

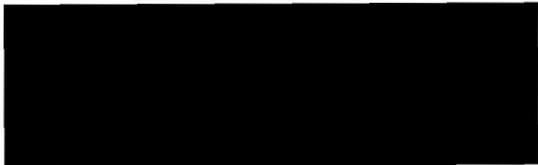


U.S. Citizenship
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **AUG 25 2008**
LIN-04-091-50024

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, Nebraska 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 AAO will withdraw the director’s decision; however, because the petition is not approvable, we will remand the petition to the director for further action and consideration as set forth below.

The petitioner is an information technology and consulting business, and seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). 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 as required on Form ETA 750.

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).¹

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 seeks to classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(1)(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.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on July 17, 2002. The Form ETA 750 was certified on November 18, 2003, and the petitioner filed

¹ 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).

the I-140 petition on the beneficiary's behalf on February 9, 2004.

On November 8, 2004, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence of the petitioner's ability to pay the proffered wage, including the petitioner's 2003 federal tax return, including Schedule L, or audited financial statement; and to submit the beneficiary's W-2 statements, and provide all amounts paid to the beneficiary since his employment in July 2000.² Further, the RFE requested that the petitioner provide evidence that the beneficiary's education at Madurai Kamaraj University consisted of eight semesters, or that the beneficiary completed any other degree based on eight semesters. The petitioner responded.

On March 14, 2005, 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 equivalent of a four-year U.S. Bachelor's degree in the required field of study. The petitioner appealed to the AAO.

On October 18, 2007, 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 asserts that the beneficiary has the required degree, which is the foreign equivalent based on a singular degree and program of study.

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 four-year bachelor's degree, and no prior experience. DOL assigned the occupational code of 030.162-014, "Programmer Analyst," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1021.00> (accessed August 20, 2008) 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/15-1021.00#JobZone> (accessed August 20, 2008).³ 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

² The petitioner provided information related to its ability to pay the proffered wage, as well as the beneficiary's W-2 statements. The petitioner's ability to pay will be discussed later in the decision.

³ 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 Programmer Analyst had a SVP of 7 allowing for two to four years of experience.

occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id. Because of those requirements and DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

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

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

(Emphasis added.)

The above regulations use a singular description of foreign equivalent degree that must be evidenced by a college or university record. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree from a college or university 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 possesses a foreign bachelor's degree in Mathematics based on three years of education. He additionally completed a three-year Bachelor's of Technology degree in Electronics Engineering. Thus, the issues are whether the beneficiary's three-year foreign degrees individually are equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's additional education together with his 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).⁴ *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

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

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.

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 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

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

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

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

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

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Ore. 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.”

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Id.* at *6-8. 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. *Id.* at *8-9. 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. *Id.* at *10-11. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor’s degree.

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 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.

On the Form ETA 750A, the “job offer” position description for a Programmer Analyst provides:

Using modern technological advances, plans, develops, tests, and documents computer programs, applying knowledge of programming and computer systems. Codes from program specifications or micro-level design documents. Unit test codes. Develops design documentation. Working knowledge of operating system concepts required. Prepares program documentation. Understands design and code inspection techniques. Plans own work at a task level. Reports work progress at a task level. Develops component, module or system test cases and scenarios from existing documentation. Executes application tests cases and scenarios.

Diagnoses application problems and identifies appropriate fixes. Familiarity with general purpose utilities and editors required. Debugs and repairs flowcharts.

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:

Education: Grade School: complete;
High School: complete;
College: 4 years;
College degree: Bachelor's degree;
Major Field Study: Computer Science or related field (e.g. Math, Engineering, or Information Systems).

Experience: None required.

Other special requirements: None.

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 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) Anna University, Madras, India; Field of Study: Electronics Engineering; from July 1992 to May 1995, for which he received a Bachelor of Technology degree; and (2) Madurai Kamaraj University, Karumathur, India; Field of Study: Mathematics; from June 1989 to April 1992, for which he listed he received a Bachelor of Science degree; (3) Government Kallar High School, Nattamangalam, India; Field of Study: Science & Math, June 1987 to May 1989 for which he received a Higher Secondary Certificate; and (4) Government Kallar High School, Nattamangalam, India; Field of Study: Science & Math, June 1986 to March 1987, for which he received a Secondary Certificate.

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 One:

- Evaluation: Foundation for International Services, Inc., Bothell, Washington.
- The evaluation considered the beneficiary's studies and copies of his educational documents, including a copy of his Higher Secondary Certificate, received in March 1989, which is equivalent to graduation from high school in the United States. Additionally submitted was the beneficiary's Secondary School Leaving Certificate dated March 1987, which is equivalent to ten years of education in the United States.

- The evaluation also considered copies of marks statements from Arul Anandar College, which is affiliated to Madurai Kamaraj University. The documents showed that the beneficiary completed and received a Bachelor of Science degree in Mathematics in June 1992, which “is equivalent to three years of university-level credit in mathematics from an accredited college or university in the United States.”
- Additionally, the evaluation considered the beneficiary’s education and copy of diploma from Anna University, Madras, India, which certified that he passed the examination of May 1995 and was awarded a Bachelor of Technology degree in Electronics Engineering. The evaluator considered this program to be “equivalent to a bachelor’s degree in electronics engineering from an accredited college or university in the United States.”
- The evaluator also looked at the beneficiary’s resume listing his experience from June to October 1995, and November 1996 to the present (October 1999, or three and one-half years).
- The evaluator concluded that based on the beneficiary’s educational background considered with his employment experience, that he had the “equivalent of an individual with a bachelor’s degree in computer science from an accredited university in the United States.”

The director then requested that the petitioner provide a more specific evaluation to “provide a detailed explanation of the material evaluated, rather than a simple conclusory statement.” The petitioner provided a second evaluation on appeal.

Evaluation Two:

- Evaluation: The Trustforte Corporation, New York, New York.
- The evaluation considered the beneficiary’s education: he completed a three-year Bachelor of Science program at Madurai Kamaraj University in India.
- Admission to the program at Madurai Kamaraj University is based on completion of high school and general entrance exams. The beneficiary completed a program of study including “generalized liberal arts studies and specialized studies concentrated in the field of Mathematics.” He was awarded a Diploma for Bachelor of Science Degree.
- The evaluation also considered the beneficiary’s “bachelor’s level program” in Electronics Engineering completed at Anna University.
- Admission to Anna University is based on completion of secondary-level studies and competitive entrance exams.
- The evaluation provides that the beneficiary “entered Anna University with advanced standing based on academic credit earned during previous post-secondary studies at Madurai Kamaraj University. Thus, he entered the Bachelor of Technology program at Anna University at the level of a second-year student and only was required to complete three years of academic studies to fulfill the equivalent of a four-year Bachelor’s Degree in Engineering.”
- At Anna University, the beneficiary completed studies with a concentration in Electronics Engineering.
- The evaluator provides that “Bachelor’s degrees in Engineering and Technology awarded by Indian educational institutions universally are considered to be equivalent to bachelor’s degrees in Engineering issued by US universities.”
- The evaluator concludes that the beneficiary’s education at Anna University “is equivalent, as a single source degree, to a bachelor’s level degree in Electronic Engineering at U.S. colleges and universities.”

The petitioner also submitted a letter from Anna University. The letter confirms the beneficiary's completion of the three-year Bachelor of Science program in Electrical Engineering and states: "The course was a Post B.Sc., 3 years Engineering Course, recognized as equivalent to an Engineering Degree course of four years duration."

In determining whether either of the beneficiary's degrees from Madurai Kamaraj University or Anna University 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, 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> (accessed August 25, 2008), 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 years or three years of university study in the United States. Based on information in the record, this degree would appear to be equivalent to three years of study towards completion of a bachelor's degree in the U.S. The beneficiary further lists that he completed a Bachelor's of Technology. EDGE considers a Bachelor of Engineering/Technology equivalent to completion of a U.S. bachelor's degree, normally contingent on completion of four years of tertiary study beyond the Higher Secondary Certificate.

On appeal, counsel provides that the beneficiary has "attained the foreign equivalent of a four-year Bachelor of Science Degree in Electronic Engineering from an accredited college or university based on the single source of his completion of the Bachelor of Technology program at Anna University." In support, he cites to *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988), and *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988), that CIS should accept the reasonable findings of a credentials evaluation made by a qualified evaluator when there is no derogatory information. Counsel provides that both the Foundation for International Services evaluation and Trustforte evaluations are consistent and trustworthy, and further, in accordance with the information provide through EDGE. Alternatively, counsel asserts that the beneficiary qualifies for the position based on a combination of education and experience.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Two degrees, neither of which is the foreign equivalent of a U.S. baccalaureate, will not be presumed to be the foreign equivalent of a U.S. baccalaureate. In this matter, however, the evaluations, the letter from Anna University and EDGE all consistently conclude that the normal engineering baccalaureate program in India is a four-year program equivalent to a U.S. Bachelor of Science in Engineering. The beneficiary was admitted into a special three-year engineering program at Anna University designed for those who had previously successfully completed and received a three-year degree. Anna University confirms that this special three-year program, which appears to be similar to student admission into a four-year program with advanced standing from an Advanced Placement course, or community college credit, is equivalent to a four-year Bachelor of Technology or Bachelor of Engineering program in India, which in turn, according to EDGE, is

equivalent to a U.S. Bachelor of Science in Engineering. Therefore, we conclude that the beneficiary has the required education to satisfy the terms of the certified labor certification.⁵

While the petitioner has overcome the director's basis for denial, the petition is not approvable. We will remand the petition for the director's consideration of the following additional issues: whether the petitioner can pay the proffered wage; whether the beneficiary may "port" to a new employer, Talentlink; or whether Talentlink can demonstrate that it is the successor-in-interest to the original petitioner of the labor certification in order to continue processing based on the initial labor certification.

The director must consider whether the initial petitioner can demonstrate its ability to pay the proffered wage.

The regulation 8 C.F.R. § 204.5(g)(2) provides that a petitioner must provide, "evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence."

The petitioner provided the following evidence of wage payment:

<u>Year</u>	<u>W-2 Wages</u>
2004	\$54,107.82
2003	\$39,791.50
2002	\$42,314.16
2001	\$27,815.34
2000	\$17,769

Additionally, we note that the petitioner has sponsored at least three other beneficiaries for permanent residence, and would need to demonstrate its ability to pay for all sponsored workers. Further, CIS records reflect that the petitioner has filed for a number of H-1B workers. The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

The director must evaluate whether these Form W-2's establish the petitioner's ability to pay the proffered wage of \$56,389, and if not, whether the petitioner's net incomes of -\$4,887 in 2002, and \$165,747 in 2003, or net current assets of -\$831,194 in 2002, and -\$737,267 in 2003 can establish the petitioner's ability to pay

⁵ Further, the petitioner expressed in its recruitment that it would accept foreign equivalent degrees. In response to the AAO's RFE, the petitioner submitted its recruitment materials filed with the labor certification application. The petitioner's submitted materials contain one ad from a computer journal, a posting notice, and an ad from the company website. The journal ad provides for recruitment for multiple computer positions at several company locations, and provides that "positions available at Bachelor of Science/Master of Science (or foreign equivalent) levels." The posting notice specific to the position provides that a "Bachelor's Degree (or equivalent) in Computer Science or related Field" is required. The ad posted on the company website similarly lists multiple computer positions at several company locations, and provides that "positions available at Bachelor of Science/Master of Science (or foreign equivalent) levels."

Based on the advertisements, the petitioner specifically allowed for candidates to meet the educational requirements based on a foreign equivalent degree, which the beneficiary has shown that he has.

the difference. The petitioner would also need to demonstrate that it can pay the proffered wage for all sponsored I-140 beneficiaries from their respective priority dates onward.

Additionally, the record of proceeding contains a claim that the beneficiary may change employment to a new employer, Talentlink, based on section 106(C) of AC 21 [the American Competitiveness in the Twenty-First Century Act of 2000].⁶ However, before we can reach that issue, the director must determine whether the initial petition is approvable,⁷ that the petitioner has the ability to pay the proffered wage to the instant beneficiary, as well as all sponsored beneficiaries.

Further, an additional issue that the director should consider on remand is the question of whether Talentlink can show that it is the successor-in-interest to the petitioner on the labor certification.

On appeal, counsel asserts that Talentlink, with an address of [REDACTED], Des Moines, Iowa, is the successor-in-interest to the original petitioner on the labor certification, Object Resources, with an address of 2300 Main, 9th Floor, Kansas City, Missouri. In support, the petitioner provided an affidavit from the president of Talentlink, which provides that:

1. Talentlink, Inc. had acquired all the employees pursuant to Paragraph 1 of the Agreement with Respect to Employees and the related projects from the information technology division of Object Resources, Inc. wherein Talentlink operates a similar information technology business.
2. That Talentlink, Inc. assumed all Labor and immigration related obligations and liabilities of the predecessor without any changes.

The petitioner additionally submitted a copy of an "Agreement with Respect to Employees," which provided in part:

This Agreement with respect to Employees ("Agreement") made this 24th day of February 2005 by and between Talentlink . . . ("TI") and Object Resources . . . ("ORI") . . . hereby agree as follows:

⁶ The pertinent section of AC 21, Section 106(c)(1), amended section 204 of the Act, codified at section 204(j) of the Act, 8 U.S.C. § 1154(j) provides:

Job Flexibility For Long Delayed Applicants For Adjustment Of Status To Permanent Residence. - A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Statute and regulations allow adjustment only where the alien has an approved petition for immigrant classification. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

⁷ To be eligible for adjustment of status, the beneficiary would require that a valid immigrant visa petition was approved on his behalf. Section 245(a) of the Act, 8 U.S.C. § 1255(a); 8 C.F.R. § 245.1(g)(1), (2).

1. The employees of ORI referred to in this Agreement are identified on Schedule A hereto.⁸ TI agrees to offer employment to the Employees through a subsidiary or affiliate of TI with cash compensation comparable to their current cash compensation with ORI and employee benefits currently provided to other nonexecutive TI personnel generally. . . the employees will be employees at will of TI . . . Commencing April 30, 2005 and each two-week pay period thereafter for a total of twenty (20) pay periods through January 21, 2006, each Employee who remains employed by TI or subsidiary or affiliate of TI will be paid a bonus equal to one-twentieth (1/20) of the balance for back-pay owing to them by ORI on the date hereof set forth on Schedule A attached hereto without interest, less applicable employment taxes and withholding. ORI will cooperate in transferring any United States work visas or similar or related rights to TI.
4. TI (and its subsidiaries and affiliates) are not purchasing or acquiring any assets or properties of ORI and are not the successors of ORI. Neither TI nor any of its subsidiaries assume any liabilities of ORI.
5. This agreement is subject to, and shall not be effective, until approval by the United States Bankruptcy Court within fourteen (14) days after the date hereof.

To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *Id.*

The director must examine whether the Agreement with Respect to Employees demonstrates that Talentlink will assume all the liabilities of the original employer, or whether the Agreement solely relates to taking on employees. More critically, the director may also consider whether in light of the Agreement's provision that "TI or subsidiary or affiliate of TI will be paid a bonus equal to one-twentieth (1/20) of the balance *for back-pay owing to them by ORI on the date hereof set forth on Schedule A attached,*" whether the initial petitioner had the ability to pay the proffered wage, as it appears from the agreement that back wages were owed to employees. Further, the agreement provides that it "is subject to, and shall not be effective, until approval by the United States Bankruptcy Court within fourteen (14) days after the date hereof."

In view of the foregoing, the petition will be remanded to the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above. Therefore, the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new detailed decision, which if adverse to the petitioner should be certified to the AAO for review.

⁸ The record of proceeding before us does not contain a copy of Schedule A.