

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

B6

[REDACTED]

FILE:

[REDACTED]  
SRC-06-274-53968

Office: TEXAS SERVICE CENTER

Date: **AUG 11 2008**

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner’s business relates to software development and consulting. The petitioner seeks to employ the beneficiary permanently in the United States as a computer systems analyst (“Systems Analyst”). As required by statute, the petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification,<sup>1</sup> approved by the Department of Labor (“DOL”). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor’s degree based on a single program of study to meet the professional category.

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).<sup>2</sup>

The record shows that the appeal is properly filed, 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.

The petitioner has filed to classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is 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.” Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form ETA 9089 was accepted for processing by the relevant office within the DOL employment system on November 2, 2005. DOL certified Form ETA 9089 on March 13, 2006. The petitioner filed Form I-140 on September 18, 2006.

On October 6, 2006, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not establish that the beneficiary had the required Bachelor’s degree or foreign equivalent degree in Computer Science based on

---

<sup>1</sup> On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA-9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

<sup>2</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).

one program of study as required by the certified labor certification. Accordingly, the director found that the beneficiary did not meet the definition of a professional. The petitioner appealed to the AAO.

On February 27, 2008, the AAO director issued an RFE, which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner responded.

On appeal, the petitioner contends that the beneficiary qualifies for the position offered as the beneficiary has the required education based on a combination of educational studies.

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

The proffered position requires a bachelor's degree, and two years of prior experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. If considered under the skilled worker category, the petitioner would need to demonstrate that the petition meets the requirements of that category.

DOL assigned the code of Computer Systems Analyst, 15-1051. According to DOL's public online database, O\*Net, 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 Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1051.00#JobZone> (accessed July 25, 2008).<sup>3</sup> Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

See *id.* Therefore, because of both the stated requirements on the labor certification and DOL's standardized occupational requirements, CIS will consider the position and the petition under both the professional and the skilled worker categories.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date

---

<sup>3</sup> DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O\*Net. Under the DOT code, the position of Systems Analyst had a SVP of 7 allowing for two to four years of experience.

the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary in this matter possesses a Bachelor of Science degree based on three years of study as well as completing a "GNIIT" program requiring two years of coursework, and one year of professional experience. She additionally has computer-related work experience. Thus, the issues are whether the beneficiary's three-year diploma is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's other education and work experience in addition to her initial degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

#### **Authority to Evaluate Whether the Alien is Eligible for the Classification Sought**

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

In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even 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).<sup>4</sup> *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.

\* \* \*

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).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as she does not have the minimum level of education required for the equivalent of a bachelor's degree.

---

<sup>4</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

The beneficiary is also not eligible for a third preference immigrant visa under the skilled worker category. A beneficiary must meet the petitioner's requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

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

#### **Authority to Evaluate Whether the Alien is Qualified for the Job Offered**

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

*K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (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 in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* 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 and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO (D. Ore. November 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at \*11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at \*14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that Citizenship & Immigration Services (“CIS”) properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at \*17, 19.

The key to determining the job qualifications is found on Form ETA 9089 Part H. This section of the application for alien labor certification, “Job Opportunity Information,” describes the terms and conditions of the job offered. It is important that the ETA-9089 be read as a whole. The instructions for the Form ETA 9089, Part H, provide:

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

On the Form ETA 9089, the “job offer” position description for a Systems Analyst provides:

Analyse [sic] user requirements, procedures and problems to improve information systems. Design, develop, test and implement system applications using C, C++, SQL Plus, MS-SQL Server, MS Access, Java, C, C++, CGI/PERL, XML, HTML, DHTML, Java Script. Conduct Studies pertaining to development of new information systems.

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

- H.4. Education: Minimum level required: Bachelor's degree  
4-A. Provides "if other indicated in question 4 [in relation to the minimum education], specify the education required."

The petitioner left this blank.

- 4-B. Major Field Study: Computer Science.

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

The petitioner checked "no" to this question.

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

Nothing was listed, as the petitioner checked no for question H.8.

- 8-B. If Other is listed in question 8-A [in relation to alternate combination and experience], indicate the alternate level of education required.

Nothing was listed as the petitioner checked no to H.8.

9. Is a foreign educational equivalent acceptable?

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

6. Experience: 24 months (2 years) in the position offered, as a Systems Analyst,  
10. or 24 months (2 years) in the related occupation of a Software Developer, Programmer Analyst, [or] Staff Technology Solutions.

14. Specific skills or other requirements: Bachelor's degree in Computer Science or equivalent and two years experience in all required skills.

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. 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).

In looking at the beneficiary's qualifications, on Form ETA 9089, signed by the beneficiary, the beneficiary listed her highest level of achieved education related to the requested occupation as "Bachelor's degree." She listed the institution of study where that education was obtained as the National Institute of Information Technology, Pune, India, and the year completed as 1998.

The petitioner submitted an evaluation of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

**Evaluation:**

Evaluation: The Trusteforte Corporation, New York, New York.

The evaluation considered the beneficiary's Bachelor of Science degree completed in 1995 at the University of Pune. She completed both general studies, and specialized studies in her areas of concentration: Statistics, Physics, Mathematics, and related subjects.

The evaluator concluded that the beneficiary's studies were equivalent to three years of academic studies from an accredited institution of higher education in the United States.

- The beneficiary additionally completed studies in a post-secondary program in Systems Management at the National Institute of Information Technology (NIIT) in India.

The evaluator states that NIIT, founded in 1981, is "accredited through the American Council on Education and offers access to university degrees through alliances with universities in India, Australia, and the United Kingdom." The evaluator continues, "Further, the institution is accredited under the Department of Electronics Accreditation of Computer Courses (DOEACC Society) and the programs offered by the Institute have been approved by the All-India Council on Technical Education/AICTE, the body with overall responsibility for accreditation in the field of technical education in India.

- The evaluator provides that the GNIIT program that the beneficiary took consists of two years of academic coursework followed by one year of Professional Practice in the field of Computer Science. The beneficiary completed the required coursework, exams, and training and received a GNIIT Degree in Systems Management. The beneficiary's program of study included courses in Computer Programming, Systems Management, Computer Applications, Systems Development, Systems Analysis and Design, Unix, C, and other related courses.
- The evaluator concluded that based on the nature of the courses completed, that the beneficiary had "satisfied substantially similar requirements to the completion of not less than two years of bachelor's level academic studies in the computer field. By completing at least two years of academic studies plus one year of professional Practice in Computer Science at the National Institute of Information Technology, in addition to completing a Bachelor of Science Degree from the University of Pune, the candidate attained the equivalent of a bachelor's degree in the area of Computer Science."

The director denied the petition as the evaluation relied on a combination of educational programs, and the petitioner did not demonstrate that the beneficiary had one degree equivalent to a U.S. bachelor's degree as required by the terms of the labor certification.

Further, in determining whether the beneficiary's diploma is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, [www.aacrao.org](http://www.aacrao.org), is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE,

<http://aacraoedge.aacrao.org/register/>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science degree awarded in India represents the attainment of a level of education comparable to two or three years of university study in the United States. The record contains the beneficiary’s yearly statement of marks and show that the beneficiary’s studies were based on three years of study.

However, the record does not contain any evidence to show that the beneficiary’s program of studies completed at the National Institute of Information Technology resulted in a postgraduate diploma issued by an accredited university or institution approved by AICTE. Further, we note that based on a review of the All India Council for Technical Education <http://www.nba-aicte.ernet.in/nmna.htm> site, accessed on August 6, 2008, the National Institute of Information Technology (“NIIT”), in Pune, India, is not an accredited institution within the state of Maharashtra, India in contrast to what the evaluator provides. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Therefore, the “title of GNIIT in Systems Management” listed on the beneficiary’s documents from NIIT would not represent attainment of a degree based on which the beneficiary could qualify for the position. Her program of study at NIIT, as listed on Form ETA 9089, is not equivalent to a bachelor’s degree.

Further, the GNIIT program combines two years of education with an additional year of practical training experience. As the petitioner’s evaluation relies on both the beneficiary’s Bachelor of Science degree, and the NIIT studies, the beneficiary’s “equivalent” degree is based on a combination of education and experience. The petitioner did not list in H.8. that it would accept any alternate combinations of education and experience, or in H.4. that it would accept anything less than a bachelor’s degree.

On appeal, counsel argues that the petition should be considered under both the professional, as well as the skilled worker category, and further that the beneficiary was qualified as she had the equivalent of a bachelor’s degree.

Counsel argues that “no where is it stating [sic] that the foreign degree must be single four years baccalaureate degree. If the foreign degree is less than four years program [sic] then it should be four years of study with additional one or more years of studies.”

As noted above, there is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. A three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.” In order to have experience and education equating to a bachelor’s degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree.

Counsel asserts that he specifically provided “Bachelor’s degree in Computer Science or equivalent and two years of experience” on Form ETA 9089 in section H.14, which would allow for “if the foreign degree is less

than four years program then it should be four years of studies with additional one or more years of studies.” Further, counsel states that the petitioner:

Said *no* in section H(8) as it want [sic] education studies of four years or more not with combination of three years of studies and three years of experience to make it equivalent to four years of Bachelor’s Degree. Any foreign equivalent of four years studies or more is considered equivalent to equivalent foreign degree [sic].

(Emphasis in original).

This presents a question of whether the petitioner properly expressed the education requirements on Form ETA 9089. The beneficiary’s combined programs of study and experience would be “the equivalent of a degree,” rather than a “foreign equivalent degree.” Form ETA 9089 allows space for a petitioner to list an “alternate level of education.” The petitioner could have selected “other” and specified that the petitioner would accept a combination of education, which was evaluated as the equivalent of a bachelor’s degree. The petitioner, here, did not specify that it would accept anything other than a “Bachelor’s degree,” and only added the word “equivalent” in a separate space related to “specific skills.”

Further, we do not agree that “any foreign equivalent of four years or more is considered equivalent to [an] equivalent foreign degree.” The foreign degree must be evaluated for its U.S. equivalency and determined to be the U.S. equivalent in the required field of study. Theoretically, there may be cases where an individual has completed four or more years of study at an institution(s), which is unaccredited, and, therefore, may not have completed the equivalent of a foreign degree, or a U.S. bachelor’s degree.

Counsel states that the beneficiary has obtained a bachelor of science degree, and then completed two additional years of coursework, and one year of professional practice in Computer Science courses at NIIT. Counsel explains that most bachelor’s degrees in India are awarded based on three years of study following 12 years of education, and “to make it equivalent to US four years program always one year [sic] or more further studies is taken in account.” Counsel further asserts that CIS has accepted “thousands of cases” combining education and experience.

The petitioner did not provide for the acceptance of a combination of educational programs and/or experience on Form ETA 9089. Whether CIS has accepted or approved other petitions combining education and experience would depend on how the Form ETA 9089, or the prior Form ETA 750 were drafted. Those petitions are not before us and we cannot assess their relative merits. Further, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988).

Further, counsel argues that the beneficiary’s NIIT training is relevant as the Occupational Outlook Handbook (OOH) for 2000-2001 specifically references that based on rapid technological advances in the field of computers, “continuous study is necessary,” and that “Employers, hardware, software vendors, colleges and universities, private training institutions offer continuing education.” Further, counsel estimates that over 20% of information technology students in India have trained at NIIT.

Certainly, as the OOH provides, continuous study is beneficial in the field of computers, as well as many other fields. However, the beneficiary’s program of study at NIIT by itself is not equivalent to a U.S.

bachelor's degree, and the petitioner did not provide for the acceptance of a combination of educational programs and/or experience on Form ETA 9089.

Counsel cites to and submits copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from [REDACTED] of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). In the July 2003 letter, [REDACTED] states that he believes that the combination of a completed PONSI-recognized post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); see also, Memorandum from [REDACTED] Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).<sup>5</sup>

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in [REDACTED] correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. We do not find the determination of the credentials evaluation probative in this matter. Again *Matter of Shah*, 17 I&N Dec. 244, generally provides that a bachelor's degree requires four years of education.

Counsel cites to *Grace Korean*, which we have addressed above. Counsel specifically cites from *Grace Korean* that it is the "employer working under the supervision and direction of OED and DOL that establishes the requirements," and further that "CIS does not have the authority or expertise to impose its strained definition of "B.A. or equivalent" on that terms as set forth in the labor certification."

We note that *Grace Korean* was decided based on a labor certification filed in 1996, which would have used a different, prior Form ETA. That form did not address the issue of alternate combinations of education and/or experience. The new form, Form ETA 9089, has been revised and now specifically allows the petitioner to address what level of alternate education that the petitioner requires. The petitioner did not list that it would accept any alternate combinations or attempt to define equivalent as the form allows.

Related to this issue, is the question of how the position's actual minimum requirements were expressed to DOL and advertised to U.S. workers, and whether a U.S. worker with the equivalency of a degree have

---

<sup>5</sup> While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions, and letters are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

known that his or her combination of education and experience would qualify them for the position. The AAO issued an RFE to determine how the minimum requirements were expressed to U.S. workers.

In response to the RFE, the petitioner submitted a copy of the recruitment conducted underlying the labor certification. The submitted materials contain a copy of a posting notice posted at the company premises in Omaha, Nebraska (where the job offer is located). The posting lists “Bachelor’s degree or equivalent in Computer Science, Math, or Engineering,” and two years of prior experience; an internet posting from the “Nebraska JobLink,” which listed the required education as only “Bachelor’s degree;” copy of a newspaper ad dated June 5, 2005, from the “Sunday World Herald,” which contained multiple positions in the same ad for Programmers, Systems Analysts, “DBA and Network administrator,” and Business Analysts. The ad lists that “you need to possess MS or BS in CS and 2+ years of work experience or its equivalent in any three of the following technologies [the ad lists over 50 different technologies].” A second newspaper ad dated May 8, 2005, similarly listed that the petitioner had openings for multiple positions and that “you need to possess BS degree in CS or its equivalent and 2+ years of experience in any of the following areas [numerous technologies listed].” The petitioner also posted an ad on its company website, which listed the “minimum educational requirements” as “Bachelor in Computer Science Degree or Related field.” A final piece of recruitment in the “Midlands Business Journal,” dated May 20, 2005 provides that the petitioner is hiring for multiple positions, and that “you must possess MS or BS degree in CS and 2+ years of work experience or its equivalent in any three of the following technologies [multiple technologies listed].”

In examining the petitioner’s recruitment, the ads are mixed. Some ads specify that the petitioner will accept a “BS degree or its equivalent,” other forms of recruitment specify that only a bachelor’s degree will be accepted. None of the ads define equivalent. Accordingly, we would not conclude that the petitioner adequately expressed its intent that it would accept the equivalent of a bachelor’s degree.

Further, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 9089. The petitioner specifies that a bachelor’s degree is required, and the certified Form ETA 9089 does not allow for meeting the degree requirement through any equivalency. The beneficiary would not meet the qualifications listed on the certified ETA 9089. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 9089.

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. *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). In this matter, the court’s reasoning cannot be followed as it is inconsistent with the actual practice at DOL. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree, whereas the classification sought in this matter does.

The petitioner in the case at hand did not list “or equivalent,”<sup>6</sup> only that the beneficiary must have a bachelor’s degree.

---

<sup>6</sup> While the petitioner listed “or foreign equivalent,” the beneficiary’s “foreign equivalent” bachelor’s degree is equivalent to three years of education, not the required four years of education leading to a bachelor’s degree in Computer Science as required by Form ETA 750.

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 us 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 the Ninth Circuit Court of Appeals.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition's 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.

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on CIS, the reasoning in those cases runs counter to Circuit Court decisions that are binding on CIS, and both decisions are inconsistent with the actual labor certification process before DOL.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.