

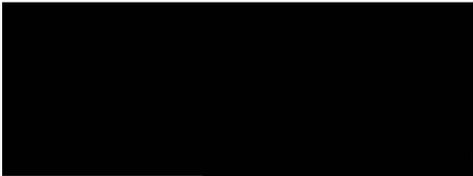
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER
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JAN 07 2008
Date:

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:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a data processing company. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst III. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because he did not have a four-year bachelor's degree or the equivalent foreign baccalaureate that would be the equivalent of a U.S. bachelor's degree in computer information systems. The director denied the petition accordingly.

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

As set forth in the director's July 21, 2005 denial, the single issue in this case is where the beneficiary is qualified to perform the duties of the proffered position.

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), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *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.

The regulation at 8 C.F.R. § 204.5 (l)(2) also states that relevant post-secondary education may be considered as training for the purposes of the skilled worker provision.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is February 3, 2003.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On appeal, counsel submits an excerpt from the *Federal Register* with regard to the ability of petitioner to file untimely motion to reconsider decision denying EB-2 Immigrant Visa petitions. This excerpt references a U.S. District Court decision, *Chintankuntla v. INS*, no.c99-5211 NMC (N.D. Cal.) which prompted the legacy INS notice. Counsel also submits a copy of an interoffice memorandum from William R. Yates, Citizenship and Immigration Services (CIS) Associate Director, Operations, on the issuance of request for further evidence.² Counsel also submits copies of an exchange of correspondence between Efren Hernandez III, CIS Director, Business and Trade Services and Mr. Aaron Finkelstein. The letters pertain to petitions for members of the professions holding an advanced degree.

The record also contains a credential evaluation report written by [REDACTED] and by [REDACTED] for Global Education Group, Inc. Miami Beach, Florida. [REDACTED] in a document entitled "Educational Evaluation Report", examined the academic credential presented by the beneficiary, namely a N4 National Certificate issued upon completion of studies at Germiston College, South Africa. [REDACTED] stated that the beneficiary's education in South Africa was equivalent to one year of undergraduate study in electrical engineering technology at a regionally accredited U.S. college.

In a document entitled "Work Experience Evaluation Report," [REDACTED] determined that the beneficiary's academic study and work experience were equivalent to a U.S. bachelor of science degree in computer information systems. [REDACTED] in her evaluation, used the three years of work experience for one year of

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).

² Memorandum from William R. Yates, Associate Director For Operations, *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID) HQOPRD 70/2* (February 16, 2005).

academic studies equation utilized by CIS in non-immigrant petitions. [REDACTED] also determined that the beneficiary's year of undergraduate study in electrical engineering technology in South Africa, and two and half years of undergraduate study in computer information systems at Salt Lake Community College equaled three and a half years of undergraduate study. [REDACTED] then determined that the beneficiary's academic studies and over five years of professional work experience in computer information systems were the equivalent to a U.S. bachelor degree in computer information systems, which she described as a four-year degree.

The record also contains a diploma from Salt Lake Community College dated December 19, 2000, that states the beneficiary earned an associate of science degree. The transcript submitted to the file indicates the degree was awarded in business and industry with a major in computer information systems. The record also contains four documents with regard to the beneficiary's studies in South Africa. The documents are identified as National Certificate N1, N2, N3, and N4, primarily covering courses completed in 1989 at Germiston College. The record also contains a letter from [REDACTED], Rector, Germiston College, South Africa. In his letter, [REDACTED] stated that the beneficiary was a full time student at Germiston College for the N4 Electronic Engineering Course during 1990. [REDACTED] goes on to state that the beneficiary successfully obtained a post high school qualification with his final year of study being the National N4 Certificate. The record also contains six certifications given to the beneficiary for various training courses taken in 1997 and 1998. The longest training appears to be an entry level programming course taken from September 8 to December 1997.³

On Form I-290B, counsel states that the petitioner filed the petition as a skilled worker, and as such meets the necessary requirements to be classified as a skilled worker under Section 203(b)(3)(A)(i) of the Act. In the accompanying brief, counsel, in pertinent part, states that CIS lacks the authority and expertise to define the petitioner's job requirements, and that, therefore, the director's denial of the petition is erroneous. Counsel also states that Department of Labor has the authority and expertise to define the employment requirements underlying a labor certification application that it has approved. In the alternative, counsel states that the petitioner has the authority and expertise to define the employment standards underlying the labor certification application. Counsel then asserts that even if CIS had the authority to define the terms "bachelor or equivalent," the definition is arbitrary, violates INA § 203(B)(3)(A)(i), and is unreasonable.

On July 23, 2007, because of the ambiguity in the record with regard to the petitioner's minimum requirements for the proffered position and the information contained on the Form ETA 750 submitted with the instant petition, position, the AAO issued a request for further evidence to obtain evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the U.S. Department of Labor (DOL) while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. The AAO received no response to this request. Therefore, the AAO will examine the record as presently constituted.

On appeal, counsel submits a copy of a letter dated January 7, 2003, from Efren Hernandez III, Director of the Business and Trade Services Branch of CIS' Office of Adjudications (Office of Adjudications letter.) This letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. First, this letter deals with a different classification, advanced degree professionals, and is not applicable to the issue before us. Regardless, the

³ The record also contains a subsequent I-140 petition with accompanying DOL Form 9089 that was approved on December 26, 2006.

Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000) (copy incorporated into the record of proceeding). The letter simply cannot supercede the statute, regulations and precedent decisions, such as *Matter of Shah*, 17 I&N Dec. at 245. In similar vein, the District Court decision cited by counsel on appeal involves the adjudication of EB-2 Professionals with Advanced Degrees. The findings in this decision are not relevant to these proceedings.

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 Mr. Hernandez' 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. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

With regard to counsel's assertions on appeal, Federal Circuit Court precedent cases, which are binding on this office, have repeatedly upheld our authority to make a de novo determination of whether the beneficiary is in fact qualified to fill the certified job offer. The issuance of a labor certification does not, therefore, bind U.S. Citizenship & Immigration Services to accept the employer's, or even the Department of Labor's definition of the amount and kind of experience that should be considered the equivalent of a college degree. In any event, the same Federal Circuit precedent, in conjunction with the reasoning set forth in decisions by the Board of Alien Labor Certification Appeals (BALCA), support our interpretation of the phrase "B.S. or foreign equivalent" as requiring a "foreign degree."

Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. While no degree is required for this classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary "meets the education, training or experience, *and any other requirements of the individual labor certification.*" (Emphasis added.)

Section 203(b)(3)(A)(ii) of the 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 issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(l)(3)(B). 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) provides:

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

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

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

According to the regulation at 20 C.F.R. § 656.20(c), as in effect at the time of filing,⁴ an employer applying for a labor certification must “clearly show” that:

- (1) The employer has enough funds available to pay the wage or salary offered the alien;
- (2) The wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work;
- (3) The wage offered is not based on commissions, bonuses or other incentives, unless the employer guarantees a wage paid on a weekly, bi-weekly, or monthly basis;
- (4) The employer will be able to place the alien on the payroll on or before the date of the alien’s proposed entrance into the United States;
- (5) The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship;
- (6) The employer’s job opportunity is not:
 - (i) Vacant because the former occupant is on strike or is being locked out in the course of a labor dispute involving a work stoppage; or
 - (ii) At issue in a labor dispute involving a work stoppage;
- (7) The employer’s job opportunity’s terms, conditions and occupational environment are not contrary to Federal, State or local law; and
- (8) The job opportunity has been and is clearly open to any qualified U.S. worker

⁴ Recently the Department of Labor has promulgated new regulations regarding the labor certification process. These new regulations only apply to applications filed on or after the effective date of the regulations, March 28, 2005. Applications filed before March 28, 2005, such as the one before us, are to be processed and governed by the current regulations quoted in this decision. 69 Fed. Reg. 77326-01 (Dec. 27, 2004).

(9) The conditions of employment listed in paragraphs (c) (1) through (8) of this section shall be sworn (or affirmed) to, under penalty of perjury pursuant to 28 U.S.C. 1746, on the Application for Alien Employment Certification form.

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

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

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

(1) The employer has met the requirements of this part. However, where the Certifying Officer determines that the employer has committed harmless error, the Certifying Officer nevertheless may grant the labor certification, Provided, That the labor market has been tested sufficiently to warrant a finding of unavailability of and lack of adverse effect on U.S. workers. Where the Certifying Officer makes such a determination, the Certifying Officer shall document it in the application file.

(2) There is in the United States a worker who is able, willing, qualified and available for and at the place of the job opportunity according to the following standards:

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

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

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

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

area of intended employment is to pay such relocation expenses, at the employer's expense.

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

It is significant that none of the above inquiries assigned to DOL involve a determination as to whether or not the alien is qualified for the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9th Circuit that covers the jurisdiction for this matter.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on this decision, the Ninth circuit stated:

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

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way*

indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (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 aware of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. November 3, 2005), which finds that 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.” We note that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from other Circuit Court decisions discussed below. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

Counsel on appeal states that the petitioner has the authority to determine the qualifications for the job that it proposes to fill. Once again, we are cognizant of the recent holding in *Grace Korean*, which held that CIS is bound by the employer’s definition of “bachelor or equivalent.” In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary’s credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *K.S.* 20 I&N Dec. at 719. In this matter, the court’s reasoning cannot be followed because, as will become clear below, it is inconsistent with the actual practice at DOL.

As discussed above, the role of the DOL in the employment-based immigration process is to make two determinations: (i) that there are not sufficient U.S. workers who are able, willing, qualified and available to do the job in question at the time of application for labor certification and in the place where the alien is to perform the job, and (ii) that the employment of such alien will not adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act. Beyond this, Congress

did not intend DOL to have primary authority to make any other determinations in the immigrant petition process. *Madany*, 696 F.2d at 1013. As discussed above, CIS, not DOL, has final authority with regard to determining an alien's qualifications for an immigrant preference status. *K.R.K Irvine*, 699 F.2d at 1009 FN5 (citing *Madany*, 696 F.2d at 1011-13). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by DOL. *Id.*

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 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 *Francis Kellogg, 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 chose 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 District Court’s decision is not binding on us, runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting “or equivalent” as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(1)(2).

In order to be eligible for classification as a professional, the beneficiary must have a completed four years of college and possess a baccalaureate degree or a foreign equivalent degree. 8 C.F.R. § 204.5(1)(2). While the beneficiary need not possess a degree to be classified as a skilled worker, the beneficiary must meet the requirements of the labor certification. 8 C.F.R. § 204.5(1)(3)(B). The beneficiary possesses two years and a half of academic studies that led to an associate of science degree from Salt Lake Community College. He also possesses a year of undergraduate studies as a final year of his high school education that the educational evaluator considered equivalent to one year of study in electrical engineering technology at a regionally accredited U.S. college. Thus the beneficiary does not possess the requisite U.S. four year baccalaureate degree or foreign equivalent degree.

The beneficiary’s three and a half years of undergraduate studies at two distinct educational institutions will also not satisfy the four-year requirement set forth on the ETA-750. 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). If supported by a proper credentials evaluation, a four-year baccalaureate degree from South Africa reasonably satisfies the four-year requirement and also be deemed to be a “foreign equivalent degree” to a United States baccalaureate degree.⁵ However, in *Matter of Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, 17 I&N Dec. at 245. Based on the same reasoning, the AAO will not consider the beneficiary’s South African engineering studies to meet the four-years of college requirement or to be the required “foreign equivalent degree” to a United States baccalaureate degree for purposes of this preference visa petition.

A four year U.S. baccalaureate degree would likewise satisfy the academic requirements for the employment-based petition.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also, *Mundany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

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

- | | | |
|-----|-------------------------|-------------------------------|
| 14. | Education | |
| | Grade School | (blank) |
| | High School | (blank) |
| | College | 4 |
| | College Degree Required | Bachelor or equivalent |
| | Major Field of Study | Computer Science or related |

The ETA 750 did not require any years of work experience in the job offered,⁶ the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A states no further special requirements.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated he had attended Germiston College studying Experimental Sciences, Mathematics, and Electronics, from January 1989 to January 1990, and received an N4 Diploma. The beneficiary also stated that he attended Salt Lake Community College, studying Computer information systems, from August 1998 to December 2000, and received an associate of science degree. As stated previously, the record contains the beneficiary's certificate from Germiston College and his diploma from Salt Lake Community College.

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

The petitioner clearly delineated four years as the required number of years required for the bachelor's degree requirement on the Form ETA 750A. Furthermore, as stated previously, it is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that

⁶ It is noted that the petitioner in its cover letter that accompanied the Ii-140 petition did state the necessity of two years of experience; however, the Form ETA 750, Part A, is silent on this requisite work experience. After the director requested evidence of a baccalaureate degree or equivalent, the petitioner then requested that the petition be considered under the skilled worker category. The director found that the beneficiary's combination of education and work experience could not be accepted in lieu of the four year baccalaureate degree or equivalent stipulated on the Form ETA 750.

case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: “[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.” With regard to the Global Education Group credentials evaluation report submitted to the record, it is given no evidentiary weight, as the principal evaluator examined both the beneficiary’s academic credentials and his work experience in her evaluation. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

The regulations define a third preference category “professional” as a “qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.” See 8 C.F.R. § 204.5(l)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

Finally, on appeal counsel states that the petition was filed under the skilled worker classification. The director in his decision notes the petitioner’s request to have the petition considered under the skilled worker classification. However, regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary’s bachelor’s degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for “professionals,” states the following:

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

alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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

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

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the beneficiary must have a four year bachelor’s degree or its foreign equivalent.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a “skilled worker,” the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a four year bachelor’s degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent foreign degree to a U.S. bachelor’s degree.

The proffered position requires a four year bachelor’s degree or equivalent. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 030.162914 on the Form ETA 750 which translates to category 15-1031.00, software applications engineers, in the DOL’s online database. DOL’s occupational codes are assigned based on normalized occupational standards. According to DOL’s public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g+Go> (accessed December 14, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone 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/15-1031.00#JobZone> (accessed December 14, 2007). 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 proffered position may be properly analyzed as professional since the position requires a four year bachelor's degree, which is required by 8 C.F.R. § 204.5(1)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements. Even if the I-140 petition is examined under the skilled worker classification, based on the *DOT* description of Job Zone 4 level academic and work experience requirements, the position appears more appropriately to be that of a professional because the Form ETA 750 stipulates that the beneficiary must be in possession of a four-year baccalaureate degree or equivalent. The record reflects that the beneficiary does not possess such a four-year baccalaureate degree, and that the petitioner has provided no further explanation for its use of the term equivalent in the Form ETA 750.

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 court in *Snapnames* 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 CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. In the instant case, the labor certification does not further clarify the petitioner's intent regarding educational equivalence, but rather vaguely states "bachelor or equivalent."^{8 9}

Here, the record does not reflect that the beneficiary possesses a four year baccalaureate degree in computer sciences or a related field. The beneficiary was required to have a four year bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

⁸ The petitioner in *Snapnames.com* stated "bachelor or foreign equivalent" on its labor certification.

⁹ Thus, the record is not clear as to whether the petitioner can combine lesser degrees to obtain the equivalent of a baccalaureate degree. With the context of an employment-based visa petition, such clarification would be essential in providing U.S. applicants for the proffered position with two two-year degrees or similar credentials to apply for the position. The petitioner's failure to respond to the AAO's request for further evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

ORDER: The appeal is dismissed.