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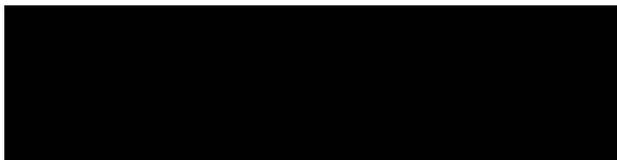
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



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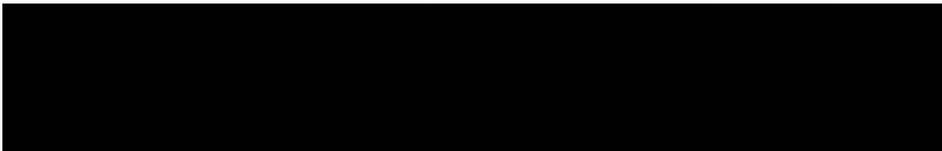
Petitioner:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a consumer retailer. It seeks to employ the beneficiary permanently in the United States as an information systems technical consultant. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary's two associate degrees and a one-year certificate program were equivalent to a U.S. bachelor degree or a foreign equivalent degree. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 9, 2005 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position.

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.

In addition, 8 C.F.R. § 204.5(l)(3)(ii)(C) states:

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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on August 4, 2003.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup> On appeal, counsel submits

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

a brief and a copy of a U.S. District Court decision, *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. November 3, 2005), and resubmits documentation submitted in the petitioner's response to the director's request for further evidence.

The record contains an educational evaluation report written by Dr. ██████████, Chairman, ██████████ ██████████ Sarasota, Florida, dated April 2, 2004. In his report, Dr. ██████████ lists the beneficiary's associate's degree from Douglas College, New Westminster, British Columbia, Canada, one in general business, and one in computer information systems, as well as the beneficiary's certificate in commerce and business administration program, with specialization in Computer Information Systems, also from Douglas College. Dr. ██████████ then noted that the beneficiary's educational credentials were the equivalent of a bachelor in Business Administration (BBA) degree with a major in information systems from a regionally accredited U.S. institution of higher education.<sup>2</sup> The record also contains copies of the beneficiary's two diplomas and one certificate from Douglas College, his transcript for the associate degree programs, and various training certificates, and letters of work verification and recommendation from former employers.

The record also contains two notarized affidavits from Mr. ██████████ and Mr. ██████████ submitted in response to the director's request for further evidence dated June 13, 2005. Counsel stated in the petitioner's response that the petitioner's standard for the educational qualification of the proffered position was not the possession of a U.S. bachelor's degree or a single source foreign equivalent degree. Counsel refers to the two affidavits submitted to the record, and states that the two affiants were former employees of the petitioner who developed and supervised the position described in the Form ETA 750, Part A, and administered the labor certification market test procedures. Counsel states that according to the affiants, any combination of foreign degrees evaluated to be equivalent to the requirements for the position was acceptable.

Also in response to the director's request for evidence, counsel submitted to the record a letter from Mr. ██████████ ██████████ ██████████, CIS Director, Business and Trade Services, a summary of an unpublished AAO decision *Matter of* ██████████ (EAC 94 027 51899) 13 Immig. Rptr. B2-269, October 19, 1994 and a memorandum from Mr. ██████████ ██████████ CIS Acting Associate Commissioner, Office of Programs and Mr. ██████████ ██████████ Deputy Associate Commissioner, Office of Field Operations.<sup>3</sup>

In Mr. ██████████ notarized affidavit, he stated that he was the final reviewer for the job description of the proffered position, and at his direction, the position required individuals who possessed either a formal college degree in computer science, information systems, or a related field or the equivalent of a college degree, based on the accumulated combination of education and training plus at least five years of experience in enterprise architecture or a related business environment. Mr. ██████████ also stated that in the information technology industry, "we understand that when a position requires a college degree, individuals with a

<sup>2</sup> In a footnote to his evaluation, Dr. ██████████ stated that the combination of the three degrees satisfied also the credit requirements of "Determining Bachelor's Degree Comparability" expressed page 11 in the *2003 AACRAO International Graduate Admissions Guide*, Published by the American Association of Collegiate Registrars and Admission Officers ISBN 1-57858-055-2.

<sup>3</sup> The AAO notes that the director in his denial of the petition correctly stated that the memorandum, the letter from Mr. Hernandez, and the unpublished AAO decision all referred to petitions for a different employment-based classification and were not relevant, because the petitioners were filing for EB-2 professionals with Advanced degrees or their equivalent, or, in the case of the unpublished AAO decision, the findings were not analogous to the circumstances of the beneficiary in the instant petition. The AAO agrees with the director's findings with regard to these three materials submitted in response to the director's request for further evidence, and will not further address these items in these proceedings.

combination of education and training equivalent to a college education are as qualified for the position as individuals that possess a formal degree.” Mr. ██████ stated that because of this his office received applications from individuals who did not possess a four-year college degree and others who did. The selection for the beneficiary’s position was based on either a college degree, a combination of education and training, and five years of related work experience. Mr. ██████ finally stated that the equivalency criteria is the same criteria that his staff used in selecting the beneficiary to fill the position for which the petitioner had filed an H-1B petition, and is a very common evaluation for the industry.

Mr. ██████, in his notarized affidavit, stated he was one of the individuals who personally screened candidates applying for the position of Information Systems Technical Consultant. Mr. ██████ then stated that the positions the company was attempting to fill required individuals who possessed either a formal college degree in computer science, information systems, or a related field or the equivalent of a college degree, based on an accumulated combination of training and education, plus at least five years of experience in enterprise architecture or a related business environment. Mr. ██████ also stated that the academic criteria that the petitioner used in selecting the beneficiary for the position as the only candidate who met the petitioner’s minimum qualifications was the basically the same it used in selecting him to fill the position when the petitioner filed an H-1B petition on the beneficiary’s behalf. Mr. ██████ stated that the beneficiary’s qualification for the position was based on his equivalent combination of education and training as determined by an accredited educational evaluator.

Counsel, on appeal, stated that the director erred by not considering or even acknowledging the affidavits submitted by the petitioner’s employees who had been involved in establishing the actual requirements for the labor certification application. Counsel also states that the petition may be approved if the proffered position fell under either the professional or skilled worker classification. Counsel cites to *Grace Korean United Methodist Church v. Chertoff, et al*, and states that there is no expertise that the Nebraska Service Center brings to the interpretation of the phrase “bachelors or equivalent” that would overcome the reasoned and credible analysis presented by the petitioner’s two employees, who were familiar with not only the proffered position but the petitioner’s policies and practices. Counsel also states that CIS incorrectly interpreted the requirements of the ETA 750 in determining that only a single academic degree would meet the requirements of the proffered position.

On July 23, 2007, the AAO sent the petitioner a request for further evidence regarding the beneficiary’s qualifications. The AAO stated that the documentation in the record of proceeding created ambiguity concerning the actual minimum requirements of the proffered position. The AAO further stated that the stated requirements of the position on the certified labor certification application did not indicate that less than a bachelor’s degree can constitute the required bachelor or equivalent educational credentials, although the two affidavits submitted to the record in response to the director’s request for further evidence dated August 24, 2005 contend that the actual minimum requirements do include at least what the beneficiary has achieved through his associate degrees and five years of work experience. The AAO then requested evidence of the petitioner’s intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the U.S. Department of Labor (DOL) while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. The AAO stated that such intent may have been illustrated through correspondence with DOL, amendments to the labor certification application initialed by DOL and the petitioner, results of recruitment, or other forms of evidence relevant and probative to illustrating the petitioner’s intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

In response, counsel submits a document entitled "Application for Alien Labor certification with Written request for Reduction in Recruitment per Gal I-97, Our File No: 20100-0048," dated July 31, 2003, with enclosures. Counsel states that he believes this document to be a copy of the entire Reduction in Recruitment (RIR) labor certification submitted to Department of Labor (DOL) by former counsel. The AAO notes that this document has the following pertinent attachments:

A Prevailing Wage Determination submitted to the Department of Economic Security, State of Minnesota, that notes the minimum education, training, experience and other special requirements for the proffered job as "bachelor's degree or equivalent" in Computer Science, Information Systems or related plus five enterprise architecture experience in a business environment. This document identified the Dictionary of Occupational Titles code as 169.167.030;

A letter in support of the Labor Certification Petition and RIR from the petitioner together with a Recruiting Activity Report and copies of supporting documentation outlined the petitioner's recruitment and ten day notice of job opening. The petitioner's Reduction in Recruitment Report indicates that from January 2003 to June 2003, based on enquiries from the petitioner's job application web site, the petitioner had interviewed five individuals for the proffered position, and had hired two of the applicants. On an accompanying page, the petitioner indicated that of the two applicants interviewed in February 2003, two did not meet the minimum requirements, while in April 2003, one did not meet the minimum requirements. All six Internet-based job announcements submitted with the petitioner's RIR application stated that the requirements for the proffered position were a bachelor's degree or equivalent in computer science, information systems or related plus five years related enterprise architecture experience in a business environment, and that the applicant must have professional experience related to the job duties and that the applicants needed to provide a holistic view of Enterprise Architecture, translating business requirements into operational/technology requirements. Two newspaper job vacancy announcements, one dated June 8, 2003, and the other undated, state that "qualified candidate will have a four-year degree or equivalence in computer science, information systems or related and five years of related enterprise architecture experience;" and

A copy of an earlier evaluation report written by Mr. [REDACTED], Director, International Evaluation Services, Marlboro, New Jersey, dated January 7, 2000. In his letter, Mr. [REDACTED] stated that, based upon the beneficiary's professional experience and educational background, the beneficiary had the equivalent of a bachelor of science in computer science; and

The petitioner's previous H-1B visa I-290 petition for the beneficiary, dated August 12, 2002. The cover letter for the submission written by previous counsel noted that essential supporting documents included credential evaluations.

Counsel states that based on the documentation submitted in response to the AAO's request for further evidence, the petitioner did not consider the abbreviation "or equiv," utilized in the education box of Item 14, Form ETA 750, Part A, to be limited to degree equivalence only.

Counsel notes that several references within the DOL documentation reinforce this interpretation. Counsel first notes that none of the job postings or advertisements referred to an equivalent degree, but rather all referred to "bachelor's degree or equivalent."<sup>4</sup> Counsel states that no applicant could reasonably have interpreted this

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<sup>4</sup> Counsel's assertion is not correct, as the two newspaper advertisements submitted to the DOL required a

description to only require a degree and, apparently, none of the applicants did. Counsel bases his assertion with regard to the job applicants on the affidavits submitted by Mr. [REDACTED] and Mr. [REDACTED] previously described in these proceedings. Counsel states that the petitioner's two employees who supervised the recruitment process during which the beneficiary was selected for the position, testified that they reviewed candidates who possessed not only the relevant degrees but they also considered qualifications from those who did not possess the degree, but possessed a combination of education, training and experience.

Counsel also notes that the petitioner's supporting letter to DOL was consistent with the job advertisement in not limiting equivalence to a degree. Counsel quotes the petitioner's letter that states that it is the determination of a well-recognized foreign credential evaluator that the beneficiary's education and experiential qualifications are the equivalent of a Bachelor of Science in Computer Science, from an accredited educational institution in the United States. Counsel also notes that the petitioner's Form ETA 750, Part B, submitted to the DOL, refers to an equivalence evaluation that goes beyond a degree evaluation. Counsel notes that the Form ETA 750 lists a "credential evaluation" among the evidence submitted to the DOL to show that the alien possesses the education, training and abilities represented.

To determine whether a beneficiary is eligible for an employment-based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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. 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, 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).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of information systems technical consultant. In the instant case, item 14 describes the requirements of the proffered position as follows:

- |     |                         |                                 |
|-----|-------------------------|---------------------------------|
| 14. | Education               |                                 |
|     | Grade School            | Y                               |
|     | High School             | Y                               |
|     | College                 | Y                               |
|     | College Degree Required | bachelor or equivalent          |
|     | Major Field of Study    | Comp Sc, Info System or related |

The applicant must also have five years of experience in the related occupation of enterprise architecture or related business environment. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A did not state any further special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he

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four-year baccalaureate degree.

attended Douglas College, New Westminster, British Columbia, Canada studying computer/info systems and general business from October 1983 to June 1985, and received an associate degree in computer/info systems, and an associate degree in general business. The beneficiary also stated that he had attended Douglas College, studying Computer Information Systems from October 1982 to June 1983, and received a certificate in "Comm & Bus Admin-CIS Spec."

The proffered position requires a bachelor's degree or equivalent and five years of experience. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 169.167-030, Data Processing 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/crosswalk/DOT?s=030.162-014+&g+Go> (accessed November 8, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Five. This zone requires extensive preparation, skill, knowledge, and experience for the occupation. According to DOL, many positions require more than five years of experience. DOL states: "for example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job." DOL assigns a standard vocational preparation (SVP) range of 8 or above to the occupation, which means "A bachelor's degree is the minimum formal education required for these occupations. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree). See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed November 8, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations: "Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training."

*See id.*

In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes an undefined number of years of college, with a bachelor's degree or equivalent in computer science, information system or in a related field.

The proffered position may be properly analyzed as professional since the position requires a bachelor's degree and five years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. Further, in its cover letter, the petitioner did state that the usual minimum requirements for performance of the job duties are a "bachelor's degree or equivalent in computer science, information systems or a related field, plus five years of related experience." This statement suggests that the petition is filed under the professional classification. Furthermore, the petitioner in its cover letter points to Dr. [REDACTED] educational evaluation report in support of its contention that the beneficiary had the requisite bachelor's degree. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements.

A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. In the instant petition, the petitioner would have the AAO consider a combination of two associate degrees and an earlier certificate program undertaken by the beneficiary to be the equivalent of a U.S. baccalaureate degree. Since the AAO does not consider a three-year program in computer science to be the equivalent of a four-year U.S. baccalaureate degree, it stands to reason that the beneficiary's

combined associate degrees would similarly not be considered as the equivalent to a U.S. baccalaureate degree in the field stipulated on the Form ETA 750.

It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: “[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.” In his educational equivalency report, Dr. [REDACTED] noted that the beneficiary’s educational credentials were the equivalent of a bachelor in Business Administration (BBA) degree with a major in information systems from a regionally accredited U.S. institution of higher education. He based his evaluation on the combination of the beneficiary’s two associate degrees with resultant diplomas and a certificate from a commerce and business administration program from Douglas College, New Westminster, Canada. In footnotes to the evaluation, Dr. [REDACTED] stated that the combination of the beneficiary’s three degrees satisfied the credits requirements contained in a publication of the American Association of Collegiate Registrars and Admission Officers entitled “2003 AACRAO International Graduate Admissions Guide.” Dr. Prade also stated that his evaluation followed the recommendations of the National Council on the Evaluation of Foreign Educational Credentials, stated in the PIER World Education Services reference publication, [REDACTED] [REDACTED] author.) However, the Douglas College transcript for the two associate degree programs that the beneficiary took simultaneously during 1984 and 1985 and the earlier certificate program indicate the beneficiary undertook 78 hours of coursework. Dr. [REDACTED] evaluation does not state any more explicit information as to why the three study programs would necessarily be the equivalent of a U.S. baccalaureate degree in computer science, information systems or a related field. Thus, the AAO gives no evidentiary weight to Dr. [REDACTED] educational evaluation report.

Counsel’s assertion that the petitioner’s reference to a credential evaluation on Item 12, of the Form 750, Part B should be considered evidence that the petitioner did not require a baccalaureate degree for the proffered position is irrelevant. The use of the phrase Credential Evaluation versus Educational Evaluation could easily denote the beneficiary did not have a baccalaureate degree, and thus the petitioner submitted an evaluation of the beneficiary’s overall credentials. The petitioner’s identification of Mr. Prade’s document as a credential evaluation in no way would constitute evidence that the position did not require a baccalaureate degree.

The regulations define a third preference category “professional” as 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.” See 8 C.F.R. § 204.5(l)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language 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. This fact by itself would also diminish the weight to be given the beneficiary’s two associate degrees, and the earlier certificate program undertaken at Douglas College.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for “professionals,” 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 AAO notes that the petitioner in its response to the director's request for further evidence submitted two notarized affidavits from individuals who were directly involved in the labor certification process and the subsequent interviewing of potential employees for the proffered position. Both Mr. [REDACTED] and Mr. [REDACTED] state that the qualifications for the proffered position can be either a college degree or the combined education and the requisite work experience. They both stated that they interviewed applicants for the proffered position in the summer of 2003 who both had baccalaureate degrees, or possess a combination of education and work experience that was the equivalent to a baccalaureate degree. They both mention the fact that the same academic criteria were used in the H-1B petition also sponsored by the petitioner for the beneficiary. However, while the H-1B petition process allows for the combination of academic studies and work experience, the employment-based immigrant process does not allow for such a combination of education and work experience.

With regard to the other applicants interviewed in the summer of 2003, although the DOL correspondence submitted by the petitioner reflects that five persons were interviewed and two were hired, the record contains no further evidence or information as to whether the persons hired for the position held baccalaureate degrees or combinations of educational credentials and work experience that the petitioner viewed as equivalent to a baccalaureate degree. Of the three applicants who were interviewed and not hired, the petitioner's documentation only indicates that the individual did not meet minimum requirements, without specifying how these individuals did not meet the minimum requirements. Thus the record does not reflect that the petitioner actually hired another individual who did not possess a baccalaureate degree with the requisite five years of relevant work experience. Of much more probative weight would have been evidence as to the academic and work credentials of the two persons hired for the same position identified on the Form ETA 750 during the recruitment period.<sup>5</sup>

The AAO does note that the record reflects that the two hires in February and April 2003 for the proffered position were recruited based on the petitioner's Internet website's job vacancy notice that does not require a four year baccalaureate degree, but rather a baccalaureate degree or the equivalent, in addition to the five years of requisite work experience. The AAO also notes that both newspaper job notices specifically required a four-year baccalaureate degree or equivalent in computer sciences, information systems or related and five years of related work experience in enterprise architecture. This discrepancy in the job description creates ambiguity concerning the actual minimum requirements of the position. Thus, the record is not clear whether the petitioner used different standards in its newspaper job opening announcement than it did in the Internet job postings.

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<sup>5</sup> The AAO notes that the petitioner filed a Reduction in Recruitment (RIR) request with the Department of Labor pursuant to 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii). The petitioner, when filing an RIR request, has to submit information as to numbers of persons interviewed, and reasons for not hiring applicants; however, the petitioner does not have to submit to the DOL the resumes of all individuals interviewed for the proffered position. Thus, the petitioner's correspondence with DOL does not necessarily provide evidence as to the academic credentials of the applicants hired by the petitioner during the period of recruitment for the same position.

On appeal, counsel refers to *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. November 3, 2005). The AAO is aware of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (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.” We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in 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 other Circuit Court decisions discussed below. 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 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 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).

At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have 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.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), 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 (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)<sup>6</sup> 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

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<sup>6</sup> The AAO notes that this cite has been superceded. The correct cite is section 212(a)(5)(A)(i) of the Act.

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). See also *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS." The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

While we do not lightly reject the reasoning of the District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with USCIS regulations. See 8 C.F.R. § 204.5(1)(2).

The beneficiary was required to have a bachelor's degree or equivalent on the Form ETA 750. Based on the beneficiary's educational documentation, namely, his two associate diplomas and one certificate from Douglas College, he does not possess a bachelor's degree or the equivalent in one of the fields stipulated on the Form ETA 750. Nevertheless, two affidavits submitted by the two employees most closely involved with the 2003 recruitment process, and the two affiants' statements as to what combination of credentials would be considered in the recruitment of U.S. workers are given significant weight in these proceedings. Alternatively, the AAO also gives weight to the fact that the record contains no evidence as to the academic credentials and work experience of any of the candidates interviewed for the position, or the academic credentials and work experience of the two persons hired for the same proffered position. Furthermore, the record reflects that the petitioner in its newspaper job vacancy announcements stated that the position required a four-year baccalaureate degree or the equivalent, which suggests the petitioner required a U.S. baccalaureate degree in the identified fields or a foreign equivalent degree. Therefore the AAO finds that the petitioner has not provided sufficient evidence to the record to establish that the proffered position required either a baccalaureate degree or a combination of academic studies less than a bachelor's degree and work experience that would suffice as the equivalent of a baccalaureate degree.

Thus, the petitioner has not met its burden. The appeal is dismissed.

**ORDER:** The appeal is dismissed.