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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: LIN 06 159 51731 Office: NEBRASKA SERVICE CENTER Date: AUG 05 2010

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 an advertising media business. It seeks to employ the beneficiary permanently in the United States as a marketing director. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

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 August 9, 2002.[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on May 5, 2006.

The job qualifications for the certified position of marketing director are found on Form ETA 750 Part A. 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)

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[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

[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.

Grade school	blank
High school	blank
College	3
College Degree Required	Bachelor of Arts
Major Field of Study	General

Experience:

Job Offered	1
(or)	
Related Occupation	1-Marketing Manager

Block 15:

Other Special Requirements	one year of experience as a Marketing Director/Manager, and one year prior work experience in the marketing/ customer relations field

As set forth above, the proffered position requires three years of college, a bachelor of arts degree in general studies, one year of experience in the proffered job or one year of experience as a marketing manager,[3] one year of experience as a marketing director/manager, and one year prior work experience in the marketing/customer relations field.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as a bachelor's degree in general studies after completing three years of education at G.N.D. University in [redacted] and a high school diploma from [redacted] The Form ETA 750B also reflects the beneficiary's experience as follows: employed full-time as a media marketing manager with [redacted] in Fremont, California from July 2000 to the date he signed the Form ETA 750B on August 5, 2002; employed full-time as a media marketing manager with the [redacted] in Santa Fe Springs, California from December 1997 to July 2000; and employed full-time as a [redacted] with Tata Donnelly (Tata Press) in New Delhi, India from March 1993 to September 1996.

The director denied the petition on April 28, 2007, because the beneficiary does not have a U.S. bachelor's degree or foreign degree equivalent required by the terms of the labor certification application.

The record does not contain a copy of the beneficiary's diploma from Guru Nanak Dev University in India. Instead, with regard to the beneficiary's qualifying academic credentials, the petitioner submitted with the petition the beneficiary's Indian School Certificate issued by Mayo College

[3] Form ETA 750, Item 14.

Ajmer High School in [redacted] a letter dated April 25, 1977, from [redacted] of Mayo College Ajmer High School, certifying that the beneficiary passed certain examinations in 1976; a marks sheet dated June 20, 1981; and a notarized statement from the beneficiary dated June 2, 2000, stating that he lost his diploma from Guru Nanak Dev University in [redacted] that he did not get a duplicate at that time, and that he is unable to obtain a duplicate copy as he has to be physically present at the University.

With the petition, the petitioner also submitted an evaluation dated September 16, 1997, from Foundation for International Services, Inc., indicating that the beneficiary has the equivalent of a bachelor's degree in business administration with an emphasis in marketing from an accredited college or university in the United States, based on the combination of the beneficiary's three years of courses at Guru Nanak Dev University in India and his twelve years of work experience. The formula employed by Foundation for International Services, Inc. in substituting three years of specialized work experience for one year of university level studies is one which is found in the regulations governing H-1B nonimmigrant visas petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition. While the evaluation uses the beneficiary's work experience in its conclusion that the beneficiary's degree is equivalent to a bachelor's degree, the regulation for the professional classification requires that a beneficiary must produce one degree that is determined to be the foreign equivalent of a United States baccalaureate degree.

On appeal, the petitioner submits an evaluation dated September 28, 2007, from [redacted][5] [redacted] of Marquess Educational Consultants equating the beneficiary's degree from Guru Nanak Dev University in India to a bachelor of arts degree from a regionally accredited institution of higher education in the United States.[6] [redacted] discusses Carnegie Units and Indian degrees, concluding

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[4] *The Certificate indicates that the beneficiary reached at least grade 8 in five subjects.*

[5] [redacted] indicates he has a Doctor of Divinity but does not indicate the school where he obtained this degree.

[6] The evaluation from Marquess Educational Consultants references as exhibits additional correspondence and research regarding educational equivalency, including excerpts from the United Nations Educational Scientific and Cultural Organization (UNESCO) regarding recognition of foreign educational qualifications. As noted by the director, these items do not establish that the beneficiary's degree is equivalent to a U.S. bachelor's degree. 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

that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate but makes no attempt to assign credits for individual courses. Ultimately, the record contains no evidence that the Carnegie Unit is a useful way to evaluate Indian degrees. According to the Carnegie Foundation's website, http://www.carnegiefoundation.org/faqs (accessed June 23, 2010), the Carnegie Unit represents 120 high school hours in one subject. Fourteen "units" warrant admission to college. The Carnegie Unit does not apply to higher education.

Also on appeal, the petitioner submits an evaluation from "[redacted]" of European-American University,[8] equating the beneficiary's degree from Guru Nanak Dev University in India to a bachelor of arts degree from a regionally accredited institution of higher education in the United States. [redacted] breaks down the beneficiary's subjects into courses and awards credits for each course, concluding that the beneficiary achieved 120 semester credit hours using the Carnegie Unit. However, the beneficiary's marks sheet does not provide any information as to classroom hours or credits, so it is unclear how [redacted] has determined such figures. Further, while [redacted] concludes that he has computed the beneficiary's credits to total 120, the total of the credits he assigns is only 119.

A third evaluation submitted on appeal, dated September 29, 2007, from [redacted] states that the beneficiary attended Guru Nanak Dev University from 1989 to 1991, and that his degree is equivalent to a U.S. bachelor's degree.[9] It is unclear how the beneficiary's two years of college studies that were reviewed by [redacted] equate to a United States bachelor's degree. The evaluations of record are not consistent. 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. 582, 591-92 (BIA 1988).

On appeal, counsel states that the beneficiary has been unable to locate a copy of his diploma from Guru Nanak Dev University in India. However, the non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). The marks sheet submitted

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binding legal agreement to recognize academic qualifications between UNESCO members. *See* http://www.unesco.org (accessed June 23, 2010).

[7] [redacted] indicates he has a canonical diploma of Sacræ Theologiæ Professor, equivalent to a Doctorate of Divinity, from St. David's Oecumenical Institute of Divinity. The only reference to this institution we were able to locate on the Internet is a reference to its founding in 1985 on the website http://www.liberalcatholics.org/education.html (accessed June 23, 2010). The same website has a section dedicated to the European-American University.

[8] According to this "university's" website, www.thedegrec.org/apel.html (accessed June 23, 2010), it awards degrees based on experience.

[9] The beneficiary indicated on Form ETA 750B that he attended college from 1977-1980. United States Citizenship and Immigration Services (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).

with the petition does not contain the name of the college issuing the marks, the beneficiary's name,[10] or the date a degree (if any) was awarded or the area of concentration of study. Therefore, the record does not establish that the marks sheet was issued to the beneficiary upon completion of a bachelor's degree program at Guru Nanak Dev University. As a result, the AAO issued a request for evidence (RFE) to the petitioner on October 28, 2009, requesting evidence of the beneficiary's degree 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. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C).

In response to the RFE, with regard to the beneficiary's qualifying academic credentials, the petitioner submitted the previously submitted evidence and the beneficiary's marks sheet from Guru Nanak Dev University containing the name of the college issuing the marks and the beneficiary's name. However, the petitioner did not provide the beneficiary's degree 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. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 11-2021 and title marketing manager 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/link/summary/11-2021.00 (accessed June 23, 2010) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four.

According to DOL, two to four years of work-related skill, knowledge, or experience are needed for Job Zone Four occupations. DOL assigns a standard vocational preparation (SVP) range of 7-8 to Job Zone Four 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/11-2021.00 (accessed June 23, 2010). 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. 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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[10] These items were submitted on a separate sheet.

> 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.

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.
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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.

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.

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

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 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.

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. 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 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 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.

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 has.

Thus, the AAO issued a request for evidence (RFE) on October 28, 2009 soliciting such evidence. The AAO requested a complete copy of the Form ETA 750 as certified by DOL, including any documentation that summarizes the petitioner's recruitment efforts and its explicitly expressed intent concerning the actual minimum requirements of the proffered position. The AAO also requested a copy of all supporting documents summarizing the petitioner's recruitment efforts, as previously presented to DOL. Further, the AAO noted that the petitioner has been employing the beneficiary in the proffered position under H-1B status since July 2000. The AAO requested a complete copy of all of the I-129 nonimmigrant petitions.[12]

In response to the RFE, regarding its recruitment for the proffered position, the petitioner submitted its reduction in recruitment request to DOL, including a supporting letter from the petitioner, a summary of recruitment, the job posting notice, tear sheets of ads in the Los Angeles Daily News, internet printouts, and the prevailing wage request. As set forth above, the proffered position requires three years of college, a bachelor of arts degree in general studies, one year of experience in the proffered job or one year of experience as a marketing manager, one year of experience as a marketing director/manager, and one year prior work experience in the marketing/customer relations field. The job posting notice for the job of marketing director states that the position requires a bachelor degree, one year of experience as a marketing director/manager, and three years prior work experience in the marketing and customer relations field, and that the annual salary for the position is $55,000.00. The tear sheets for the newspaper advertisements list the job title of marketing director, but do not list any details about the proffered position. The ads simply direct applicants where to submit resumes. Similarly, the internet advertisement does not list any details about the proffered position. Finally, on the prevailing wage request form, the petitioner listed the job title of marketing manager, stated an annual pay rate of $45,000.00, and stated that the position requires a bachelor degree, one year of experience as a marketing director/manager, and three years prior work experience in the marketing and customer relations field. None of the recruitment documents indicate that an applicant may have a 3-year college degree as referenced on the labor certification

[12] The petitioner did not submit copies of the H-1B petitions as requested. Instead, it submitted copies of the approval notices issued by USCIS.

application, and none of them list the proper work experience required for the proffered position as detailed on the Form ETA 750.

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).

Moreover, as advised in the RFE issued to the petitioner by this office, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[13] According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with 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.

EDGE states that an Indian bachelor of arts 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 state that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

The Form ETA 750 does not provide that the minimum academic requirements of three years of

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[13] 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.

college and a bachelor of arts degree in general studies might be met through a combination of education and work experience, or some other formula other than that explicitly stated on the Form ETA 750. The recruitment documents provided with the petitioner's response to the RFE issued by this office, also fail to advise DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. Thus, the alien does not qualify as a skilled worker as s/he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

Beyond the decision of the director,[14] the petitioner has not established that it had the continuing ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the Form ETA 750 is $105,830.40 per year.[15] The labor certification application was filed on August 9, 2002, by [redacted], located at [redacted] Fremont, California. It was certified by the DOL on May 23, 2005. The I-140 petition was filed on May 5, 2006, by [redacted][16] located at [redacted], Union City, California. In the AAO's RFE, the AAO noted that the petitioner had not submitted any documents required by 8

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[14] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

[15] We note that the wage rates listed on the petitioner's advertisements submitted in response to the AAO's RFE were significantly lower that the proffered wage.

[16] The Employer Identification Number (EIN) for the petitioner is 94-3200161. The corporate identity of the petitioner is unclear from the record.

C.F.R. § 204.5(g)(2) and, therefore, the petitioner was requested to submit evidence showing that it could pay the beneficiary the proffered wage in 2002, 2003, 2004, 2005, 2006, 2007 and 2008.

In response to the RFE, regarding its ability to pay the proffered wage, the petitioner submitted IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for Indiapost.com, Inc.[17] for 2002; IRS Forms 1120S for Post Media, Inc.[18] for 2003, 2004 and 2005; and IRS Forms 1120S for RJ Media[19] for 2006, 2007 and 2008.

[redacted] Inc. have the same tax identification numbers. However, their EINs do not match those of the petitioner or RJ Media. [redacted] and RJ Media have not claimed to be successors-in-interest to the employer named on the Form ETA 750 or the petitioner named on the Form I-140.

Matter of Dial Auto Repair Shop, 19 I&N Dec. 481 (Comm. 1986), is an AAO decision designated as precedent by the Commissioner. The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all USCIS employees in the administration of the Act. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

By way of background, *Matter of Dial Auto* involved a petition filed by [redacted] on behalf of an alien beneficiary for the position of automotive technician. The beneficiary's former employer, [redacted] filed the underlying labor certification. On the petition, Dial Auto claimed to be a successor-in-interest to [redacted] The part of the Commissioner's decision relating to successor-in-interest issue is set forth below:

> Additionally, the *representations made by the petitioner* concerning the relationship between [redacted] and itself are issues which have not been resolved. On order to determine whether the petitioner was a true successor to [redacted] counsel was instructed on appeal to fully explain the manner by which the petitioner took over the business of [redacted] and to provide the Service with a copy of the contract or agreement between the two entities; however, no response was submitted. If the *petitioner's claim* of having assumed all of [redacted] rights, duties, obligations, etc., is found to be untrue, then grounds would exist for *invalidation of the labor certification under 20 C.F.R. § 656.30 (1987)*. Conversely, if the claim is found to be true, *and it is determined that an actual successorship exists*, the petition could be approved if

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[17] EIN 94-3352479. This EIN does not match the petitioner's EIN. [redacted] was incorporated in the State of California on December 3, 1999 and has been dissolved. *See* http://kepler.sos.ca.gov/cbs.aspx (accessed June 23, 2010).

[18] EIN 94-3352479. This EIN does not match the petitioner's EIN. [redacted] was incorporated in the State of California on June 20, 2003 and is currently in active status. *Id.*

[19] EIN 20-3774201. This EIN does not match the petitioner's EIN. RJ Media was incorporated in the State of California on October 7, 2005 and is currently in active status. *Id.*

> eligibility is otherwise shown, including ability of the predecessor enterprise to have paid the certified wage at the time of filing.

(All emphasis added). The legacy INS and USCIS has, at times, strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where the petitioner could show that it assumed all of the original entity's rights, duties, obligations and assets. However, a close reading of the Commissioner's decision reveals that it does not explicitly require a successor-in-interest to establish that it is assuming all of the original employer's rights, duties, and obligations. Instead, in *Matter of Dial Auto*, the petitioner had *represented* that it had assumed all of the original employer's rights, duties, and obligations, but had failed to submit requested evidence to establish that this was, in fact, true. And, if the petitioner's claim was untrue, the Commissioner stated that the underlying *labor certification* could be *invalidated for fraud or willful misrepresentation* pursuant to 20 C.F.R. § 656.30 (1987).[20] This is why the Commissioner said "[i]f the petitioner's claim is found to be true, *and* it is determined that an actual successorship exists, the petition could be approved." (Emphasis added.) The Commissioner was explicitly stating that the petitioner's claim that it assumed all of the original employer's rights, duties, and obligations is a separate inquiry from whether or not the petitioner is a successor-in-interest. The Commissioner was most interested in receiving a full explanation as to the "manner by which the petitioner took over the business of [the alleged predecessor] and seeing a copy of "the contract or agreement between the two entities."

In view of the above, [redacted] *did not state that a valid successor relationship could only* be established through the assumption of all of a predecessor entity's rights, duties, and obligations. Instead, based on this precedent and the regulations pertaining to this visa classification, a valid successor relationship may be established if the job opportunity is the same as originally offered on the labor certification; if the purported successor establishes eligibility in all respects, including the provision of evidence from the predecessor entity, such as evidence of the predecessor's ability to pay the proffered wage as of the priority date; and if the petition fully describes and documents the transfer and assumption of the ownership of the predecessor by the claimed successor.

Evidence of transfer of ownership must show that the successor not only purchased the predecessor's

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[20]The regulation at 20 C.F.R. § 656.30(d) (1987) states:

> (d) After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a Regional Administrator, Employment and Training Administration or to the Administrator, the Regional Administrator or Administrator, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

In the instant case, the petitioner has not established that Indiapost.com, Inc., Post Media, Inc., and RJ Media are its legal successors-in-interest. Therefore, the petitioner may not use the tax returns of these entities to establish its ability to pay the proffered wage.[21] The petitioner has not submitted any documents required by 8 C.F.R. § 204.5(g)(2) and, therefore, the petitioner has not established its continuing ability to pay the proffered wage.

In addition, beyond the decision of the director, the petitioner has not established that the beneficiary has the requisite work experience required to perform the duties of the proffered position. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

The record contains a letter dated April 19, 1999, from [redacted] of the India Journal, indicating that the beneficiary worked as an '[redacted]' from December 9, 1997, to the date of the letter. The record also contains a letter dated August 18, 1997, from [redacted] of [redacted] indicating that the beneficiary worked for the company from August 17, 1993 to September 30, 1996 as was "responsible for [redacted]" The letter states that "his designation at the time of leaving was Sr Sales Executive." As noted in the AAO's RFE, while the petitioner has established the beneficiary's one year of prior work experience in the marketing/customer relations field as required by the Form ETA 750, neither letter submitted to the record establishes that the beneficiary has the requisite two years of experience as a marketing director/manager. Therefore, the AAO requested that the petitioner submit regulatory-prescribed evidence to establish that the beneficiary possessed the requisite experience prior to the priority date.

[21] We note the tax returns submitted do not establish the taxpayer's ability to pay a proffered wage of $105,830.40, based on the net income and net current assets listed on the tax returns submitted to the record for 2002, 2003, 2004, 2005, 2006, 2007 and 2008.

In response, the petitioner submitted the previously submitted letters from [redacted] of the *India Journal*, and [redacted] of [redacted] The letters do not establish that the beneficiary has the requisite two years of experience as a marketing director/manager. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Finally, beyond the decision of the director, the AAO's RFE requested the petitioner to provide proof that it has not been dissolved in the State of California and is currently in active status. The AAO noted that the petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, 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. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). If the petitioning business is no longer an active business, the job offer is not realistic, the petition and its appeal have become moot and the appeal shall be dismissed.

In response to the RFE, the petitioner provided a fictitious name statement for [redacted] indicating that the name was registered to [redacted] on January 1, 2006. The petitioner also submitted the Articles of Incorporation of [redacted] and evidence that RJ Media is an active corporation in the State of California. However, [redacted] is not the petitioner, and the petitioner has not established that [redacted] is a successor-in-interest to the petitioner. Therefore, the petitioner has not established that it is an active business.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial.[22] 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.

[22] When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd.* 345 F.3d 683.