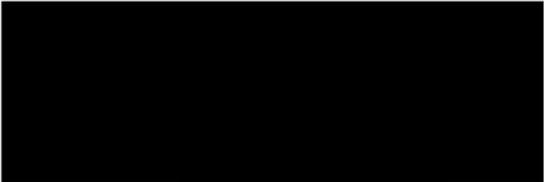


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FILE: [Redacted]  
WAC-06-041-50227

Office: TEXAS SERVICE CENTER Date:

**JUL 09 2008**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

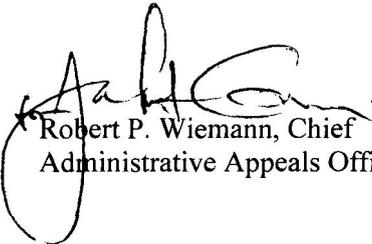
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



**INSTRUCTIONS:**

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

  
Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center (“director”), denied the employment-based immigrant visa petition.<sup>1</sup> The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner’s business relates to providing student loan services. The petitioner seeks to employ the beneficiary permanently in the United States as a computer programmer (“Senior Systems Programmer - Mainframe”). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor’s degree as listed on Form ETA 750.

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

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

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

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

<sup>1</sup> The petitioner initially filed its petition with the California Service Center. The petition was transferred to the Texas Service Center for decision in accordance with new procedures related to bi-specialization.

<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case states no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on July 25, 2002. The proffered wage as stated on the Form ETA 750 is \$85,000 per year based on a 40 hour work week. The Form ETA 750 was certified on May 13, 2005, and the petitioner filed the I-140 petition on the beneficiary's behalf on November 17, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1997; gross annual income: \$34,704,899; net annual income: \$23,209,260 and current number of employees: 655.

On April 20, 2006, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence that the beneficiary had the required Bachelor of Science or foreign equivalent in Computer Science or a related field. The petitioner responded.

On July 26, 2006, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not establish that the beneficiary had the required Bachelor's degree or foreign equivalent degree in Computer Science or a related field as listed on the certified labor certification. The petitioner appealed to the AAO.

On appeal, the petitioner states that the beneficiary has the equivalent of a U.S. bachelor's degree in the required field. Further, counsel contends that the Citizenship and Immigration Services ("CIS") interpretation of "B.S. or foreign equivalent" contradicts "the employment conditions set by the petitioner and approved by the Department of Labor," and that CIS also should have considered the petition under the skilled worker category.

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

The proffered position requires a four-year bachelor's degree. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. The proffered position requires a four-year bachelor's degree and six months of experience. DOL assigned the occupational code of 030.162-010, "Computer Programmer," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1032.00> (accessed July 7, 2008) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do

not.” See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed July 7, 2008).<sup>3</sup> Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

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

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

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

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

The beneficiary in this matter possesses a “diploma” based on three years of technical training and passing **examinations. He additionally has computer related experience. Thus, the issues are whether the beneficiary’s three-year diploma is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary’s work experience in addition to his technical training. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.**

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

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

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-

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

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

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

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

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

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

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

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts.

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).<sup>4</sup> *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

\* \* \*

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

*Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

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

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

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

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

The petition and the beneficiary are also not eligible for a third preference immigrant visa under the skilled worker category. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which states:

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

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

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

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

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

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

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

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

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

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (CIS) “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at \*8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. See section 103(a) of the Act, 8 U.S.C. § 1103(a).

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

determined that Citizenship & Immigration Services (“CIS”) properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at \*17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor’s degree.

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

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

On the Form ETA 750A, the “job offer” position description for a Senior Systems Programmer-Mainframe states:

Provide installation and customization of hardware and peripherals including installation, customization and maintenance of OS/390 R10 and IBM software/PTF and other vendor software’s using SMP/E. Provide day-to-day support for OS/390 R10, CICS and other vendor products such as CA, Compuware, Candle, Digital, and Chicago Soft. Install and customize UNIX system Services (OpenEdition) for OS390, Maintain Exit routines. Configure IBM Enterprise Storage Server. Build a test environment to test the process of recovery of production image during a disaster. Duties involve working in IBM Multiprise 3000 7060 HD 50 S/390 based mainframe environment running OS/390 and JES2 and vendor products such as Omegamon, CA-7, CA-ACF2, CA-1, File-Aid, CA-View, PROJCl, and SYNCSort.

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

Education:	Grade School: none listed; High School: none listed; College: 4 years; College degree: “B.S. or foreign equivalent;”
Major Field Study:	Computer Science or related field.
Experience:	none required.

Other special requirements: none required.

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification,

nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: State Board of Technical Education; Field of Study: Electronics & Communication; from June 1988 to April 1991, for which he received a Diploma in Engineering.

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

**Evaluation:**

- Evaluation: Foundation for International Services, Inc., Bothell, Washington.
- The evaluation considered the beneficiary's educational documents, including a copy of Diploma from the State Board of Technical Education and Training, Department of Technical Education in Madras, India, which provided that the beneficiary completed a Diploma of Electronics and Communications Engineering with Medical Electronics and System Design Using Integrated Circuits as elective subjects. The evaluation further states that the beneficiary passed the Board's Final Examinations in April 1991.
- The evaluator states that the Diploma is equivalent to completion of high school in the United States and an associate's degree (two years) in electronic and communication engineering technology.
- The evaluator also considered the beneficiary's six years of experience.
- The evaluator concluded that based on the beneficiary's studies, and his six years of experience (equating three years of experience to one year of university studies), that the beneficiary had the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

The director denied the petition as the Form ETA 750 required that the petitioner have a four-year bachelor's degree. As the evaluation relied on a combination of education and experience, the petitioner did not demonstrate that the beneficiary had the required four years of education leading to a bachelor's degree as required by the terms of the labor certification.

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

EDGE states that a Diploma in Engineering awarded upon completion of three years of study beyond the Secondary School Certificate<sup>5</sup> represents the attainment of a level of education comparable to one year of university study in the United States.

We note that the labor certification specifically designates that four years of education leading to a Bachelor's degree is required. The petitioner did not list that the beneficiary could have two years of education, or two years of education in combination with work experience, and/or training.<sup>6</sup>

On appeal, counsel states that the requirements of the approved labor certification are a "Bachelor's degree or foreign equivalent in Computer Science or a related field," and that the beneficiary has "the equivalent of a Bachelor's degree in Computer Science from an accredited college or university in the United States based upon his two-years of university-level academic credit and three years of employment experience."

We note that the evaluator concluded that the beneficiary's "equivalent" degree was based on the combination of the three-year program of study, (which the evaluator stated resulted in two-years of education), and the beneficiary's six years of experience (equating three years of experience to one year of university studies), not three years of experience as counsel states.<sup>7</sup>

Further, the labor certification does not designate "or equivalent," or provide how "or equivalent" would be defined. Form ETA 750, Box 15 allows more than adequate space for the petitioner to provide additional requirements, or to list any alternate combinations of education and/or experience that the employer would accept in lieu of a bachelor's degree. The petitioner did not list what it was willing to accept as "equivalent" in Box 15, or anywhere else on the Form ETA 750 such as in an addendum or in any correspondence to DOL that it would accept any alternate combinations of education and/or experience.

Counsel states that the beneficiary "clearly possesses the equivalent of a U.S. Bachelor's degree . . . as was indicated on the form ETA 750B Box 14."

Form ETA 750B Box 14 states that the beneficiary has a "Diploma," and not a bachelor's degree. Further, the evaluator provided that the beneficiary's "Diploma" was equivalent to two years of university education.<sup>8</sup>

Counsel further states that CIS' interpretation of "B.S. or foreign equivalent" excludes degree equivalencies based on a combination of education and experience, which is contrary to the interpretation of the term in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK that "it is the employer, working under the supervision and direction of OED and DOL that establishes the requirements for the position."

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<sup>5</sup> EDGE states that a Secondary School Certificate/School Leaving Certificate "represents attainment of a level of education comparable to less than completion of senior high school in the United States."

<sup>6</sup> The record contains copies of several training certificates awarded to the beneficiary from Oracle Education, and IBM Global Services for various computer related training courses. The certificates would not represent any educational equivalency.

<sup>7</sup> We additionally note that the rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5).

<sup>8</sup> Based on the information provided through EDGE, the beneficiary's "Diploma" should have been considered as one year of university credit, and not two years.

The labor certification as “drafted” by the employer, and as approved by DOL states that the position requires the individual to have a Bachelor’s degree based on four years of study or the foreign equivalent thereof. As the beneficiary is from India, a “foreign equivalent” of a U.S. Bachelor’s degree might for example be a Bachelor of Engineering or Bachelor of Technology degree in the requisite field of study based on four years of education.<sup>9</sup> A Bachelor of Engineering or Bachelor of Technology degree would be a single source equivalent degree. In contrast, the petitioner asserts that the beneficiary has the “equivalent” of a U.S. bachelor’s degree, which is not based on one program of study, but instead based on the combination of education and experience. The petitioner did not provide for any such combination on the Form ETA 750. Further, as noted above, in *Snapnames.com, Inc. v. Michael Chertoff*, CV 06-65-MO, the labor certification specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at \*11-13.

Related to these issues is the question of how the position’s actual minimum requirements were expressed to DOL and advertised to U.S. workers, and whether a U.S. worker with the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position.

Counsel provided in its RFE response to CIS that:

Although [the beneficiary] does not possess a traditional Bachelor of Science degree in computer science, [the petitioner] was aware of that and mindful that many professionals in the IT industry do not have the traditional degree. Therefore, [the petitioner] would consider a candidate to have met the education requirement as long as the candidate possesses either a US degree, a foreign equivalent degree, or an equivalent of an degree [sic] based on education and professional experience obtained either in the US or overseas.

The petitioner additionally provided a statement in response to the RFE that:

Because the position is in the field of computer science, we recognize that many professionals do not have traditional degrees in the field. Therefore, we also accept candidates who, through both education and experience, attain the equivalent of a bachelor’s degree. We feel that we expand the potential pool of applicants by accepting candidates who either have the requisite degree, a foreign equivalent degree, or an equivalent of a degree based on education and professional experience obtained in the US or overseas.”

Along with the appeal, the petitioner submitted a copy of the recruitment conducted underlying the labor certification. The submitted materials contain a copy of an ad placed in a computer journal, which provided that the position required: “a B.S. or foreign equivalent in Computer Science or related field;” a copy of a “job bank” posting listed on “America’s Job Bank” and required: “a B.S. or foreign equivalent in Computer Science or related field;” and a posting notice, which listed the requirements as “B.S. or foreign equivalent.”

Despite the petitioner’s expressed intention that it would consider candidates without a bachelor’s degree, but with the equivalent in education and experience, we would not conclude that the petitioner expressed that intention clearly to any U.S. candidates in its recruitment efforts. All the recruitment listed that a “B.S. or

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<sup>9</sup> EDGE considers a Bachelor of Technology or Bachelor of Engineering degree from an appropriate Indian school to be the equivalent of a U.S. Bachelor’s degree.

foreign equivalent” was required. The recruitment did not indicate that it would accept a combination of education and/or experience in any of the print ads, or online sources of recruitment.

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 as it is inconsistent with the actual practice at DOL. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree, whereas the classification sought in this matter does.

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

Significantly, when DOL raises the issue of the alien’s qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL’s certification of an application for labor certification does not bind CIS 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.

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, CIS must examine “the language of the labor certification job requirements” in order to determine what the petition’s beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to “examine the certified job offer *exactly* as it is completed by the prospective employer.” *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS’s interpretation of the job’s requirements, as stated on the labor certification must involve “reading and applying *the plain language* of the [labor certification application form].” *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification. While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on CIS, the reasoning in those cases runs counter to Circuit Court decisions that are binding on CIS, and the reasoning is inconsistent with the actual labor certification process before DOL.

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

Further, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750. The petitioner specifies that a bachelor’s degree is required, and the certified Form ETA 750 does not allow for meeting the degree requirement through any equivalency, so the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

Further, although not raised in the director’s decision, the petition should have been denied based on the petitioner’s failure to demonstrate that it had the ability to pay the beneficiary the proffered wage.<sup>10</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate its 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 CFR § 204.5(d). The priority date in the instant petition is July 25, 2002.

First, in determining the petitioner’s ability to pay the proffered wage during a given period, Citizenship & Immigration Services (CIS) will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner’s ability to pay the proffered wage. On Form ETA 750B, signed by the beneficiary on July 18,

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<sup>10</sup> The petitioner notes that the decision contains one sentence regarding the petitioner’s ability to pay, which is likely in error: “In view of the fact that the petitioner has not established that he can pay the beneficiary the proffered wage, the petition is hereby denied.” However, the prior portion of the decision discusses the beneficiary’s education, and the petitioner’s failure to establish that the beneficiary met the qualifications of the certified labor certification.

2002, the beneficiary listed that he has been employed with the petitioner since February 2001. The petitioner provided the following evidence of wage payment: copies of pay statements for the pay period ending October 21, 2005, and October 30, 2005. The pay statements showed a rate of pay of \$3,827.09, and year-to-date payments in the amount of \$84,195.98 as of October 30, 2005. While the proffered wage listed is \$85,000, and the pay evidence would demonstrate the petitioner's ability to pay the proffered wage in 2005, the petitioner did not provide any W-2 statements or other evidence to demonstrate its ability to pay in the year of the priority date, 2002, or for 2003, or 2004.

While the petitioner did submit its annual report, the annual report does not address the petitioner's financials and, therefore, does not address the petitioner's ability to pay the proffered wage and is insufficient to evidence the petitioner's ability to pay. Further, the petitioner did not provide audited financial statements or its tax returns to demonstrate its ability to pay the proffered wage. As the record lacks the evidence prescribed by regulation to demonstrate the petitioner's ability to pay for 2002, 2003, and 2004, the petitioner has not demonstrated its ability to pay.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification, and further failed to demonstrate its ability to pay the proffered wage. Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.