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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JAN 0 8 2010

SRC 08 222 52549

IN RE: Petitioner:
Beneficiary: [redacted]

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:

SELF-REPRESENTED

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, approved the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on certification.[1] The AAO concurs with the director's decision to approve the petition but would approve the petition as a professional. However, the petition is currently not approvable until the identification of the petitioner on the Form I-140, Immigrant Petition for Alien Worker is resolved. The case will be returned to the director for further investigation and entry of a new decision.

The petitioner is a computer software development/consultancy firm. It seeks to employ the beneficiary permanently in the United States as a senior associate-systems analyst II. As required by statute, an ETA Form 9089 Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner demonstrated that the beneficiary satisfied the minimum level of education and experience stated on the labor certification and certified the decision to approve the petition to the AAO for review.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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[1] The regulation at 8 C.F.R. § 103.4(a)(4) states as follows: "*Initial decision.* A case within the appellate jurisdiction of the Associate Commissioner, Examinations, or for which there is no appeal procedure may be certified only after an initial decision." The following subsection of that same regulation states as follows: "*Certification to [AAO].* A case described in paragraph (a)(4) of this section may be certified to the [AAO]." 8 C.F.R. § 103.4(a)(5).

The regulation at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003) states in pertinent part:

> (iii) Appellate Authorities. In addition, the Associate Commissioner for Examinations exercises appellate jurisdiction over decisions on;
>
> (B) Petitions for immigrant visa classification based on employment or as a special immigrant or entrepreneur under Secs. 204.5 and 204.6 of this chapter except when the denial of the petition is based upon lack of a certification by the Secretary of Labor under section 212(a)(5)(A) of the Act;

Pursuant to the delegation cited above, the AAO exercises the appellate jurisdiction formerly exercised by the Associate Commissioner for Examinations.

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.

At the outset, it is noted that the I-140 petitioner is "[redacted]" It is identified as one of many subsidiaries of the publicly traded "[redacted]" on the SEC Form 10-K submitted to the record as the financial documentation supporting the petitioner's ability to pay the proffered wage of $56,015 per year for the certified position. Both entities have different federal employer identification numbers as reflected on the ETA Form 9089 (C.7) for [redacted] which is identified as the employer on that document, and on Part 1 of the I-140 for Cognizant Technology Solutions US Corporation. While the director noted that for nonimmigrant purposes, both entities might be considered as the "same employer," citing an example of a foreign employer and proposed U.S. employer, we do not find this to be applicable within the context of section 203(b)(3) of the Act where there are two distinct U.S. corporate and legal entities. Unless the I-140 petitioner is determined to be the successor-in-interest[2] to the petitioner specified on the ETA Form 9089, then either the parent company must file its own I-140 or possibly amend the information on the existing I-140, or the subsidiary must obtain its own labor certification. It is noted that every employer who files an ETA Form 9089 must be a person, association, firm, or a corporation located within the United States to which U.S. workers may be referred for employment, or the authorized representative of such a person, association, firm, or corporation. There is no provision for multiple or co-employers. Every employer must possess its own valid Federal Employer Identification Number (FEIN). *See* 20 C.F.R. § 656.3(1).

Regarding the issue of eligibility for a visa based on the skilled worker visa category pursuant section 203(b)(3)(A)(i) of the Act, 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 ETA Form 9089 was

[2] This status requires documentary evidence that the I-140 petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop*, Inc., 19 I&N Dec. 481 (Comm. 1986). Here, as the Form 10-K represents the audited consolidated financial statements, the ability to pay is not at issue, however establishing how the I-140 petitioner could be considered as a successor-in-interest to its existing parent company could be problematic.

accepted for processing on January 24, 2008.[3] The Immigrant Petition for Alien Worker (Form I-140) was filed on July 11, 2008.

The job qualifications for the certified position of Senior Associate-Senior Systems Analyst-II are set forth on Part H of the ETA Form 9089. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, provide:

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

On H. 11 of the ETA Form 9089, the job duties for a Senior Associate –Senior Systems Analyst II provide that the applicant will supervise the analysis, design and development of client software applications; modify and enhance existing applications; serve as a lead for small teams of programmer analysts and/or systems analysts as needed; conduct status reports and assist in planning and design; and set goals and provide performance review for subordinates.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: Bachelor's

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required." n/a

4-B. Major Field Study: Computer Sc, Eng. (any), Math, Sc, or Business

7. Is there an alternate field of study that is acceptable.

The petitioner checked "no" to this question.

7-A. If Yes, specify the major field of study: n/a

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[3] 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.

6. Experience: 12 months in the position offered,

10. or 12 months (1 year) in the related occupation of Computer / Engg. Professional

8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "yes" to this question.

8-A. If yes, specify the alternate level of education required:

The petitioner checked "none."

9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

8-C If applicable, indicate the number of years experience acceptable in question 8:
"3"

14. Specific skills or other requirements: "Any suitable combination of education, training or experience is acceptable."

To determine whether a beneficiary is eligible for a preference immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

As set forth above, the proffered position requires a Bachelor's degree in Computer Science, Engineering (any), Math, Science, or Business and 1 year of experience in the job offered of Senior Associate-Senior Systems Analyst –II, or 1 year of experience in the alternate occupation as a Computer/ Engg. Professional. An alternate combination of education and experience is set forth on the ETA Form 9089 as no education and 3 years of experience in the job offered. In Part H of item 14, the petitioner states that it will also accept "any suitable combination of education, training or experience."[4]

On the ETA Form 9089, signed by the beneficiary, the beneficiary represented that the highest level of achieved education related to the requested occupation was Bachelor's. He listed the institution of study

[4] *See* the Instructions to ETA Form 9089, found online at http://www.foreignlabor cert.doleta.gov/pdf/90890inst.pdf. (Accessed 11/16/09).

where that education was obtained as the Indian Institute of Technology, Madras, and the year completed as 2000.

In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma from the Indian Institute of Technology, Madras. It indicates that the beneficiary was awarded a Master of Science in Physics in July 2000. The beneficiary had previously obtained a Bachelor of Science in Physics in April 1998 from Madura College (Autonomous) Madurai, India. The petitioner additionally submitted a credentials evaluation, dated November 15, 2007, from The Trustforte Corporation. The evaluation describes the beneficiary's Master of Science degree in Physics and concludes that it is equivalent to at least a Bachelor of Science degree in Physics in the United States.

DOL assigned the occupational code of 15-1051, computer systems analyst, to the proffered position as indicated on the ETA Form 9089. DOL's occupational codes are assigned based on normalized standards. According to the public online database at *http://online.onetcenter.org/link/summary/15-1051.00#JobZone*,[5] the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See Id.* Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

See id.

More specific to this position, O*NET provides that 68 percent of responding computer systems analysts, have a bachelor's degree or higher.[6] Further, DOL's Occupation Outlook Handbook, available online at http://www.bls.gov/oco/ocos287.htm, provides that

> **Education and Training.** When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. . . .
>
> For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science,

[5] (Accessed 08/14/09).
[6] *See http://online.onetcenter.org/link/details/15-1051.00.*

> information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a degree in a business-related field such as management information systems (MIS).

Based on the SVP identified by DOL and the majority percentage of responding computer systems analysts that have a bachelor's degree or higher, as well as the petitioner's designation of the position as a professional occupation as set forth on Part I, a, 1. of the Form ETA 9089, the job in this case would be characterized as a professional position. However, as noted by the director, the position's requirements of education and required experience as set forth on the ETA Form 9089 specifically permit an applicant with no formal education and three years of experience to be considered for the certified position. 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:

> 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 ETA Form 9089 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).**[7] **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

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

> 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).

In this case, the beneficiary possesses a Master of Science degree in Physics from the Indian Institute of Technology in Madras, India. The academic evaluation provided to the record asserts that this is at least equivalent to a Bachelor of Science in Physics at an accredited institution in the United States. In this case, the AAO concurs with this assessment based on a review of the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[8] 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

[8] 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.

author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In the credential advice related to a Master of Science degree conferred by an accredited Indian institution, it states that the "Master of Arts/Commerce/ Science represents attainment of a level comparable to a bachelor's degree in the United States."

Additionally, it is noted that physics is defined as a "science of matter and energy and of interactions between the two grouped in traditional fields such as acoustics, optics, mechanics, and thermodynamics, as well as in modern extensions including atomic and nuclear physics, cryogenics, and particle physics."[9] Therefore, the beneficiary's Indian Master of Science degree in Physics would also be considered as a foreign equivalent degree to a U.S. bachelor of science degree in physics. As the beneficiary has 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 qualifies for preference visa classification as a professional under section 203(b)(3)(A)(ii) of the Act.

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.

Although the labor certification permits a skilled worker classification because it allows an alternative combination of no education and three years of experience in the job offered, the record here does not verify that the beneficiary acquired three years of experience in the job offered as a Senior Associate-Senior Systems Analyst indicated by the employment verification letter, dated January 18, 2008. It was submitted to the record by [redacted], and fails to confirm that the beneficiary possessed three years of experience in the job offered. The letter states that the beneficiary worked as a "Programmer Analyst Trainee" for [redacted] from July 3, 2000 to January 2, 2001, a period of approximately six months. He then served as a "Programmer Analyst" for [redacted] from January 3, 2001 to September 21, 2003, a period of approximately two years and eight months. [redacted] describes the beneficiary's job

[9] *See The American Heritage College Dictionary* 1031 (3rd ed. 1997).

duties performed as a programmer analyst that included both technical expertise and supervisory skills that are analogous to those to be performed in the job offered as described on Part H, 11 of the ETA Form 9089. In determining whether a beneficiary has acquired the requisite job experience as of the priority date, both the job titles and job duties of previous employment should be reviewed. *See e.g., Matter of Maple Derby, Inc.* 89 INA 185 (BALCA 1991)(*en banc).* In this matter, although the petitioner demonstrated that the beneficiary had at least one year of experience in the job offered, it failed to establish that the beneficiary possessed three years of experience in the job offered. Therefore, while the beneficiary may be eligible as a professional as he has the requisite foreign equivalent degree and work experience, he may not be approved as a skilled worker as his qualifications do not meet the terms of the labor certification as explicitly expressed. The beneficiary qualifies for preference visa classification under section 203(b)(3) of the Act as a professional but not as a skilled worker.

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 met that burden with regard to the issue of the beneficiary's eligibility for classification as a professional under section 203(b)(3)(A)(ii) of the Act. As set forth above, however, the petitioner has not met that burden in establishing that the existing I-140 petitioner is consistent with the employer identified on the ETA Form 9089, or that it is a successor-in-interest. If the I-140 petitioner is not the same employer as the employer identified on the ETA Form 9089 and is not its successor-in-interest, it must obtain its own labor certification. This case is not approvable until this is resolved. The case will be remanded to the director for further review and adjudication on this issue.

ORDER: Based on the foregoing, the petition is currently not approvable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for further investigation and for issuance of a new decision, which, if adverse to the petitioner, is to be certified to the AAO for review.