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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: MAR 04 2009

EAC 06 110 51481

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, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas 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's business is software consultancy and development. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment 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. Specifically, the director determined that the beneficiary did not possess a U.S. bachelor degree (or its equivalent), and the beneficiary did not meet the minimum requirements stated on the Form ETA 750. Therefore, the petition was denied.

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 or skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. See 8 CFR § 204.5(d).

[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).

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 December 7, 2001. The Form ETA 750 was certified on January 24, 2006, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 8, 2006.

On June 1, 2006, the director issued a Notice of Intent to Deny (NOID) for the petitioner to provide: evidence that the beneficiary had the required Bachelor's degree or foreign equivalent in any field by the time of the priority date. The petitioner responded to the NOID as discussed below.

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 two 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/15-1021.00> (accessed January 30, 2009).[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.

[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.

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 finance, accounting and auditing. Additionally the beneficiary has a Post Graduate Diploma (PGD) in computer applications and computer related employment experience. Thus, the issues are whether the beneficiary's three-year degree is equivalent to a U.S. baccalaureate degree in "any field,"[3] or, if not, whether it is appropriate to consider the beneficiary's PGD and his work experience. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

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

[3] "Any field" is the phrase used in the Form ETA 750, Part A, Section 14, entitled "Major Field of Study."

> (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).[4] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

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 professional classification), the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

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

The petition and the beneficiary are not eligible for consideration under the third preference immigrant visa as a professional under section 203(b)(3)(A)(ii) of the Act.

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. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor's degree.

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

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

On the Form ETA 750A, the "job offer" position description for a programmer analyst provides:

> Analyze, design, develop and implement client server application systems using HTML, Windows NT, Visual Basic, Unix. Develop object, dynamic and functional models for systems, and implement applications customized to meet specifications.

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:	blank;
	High School:	blank;
	College:	blank;
	College degree:	"Bachelor's"
Major Field Study:		"any field"

Experience: "2 years in the position offered as a programmer analyst, or 2 years as a Customer Support Executive/Trainee Jr. Software Engineer."

Other special requirements: blank.

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 his prior education as: (1) Narsee Monjee College of Commerce and Economics, Bombay, India; Field of Study: Financial Acct., Auditing, from June 1989 to April 1991, for which he received a Bachelor's Degree in financial accounting and auditing; and, (2) Intel Computers, Hyderabad, India; Field of Study: computer science from June 1994 to June 1995, for which he received a PGD in computer applications.

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:

Credentials Evaluation

- Evaluation: [redacted], New York, New York, dated August 2000.
- The evaluation considered the beneficiary's educational documents which included documents which evidenced the beneficiary's Bachelor of Commerce Degree from the University of Bombay, India, including coursework in accounting, auditing, costing and related courses.
- According to [redacted], the beneficiary satisfied similar requirements to the completion of three years of academic study towards a baccalaureate degree from an accredited institution of tertiary education (i.e. college or university) in the United States.
- The evaluation did not consider or evaluate the beneficiary's PGD above mentioned.
- The evaluation considered five years and one month of "bachelor-level" employment experience in computer science, specifically the evaluator considered the beneficiary's work experience with [redacted], Mumbai, India, from February 1984 to March 1999.

- After a discussion of the beneficiary's professional work experience, the evaluator stated that the beneficiary completed specialized academic coursework and training in both commerce and computer science.

  The evaluator concluded that the beneficiary academic coursework and training and, at the time of his report, five years and one month of specialized work experience in computer science indicates that the beneficiary satisfied similar requirements to the completion of a Bachelor of Science Degree in Management Information Systems from an accredited institution of tertiary education in the United States.

In determining whether the beneficiary possessed a U.S. bachelor's degree in any field or a foreign equivalent degree, 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.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 science 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, provide:

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

In the instant case, the record does not contain any evidence showing the beneficiary holds a four-year U.S. bachelor's degree, nor does the record contain any evidence showing that the Intel Computers professional training is a postgraduate diploma issued by an accredited university or institution approved by AICTE and its entrance requirement is the three-year bachelor's degree. Therefore, you are requested to submit such evidence.

The evaluator relies on a combination of education and experience which the petitioner did not state as a requirement on the certified form ETA 750. The beneficiary's receipt of the PGD is stated in the labor certification under a listing of his education. The record contains no evidence that the beneficiary's PGD received from Intel Computers, Hyderbad, India, is from an institution of tertiary education in India, or that the PGD program of Intel Computers was certified by the All-India Council for Technical Education (AICTE).[5] The evaluation that the petitioner submitted described this education as specialized academic coursework and training but did not assign any specific academic value. We concur that the coursework would be professional training and not education. Further, the petitioner did not draft Form ETA 750 to allow for an "equivalent" based on any alternate combinations of education and/or experience.

- According to the evaluator, the Code of Federal Regulations states that for the purposes of determining equivalency, three years of work experience must be demonstrated for each year of Bachelor's level training.

The equivalence of employment experience for education may only be used for non-immigrant petitions and therefore, not for immigrant petitions as is the case here. Visas have different eligibility standards. Each preference visa category has its own regulatory criteria. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

The director issued a notice to deny the petition on June 1, 2006 in which the director found that the labor certification did not make an allowance for an education and experience equivalent degree. The labor certification required a Bachelor's degree, meaning in this context a four-year degree.

According to evidence in the record of proceeding, counsel stated in a cover letter dated February 21, 2006, accompanying the I-140 petition that the petitioner was submitting copies of the beneficiary's educational degrees, transcripts and certificates showing eligibility to perform the job duties of this position. In the labor certification also enclosed the petitioner lists the occupation as programmer analyst (ETA Form 750, Part A, Item 9). The petitioner had also submitted with the petition a credentials evaluation from [redacted], New York, New York, dated August 2000. In that evaluation, [redacted] stated that the beneficiary satisfied similar requirements to the completion of a Bachelor of Science Degree in Management Information

[5] USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Systems from an accredited institution of tertiary education in the United States. There is no indication in the record that the petitioner requested consideration of the petition under the skilled worker classification at the time the petition was filed.

However, the petitioner asserted in its response to the director's notice of intent to deny the petition, it wished to have the petition considered under the skilled worker classification and to apply the alternative occupation requirements mentioned in item 14 of the Form ETA, Part A. Counsel submitted with this response an explanatory letter dated June 29, 2006, one page of the labor certification and three letters from the beneficiary's past employers.

In the explanatory letter counsel for the first time sets forth his contention that the minimum requirements "represented by a combination of Items 13, 14, and 15" in the labor certification are not to be considered or followed and it is the alternative related occupation requirements stated in item 14 that the petitioner desires to apply. Counsel cites five Board of Alien Labor Certification Appeals (BALCA) that concern alternative experience requirements. Counsel cites he is aware the cases cited are not binding on USCIS but submits them for "illustrative value." While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions 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).

Counsel's proposition that the petitioner can unilaterally pick or choose, after the petition is filed and after job recruitment, some but not all of the requirements stated in the labor certification is misplaced. 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).

A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The director denied the petition on October 3, 2006. The director stated in her decision that the petitioner selected block 'e' from the I-140 petition that concerned two separate visa classifications, professional and skilled worker, and that at the time of the submission of the petition, the petitioner did not specify either classification. On October 3, 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.

On appeal the petitioner submitted a legal brief dated November 3, 2006; a job reference letter from [redacted] dated February 23, 2006; Board of Alien Labor Certification Appeals (BALCA)

cases dated April 18, 1990, April 12, 1993, November 14, 1996, and July 23, 1998;[6] as well as other documentation.

On appeal, counsel asserts that the petitioner is seeking classification of skilled worker under section 203(b)(3)(A)(i) of the Act. Counsel contends that the director erred by disregarding the above request during the pendency of the proceeding and reviewing the evidence in this case under the professional classification. Counsel asserts that the director erred by combining all the requirements of the position as stated in item 14 which determination is based upon an incorrect application of regulations and is contrary to USCIS policy. Counsel is in error. The AAO notes that the director in her decision considered both skilled worker and professional regulations in relation to the evidence submitted. *See Matter of Silver Dragon Chinese Restaurant, Id.* There is no doubt that the authority to make preference classification decisions rests with INS. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977).

The AAO notes that the director considered the bachelor's degree requirement with both the experience requirement of two years as a programmer analyst and the experience requirement of two years as customer support executive/trainee Jr., software engineer.

Counsel asserts that if the beneficiary qualifies based upon the alternate occupations, than in that case, the degree requirement, although stated in the labor certification, is ignored because it is an alternate prong. Under this proposition, counsel contends that the bachelor's degree is no longer required, and that therefore, the experience requirement of two years as customer support executive/trainee Jr., software engineer is the only requirement. In support of his contention, counsel again references the BALCA cases above mentioned regarding alternative experience.

As already stated, 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.

Counsel contends that the director disregarded evidence submitted in this matter to classify the beneficiary as a skilled worker based upon the related occupations (i.e. customer support executive/trainee Jr. software engineer) listed on the labor certification.

The record evidences that the director considered both professional and skilled worker classifications.

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[6] Counsel cites he is aware the cases cited are not binding on USCIS but submits them for "illustrative value." While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions 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).

Related to these issues, is the question of how the position's actual minimum requirements were expressed to DOL and advertised to U.S. workers. Further there is the question would a U.S. worker having the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position.

On November 4, 2008, the AAO issued a request for evidence to the petitioner to determine its intent as evidenced by its recruitment efforts and received a response dated December 1, 2008. In the response to the AAO's request for evidence, counsel submitted an explanatory letter dated December 1, 2008, a letter from the petitioner to the New York State Workforce Agency dated December 5, 2001, a Notice of Job Opportunity certifying to the job posting indicating recruitment results of *"none,"* and the job advertisement as well as other documentation concerning the ability of the petitioner's ability to pay the proffered wage.

Despite counsel's contention that the requirement expressed in the labor certification that the job requires a Bachelor's degree should be ignored and that the alternate occupations of customer support executive/trainee Jr., software engineer control, the job advertisement stated the following;

> Programmer Analysts: Bachelors Degree + yrs exper in HTML, Win NT, Java, Oracle Developer 200, VB, Unix. Will also accept : Programmers 2 yrs in above skill sets. Apply to, ...

As advertised in the Daily News newspaper, on Sunday, November 4, 2001.

The petitioner also placed what appear to be three job advertisements together in Computerworld, etc., on February 18, 2001. In pertinent part the three job requests stated together in the ad were:

> Programmer Analyst/Software engineer-Bachelors degree in engineering (any), math, science and two years of experience in the job (or five years of experience in the job. Will accept bachelors degree + five years experience in the field ....[discusses skill sets required]
>
> Programmer Analyst; two years experience required and experience in skill sets mentioned above. ....
>
> Software Engineer-master degree: Analyze, design, develop application systems in conjunction with hardware using skill combinations ....

A third job advertisement[7] was placed in "America's JOBBANK" which is an Internet accessible "classified" advertisement website that was utilized, inter alia, by the New York State SWA. The ad found in the record combined language from the above three job descriptions.

[7] The date of the Job Bank ad is not noted. The petitioner's had requested and was granted that the recruitment be considered under the reduction in recruitment procedure (RIR) but according to the record, the advertisement was not accomplished within six months of filing the RIR request.

In the petitioner's response, counsel contends the job advertisements and notice of posting identified the alternative two-year requirement. Since the petitioner has either advertised to attract applicants with a bachelors or masters degree or in the case for one portion of one advertisement for two years experience, and no recruitment results were provided, the AAO cannot find that the actual minimum requirements of the job are merely two years of experience.

Counsel further asserts that the petition should be considered under the skilled worker classification and that the petitioner's recruitment efforts demonstrates the petitioner's willingness to accept less than a bachelor's degree for the position as stated on the labor certification. The advertisement's language cited above does not support counsel's contention.

The totality of the evidence submitted demonstrates that it was the petitioner's intent to recruit university or college bachelor degree holders for the job of programmer analyst. The 'requirements' section of the petitioner's Notice of Job Opportunity" and the job advertisements provided by the petitioner state "bachelor's degree and two years of experience in the job or in the job related or 2 years experience in the job duties ...."

Further, the petitioner has not demonstrated by evidence submitted in this matter that it expressed the intention to any U.S. candidates in its recruitment efforts that it would accept any equivalent degrees based on a combination of education or education and experience, or that despite the posted and advertised job requirements requiring a bachelor degree, the petitioner was seeking only skilled workers.[8] Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof.

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

ORDER: The appeal is dismissed.

[8] As set forth in counsel's brief dated November 3, 2006, "[the] Beneficiary is not seeking to qualify for the instant position on the minimum requirements represented by a combination of Items 13, 14, and 15, but the alternative related occupation requirements mentioned in Item 14 of the Application for Alien Employment certification on form ETA 750A." Counsel has not provide any explanation how the petitioner could unilaterally accept some terms of the labor certification and reject others.