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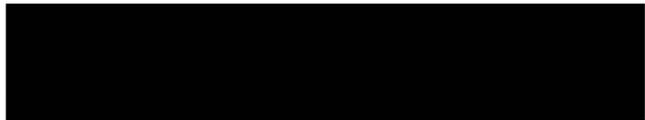


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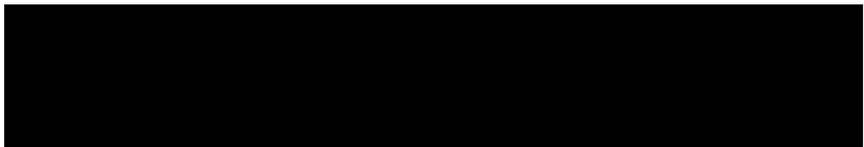
Date: 22 2006

IN RE: Petitioner:  
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:



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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed, and the petition will be denied.

The petitioner is a publishing company. It seeks to employ the beneficiary permanently in the United States as a director of systems technology.<sup>1</sup> As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary had a bachelor's degree in science or technology and denied the position accordingly. The AAO in its decision on appeal upheld the denial of the instant petition. On motion, counsel submits additional documentation and two additional evaluation documents.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. According to 8 C.F.R. § 103.5(a)(3), a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. The petitioner has submitted a recent district court decision as well as new documentation with regard to the equivalence of the beneficiary's three-year diploma to a U.S. baccalaureate degree. This evidence is viewed as sufficient to reopen the proceedings.

Section 203(b)(3)(A)(i) of the Act 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. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

*Professionals.* 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.

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<sup>1</sup> Although the petitioner indicated on the I-140 that it wished to classify the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability who is not seeking a National Interest Waiver, the record, and the previous discussion of the petition during its initial adjudication and on appeal, suggest that this was a clerical error, and that the petitioner wished to classify the beneficiary as a skilled worker or professional.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” 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.

Furthermore, the regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part: “*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the petitioner must show that the beneficiary meets the requirements of the Form ETA 750A, which includes a bachelor degree in science or technology.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on July 20, 2001. The Form ETA 750 states that the proffered position requires a “Bachelor degree in science or technology” and five years of work experience in the job offered or in a related occupation of systems manager/administrator.<sup>2</sup>

With the petition, counsel submitted the report, dated December 14, 1998 from [REDACTED] and [REDACTED] Atlanta, Georgia. That report stated that the beneficiary was awarded a diploma in television engineering from the State Board of Technical Education, India in 1983 and that this diploma was equivalent to a three-year program of academic studies in electronics (television) engineering and transferable to an accredited U.S. university. The MEI evaluator stated that the beneficiary had over 14 years of training and experience in software engineering, system analysis, computer program design, and that this experience was equivalent to or exceeded a one-year diploma of academic studies in software applications. The evaluator then combined both the beneficiary’s education and work experience to find that the beneficiary had the equivalent of a bachelor degree in electronics engineering and computer sciences from an accredited U.S. university.

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<sup>2</sup> The Form ETA 750 reflects sufficient work experience to meet the stipulated experience and other special requirements listed. Thus, the issue of the beneficiary’s work experience is not at question in these proceedings.

The director determined that the evidence submitted did not establish that the beneficiary had a United States baccalaureate degree or an equivalent foreign degree, and, on January 13, 2005, denied the petition.

On appeal, counsel stated that the ETA 750 originally submitted by the petitioner for certification allowed for the substitution of experience for the requirement of a bachelor's degree but that the certifying officer with the New Jersey State Workforce Agency informed the petitioner that the petition would not be approved unless that alternative qualification requirement was removed. Counsel stated that the petitioner then submitted an amended ETA 750 with no alternative job qualification allowing work experience to substitute for a bachelor's degree, and that the ETA 750 was then certified by the U.S. Department of Labor (DOL) in its amended form. Counsel also asserted that DOL reviewed the beneficiary's qualifications and approved them and that this fact should be sufficient to establish that the beneficiary is qualified for the proffered position.

Counsel also stated that most of the advertising for the proffered position stated that work experience could be substituted for the requirement of a bachelor's degree, and that any deficiency on the ETA 750's qualification requirements was therefore harmless error. Counsel then stated that CIS has the authority to relax procedural rules. Counsel concluded by stating that some three-year degrees from higher education institutions in India are equivalent to U.S. bachelor's degrees and stated that the director should have issued a request for evidence to afford the petitioner an opportunity to submit evidence to show that the beneficiary's three-year diploma from an Indian higher education institution is equivalent to a United States bachelor's degree.

On appeal counsel submitted extensive documentation pertaining to the ETA 750 labor certification underlying the instant I-140 petition, including the petitioner's recruitment efforts, as well as a printout of a document titled "Higher Education in India" printed from the internet website of the Department of Education of the government of India that provides a detailed description of the various programs and institutions of higher education in India. Counsel highlighted a section of that document which states that study for bachelor's degrees begins after twelve years of school education and that the course of study for bachelor's degrees is three years, except for certain bachelor's degree programs which may require longer study.

In its decision, the AAO first reviewed the materials submitted with the petition. With regard to the beneficiary's academic diploma, the AAO noted that the diploma indicated six semesters of study, and found that the course of study for the diploma was a three-year program. With regard to the MEI educational evaluation report, the AAO noted that the evaluation stated that the beneficiary's studies were the equivalent of three years of study at an accredited U.S. university, and that the evaluation relied on a formula that for every year of university studies three years of specialized work experience may be substituted. The AAO noted that this formula is one found in the regulations governing H-1B nonimmigrant visa petitions, but that nonimmigrant regulations governing H-1B visa petitions were not applicable to the instant immigrant petition. The AAO stated that the only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one that pertains to professionals and referred to 8 C.F.R. § 204.5(1)(2).<sup>3</sup> The AAO

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<sup>3</sup> As discussed previously, 8 C.F.R. § 204.5(1)(2) states: "Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." The AAO also noted in its previous decision on appeal that the regulation uses a singular description of foreign equivalent degree. Thus, the AAO found that the plain meaning of the regulatory language stands for the requirement that a beneficiary must have one degree that is determined to be the

noted that no provision pertaining to skilled workers specified the equivalent to a bachelor degree, and stated that even if it were assumed that the instant petition was for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The AAO stated that the petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor of science degree, but the petitioner chose not to do so.

The AAO then stated that a bachelor's degree usually requires four years of education and cited *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg. Comm. 1977). The AAO noted that even if the petition was considered as one for a skilled worker, the evidence shows only three years of higher education for the beneficiary, which is not usually sufficient for a bachelor's degree.

With regard to the documentation as to the certification process, the AAO noted that if the petitioner disagreed with the actions of the New Jersey State Workforce Agency of the U.S. Department of Labor, any such concerns would have to be raised in another forum. The AAO noted that it did not have jurisdiction to review the actions of either agency, and was limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. The AAO referred to DHS Delegation No. 0150.1 (effective March 1, 2003), and also 8 C.F.R. § 2.1(2005 ed.).

The AAO noted that the evaluation report found in the record made no finding that the beneficiary holds a foreign degree which is the equivalent to a U.S. bachelor's degree. The AAO stated that regardless of whether the petitioner sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. Thus, the AAO determined that the evidence submitted by the petitioner as to the beneficiary education prior to the director's decision was not sufficient to establish that the beneficiary had a bachelor's degree in science or technology or a foreign equivalent degree on July 20, 2001.

The AAO then examined the evidence submitted on appeal with regard to the petitioner's recruitment efforts and counsel's assertions that the petitioner's recruitment efforts were directed at both persons with bachelor's degrees as well as persons who had the equivalent of a bachelor's degree. The AAO also examined counsel's assertion that based on these recruitment efforts, the more restrictive requirement on the ETA 750 was a harmless error that CIS had the authority to revise.

With regard to counsel's assertions as to the ability of CIS to relax the procedural rules, the AAO stated that CIS may not ignore a term of the labor certification, nor may it impose additional requirements. The AAO cited *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). The AAO also noted that none of the cases cited by counsel concerning the authority of CIS to relax procedural rules in the interest of justice provide authority for CIS to make any changes concerning job qualifications on an ETA 750.

With regard to the document on Indian education submitted by counsel on appeal, the AAO noted that while the document provided a detailed description of the various programs and institutions of higher education in India, it

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foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

made no specific reference to the type of program under which the beneficiary received his diploma. The AAO also found that the text highlighted by counsel in the document was not directly relevant to the instant petition, because the beneficiary's diploma in the record is not a bachelor's degree and does not state that the beneficiary was awarded a bachelor's degree. The AAO further noted that the document submitted also did not make any comparative statements as to whether a three-year bachelor's degree in India is equivalent to a four-year U.S. bachelor's degree. The AAO stated that the document simply noted that in India, some courses of study allow for a bachelor's degree in three years.

The AAO then determined that neither the evidence submitted prior to the director's decision or on appeal established that the beneficiary's diploma is a foreign equivalent degree to a U.S. bachelor of science or technology degree.

On motion, counsel submits a copy of *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005). Counsel describes this decision as a new precedent decision and references the following sections of the decision:

It is the employer, working under the supervision and direction of OED and DOL that establishes the requirements for employment. CIS looks to Education and Experience requirements in the labor certification to determine whether the applicant falls within the skilled worker or professional classification. That determination should be 'based on the requirement of training and/or experience placed on the job by the prospective employer as certified by the Department of Labor.' 8 C.F.R. § 204.5(1)(4). It is the responsibility of the employer, not CIS, to establish the criteria for the open position.

CIS 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.

If any agency has the power to define the job qualifications set for in the labor certification it is the DOL. Here, the only evidence before this court is that DOL and OED wor[k]ed with the Church in drafting the labor certification and advertising the position, know[ing] full well [the beneficiary's] credentials.

Counsel then states that despite the use of "B.A. degree" on the ETA 750, the use of the term does not reflect the job opportunity criteria that was actually offered by the employer, that the term "bachelor degree" may include the equivalent whereby the beneficiary would qualify and that, by virtue of the findings in *Grace Korean*, the term bachelor degree can be broadened to include the equivalent in education. Counsel again asserts that the use of the term "bachelor degree" amounts to a harmless error and that the AAO has the discretion and compassion to adjudicate the matter favorably.

Counsel also reiterates that the CIS denial of the instant petition based on the contents of Form ETA 750 is a "form over substance" approach, and again mentions that during the recruitment process individuals possessing both bachelor's degrees and the equivalent work experience and/or education were sought. Counsel reiterates again that no U.S. worker was disadvantaged by the recruitment process and that no U.S. worker without a bachelor's degree was excluded during the process.

Counsel contests the AAO's statement in its October 2005 decision that the Department of Labor's certification does not include a finding that the beneficiary is qualified for the proffered position. Counsel states that in fact the DOL is making such determinations and has denied many labor certifications based on the alien's credentials not meeting the terms of the ETA 750. Counsel then states that based on *Grace Korean*, a new standard of review concerning the "B.A. degree" is necessary. Counsel asserts that the beneficiary was not offered an opportunity to demonstrate that his three-year diploma obtained in India equates to the required degree. Counsel asserts that it is an error to consider all three-year degrees from India as not meeting the U.S. educational standard when the United Kingdom and India are based on the same educational system.

Counsel finally requests that the AAO and CIS consider a new review in light of the *Grace Korean* decision, and in light of the petitioner's extensive advertising campaign that offered alternative educational equivalencies; the misdirection provided to the beneficiary from the New Jersey State Workforce Agency; and the DOL's prior approval of the beneficiary's educational credentials. For such a review, counsel requests that the director issue a request for additional evidence.

In a subsequent submission to the record dated January 24, 2006, counsel submits two additional educational evaluation documents. Counsel also asserts that the petitioner used the term "BA or equivalent" throughout its advertising for the proffered position. Counsel also contends that despite the use of BA degree on the Form ETA 750, the petitioner made no mention of the number of postgraduate years required, and that while the average U.S. bachelor degree is four years in length and 120 hours, this does not exclude the possibility of completing the 120 hours of coursework over the course of three years. Counsel then states that it is error to simply exclude an Indian three-year diploma without the opportunity to prove that the necessary 120 hours of coursework was completed and that the resulting diploma is in fact equivalent to a U.S. baccalaureate degree. Counsel also states that the term "Bachelor degree" as agreed upon by the U.S. Department of Labor and the petitioner includes the equivalent in education/and/or experience as they reviewed and assessed the beneficiary's education, diploma and equivalency evaluation and found the alien qualified for the position by certifying the application. Counsel again states that the use of the term "bachelor degree" amounts to harmless error as the term "bachelor degree or equivalent" was used in the advertising.

The first document submitted by counsel on motion is a document entitled U.S. Equivalency Summary written by [REDACTED] Career Consulting International (CCI), Sunrise, Florida. The document notes that the beneficiary's education program resulted in a three year Indian degree from the Government of Tamilnadu, Department of Technical Education with a diploma in electronics, specialization in television engineering. In her evaluation, Dr. [REDACTED] examines the beneficiary's six semesters of coursework, identifying each course taken during each semester as a "paper." She further assigns semester credit hours of 3.22 for each paper, and states that by utilizing the Carnegie Unit,<sup>4</sup> a total U.S. credit equivalency per contact hours of 125 is reached. Dr. [REDACTED] further establishes the beneficiary's grade point average as 3.74. Dr. [REDACTED] then notes that CCI considers the

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<sup>4</sup> In a footnote, Dr. [REDACTED] states: "CCI, like most American higher education has adopted a variant of the traditional 'Carnegie Unit' as a measure of academic credit. This unit is known in the University by the familiar term, 'semester credit hour,' and is the primary academic measure by which progress toward a degree is gauged. In summary, this states that 15 classroom (50 minute) hours equal 1 [one] semester credit hour. "

beneficiary's international coursework to be comparable to a bachelor of science in electronics engineering from a regionally accredited U.S. higher education institution.

Dr. [REDACTED] further comments that UNESCO clearly recommends that the three-year and four-year Indian degrees should be treated as equivalent to a bachelor's degree by all UNESCO members. She also notes that India, the United States and England are members of UNESCO, and that the three-year Indian degree is based on the British UK Cambridge/Oxford model which is a three-year degree. Dr. [REDACTED] asserts that the three-year English degree is generally, if not universally, accepted as equivalent to a U.S. bachelor's degree. Dr. [REDACTED] also states that a number of recognized and well-regarded British universities accept an Indian three-year bachelor's degree for entry in master's programs, and identifies some of these institutions as Queen Mary and Westfield College, University of London, University of Manchester, and Anglia Polytechnic University. Dr. [REDACTED] also asserts U.S. universities that also consider the three-year Indian degree for admission into their graduate programs, include, but are not limited, to institutions such as Harvard University, Georgetown University, IMPAC University, Huntington College of Health Sciences, The Wharton School of Business Administration, University of Pennsylvania, University of Missouri-Kansas City, Hult International Business School, Kellogg Business School of Northwestern University, and Emory University, among others.

Dr. [REDACTED] also refers to the "Bologna process" which she describes as being introduced in the European Union that will bring about three-years of studies for all participating first degree programs, and also notes that certain universities in the United States allow for an accelerated route to the bachelor's degree in which an assessment of prior learning is taken into account. Dr. [REDACTED] states that all programs permit the bachelor's degree to be awarded after a candidacy that is often substantially shorter than three years, but the standards under which they do so are identical to those applied to graduates of a traditional four-year academic program. Dr. [REDACTED] notes that these programs can be completed through a process of exams only with no contact hours at all, and that it is the academic outcome, and not the duration of the program that counts.

In a second document submitted by counsel to the record, [REDACTED] Chief Evaluator, Marquess Educational Consultants, London, England, provides an expert opinion on the beneficiary's educational credentials. Dr. [REDACTED] references a paper that he and Dr. [REDACTED] co-authored, entitled "Does the value of your degree depend on the color of your skin?" (available at <http://www.degree.com/articles/three-year-indian-degree.html>). Dr. [REDACTED] states that the disparity in time between the three-year Indian program and the four-year U.S. baccalaureate degree is a semantic distinction because the Indian diploma program contains as many if not more contact hours during its three years than the four-year U.S. program. Dr. [REDACTED] states that the beneficiary's diploma contains the equivalent of 125 credit hours of post-secondary education, which exceeds the minimum of 120 credit hours normally expected for a recognized U.S. degree.

With regard to the petitioner's request to either approve the petition or submit an additional request for further evidence to the petitioner, the AAO will neither approve the petition nor remand the petition to the director for the issuance of another request for further evidence. The AAO notes that both during the appeal process and on motion, the petitioner has had the opportunity to provide additional evidence, and has done so. Furthermore, as will be discussed, the AAO does not find that the petitioner has provided sufficient evidence on motion to establish that the beneficiary has the foreign equivalent of a U.S. bachelor degree in science or technology.

The AAO also notes counsel's reiteration on motion of its assertions with regard to its recruitment efforts for the proffered position, its negotiations with the New Jersey State Workforce Administration on the wording of the labor certification, and counsel's assertions that the previous DOL approval of the labor certification negated any need for CIS subsequent approval of the beneficiary's educational credentials. The AAO further notes counsel's reiteration with regard to CIS' and the AAO's ability to relax procedural rules. Furthermore on appeal, counsel cites to *Grace Korean*, an Oregon circuit court decision that addresses the CIS role in determining whether a beneficiary's qualifications meet the ETA 750 requirements. Counsel's comments on motion with regard to the DOL approval of the labor certification negating any subsequent CIS examination of whether the beneficiary is qualified to perform the proffered position suggest that it would be useful to discuss the DOL role in the labor certification process. The AAO will then discuss the applicability of the findings in *Grace Korean* to the instant petition. Following this discussion, the AAO will examine the additional educational evaluations submitted on motion.

Pursuant to labor certifications, Section 212(a)(5)(A)(i) 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.

According to the regulation at 20 C.F.R. § 656.20(c), as in effect at the time of filing,<sup>5</sup> an employer applying for a labor certification must "clearly show" that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;
- (3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis;

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<sup>5</sup> Recently the Department of Labor has promulgated new regulations regarding the labor certification process. These new regulations only apply to applications filed on or after the effective date of the regulations, March 28, 2005. Applications filed before March 28, 2005, such as the one before us, are to be processed and governed by the current regulations quoted in this decision. 69 Fed. Reg. 77326-01 (Dec. 27, 2004).

- (4) The employer will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States;
- (5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
- (6) The employer's job opportunity is not:
  - (i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
  - (ii) At issue in a labor dispute involving a work stoppage;
- (7) The employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State or local law; and
- (8) The job opportunity has been and is clearly open to any qualified U.S. worker.
- (9) The conditions of employment listed in paragraphs (c) (1) through (8) of this section shall be sworn (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746, on the Application for Alien Employment Certification form.

The regulation at 20 C.F.R. § 656.21(a) requires the ETA 750 to include:

- (1) A statement of the qualifications of the alien, signed by the alien; [and]
- (2) A description of the job offer for the alien employment, including the items required by paragraph (b) of this section.

Finally, the regulation at 20 C.F.R. § 656.24(b) provides that the DOL Certifying Officer shall make a determination to grant the labor certification based on whether or not:

- (1) The employer has met the requirements of this part. However, where the Certifying Officer determines that the employer has committed harmless error, the Certifying Officer nevertheless may grant the labor certification, Provided, That the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. Where the Certifying Officer makes such a determination, the Certifying Officer shall document it in the application file.
- (2) There is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity according to the following standards:

(i) The Certifying Officer, in judging whether a U.S. worker is willing to take the job opportunity, shall look at the documented results of the employer's and the Local (and State) Employment Service office's recruitment efforts, and shall determine if there are other appropriate sources of workers where the employer should have recruited or might be able to recruit U.S. workers.

(ii) The Certifying Officer shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally accepted manner the duties involved in the occupation as customarily performed by other U.S. workers similarly employed, except that, if the application involves a job opportunity as a college or university teacher, or for an alien whom the Certifying Officer determines to be currently of exceptional ability in the performing arts, the U.S. worker must be at least as qualified as the alien.

(iii) In determining whether U.S. workers are available, the Certifying Officer shall consider as many sources as are appropriate and shall look to the nationwide system of public employment offices (the "Employment Service") as one source.

(iv) In determining whether a U.S. worker is available at the place of the job opportunity, the Certifying Officer shall consider U.S. workers living or working in the area of intended employment, and may also consider U.S. workers who are willing to move from elsewhere to take the job at their own expenses, or, if the prevailing practice among employers employing workers in the occupation in the area of intended employment is to pay such relocation expenses, at the employer's expense.

(3) The employment of the alien will have an adverse effect upon the wages and working conditions of U.S. workers similarly employed. In making this determination the Certifying Officer shall consider such things as labor market information, the special circumstances of the industry, organization, and/or occupation, the prevailing wage in the area of intended employment, and the prevailing working conditions, such as hours, in the occupation.

It is significant that none of the above inquiries assigned to DOL involve a determination as to whether or not the alien is qualified for the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *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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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 this decision, 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' decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from the 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, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

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 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1984).

Thus, based on Department of Labor regulations as described above and by the decisions of two circuit courts, CIS does have the authority and expertise to evaluate whether the beneficiary's qualifications are sufficient to meet the requisites outlined in the Form ETA 750.

With regard to the circuit court decision submitted to the record on motion, the AAO is cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that CIS "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. 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 AAO notes that 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* at 8 (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 CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

In this matter, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, has held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

Furthermore, while counsel states on motion that the findings in *Grace Korean* "frowned upon CIS' narrow definition of a bachelor's degree that excludes all other interpretations or equivalent," counsel's assertion as to the findings in *Grace Korean* are found to be overly broad. *Grace Korean* explored the use of the phrase "or equivalent" and what such equivalence could mean. The petitioner in the instant petition removed the term "or equivalent" from its ETA 750 and now contends that a three-year degree program is the equivalent of a four year U.S. baccalaureate degree. Although the original educational evaluation report submitted to the record combined both the beneficiary's education and work experience, on motion, counsel and the petitioner's major assertion is that the beneficiary's three-year program is the equivalent of a U.S. baccalaureate. This assertion is quite distinct from the arguments raised in *Grace Korean*.

The AAO further notes that in contrast to the petitioner in the instant petition, the petitioner in *Grace Korean* did include the phrase "or equivalent" in the educational requirements stipulated on its ETA Form 750. The findings of this decision centered on which party, the petitioner or CIS, could determine what the phrase "or equivalent" meant, if anything, in stipulated educational requirements on a Form ETA 750. In *Grace Korean*, the petitioner wished to establish the beneficiary's educational credentials in the proffered position of a church director of adult activities by combining her four year degree in home economics with her further two years of seminary studies. The petitioner in the instant petition, contends that the beneficiary's three-year degree program is in fact the equivalent of a U.S. baccalaureate degree, which is a distinct issue from the

issue raised in *Grace Korean*. Therefore the AAO does not find the analysis utilized in *Grace Korean* to be dispositive in these proceedings.

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

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

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: The petitioner indicated "yes" for college and required a "bachelor degree in science or technology."

Experience: Five years in the job offered or in the related occupation of systems manager/administrator.

Block 15 does not include any qualifications relating to education. Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS 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, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. Contrary to counsel's assertion, CIS 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).

Furthermore the alien must meet all of the requirements specified by the petitioner on the labor certification as of the filing date of the labor certification application. *Matter of Wing's Tea House*, 16 I. & N. Dec. 158 (Act. Reg. Comm. 1977). In this case the labor certification required a "bachelor degree" in science or technology, a requirement that CIS has reasonably interpreted to mean "a bachelor's degree or foreign degree equivalent" in science or technology. The agency did not, therefore, base its denial of the petition on an improper understanding of the law.

Once again, we are cognizant of the recent holding in *Grace Korean*, which held that CIS is bound by the employer's definition of "bachelor or equivalent." In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the

beneficiary's credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *K.S. 20 I&N Dec. at 719*. In this matter, the court's reasoning cannot be followed because, as will become clear below, it is inconsistent with the actual practice at DOL.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (citing *Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind CIS in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS 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). CIS'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). CIS 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.

In order to be eligible for classification as a professional, the beneficiary must have completed four years of college and possess a baccalaureate degree or a foreign equivalent degree in science or technology. 8 C.F.R. § 204.5(l)(2). See *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). While the beneficiary need not possess a degree to be classified as a skilled worker, the beneficiary must meet the requirements of the labor certification, which in the instant petition, includes a baccalaureate degree or foreign equivalent degree in science or technology. 8 C.F.R. § 204.5(l)(3)(B). As previously discussed, the AAO does not view the findings of *Grace Korean*, which in essence examined whether a degree in an unrelated area combined with

further studies in a related field could be viewed as a foreign equivalent to a U.S. baccalaureate degree, as dispositive in these proceedings.

With regard to the two educational evaluation reports submitted on motion, the AAO notes that Dr. [REDACTED] evaluation is basically a reiteration of Dr. [REDACTED]'s evaluation, with similar citations and references to British and U.S. universities. The AAO views several comments made by both Dr. [REDACTED] and Dr. [REDACTED] to be immaterial. Namely, the fact that some British universities and U.S. universities allow holders of three-year post-secondary programs of studies to enter master's programs in these respective universities does not in any manner impact on whether a U.S. immigration agency should approve an employment-based visa petition in which the beneficiary's actual academic credentials appear to differ with the traditional U.S. four year program of studies. The purpose of these proceedings is not to determine whether the beneficiary would be eligible to enter a U.S. masters' program, but rather whether his academic credentials are equivalent to those usually held by an individual after completion of a U.S. baccalaureate program. Likewise, the fact that some U.S. universities assess the work experience of students and provide for programs of less than four years in length to obtain a baccalaureate program is not dispositive of how the majority of U.S. colleges and universities assess the equivalency of foreign studies to U.S. baccalaureate program. The issue of concern here is that counsel would have a system whereby prospective U.S. applicants could be disqualified for the job opportunity due to the fact that they lack a degree, whereas the beneficiary whose education is less than a U.S. baccalaureate degree, as set forth in *Shah*, could be found qualified.

Nevertheless, both Dr. [REDACTED] and Dr. [REDACTED] are correct in stating that academic studies equivalent to a U.S. baccalaureate degree program can be accomplished in less than four years. The AAO acknowledges that a program of studies may be completed in less than four years, in cases in which students attend school through the entire year, or undertake extra courses that add to the cumulative course load. It is also noted that the AAO in other petitions has viewed beneficiaries with three-year degrees who also possess master's degree in the same or related fields as possessing the equivalent of a U.S. baccalaureate degree.

Upon review of Dr. [REDACTED] evaluation, the AAO notes that Dr. [REDACTED] listed the number of courses which she identified as "papers" taken by the beneficiary over his six semesters of study, and then accorded each course the same number of credit hours, namely 3.22. Based on Dr. [REDACTED] use of the Carnegie Unit and her interpretation of this measure in a footnote, the beneficiary accomplished 48.30 contact hours for each course undertaken during his three years of study.<sup>6</sup> However, it is noted that Dr. [REDACTED] assignment of 3.22 credit hours per course, or papers as she describes the coursework, is not reflected anywhere on the beneficiary's marks sheets for his six semesters of studies. These marks sheets simply list the number of courses, with no further identification of coursework, requirements for papers, or time spent in class or any equivalent manner of measuring corresponding credit hours. Nor is there any indication that each course during the beneficiary's six semesters of studies required the same number of equivalent credit hours. Thus, there is no evidentiary documentation as how Dr. [REDACTED] arrived at her estimation of the beneficiary's semester hours and their equivalency to the required 120 semester hours for a four year U.S. baccalaureate degree. Thus, her evaluation is thus given limited evidentiary weight in these proceedings.

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<sup>6</sup> Dr. [REDACTED] stated that 15 hours of classroom house equals 1 semester credit hour; therefore 3.22 credit hours multiplied by 15 amounts to 48.30 (50 minute )classroom hours per course.

Thus, on motion, the petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. The instant petition, submitted pursuant to 8 C.F.R. §204.5(1), may not be approved.

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 motion to reopen is granted and the decision of the AAO dated October 20, 2005 is affirmed. The petition is denied.