software development and in testing and/or supporting Windows and/or Web applications, 1 yr. of which must be in establishing and working under effective quality assurance processes and methodology, 1 yr. of which must be in testing and/or supporting Windows or web applications using XML, ASP, VB, VB Script, Java Script and Java, 1 yr. of which must be in performing automated regression, load and stress testing of web applications using E-Tester, Silk and Win Runner.

Other special requirements: Must meet requirements for at least one QA or QC certification to qualify to take exam.

To determine 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).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed her prior education as: (1) University of Kansas, Lawrence, Kansas; Field of Study: Engineering Management; from August 2000 to the present (date of signature, March 11, 2004), no degree received;[4] and (2) Institute of Computer Software Sciences, Hyderabad, India; Field of Study: Computer Applications; from March 1996 to March 1997, for which she received a Post Graduate Diploma in Computer Applications; (3) Arts & Science College for Women, University Campus, Hyderabad, India; Field of Study: Commerce; from April 1993 to May 1996, for which she received a Bachelor's degree; (4) Guruswamy Christian College, Hyderabad, India; Field of Study: General Studies; from April 1991 to March 1993, no degree or diploma received; (5) St. Pius "X" Girls High School, Hyderabad, India; Field of Study: General Studies; from August 1983 to September 1990, no degree or diploma received; and (6) C.C. Reddy Convent, Kodada, Nalgonda District, Andhra Pradesh, India, Field of Study: General Studies; from June 1977 to July 1983, no degree or certificate received.

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: [redacted], dated November 11, 2005.
- The evaluation considered the beneficiary's education and work history, including the following: Bachelor of Commerce degree, Osmania University, completed November 1997; Post Graduate Diploma in Computer Applications, Institute of Computer Software Sciences, received April 1997; her experience as a Programmer/Analyst with Concepts in Computing, Inc. from December 2001 to May 2003; her experience as a GUI Programmer/Analyst with Integrated Software Solutions Inc. from November 1999 to June 2001; and her experience as a Computer Programmer Analyst with Compusys (India) Pvt. Ltd. from January 1997 to June 1999.
- The evaluator notes that the Institute of Computer Software Sciences is "not a recognized degree granting institution of higher education in India."
  Based upon the evaluator's consideration of the beneficiary's combined education and work experience, the evaluator determined that the beneficiary had "the equivalent of a bachelor's degree with a major in Computer Information Systems."
  The evaluator based his conclusion on the beneficiary's positions, which "have been broad in scope requiring knowledge typically achieved in a baccalaureate degree program;" that her

[4] The petitioner did not provide any documentation related to the beneficiary's studies at the University of Kansas. The petitioner did provide the beneficiary's transcript from Johnson County Community College, Overland Park, Kansas for one course, which demonstrates that she took "Java 1" in the Summer of 2000. The evaluation that the petitioner submitted did not reference any courses that the beneficiary took at the University of Kansas.

responsibilities had been professional in nature; that her "record reveals as sustained and growing competence in business areas that in the U.S. are normally staffed by professional systems analysts possessing university degrees;" and that the beneficiary's education, training and experience in the computer field "surpasses that required of our computer systems majors in the Bachelor of Business Administration Degree Program."

- The evaluator continues that the beneficiary's studies at Osmania University would be equivalent to three years of undergraduate study in Business Administration at an accredited college or university in the United States. The beneficiary's Post Graduate Diploma in Computer Applications would be equivalent to "one semester of study in Computer Information Systems and related courses at a United States post-secondary vocational school, which following the three-for-one rule INS formula, is equivalent to three semester credit hours of undergraduate study in computer information systems." Further, the evaluator states that the beneficiary had five years and five months of documented work experience, which he determined would be equivalent to 54 semester credit hours. Therefore, he concludes that the beneficiary's work and education combined would be equivalent to 147 semester credit hours total, with 57 credit hours in the computer field. The evaluator states comparatively that a four-year bachelor's degree in Computer Information Systems at the University of Miami would require completion of 120 semester credit hours, including 27 credit hours in the major.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor's degree in Quality Assurance, Software Support, or Tax Preparation. The evaluation found that the beneficiary had a degree in the field of Computer Information Systems, and not in any of the required fields. The evaluation did not show that the beneficiary had one four-year degree as listed on the labor certification. The evaluation relied on a combination of education and experience to determine that the beneficiary had the equivalent of a bachelor's degree in Computer Information Systems. The director did not find that Form ETA 750 allowed for a combination of education and experience or a combination of lesser degrees.

Further, in determining whether any of the beneficiary's educational programs are individually 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. The record does contain the beneficiary's yearly statement of marks so that the record shows that the beneficiary's studies were based on three years of study.

EDGE does provide 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.

However, based on a review of the All India Council for Technical Education http://www.nba-aicte.ernet.in/nmna.htm site, accessed on February 1, 2009, the Institute of Computer Software Sciences, is not an accredited institution within the state of Andhra Pradesh, India, and, therefore, the beneficiary's post-graduate diploma following her bachelor's degree would not be comparable to a U.S. bachelor's degree.

On appeal, counsel asserts that the beneficiary is qualified for the position, and that a "single source" degree is not required for the petition.

Counsel disagrees with the director's decision where he states that "there is no provision in the statute or regulations that would allow a third preference professional beneficiary to qualify using work experience, training, or a combination of lesser degrees in conjunction with education of less than a full baccalaureate degree as the minimum level of education." Counsel asserts that a letter from [redacted] of the INS Office of Adjudications supports an interpretation allowing more than a single degree to meet the degree standard. She cites to the [redacted] letter dated January 7, 2003 to counsel in another case, expressing 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), and not the professional or skilled worker category.

At the outset, we note that private discussions and correspondence solicited to obtain advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also,* Memorandum from [redacted], Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).[5]

[5] While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS, formerly the Service or INS, are binding on all USCIS 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).

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 [redacted] 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 the beneficiary meets the requirements for eligibility as she completed a three-year Bachelor's degree in Commerce and a Post Graduate Diploma in Computer Applications from the Institute of Computer Software Sciences in 1997.

The beneficiary's Bachelor of Commerce degree is a three-year program of study in a field not listed as a required field of study on the certified Form ETA 750. The evaluator determined that this degree was equivalent to three years of study at an accredited U.S. institution of higher learning. Further, the evaluator determined that the beneficiary's "post graduate diploma" would be equivalent to "one semester of study in Computer Information Systems and related courses at a United States post-secondary vocational school, which following the three-for-one rule INS formula, is equivalent to three semester credit hours of undergraduate study in computer information systems."[6] The evaluation that the petitioner submitted did not find that the two programs combined were the equivalent of a bachelor's degree, but additionally considered the beneficiary's work experience in its determination. The Institute is not an accredited AICTE program and would not be a valid post graduate program as contemplated by the [redacted] letter even if the [redacted] letter was binding and applicable to this petition type, which it is not.

Counsel also contends that the petitioner has listed "or equivalent" on the Form ETA 750, and that would account for a combination of degrees, in contrast to USCIS's interpretation. In support, the petitioner submitted an Affidavit, dated June 8, 2006, from [redacted], the petitioner's Senior Human Resource Representative. In the affidavit, [redacted] states:

- That he is employed with the petitioner as a Senior Human Resources Representative and is responsible for coordinating immigration for the company in connection with outside counsel.
- That he is familiar with the petitioner's requirements for all immigration related positions and applications. He stated that he also consulted when necessary with the petitioner's recruiters to ensure that the petitioner's recruiters adhered to its job requirements when

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[6] The rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5).

hiring non-U.S. workers. This was to ensure that, "any alien hired for one of our positions meets those requirements and is therefore, eligible for nonimmigrant and/or immigrant status."

- He stated that the petitioner considered "any equivalent combination of education, training, certificates, diplomas or the like plus all experience possessed by the candidate in determining whether he or she meets the minimum educational requirements for the position."
- He stated that the requirements are customary for the petitioner and had not been altered for the instant application.
- That Form ETA 750 submitted on the beneficiary's behalf would have been based on its minimum requirements with consideration of "any equivalent combination of education, training, certificates, diplomas or the like plus all experience possessed by the candidate in determining whether he or she meets the minimum educational requirements for the position." Further, that it was the petitioner's "explicit intent to describe those requirements as stated above."
- That the petitioner "does not and never has required that an individual who fills this Analyst position possess a single source, four-year academic Bachelor's degree; the combination of academic study and/or academic study and work experience is always acceptable to the petitioner."

  That the petitioner drafted the labor certification with the beneficiary in mind and that "we considered her qualified for the benefit being sought at the time of our submission. We certainly would not have filed the labor certification had we thought otherwise."

Counsel additionally cites to *Grace Korean* in support, that the petitioner used the language or "equivalent" and that it had the beneficiary in mind when it drafted the labor certification.

Related to these issues, is the question of how was 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. Because the terms of the labor certification as drafted were ambiguous, the AAO issued an RFE to the petitioner to determine its intent. The petitioner responded to the RFE.

Counsel states that "by using the word "equivalent," the employer evidenced its intent to accept any combination of degrees, education or experience that would be equal to four years of college education in the fields of Quality Assurance, Software Support, Tax Preparation, Quality Control, Software Development, Business Applications, or a related field." Further, counsel states that the petitioner seeks qualified candidates, and is not concerned with whether the individual obtained the degree through one school or multiple schools, or whether the individual would qualify based on a combination of education and experience. Counsel further states that no U.S. workers were rejected for the job offer as a result of a lack of single source four-year bachelor's degree. 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). Counsel also requests that consideration be

given to the way an employer advertises in the industry, that no employer would define equivalent in its advertising.

In support, the petitioner provided copies of its recruitment efforts underlying the labor certification. The petitioner submitted a copy of a newspaper ad from the Kansas City Star, dated September 25, 2003, which stated that, "We require Bachelors' degree in quality assurance, software support, tax preparation, quality control, software development, business applications, or a related field." The petitioner additionally listed that 3 years of work experience was required in accordance with the specifications on Form ETA 750. The petitioner did not list "Bachelor's or equivalent" in this ad. The recruitment also contained a copy of a posting from the petitioner's website, as well as an internal posting. The website and the internal posting listed the educational requirements as: "**bachelor's degree or equivalent experience** in quality assurance, software support, tax preparation, quality control, software development, business applications or other related field." (Emphasis added). A posting on "kshasjobs.com," a Kansas City jobs site listed the educational requirements as: "**bachelor's degree or equivalent experience** in quality assurance, software support, tax preparation, quality control, software development, business applications, or a related field." (Emphasis added). The internal posting notice additionally listed the educational requirements as: "bachelor's degree or the equivalent."

Based on the petitioner's advertisements and the affidavit that the petitioner's human resource representative provided, we would conclude that the petitioner's actual minimum requirements for the proffered position included equivalent education and/or experience to a degree and that it considered candidates with the equivalent of a degree based on a combination of education and/or experience. The petitioner listed this in four out of its five recruitment pieces.

The AAO notes DOL certified the labor certification with the fields of study that the petitioner listed, which are very specific, and not degree fields commonly offered as might be expected, such as Accounting with experience in Software Support, or Business Administration with experience in Business Applications, or Computer Science with experience in tax software or databases. However, the petitioner's evaluation states that the beneficiary had the equivalent of a Bachelor's degree in Computer Information Systems. Computer Information Systems would be related to the fields specified of software development, or business applications.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" in the required field of study, or a closely related field, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. However, as the petitioner listed that the requirements would include the equivalent of a bachelor's degree, the petition could be considered under the skilled worker category. *See* 203(b)(3)(A)(i) of the Act. The AAO withdraws the director's decision because the petitioner has satisfied the minimum level of education required by the proffered position under the skilled worker prong of the third preference category.

The petitioner would still need to demonstrate that the beneficiary meets all of the requirements of the labor certification. In this case, the petitioner has not done so. Even if we accept that the beneficiary had the required degree based on equivalency, the petitioner has relied on all of her

documented experience to evidence that she had the required education. The labor certification expressly requires three years of experience in addition to the education requirement. The experience cannot then be "double counted" to conclude that she had the required three years of work experience.

Although not raised in the director's decision, the petition should have been denied based on the petitioner's failure to demonstrate that the beneficiary had the required prior experience to meet the terms of the certified labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

In examining the issue of the beneficiary's experience, USCIS must look to the job offer portion of the alien 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*, *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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires:

- 3 years in the position offered as a Senior Quality Assurance (QA) Analyst, or,
- 3 years in a related occupation of quality assurance, quality control and software development and in testing and/or supporting Windows and/or Web applications,
- 1 yr. of which must be in establishing and working under effective quality assurance processes and methodology,
- 1 yr. of which must be in testing and/or supporting Windows or web applications using XML, ASP, VB, VB Script, Java Script and Java,
- 1 yr. of which must be in performing automated regression, load and stress testing of web applications using E-Tester, Silk and Win Runner.

- Other special requirements: Must meet requirements for at least one QA or QC certification to qualify to take exam.

On the Form ETA 750B, signed by the beneficiary on March 11, 2004, the beneficiary listed her prior experience as: (1) the petitioner, June 2003 to the present (date of signature), Senior Quality Assurance Analyst; (2) [redacted]., Edison, NJ, December 2001 to June 2003, Quality Assurance Analyst; and (3) [redacted] Princeton Junction, NJ, January 2000 to December 2001, Quality Assurance Analyst.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

(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.

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letter:

Letter from [redacted] Projects Manager, [redacted] Edison, NJ, dated June 30, 2003;
Position title: Quality Assurance Analyst;
Dates of employment: December 2001 to June 2003;
Description of duties: **the letter describes the** beneficiary's duties on three different **assignments.** For her assignment with the petitioner, "she was responsible for quality assurance, quality control, preparing testing plans, executing test cases, performing regression, load and stress testing, and debugging using C++, Java, XML, Oracle on HP UNIX platform." Her experience for other client projects included use ofVisual Basic, VBScript, WinRunner and other tools.

Letter from Human Resources, [redacted], Princeton, NJ, dated December 31, 2001;
Position title: GUI Programmer Analyst;

Dates of employment: January 2000 to December 2001;
Description of duties: "She performed a variety of tasks for Integrated Service Assurance/Fault Management Team of Broadband Network Management Development. This included complex system analysis, technical specifications and design review, development of test plans, test cases, and test scripts for maintenance and support for the production environment using WinRunner, Test Director, C++, Java, CORBA, XML, Perl, Micromuse Netcool, SNMP, TL/1, on a variety of Unix and Windows platforms such as HP, Sun Solaris and Windows NT." The letter further states that the beneficiary, "also worked as a Test Analyzer for Enterprise Integration Team. Her responsibilities were: project builds, test environment setup and execution production environment support, analysis, testing, defect logging and tracking, and debugging using C++, Java, SQL, Pro C/C++, Oracle 8.x on HP Unix platform."

Letter from [redacted]., Director, [redacted]., New Delhi, India, dated June 8, 1999;
Position title: Computer Programmer Analyst;
Dates of employment: from June 1997, the letter does not list the end date for the beneficiary's employment;
Description of duties: "During this period she has been involved in different projects which were undertaken by the company for different clients. She has contributed greatly in the technical design, development and testing of Invoice and Advice System, Sales and Distribution System, and Transport Management System using Visual Basic 5, Developer 2000, Oracle 7.3 on Windows NT platform."

The educational evaluation considered the beneficiary's work experience: as a Programmer/Analyst with [redacted] from December 2001 to May 2003; her experience as a GUI Programmer/Analyst with [redacted]. from November 1999 to June 2001; and her experience as a Computer Programmer Analyst with [redacted] from January 1997 to June 1999. The evaluator then calculated that the beneficiary had five years and five months of documented work experience, which he determined would be equivalent to 54 semester credit hours. Accordingly, in order to determine that the beneficiary had a bachelor's degree, the evaluator already used all of the beneficiary's documented work experience. That experience cannot then be used to document that the beneficiary had the additional three years of experience required to qualify for the position offered, or three years in the specified related occupation. The petitioner has provided no other evidence to show that the beneficiary has the required three years of experience in the position offered or in a related occupation.

Therefore, the petitioner has failed to adequately document that the beneficiary had the required prior three years of experience in the position offered, or alternatively that the beneficiary had three years of prior experience in the related occupation obtained before the March 23, 2004 priority date. As the director did not raise this issue, the petitioner should be allowed to address whether the beneficiary meets the experience requirements on remand.

In view of the foregoing, the petition will be remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.