

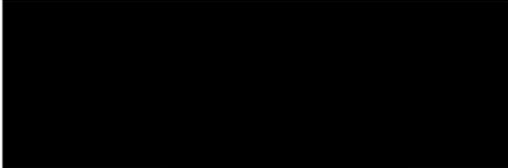
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



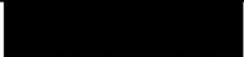
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE:



EAC 05 081 51758

Office: VERMONT SERVICE CENTER

Date: FEB 07 2008

IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

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

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition,¹ which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The nature of the petitioner's business is software development and consultancy. It seeks to employ the beneficiary permanently in the United States as a systems administrator. As required by statute, a Form ETA 750,² Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. 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 acting director determined that the beneficiary did not possess a Master's degree or "equivalent*"³ in the major field of study of Comp. Sc.[Computer Science] / Inf. Tech. [Information Technology] / Maths [Mathematics], and three years of job experience in the proffered position or the related occupation of Unix Admn. / Network Admn. / Sys / Network Support Engr. Therefore the petition was not approved.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

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

The I-140 petition was filed by the petitioner on January 22, 2005, and it was denied by the acting director on August 23, 2005. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on July 20, 2001.⁴ The petitioner must also 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 DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

¹ The instant petition is for a substituted beneficiary. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

³ "Equivalent*" is annotated in the labor certification and defined as follows; "Will accept a Bachelor's degree in Computer Science/Info. Tech/Maths and five years of progressive experience in lieu of [a] Master's degree and three years of experience."

⁴ It has been approximately seven years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work."

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.⁵

On appeal, the petitioner asserts it filed an I-140 petition that requested, as an equivalent, a Bachelor's degree in Computer Science / Info. Tech [information technology] / Maths [mathematics] and five years of experience, and the director erroneously found that the petition and accompanying labor certification *only* required a master's degree in computer science, information technology and mathematics.

According to the petitioner the credentials advisory opinion of [redacted] University, contrary to the director's findings, stated that the beneficiary's whole employment experience is over a span of more than eight years. Further the petitioner asserts that the beneficiary has a diploma in electrical and electronics engineering with electives in machine design and industrial electronics.

On appeal the petitioner submits additional evidence which is a credential advisory opinion from [redacted] of Pace University, New York, New York, dated September 14, 2005.

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. Further, those decisions, in conjunction with decisions by the Board of Alien Labor Certification Appeals (BALCA), support our interpretation of the phrase "B.A. or equivalent" (and in this instance Master's degree or "equivalent.")

Minimum Education, Training, and Experience Required to Perform the Job Duties

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

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

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements in Blocks 14 and 15:

⁵ The submission of additional evidence on appeal is allowed by the instructions to the CIS 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).

Block 14:

Grade School	Blank
High School	Blank
College	Blank
College Degree Required	<u>Master's Degree or equivalent*</u>
Major Field of Study	<u>Comp. Sc.[computer science], Info. Tech [information technology] / Maths [mathematics]</u>
Training	N/A
Experience [Years]	<u>3</u>
Related Occupation	<u>Unix Admn. / Network Admn. / Sys / Network Support Engr.</u>

To restate the above information, the applicant must have three years of experience in the job offered, the duties of which are delineated at Block 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision, or three years of experience in the related occupation of Unix Admn. [Unix administrator] / Network Admn. [network administrator] / Sys [systems support engineer?] / Network Support Engr. [network support engineer].

The petitioner has provided additional information in Block 15 that clearly relate to "equivalent*" as found in Block 13. "Equivalent*" is annotated in the labor certification in Block 15 and defined as follows; "Will accept a Bachelor's degree in Computer Science/Info. Tech/Maths and five years of progressive experience in lieu of [a] Master's degree and three years of experience."

According to the labor certification, the offered position of *systems administrator* requires either a Master's degree and three years of experience, or a college Bachelor's degree and five years of progressive experience. The major fields of study are the same for either requirement (computer science, information technology and mathematics.)

Because of those requirements, the director determined that the proffered position is for a professional occupation. DOL assigned the occupational code of 030-167-014 "*system analyst*" to the proffered position. The job title of *systems analyst* corresponds to DOL O*NET OnLine job code 15-1051.00 *computer systems analysts*.

DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database (See <<http://online.onetcenter.org/link/summary/15-1051.00>> accessed November 20, 2007) and its extensive description of the position and requirements for the position it 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." 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.

The Director's Findings

The acting director determined that the petition requested that the beneficiary be accorded the visa preference classification under Section 203(b)(3) (A)(ii) of the Immigration and Nationality Act (the Act), as amended, as a qualified immigrant who holds a baccalaureate degree and who is a member of the professions. As already stated, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the acting director determined that the beneficiary did not possess a Master's degree or "equivalent*"⁶ in the major field of study of computer Science, Information Technology or Mathematics, and three years of job experience in the proffered position or the related occupation of Unix administrator, network administrator, systems support engineer, or network support engineer.⁷

Preference Classification - Professional

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

The regulation at 8 C.F.R. § 204.5(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 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 AAO notes that the beneficiary has completed a total of 10 years of elementary, middle and high school education and attended The Seshasayee Institute of Technology, India in a course of instruction culminating in a diploma in Electrical and Electronics Engineering, with machine design and industrial electronics as an elective subject, that required three years of education from April 1982 to April 1985.⁸

⁶ "Equivalent*" is annotated in the labor certification and defined as follows; "Will accept a Bachelor's degree in Computer Science/Info. Tech/Maths and five years of progressive experience in lieu of [a] Master's degree and three years of experience."

⁷ The AAO notes that the only evidence submitted to prove the petitioner's ability to pay the proffered wage, besides W-2 statements, was the first page of its U.S. federal corporate tax return for tax year 2002. This is insufficient evidence. In the event this matter is pursued, the petitioner shall present evidence of its ability to pay the proffered wage according to the regulation at 8 C.F.R. § 204.5(g)(2).

⁸ As an indicator of education equivalency, an examination may be made of the beneficiary age and his

We also note that the “Opinion Letter on the Qualification and Experience” submitted by the petitioner dated May 19, 2003, from [REDACTED] Associate Professor and Chair, Howard University, Washington, D.C., opined that, not considering the beneficiary’s work experience, the diploma “is equivalent to an associate degree in mechanical engineering.”

As already stated, according to the petitioner the credentials advisory opinion of [REDACTED] of Howard University stated that the beneficiary’s whole employment experience is over a span of more than eight years. The petitioner asserts that the beneficiary has a diploma in electrical and electronics engineering with electives in machine design and industrial electronics. The petitioner is correct in his assertions.

In determining whether the beneficiary’s diploma from The Seshasayee Institute of Technology, India 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). ACARAO, according to its website, www.acrao.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://acaraoedge.acarao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

According to the database EDGE mentioned above, the All India Secondary School Certificate represents attainment of grades one through 10 or less than a high school education in the United States. According to the database EDGE, a diploma in engineering equates to one year of university study in the United States.

The AAO notes that the petitioner is not asserting upon appeal that the beneficiary possesses a master’s degree, and, the record of proceeding does not demonstrate that the beneficiary has a master’s degree, therefore this issue will not be discussed further.

Thus, the issues are whether the beneficiary’s degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary’s employment experiences in addition to that degree. We must also consider whether the beneficiary meets the other job requirements such as employment experience 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:

education attainment through the years. The beneficiary was born according to the petition on July 7, 1966. The beneficiary finished 10th grade, graduating from St. Joseph’s Higher Secondary School, India, in March 1982, when the beneficiary was 15 years, eight months old. When the beneficiary graduated from The Seshasayee Institute of Technology, India, he was 18 years, 9 months of age which is approximately the age when students in the United States enter college.

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 [Act] (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).⁹ *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

⁹ This provision is now section 212(a)(5)(A) of the Act.

“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 (now Citizenship and Immigration Services (CIS), hereinafter “CIS”), 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, CIS 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.

According to the record of proceeding, the beneficiary attended secondary school through tenth grade and then three years of what may be termed as a polytechnic school, in this case The Seshasayee Institute of Technology, India, when he was 18 years, 9 months of age. The AAO finds that 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) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor’s 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*, 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 pages 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 page 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate

degree, the court determined that CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at pages 17, 19.

Eligibility - Degree Equivalency and an Unrelated Degree

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).

As an indicator of education equivalency, an examination may be made of the beneficiary's chronological age and his educational attainment through his life. The beneficiary was born according to the petition on July 7, 1966. The beneficiary finished 10th grade, graduating from St. Joseph's Higher Secondary School, India, in March 1982, when the beneficiary was 15 years, eight months old. When the beneficiary graduated from The Seshasayee Institute of Technology, India, he was 18 years, 9 months of age, which is approximately the age of students in the United States who first enter college. As already stated, a college bachelor's degree in the United States is attained after a four-year college or university level education. See *Matter of Shah, Id.*

As stated above, the petitioner required (as an equivalent education experience) that the beneficiary for the offered position of systems administrator have a college bachelor's degree in the major field of study of computer science, mathematics, engineering, or a related field.

On this issue, the petitioner had initially submitted an "Opinion Letter on the Qualification and Experience" dated May 19, 2003, from ██████████ Associate Professor and Chair, Howard University, Washington, D.C., who opined that, not considering the beneficiary's work experience, the diploma "is equivalent to an associate degree in mechanical engineering."¹⁰

On appeal the petitioner submitted an additional credential's evaluation from ██████████ of Pace University, New York, New York, dated September 14, 2005. ██████████ opined that based upon the beneficiary's educational attainments the beneficiary has the equivalent of an associate of Science degree or two years of study towards a Bachelor of Science degree from an accredited institution of higher education in the United States.

The Roles of the Employer, DOL and CIS in the Employment-based Immigration Process

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

¹⁰ Although the petitioner states on appeal that ██████████ opined that the beneficiary has the equivalent of a "bachelor's degree with a major in computer information systems from an accredited university in the United States" reading this summary statement in context ██████████ stated that the beneficiary's education and professional employment experience equates in his opinion to a bachelor's degree.

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

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

Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree's or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in [REDACTED], et als., 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

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 a federal court. If we were to accept the employer's definition of "or equivalent," instead of the definition DOL uses, we would allow the employer to "unlawfully" tailor the job requirements to the alien's credentials after DOL has already made a determination on this issue based on its own definitions. We would also undermine the labor certification process. Specifically, the employer could have lawfully excluded a U.S. applicant that possesses experience and education "equivalent" to a degree at the recruitment stage as represented to DOL.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

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 us, run counter to Circuit Court decisions that are binding on us, and are 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.

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)(A)(ii) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification for the professional classification.

The Petitioner's Contentions on Appeal

To restate the petitioner's assertions on appeal, it contended that the petitioner filed an I-140 petition requesting a preference visa in the professional classification, and the director then erroneously adjudicated the petition when the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. As already stated, the acting director determined that the beneficiary did not possess a Master's degree or "equivalent*" in the major field of study of computer Science, Information Technology or Mathematics, and three years of job experience in the proffered position or the related occupation of Unix administrator, network administrator, systems support engineer, or network support engineer. The term "Equivalent*" is stated in the labor certification as "Will accept a Bachelor's degree in Computer Science/Info. Tech/Maths and five years of progressive experience in lieu of [a] Master's degree and three years of experience."

Preference Classification - Skilled Worker

The proffered position could also be properly analyzed as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience. If sufficient evidence is found in the record, the AAO could also examine the petition under the skilled worker category which requires a showing that the alien has two years of training or experience and meets the specific education, training, and experience terms of the job offer on the alien labor certification application.

Section 203(b)(3)(A)(i) of 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.

In this case, the instant petition contains a position that qualifies in the skilled worker category. The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." The singular degree requirement (found under the professional classification) is not applicable to skilled workers and the regulation governing skilled workers only requires that the beneficiary meet the requirements of the labor certification which must include at least two years of qualifying employment experience.

However the record of proceeding does not contain, and the petitioner has not submitted supplemental materials in the appeal or in response to the AAO's request for evidence dated October 10, 2007, that the petitioner during the recruitment phase of the Application for Alien Employment Certification Form ETA 750 process would accept a combination of education and experience to meet the degree equivalency requirement.

For example the petitioner has not submitted documents detailing its recruitment efforts, a description of the candidates who were screened or information as to job offers that were made to applicants (other than the beneficiary) for the offered position. The petitioner has not submitted, although requested, supporting documents reasonably available to the petitioner of its intent to inform and recruit qualified U.S. workers that includes those without bachelor's degrees but who had equivalent work experience.

The U.S. Department of Labor (DOL) has provided the following field guidance:

When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job. See Memo. from [REDACTED] Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994).

DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [Citizenship and Immigration Services (CIS)] CIS to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." See Ltr. From [REDACTED] Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to [REDACTED] (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we

understand to mean the employer is willing to accept an equivalent foreign degree.” See Ltr. From [REDACTED] Certifying Officer, U.S. Dept. of Labor’s Empl. & Training Administration, to [REDACTED] INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

The beneficiary does not have a Master’s or Bachelor’s degree or a foreign equivalent degree and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. For these reasons the petition may be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has met that burden.

ORDER: The appeal is dismissed.