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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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FILE: LIN 07 043 51883 Office: NEBRASKA SERVICE CENTER Date: NOV 09 2009

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a home furnishing business. It seeks to employ the beneficiary permanently in the United States as a Clarify 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's Bachelor of Arts degree could not be accepted as a foreign equivalent degree to a U.S. Bachelor of Science degree in computer science because the beneficiary earned a three and not a four-year degree from University of Calicut; that a United States baccalaureate degree is generally found to require four years of education citing the case of *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977); that the petitioner failed to establish that the beneficiary's combination of a three-year degree with a diploma in computer programming is the equivalent to a U.S. bachelor of science degree in computer science; and, that the Form ETA 750 required "that, at a minimum, a prospective employee would have completed four years of college education; earned a bachelor's degree or equivalent in Computer Science or a related field and 2 years in the job offered or a related occupation."

The AAO maintains plenary power to review each appeal on a *de novo* basis. *See, 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]

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

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. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on June 19, 2003.[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on November 29, 2006.

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[1] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations 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).

[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

The job qualifications for the certified position of programmer analyst are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

> Responsible for planning, maintaining and developing the call center/order management system, supporting technologies and applications; maintaining and improving the Clarify site's functionality through programming and authoring as well as participating in other Microsoft platform solutions; and providing hands-on development and engineering using Clarify Clear Basic and Visual Basic with SQL, DB2, and Oracle RDBMS.

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:

Block 14:

Education (number of years)

Grade school	Blank
High school	Blank
College	4
College Degree Required	**Bache**lor's degree or foreign equivalent
Major Field of Study	Computer Science or related

Experience: (number of years and months)

Job Offered	2 years
(or)	
Related Occupation	Not stated[3]
	2 years

Block 15:

Other Special Requirements	Blank

As set forth above, the proffered position requires four years of college culminating in a bachelor of science degree in computer science "or related"[4] and two years of experience in the job offered which is programmer analyst. In the alternative, the proffered position requires two years of

[3] Under the heading "Experience," the related occupation is not stated but the un-named related occupation requires two years of experience in "Developing client server business applications. Experience must include use of Clarify Clear Basic and Visual Basic with SQL, DB2, and Oracle RDBMS."

[4] The phrase "or related" is not explained in the record of proceeding.

experience in "Developing client server business applications. Experience must include use of Clarify Clear Basic and Visual Basic with SQL, DB2, and Oracle RDBMS."[5] The AAO notes that these skill sets are stated in the above job description.

On the Form ETA 750B, signed by the beneficiary, he listed his prior education as having received a Bachelor of Art degree in general studies from the University of Calicut, India, after completing less than three years of study (i.e. June 1989 until April 1992). The beneficiary also claims to have received a "diploma" in computer programming from Aptech Computer Education Institute, India, after completing approximately two years of study. The Form ETA 750B also reflects the beneficiary's experience as having worked as a programmer for two Indian employers from 1993 until 1996; as having worked as a systems analyst in India and the United States from 1996 until 2002; and as having worked as a Clarify programmer analyst from April 2002 until the date he signed the Form ETA 750B, i.e. June 12, 2003.

In support of the beneficiary's educational qualifications, the petitioner submitted, *inter alia*, a copy of the beneficiary's provisional university certificate[6] from the University of Calicut, dated February 16, 1998. The petitioner also submitted a credentials evaluation, dated July 23, 1999, from the Trustforte Corporation signed by [redacted] The evaluation describes the beneficiary's diploma from the University of Calicut, where the beneficiary undertook instruction in the English language, history and literature. [redacted] indicated that the beneficiary satisfied "substantially similar requirements to the completion of three years of academic studies leading to a baccalaureate degree from an accredited institution of higher education in the United States." The evaluation also describes the beneficiary's participation in a diploma program in computer programming and applications at Aptech Computer Education Institute, India. [redacted] concluded that the combination of the beneficiary's completion of these two programs constitutes the equivalence of a bachelor of science degree in computer science from an accredited institution of higher institution in the United States.

As set forth in the director's denial dated December 1, 2006, the primary issue in this case is whether the beneficiary can be found to have met the minimum educational requirements stated on the Form ETA 750 as of the priority date, or more specifically, whether or not the beneficiary's Indian bachelor's degree, alone or in combination with a "diploma" in computer science from the Aptech Computer Education Institute, constitutes the "foreign equivalent" to a bachelor's of science degree

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[5] The AAO notes that the petitioner's requirement "Experience must include use of Clarify Clear Basic and Visual Basic with SQL, DB2, and Oracle RDBMS" was typed into Block 15 but appears, because of the inclusion of double asterisks to be appended to the specifications begun under Block 14 "Related Occupations." It is not clear from the record of proceeding whether the asterisked content was in fact a special requirement, or as it appears to be, requirements of the unnamed related occupation which requirements are also skill sets required in the offered job.

[6] A provisional certificate is a certificate which is issued on temporary basis for some purpose such as for applying for a job before the original certificate is issued. The petitioner has not submitted the petitioner's diploma from the University of Calicut, India.

in computer science or related field.

Beyond the decision of the director, an issue in this case is whether or not the petitioner adequately demonstrated that the beneficiary's education, training or experience, met these and any other requirements of the labor certification.

Also, beyond the decision of the director, an issue in this case is whether the petitioner adequately demonstrated that the beneficiary's training and experience conformed to the requirements of the labor certification, specifically, whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Part A of the Form ETA 750 indicates that DOL assigned the occupational code #030.162-014 with accompanying job title "programmer analyst," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g=Go>[7] as accessed September 21, 2009, DOL's updated correlative occupation code is #15-1051.00. The job title "programmer analyst" occupation description and its requirements are most analogous to the petitioner's offered position. In the database, the job title programmer analyst falls within "Job Zone Four: Considerable Preparation Needed." According to DOL, two to four years of work-related skill, knowledge, or experience are needed for Job Zone 4 occupations. DOL assigns a standard vocational preparation (SVP) range of 7.0 to < 8.0 to Job Zone 4 occupations, 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 as accessed October 13, 2009. Additionally, DOL states the following concerning the training and overall experience required for these occupations:

> A considerable amount 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. Because of the requirements of the proffered position and DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

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

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[7] The DOL "Occupational Information Network" website "O*NET Online" connects the code 15-1051.00 by an on-line search to that DOL occupational code stated on the labor certification which is #030.162-014.

> 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 regulation uses 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 regulation at 8 C.F.R. 204(5)(l)(3)(ii)(B) states the following:

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

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

Counsel also submitted the following relevant evidence:[8] a letter dated July 20, 1999, prepared in support of a I-129 petition for the beneficiary on company letterhead by Clear Technologies LLC, South Plainfield, New Jersey; the beneficiary's provisional university certificate from the University of Calicut, Kerala, India, dated February 16, 1998; the beneficiary's memorandums of course marks[9] from the University of Calicut for "Examination of April 1992," dated September 4,

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[8] The employment references and training certificates listed are the beneficiary's documents.

[9] The petitioner did not provide any statements for 1989, 1990 or 1991. Further, it is unclear why the mark statements appear to be dated 1997 when the beneficiary was matriculated from 1989 to 1992. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent

1992, and for "Examinations of September 1997," as dated January 14, 1998; the beneficiary's performance statements from Aptech Computer Education Institute ("Aptech"), [redacted], for examinations dated March 28, 1993, October 17, 1993, and May 29, 1994; the beneficiary's record of achievement in computer programming and applications from the National Centre for Information Technology (NCC), dated September 10, 1994; an Honours Diploma from [redacted] dated March 8, 1995, for programming languages COBOL and "C;" a diploma dated October 9, 1994, in Computer Programming and Applications from NCC, the National Centre for Information Technology, United Kingdom; a certification from [redacted] Anna University, Madras, India, and [redacted], evidencing the completion of the Integrated Professional Software Programme in client server computing from September 4, 1995 to December 22, 1995; an employment reference concerning the beneficiary from Prakash Business Software Consultancy, dated July 14, 1995; an employment reference from Tachyon Software Consultancy dated May 31, 1996; an employment reference from Abu Dhabi National Oil Company dated January 26, 2000; the decision in the case of *Snapnames.com, Inc. v. Chertoff,* 2006 WL 3491005 (D. Ore. Nov. 30, 2006); a "Statement of Employer" from the petitioner dated January 22, 2007; a letter from [redacted] Business and Trade Services, U.S. Immigration and Naturalization Service dated January 7, 2003; a letter dated June 28, 2006, and a statement dated October 25, 2006, by [redacted] Mumbai, India; an undated statement from [redacted], president of Education Consultants and Evaluators International, Miami, Florida; a newspaper article printed from the web site http://timesofindia.com accessed November 10, 2006; a U.S. Citizenship and Immigration Services (USCIS) Interoffice Memorandum (HQOPRD 70/23.12) dated September 12, 2006; approximately 15 pages from the website at http://www.aila.org/Content/default.aspx?docid=10492, as accessed January 24, 2007; and, approximately 13 pages from the website at <http://www.aila.org/Content/default.aspx?docid=1521>, as accessed December 28, 2006; a certificate of achievement dated March 9, 1997, in administering Windows NT 4.0 at the ICL Training Centre; a certificate of achievement dated October 9, 1997, in Microsoft Windows NT 4.0 - core technologies; a certificate from Sybase in data modeling with Power designer 6.0 held from October 12, 1997 to October 14, 1997; a certificate from Sybase in building object orientated application using PB training from November 29, 1997 to December 1, 1997; a certificate from Sybase in Fast Track to Power Builder 5.0 held from August 23, 1997 to August 26, 1997; and a certificate of merit from 5th Generation Systems dated January 19, 1996, in Visual Basic 3.0.[10]

On January 22, 2009, the AAO issued a request for evidence (RFE) to the petitioner. In this request, the AAO noted that there was no evidence in the record of proceeding that the beneficiary ever enrolled in university/college classes beyond his academic studies at the University of Calicut. The AAO also noted that the petitioner did not specify on the Form ETA 750 that the minimum academic

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objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The provisional certificates and mark sheets as received do not evidence that the beneficiary completed a three-year program of study.

[10] It is noted that the petitioner's four credentials evaluations do not assess or accord these certificates any academic value.

requirements of four years of college and a bachelor's of science degree might be met through a combination of lesser degrees and/or a quantifiable amount of work experience. The AAO further advised that a joint publication of American Association of Collegiate Registrars and Admissions Officers (AACRAO) and National Association For Foreign Student Affairs (NAFSA) states a Bachelor of Arts degree in English, history and literature from the University of Calicut is equivalent to three years of undergraduate study in the United States. The AAO also advised that the labor certification application did not demonstrate that the petitioner would accept a combination of degrees that are individually less than a four-year U.S. bachelor's degree or its foreign equivalent and/or a quantifiable amount of work experience when the labor market test was conducted. As noted *intra,* the petitioner failed to respond to the AAO's RFE.

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

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

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 the position and the alien are qualified for a specific immigrant classification. 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).[11] 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.

* * *

[11] 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).

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).

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.)

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).

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289m 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement in of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education earned at an institution other than a college or university.

The petitioner in this matter relies on the beneficiary's combined education to reach the "equivalent" of a degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification.

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 single-source "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," from a college or university in the required field of study listed on the certified labor certification, 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.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Ore. 2005), which finds that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 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. Ore. 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 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 on the Form ETA 750 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. See also Maramjaya v. USCIS,* Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the Form ETA 750 does not specify an equivalency to the requirement of a bachelor's degree or foreign equivalent.

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

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS,* Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary possesses.

Thus, the AAO issued a request for evidence (RFE) on January 22, 2009 soliciting such evidence. The petitioner failed to respond to the request. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

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).

The petitioner submitted evaluations of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification. With the I-140 petition, the petitioner submitted an academic evaluation report dated July 23, 1999, from The Trustforte Corporation signed by [redacted] stated that the beneficiary's diploma from the University of Calicut, where the beneficiary specialized in English, history and literature, indicated the beneficiary satisfied "substantially similar requirements to the completion of three-years of academic studies leading to a baccalaureate degree from an accredited institution of higher education in the United States."

The beneficiary's Bachelor of Art received from the University of Calicut, is an unrelated degree to the field of study of computer science required by the labor certification. Both for duration of studies (three versus four years) and field of studies (English, history and literature versus computer science), the beneficiary's Bachelor of Arts degree would not be equivalent to a four-year U.S. bachelor of science degree in computer science or a related field.

In the same evaluation, stated that the beneficiary enrolled at Aptech from 1993 to 1994 and completed courses in data and file management techniques, computer programming, systems analysis, computer applications and related subjects. According to [redacted] the diploma received from Aptech indicates that the beneficiary "satisfied substantially similar requirements to the completion of not less than one-year of academic studies leading to a baccalaureate degree in Computer Science from an accredited institution of higher education in the United States." Without further explanation, [redacted] indicated that he based this opinion on the proposition that the aggregate of the beneficiary's Bachelor of Arts degree and his Aptech diploma constitutes the equivalent of a U.S. bachelor's degree in computer science. The evaluator's logic is not apparent.

[redacted] concluded:

> Based upon the reputations of the University of Calicut and the Aptech Computer Education Institute, the number of years of coursework, the nature of the coursework,

[12] Based upon a review of other similar cases in the records of USCIS, [redacted] appears to sign all Trustforte Corporation credential evaluations.

> the grades attained in the courses, and the hours of academic coursework, it is the judgment of the Trustforte Corporation that [the beneficiary] attained the equivalent of a Bachelor of Science Degree in Computer Science from an accredited institution of higher education in the United States.

The petitioner submitted a second academic evaluation report dated July 22, 2007, from the Trustforte Corporation by the same evaluator. According to the second report the beneficiary received a Bachelor of Arts degree in the fields of the English, history and literature. The first report reached the same conclusion. In both reports, [redacted] relies upon the beneficiary's attendance at Aptech and its diploma as a basis along with the Bachelor of Arts degree in his opinion that the beneficiary has a single source degree.

stated in the second report that the computer courses the beneficiary took comprised classes in computer science, information and systems management and related subjects. [redacted] equates the training at Aptech with the "completion of the advanced post-secondary program at Aptech Computer Education." According to the Trustforte Corporation academic equivalency evaluation dated January 22, 2007, admission to Aptech's programs "include at a minimum, the completion of secondary-level[13] academic studies." The evaluator as a basis of his opinion concludes that the computer training qualifies as a single source for an equivalence to a bachelor of science degree in computer science, but also notes the beneficiary's Bachelor of Arts degree is a prerequisite for entrance into the Aptech program although there is no substantiation given in the record for this statement.

As already stated, a combination of education resulting in multiple degrees\diplomas (assuming for the sake of argument that the Aptech diploma amounts to a degree from an university or college) is contrary to the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), and not acceptable as a foreign equivalent degree to a U.S. bachelor's of science degree in computer science. Further, as already stated Aptech, situated in Anna Nagar, Chennai, India, is not an accredited institution within the State of Tamil Nadu, India. As the Aptech studies are unaccredited, such studies would not constitute an approved post graduated diploma program.

The Trustforte Corporation evaluator desired to combine the two dissimilar education experiences. [redacted] concluded in his second report that based upon the beneficiary's three-year studies at the University of Calicut and the beneficiary's one-year of attendance at Aptech, that the beneficiary has attained "the equivalent of a Bachelor of Science Degree in Computer Science from an accredited institution of higher education in the United States." The evaluation relies on a combination of education/training programs to conclude that the beneficiary was a bachelor's degree equivalent. The evaluator reliance on a combination of education/training experiences in this case is misplaced. *See Snapnames.com, Inc.*, 2006 WL 3491005 at *17,19.

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[13] Since college and university level academic level studies are tertiary education, is indicating that graduation from a U.S. equivalent of high school (secondary education) is the minimum entrance requirement.

Also, on appeal, the petitioner introduced additional academic evaluations from [redacted] and [redacted] who provide credentials evaluations as Career Consulting International, Sunrise, Florida and Marquess Educational Consultants, London, United Kingdom, respectively.

[redacted] asserted in her evaluation:

> *"There is no combination of degrees. There is no combination of work experience and education. This is a single source degree evaluation using only the credentials listed above."*

The AAO notes that this is in contradiction to the Trustforte Corporation evaluation that there is a combination of educational programs. [redacted] concluded that a combination of the beneficiary's Bachelor of Arts degree with the beneficiary's training at Aptech results in the equivalence of a baccalaureate degree in computer science.

However, the "single source degree" referenced by [redacted] are a Bachelor of Arts degree received by the beneficiary at the University of Calicut, India, in "1992" [sic 1998],[14] and a "diploma in Computer Programming and Applications from the National Centre for Information Technology (NCC), UK [United Kingdom]/Aptech, India, 1994."[15]

Further, [redacted] stated she conducted a credit equivalency computation of the courses the beneficiary completed at the University of Calicut (a tertiary education institution) as well as at Aptech (a nontertiary education institution). According to [redacted] the beneficiary has attained a "total U.S. credit equivalency per contract hours using the Carnegie Unit[16] of 150." It is apparent, among other errors present in the report, that [redacted] is equating credit hours with transfer credits. The correct term is "transfer credits." *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (the Report) I80-I81 (AACRAO/NAFSA 1986),[17] explicitly states that "transfer credits should be considered on

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[14] The petitioner has not clarified why the provisional certificate is dated 1998 although this inquiry was made in the AAO's RFE to the petitioner.

[15] According to the record of proceeding, the training regime taken by the beneficiary was all completed in India, and at two different organizations, Aptech and NCC

[16] Although [redacted] makes an estimation of the beneficiary's "total U.S. credit equivalency per contract hours using the Carnegie Unit" it is not demonstrated or proved in her evaluation by what criteria she converted the beneficiary's "statement of marks" from the University of Calicut, India and Aptech Computer Education Institute performance statements for tertiary education and technical non-tertiary education courses taken by the beneficiary to total. *See http://www.purdue.edu/registrar/pdf/Credit_Hour_Guidelines.pdf*; "2000-2001 Academic Calendars Study Analytical Profiles of Calendar Use and conversions." Ashford Brenda, AACRAO.

[17] Projects for International Education Research, American Association of Collegiate Registrars and Admission Officers (AACRAO), National Association For Foreign Student Affairs (NAFSA), *A PIER Workshop Report On South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka,* (Leo J. Sweeney and Valerie Woolston ed., AACRAO/NAFSA

a year-by-year basis starting with post-Grade 12 year," and "[t]ransfer credits should be considered only by reviewing a syllabus of subject credit."

The Report in an exhibit beginning at page I85 entitled "*India, Placement Recommendations*" stated under *Postsecondary*, Item 2, that 12 years of primary and secondary education followed by a three-year baccalaureate degree "[m]ay be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." This information seriously undermines the evaluations submitted by Career Consulting International and Marquess Educational Consultants that both attempt to assign credits hours for the beneficiary's three-year baccalaureate that are equivalent to or beyond a U.S. four-year baccalaureate.

As mentioned, [redacted] provided an education evaluation dated January 23, 2006, as Marquess Educational Consultants, London, United Kingdom. [redacted] referenced the beneficiary's credentials as a "Bachelor of Arts degree received by the beneficiary at the University of Calicut, India, in 1992 [sic 1998], and a "diploma in Computer Programming and Applications from the National Centre for Information Technology (NCC), UK [United Kingdom]/Aptech, India, 1994."

[redacted] in his evaluation stated that on the basis of a comparison of coursework, an Indian three-year bachelor's degree is equivalent to a four-year bachelor's degree received in the United States. [redacted] reached this conclusion by declaring that the beneficiary's Indian education includes more contact hours than the United States does in its four years, and that these contact hours would be equivalent to 120 U.S. credit hours when converted to the "United States system." From the information provided, it is not clear that a "contact hour" would be the same or directly equivalent to a U.S. "credit hour."

In the Indian system, students purportedly spend more time in the classroom providing more "contact hours." The U.S. system calculates time spent studying outside the classroom into the credit hour determination.[18] The measures are based on two separate calculations, and therefore, cannot be considered as equivalent or interchangeable.

For substantiation of this and other suppositions and premises upon which [redacted] builds his evaluation and conclusion, he references an article he co-authored with [redacted][19] The article's

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1986).

[18] U.S. students "are assumed to spend two hours of outside preparation for every 1 hour of lecture." [redacted] The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," from the website <http:www.handouts.accrao.org/am07/finished/[redacted] accessed February 19, 2008. As the Indian system is not based on credits, but is exam based, transfer credits are based on a calculation of the number of exams taken multiplied to reach "a base line of 30" for credit conversion as the systems do not readily equate. *Id.*

[19] [redacted] American

central premise is that the authors believe Indian three-year bachelor's degrees should be accepted for admission into U.S. master's degree programs, and, further, should be accepted as the equivalent of U.S. bachelor's degrees. The article discusses the foundation of the Indian educational system, much of which was developed pre-1947 under British rule.

The authors provide that, as the Indian system was based on a three-year program such as Oxford, Cambridge, and London, the degrees should be treated as comparable to individuals holding three-year degrees. The British system requires an additional year of education, the "A" levels, following twelve years of education, in contrast to the Indian system of only twelve years of education.

While the AAO notes the labor certification does not require a master's degree, the article submitted by the evaluator to support his opinion in this case states that many well-regarded British universities will accept graduates with three-year bachelor's degrees for entry into their Master's programs. The authors note that they found a number of universities that "specifically stated that they would not accept the Indian three-year bachelor's degree, and would only accept an Indian four-year degree or an Indian master's degree for entry to a master's program."

The authors do not distinguish whether the schools would admit these students fully to immediately begin master's level studies, or whether the schools would admit the three-year degree holders provisionally with the need to complete another year of studies prior to beginning the master's level studies.

The authors further state that the United Nations Education Scientific and Cultural Organization (UNESCO) has produced several instruments, which provide that member nations should "take all feasible steps" to provide recognition to qualifications in higher education awarded in other foreign nations.

The authors did not submit the UNESCO report. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a

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Immigration LLC, ILW.COM (10/20/2005);
http://www.ilw.com/search/documentFrame.asp?Request=sheila+danzig&nPage=1&sort=Hits&MaxFiles=25&Fuzzy=No&Phonic=No&Stemming=Yes&NaturalLanguage=Yes&HitNum=0&cmd=getdoc&DocId=1618&Index=%5c%5ccl%2dilw%2d2wb001%5cwwwroot%5cdtSearch%5cILW%20Web%20site&HitCount=7&hits=36+37+15a4+15a5+15a9+15aa+1644+&hc=272&req=sheila+danzig.

binding legal agreement to recognize academic qualifications between UNESCO members. *See* <http://www.unesco.org> accessed January 16, 2007.

The authors find further parallels to support their opinions in the Bologna process in the European Union where three-year "first" degrees are issued. The authors additionally quote educators from different schools as to whether they would accept three-year degrees. Some programs indicate that a student with a three-year degree could "apply," or that they are "eligible to apply." The article similarly does not distinguish how such students would be accepted, whether such acceptance would be full acceptance to immediately begin master's level course work, or whether a student could apply, but would be conditionally accepted into the program to begin following completion of another year of studies.

The authors conclude that there are valid reasons to accept Indian three-year bachelor's degrees as equivalent to bachelor's degrees issued in the U.S. However, the authors provide theoretical arguments why the three-year Indian degree should be accepted. However, the arguments remain theoretical, and as the authors note, academics disagree on the proper interpretation of the three-year Indian degree. Further, unlike the British system, India does not have the 13th year of school similar to the "A" levels. Further, the petitioner specifically stated that the position of programmer analyst required four years of college and a bachelor of science degree in computer science.

Furthermore, counsel has submitted an undated letter statement from president of Education Consultants and Evaluators International, Miami, Florida. The AAO has reviewed the statement. Since it was directed to [redacted] and not to the petitioner, it does not purport to be an education evaluation and does not evidence that [redacted] examined the beneficiary's educational materials such as his diplomas, mark sheets or even the subject schools accreditations or course content. Accordingly, the statement has slight probative value in these proceedings.

Counsel has also submitted a letter dated June 28, 2006, and a statement dated October 25, 2006 by [redacted] the former directed to [redacted] and the other to "whom it may concern." Similar to [redacted] statement, these statements do not purport to be an education evaluation and do not evidence that [redacted] examined the beneficiary's educational materials. The statements have slight probative value in these proceedings.

Counsel also submits on appeal a newspaper article printed from the Internet web site http://timesofindia.com accessed November 10, 2006. The article is entitled "With a 3-year BA, you can join a US varsity." The article in summary form reports on The Bologna Declaration of 1999, and admittedly "anecdotal evidence" that some university degrees from India allow acceptance into graduate schools in the United States, which does not relate to the equivalency issue in this matter.

The AAO notes that the petitioner has provided differing credential evaluations some stating that foreign equivalence may be achieved through a combination of diverse educational and vocational experiences (i.e. the Trustforte evaluations), while others, such as [redacted] evaluation state that the beneficiary's Indian three-year bachelor's degree is equivalent to a four-year bachelor's degree in the United States based upon his supposition that the Indian education includes more contact

hours than the education system within the United States. Likewise [redacted] single source degree proposition refers to both the beneficiary's Bachelor of Arts degree in English, history and literature and the Aptech training course as together constituting a single source.

The petitioner has submitted four different credential evaluations with different analysis concerning the beneficiary's education and/or professional training and what constitutes a foreign equivalent degree. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. *Matter of Ho* also states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

We find that no evaluation may be relied upon since the beneficiary's course content at the University of Calicut is lacking in computer science studies, and the computer science studies at Aptech are not from an institution of tertiary studies. The Aptech training course was less than a four-year program. Since the labor certification requires a four-year bachelor of science degree in computer science, the Aptech training falls short in duration. As noted here, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92

Where an opinion is not in accord with other information or is in any way questionable, the 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). Additionally, 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.

Moreover, as advised in the RFE issued to the petitioner by this office, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[20] According to its website, www.aacrao.org, AACRAO 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." Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with

[20] In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at *www. Aacrao.org/publications/guide to creating international publications.pdf.* If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

The AACRAO EDGE database provides a great deal of information about the educational system in India. It discusses both Post Secondary Diplomas, for which the entrance requirement is competition 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." However, the "Advice to Author Notes," 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.

Based upon a review of the All India Council for Technical Education http://nba-aicte.ernet.in/nmna.htm website accessed on December 17, 2008, Aptech, Anna Nagar, Chennai, India, is not an accredited institution within the State of Tamil Nadu, India. As the Aptech studies are unaccredited, such studies would not constitute an approved PGD program.

There is no provision in the statute or 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. Because the beneficiary does not have a single United States baccalaureate degree or a foreign equivalent degree, he does not qualify as a professional under section 203(b)(3)(A)(ii) of the Act as he does not have a single foreign equivalent bachelor's degree.

The beneficiary is also not eligible for qualification as a skilled worker under section 203(b)(3)(A)(i) of the act.

> 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.

For this skilled worker qualification, a beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B). The regulation provides:

> 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.

In this case, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements set forth on the ETA 750. The petitioner specified that the academic requirements of the labor certification require a bachelor's degree or foreign equivalent in computer science or a related field. The AAO also notes that the petitioner did not state or identify the "related occupation." If the petitioner is relying upon an unspecified related occupation and skill sets exactly as required for the offered job of Clarify programmer analyst to qualify for the skilled worker preference visa, but has not disclosed that "related occupation. Counsel's contention that the skilled worker classification applies in this case must fail for lack to specify.

As noted in the AAO's RFE dated January 22, 2009, in order to determine whether the petitioner's express intent regarding the minimum educational requirements set forth on the ETA 750 was communicated to potential applicants, the petitioner was requested to provide documentation of the petitioner's recruitment efforts. Documents were requested that would demonstrate the petitioner's intent concerning the actual minimum requirements of the proffered position. The documents would illustrate that the petitioner tested the U.S. labor market with those actual minimum requirements, at the time it submitted to DOL its Form ETA 750 application and attachments. The AAO requested the requisite signed, detailed written report of the petitioner's reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. *See* 20 C.F.R. §§ 656.21(b) or (j). The AAO also asked the petitioner to provide a copy of all supporting documents summarizing its recruitment efforts, as previously presented to DOL, which might overcome any deficiencies or defects in the record outlined above. No such evidence was submitted by the petitioner in response to the RFE.

Counsel asserts in his brief accompanying the appeal that the director committed error, and that there are other ways to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

Counsel also asserted in his statements on appeal several matters not related to the determination of the qualifications of the beneficiary. Chief of among these was counsel's complaint that because the director did not request additional evidence during USCIS' review of the petition as submitted, that this is an substantive error, since regulations "mandate" that the petitioner be presented with the opportunity to present additional evidence. Counsel's contention is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases.

There is no regulatory requirement for USCIS to issue such a request. When petitions on their face do or do not demonstrate eligibility for the preference visa classification sought, the director may review and act upon the petition as submitted. The regulation at 8 C.F.R. § 103.2(b)(8) provides that an application or petition may be denied if there is clear evidence of ineligibility, notwithstanding the lack of initial evidence. Clear ineligibility exists when an applicant or petitioner does not meet a basic statutory or regulatory requirement. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Additionally, counsel questioned on appeal whether or not USCIS, because it did not include counsel's law firm name in the address when it sent the decision dated December 1, 2006, failed "to allow for notification, service, and time to respond." Following advice from the Nebraska Service Center premium processing section, counsel filed a timely appeal which was accepted, and counsel indicated on the appeal, that a brief with additional evidence would follow, which in time was submitted. Counsel is not alleging irreparable harm or fundamental unfairness in the matter. Counsel's contention of failure of service or undue delay has been mooted by subsequent circumstances. This matter will not be discussed further. *See Dukuly v. Mukasey,* 551 F.3d 756, 758 (8th Cir. 2008).

Counsel contends that the director decided the petition as a visa preference petition for a professional when the petition allowed professional or skilled worker classifications, and the skilled worker classification was not considered by the director. The AAO has found in this discussion that the beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act. Further, we note that the labor certification requires a U.S. bachelor's of science degree in computer science. Also, assuming for the sake of argument that the job of programmer analyst qualified for skilled worker consideration, the beneficiary does not meet the terms of the labor certification that requires a baccalaureate degree, and the petition would be denied on that basis as well. See 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the education, training or experience, and any other requirements of the individual labor certification).

Counsel asserts that it is within the petitioner's "purview" whether or not to accept education credentials from multiple foreign institutions as the foreign equivalent to a U.S. bachelor's degree. Counsel has submitted a letter from the petitioner dated January 22, 2007, stating that it does not differentiate between education that that was completed in one institution and resulted in a four-year bachelor's degree and three years of college plus one year of post-graduate study.

Analyzing counsel's assertion within the context of this case, the beneficiary has according to the record, and all four academic credentials evaluations, a three-year Bachelor of Arts degree in English, history and literature from the University of Calicut, and the Aptech computer training diploma. Therefore counsel is asserting that the beneficiary's combination of a higher education degree and a vocational computer training diploma is acceptable since the petitioner deems that combination acceptable; and this is so, even if USCIS does not. Counsel's contention is misplaced. No evidence was submitted into the record that the petitioner ever communicated its intent to DOL during the labor certification process to accept combinations of higher education from multiple

institutions of tertiary education and vocational training although such evidence was requested by the AAO in its RFE dated January 22, 2009.

As already stated, the Act and federal court decisions have upheld USCIS authority to evaluate whether the beneficiary is qualified for the job offered and that includes a review of the beneficiary's education as called for in the labor certification. *See* Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. At 833 (D.D.C. 1984)(*See Castaneda-Gonzalez v. INS*, 564 F. 2d at 429; *See K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. at 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 atl (1st Cir. 1981); S*napnames.com, Inc.*, 2006 WL 3491005 at *17, 19.

Counsel asserts that the explicit terms of the subject labor certification do not prohibit combinations of higher education and/or vocational attainment. Therefore, according to counsel, the lack of prohibition allows such combinations. Counsel has not pointed to any statutory directive or legislative history that would allow such a negative inference. The burden of proof in these proceedings rests solely with the petitioner. As 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 single-source "foreign equivalent degree." *See* section 203(b)(3)(A)(ii) of the Act.

Counsel also submits a copy of a letter dated January 7, 2003 from Efren Hernandez III of the INS Office of Adjudications 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). Within the January 2003 letter, Mr. Hernandez states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

At the outset, it is noted 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).

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. It is further noted that a

bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah,* at 245.

On appeal, counsel cites the decision of *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 for the contention that USCIS does not have the authority to define the particular employment position, or "the necessary qualifications for such." Counsel relates the latter assertion, (i.e. the necessary qualifications for such) to the beneficiary's combined education experience, and then this combination, with the beneficiary's employment experience.[21] Counsel asserts that the petitioner's intent controls to determine "what type" of education and/or experience satisfies the job requirements, and USCIS must defer to the petitioner. Counsel's assertions and his reliance on *Snapnames.com, Inc.* are misplaced. *See Snapnames.com, Inc.,* 2006 WL 3491005.

Further, on appeal counsel asserts that the petitioner submitted the Application for Alien Employment Certification Form ETA 750 "with the beneficiary in mind," and it has already hired the beneficiary for the job. It is clear therefore, that such conduct would of necessity preclude all other interested job applicants during the recruitment phase of the DOL labor certification process. Notwithstanding anything else discussed heretofore, the job offer was not *bona fide* according to the regulation at 20 C.F.R. § 656.3, et seq. According to the DOL Employment Training Administration, website information for the Permanent Labor Certification for Foreign Workers, No. 17.272, https://www.cfda.gov/index?s=program&mode=form&tab=step1&id=b2ae994a0c2bce6dbab33c66f4066a36&cck=1&au=&ck= accessed on September 29, 2009:

> Under Section 212 (a)(5)(A) of the Immigration and Nationality Act, foreign workers who seek to immigrate to the United States for employment shall be excluded from admission unless the Secretary of Labor determines and certifies to the Secretary of State and to the Secretary of Homeland Security that there are not sufficient U.S. workers available for the position, and that the employment of such foreign workers will not adversely affect the wages and working conditions of U.S. workers similarly employed. The certified employer must hire the foreign worker as a full-time employee; there must be a bona fide job opening available to U.S. workers; job requirements must adhere to what is customarily required for the occupation in the U.S. and *may not be tailored to the foreign worker's qualifications* [emphasis added]. In addition, the employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements, unless adequately documented as arising from business necessity.[22]

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[21] As already stated, the petitioner in its letter dated January 22, 2007, does not include the beneficiary's employment experience in its evaluation of the beneficiary's qualifications.

[22] Immigration and Nationality Act of 1952, as amended, Sections 101 (a) (15) H (II), 214 (c) and 212 (a) (5) (A), Section 101, 212, 214, Public Law 82-414, 66 Stat. 163, 8 U.S.C 1101 et seq.

Accordingly, the AAO affirms the director's decision that the preponderance of the evidence demonstrates that the beneficiary does not satisfy the minimum level of work experience and education stated on the labor certification. The beneficiary did not possess a bachelor's degree (or foreign equivalent) when the request for certification was accepted, and that the beneficiary cannot be found to have met the minimum requirements stated on the Form ETA 750 as of that date. The petitioner has not demonstrated that the beneficiary possesses the requisite experience for the proffered position. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Beyond the decision of the director, an additional issue in this case is whether the petitioner adequately demonstrated that the beneficiary's training and experience conform to the requirements of the labor certification, specifically, whether the petitioner has failed to adequately document the beneficiary's work experience.

As already stated, the petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, as certified by the DOL, and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158.

A beneficiary is required to document prior experience in accordance with the regulation at 8 C.F.R. § 204.5(l)(3), which provides:

> (ii) Other documentation-
>
> (A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) Skilled workers. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

In the labor certification, Form ETA 750, Part A, Item 14, the petitioner required that the candidate have two years of experience in Clarify Clear Basic and Visual Basic with SQL, DB2 and Oracle RDBMS.

The Form ETA 750 B, prepared and signed by the beneficiary on June 12, 2003, stated the beneficiary's work experience. The beneficiary listed four prior and one present employers with his job title at each employer.

- From May 1995 to May 1996, the beneficiary was employed as a senior programmer by [redacted]
- From July 1993 to July 1995, the beneficiary was employed as a programmer by [redacted]
- From June 1996 to February 2000, the beneficiary was employed as a systems analyst by [redacted]
- From April 2000 to April 2002, the beneficiary was employed as a systems analyst and Sr. Clarify Consultant. [redacted]
- From April 2002 to present (i.e. June 12, 2003), the beneficiary was employed by the petitioner as a Clarify Programmer Analyst by the petitioner.

The petitioner submitted the following employment reference and information letters concerning the beneficiary that relate to the above employment history:

- A letter on company letterhead dated July 20, 1999, prepared in support of an I-129 petition for the beneficiary by [redacted], as signed by its vice president. According to the letter, the beneficiary "will be responsible for programming, software development, testing, debugging, installing software, and identifying and trouble shooting software and development problems." The company stated that in the development process the beneficiary will use SQL Server 6.5, MS Access 7.0, Visual Basic 4.0/5.0, Power Builder 4.0/5.0/PFC, ADW Case Tools, S-Designer 5.0, Power Designer 6.0, Windows NT 4.0 and Windows 95. The job is identified in the letter as a programmer and not as a systems analyst and Sr. Clarify Consultant as stated by the beneficiary in the labor certification.
- An employment reference on company letterhead dated July 14, 1995, given to the beneficiary by Prakash Business Software Consultancy signed by its chief executive. According to the letter, the beneficiary worked for the company for two years as a computer programmer, "his performance was good," he was "sincere, hard working and enthusiastic," and the company wished him future success.
- An employment reference on company letterhead dated May 31, 1996, given to the beneficiary by Tachyon Software Consultancy signed by its chief executive. According to the letter, the beneficiary worked for the company "for the past 12 months," that he worked on several projects developed in Visual Basic, and "during his tenure here he was found satisfactory."
- An employment reference on company letterhead dated January 26, 2000, given to the beneficiary by Abu Dhabi National Oil Company signed by its "Head-business Group." According to the letter the beneficiary was "deputed" to the company. That is to say the beneficiary was employed by Compin, but working at the oil company from June 1996 to February 2000. The reference indicated that the beneficiary was responsible for "user requirements study, system design, Development, Implementation of the system, User Training and post implementation support for the system." The letter stated that the

beneficiary "is technically strong in Visual Basic, SQL server, Crystal Reports and has exposure to Power Builder and Power Designer."

None of the above job experience letters stated that the beneficiary was skilled in Clarify Clear Basic, DB2 or Oracle RDBMS, or Clarify Clear Basic and Visual Basic together with SQL, DB2 and Oracle RDBMS. On January 22, 2009, the AAO issued an RFE to the petitioner and stated, *inter alia*, that "the letters that the petitioner submitted on behalf of the beneficiary fail to establish that he has the required two years of experience in Clarify Clear Basic and Visual Basic with SQL, DB2 and Oracle RDBMS. The AAO requested that the petitioner provide documentation that adequately demonstrates that the beneficiary had these skills on the priority date of the labor certification, i.e. June 19, 2003. As of this date, the petitioner has failed to respond to the RFE. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The AAO notes that the petitioner failed to provide sufficient evidence by additional documentation when requested regarding the beneficiary's work experience before the priority date. Thus, the petitioner has failed to accurately document that the beneficiary had the full two years of required experience as a Clarify programmer analyst required by the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A), and the petition shall be denied for this additional reason.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.