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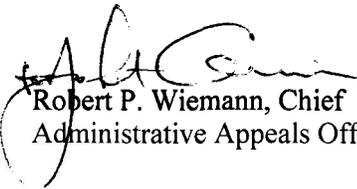
FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 23 2008
WAC-05-142-52449

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

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

ON BEHALF OF PETITIONER:
[Redacted]

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


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner operates a precision machine shop and seeks to employ the beneficiary permanently in the United States as a computer programmer. 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).¹

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

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

On September 12, 2005, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not establish that the beneficiary had the required Bachelor’s degree or foreign equivalent degree in Computer Information Systems as listed on the certified labor certification. The petitioner appealed to the AAO.

On November 21, 2007, the AAO director issued an RFE, which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position offered to the public in its labor certification advertisements. The petitioner responded.

On appeal, counsel contends that CIS is in error, and that evaluation submitted established that the beneficiary has the required degree to meet the requirements as listed on Form ETA 750.

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).

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

The proffered position requires a four-year bachelor's degree, and two years of prior experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. 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 22, 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 22, 2008).² 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 issued by a technical school, and has computer related experience. Thus, the issues are whether the beneficiary's 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

² 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.

diploma. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

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

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

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

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

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

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

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).³ *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

³ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

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

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

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

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

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as 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 provides:

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

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

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

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

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

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

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

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

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

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

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

from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

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

The key to determining the job qualifications is found on Form ETA-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 computer programmer provides:

Program CAD/CAM software for computerized machine operation in CNC environment. Read blue print and hardware interface for windows set-up. Creation of tool-paths required in the process of machining and design of fixtures.

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: 6 years; High School: 6 years; College: 4 years; College degree: “Bachelor;”
Major Field Study:	Computer Information Systems.
Experience:	2 years in the position offered, as a Computer Programmer.
Other special requirements:	None listed.

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: Escuela Normal Superiore de Profesorados, Argentina; Field of Study: Computer System Analyst; from March 18, 1986 to March 1988, for which he received a Certificate.

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

Evaluation One:

- Evaluation: Josef Silny & Associates, Inc., International Education Consultants, Coral Gables, Florida.
The evaluation considered the beneficiary's education and work history. The beneficiary "received the degree of Programmer Analyst and Computer Systems Analyst in July 1990." He completed his studies at the Higher National Normal School of Bragado-Province, Buenos Aires, Argentina.
- The evaluation further considered the beneficiary's employment: he was employed by the Cardiovascular Center Mercedes, part-time, between 8 to 15 hours a week, as an Analyst/Programmer, and he worked for the Sys Corporation from August 1990 to September 1993 [hours unstated] as a Programmer/Analyst.
- The evaluator concluded based on the beneficiary's education and work experience that the beneficiary had the equivalent of a bachelor's degree with a major in Computer Information Systems based on the beneficiary's positions of "broad . . . scope requiring knowledge typically achieved in a baccalaureate program," the professional nature of his responsibilities, his record of "sustained and growing competence in business areas that in the U.S. are normally staffed by professional programmer analysts possessing university degrees," and his formal education.
- The evaluator concluded that the beneficiary's studies were equivalent to three-years of education at an accredited college or university in the U.S., which combined with four years and six months of work experience in computers (based on three years of experience equal to one year of university studies) would be the equivalent of a bachelor's degree in Computer Information Systems.

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. 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 C.F.R. § 214.2(h)(4)(iii)(D)(5). Nothing contained in the regulations related to the professional category parallels the nonimmigrant provision at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) that would allow CIS to interpret this matter differently.

On appeal, counsel provides that the beneficiary has the required education and is therefore a member of the professions. In support, he cites to two additional evaluations submitted on appeal.

Evaluation Two:

- Evaluation: Marquess Educational Consultants, London, England.
- The evaluator considered the beneficiary's degree: "Degree of Programmer Analyst and Computer Systems Analyst, Escuela Normal Nacional Superior de Bragado, July 1990."
- The evaluator explained the Argentinian education system: institutions whether public or private are autonomous, but can only offer a program when the national government, through the Ministry of Education, has approved the program. Further, the evaluator continues that the Argentine postsecondary education system is "sharply divided between 'academic' and 'vocational' paths in a way not found in the United States." The evaluator explains that as a result, there is a difference between "what are deemed university studies, and more technical courses that lead to qualifications that are similar to the bachelor's degrees in the United States conferred by some institutions accredited by the Distance Education and Training Council." In Argentina, computer studies are considered vocational education.
- The evaluator considers that based on the "Carnegie Unit" of measure, which provides that 15 classroom hours (50 minutes) equal 1 semester credit hour, the beneficiary's studies "exceeds the credit hour requirements for a U.S. bachelor's degree in Computer Information Systems at the University of Miami." He continues that a four-year bachelor's degree in Computer Information Systems from the University of Miami requires 120 credit hours, but that the beneficiary's degree would be based on 2592 contact hours and 172 credits.
- The evaluator provides that the beneficiary completed a diploma of Mechanical Technician in 1982, which is equivalent to a U.S. Associate's degree, or two years of school. The beneficiary then spread out coursework in computers between 1986 and 1990, which were narrowly focused in computer science, but also included general education requirements similar those required for a U.S. bachelor's degree. The evaluator continues in greater detail: The issue of acceptance of foreign first degrees extending over three years rather than four in the United States is one which is coming to prominence in credential evaluation as the Bologna process is introduced in Europe. It is generally accepted by foreign credential advisors in the United States that where the pre-university stage of compulsory education lasts for thirteen years (in the case of Argentina, divided into stages of 1 (at least) +9+3 leading to the Bachillerato (see http://www.unesco.org/iau/onlinedatabases/systems_data/ar.rtf) the apparent shortfall in the duration of some Argentine undergraduate degrees compared to the United States system is remedied, since the United States has only a twelve-year system leading to high school graduation, and the thirteenth year is regarded as providing the relevant eligibility for a three-year bachelor's degree.

....
Accordingly, the completion of at least thirteen years of pre-undergraduate study by Mr. Grebe is considered by us to compensate for the three-year duration of his degree.

....
We therefore conclude that there is substantial functional and academic equivalency between [the beneficiary's] credentials and a U.S. Bachelor of Science degree, and thus it is our opinion that they should be regarded as equivalent.

From the information provided, it is not clear that a “contact hour” would be the same or directly equivalent to a U.S. “credit hour.” In the Argentine system, students may spend more time in the classroom providing more “contact hours,” whereas the U.S. system calculates time spent studying outside the classroom into the credit hour determination.⁴ The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable. Further, the evaluation relies on a combination of the beneficiary’s studies as a mechanical technician, which also appear to be vocational, and the beneficiary’s studies in computer systems.⁵ As noted above, the Form ETA 750 was drafted to contemplate only an individual with a bachelor’s degree based on four years of education from one program of study.

The petitioner provided a third evaluation on appeal as follows:

Evaluation Three:

- Evaluation: Career Consulting International, Sunrise, Florida.
- The evaluator determined that the beneficiary had the equivalent of a U.S. regionally accredited bachelor of science degree in Computing.
- The evaluator made this determination based on the beneficiary’s studies at Escuela Normal Nacional Superior de Bragado.
- The evaluator considered the beneficiary’s coursework to be equivalent to 120 “Carnegie Units.” The evaluator explains that the Escuela Normal Nacional Superior de Bragado is an accredited institution of tertiary education. A student must complete course work within a core curriculum, a major area of concentration, and then pass required examinations. The evaluator provides that the beneficiary “was awarded a Bachelor of Science Degree in Computing from Escuela Normal Nacional Superior de Bragado.”
- The evaluator cites to UNESCO (the United Nations Education Scientific and Cultural Organization) and that UNESCO recommends that a 3 year Argentinian degree should be treated as the equivalent of a bachelor’s degree by all UNESCO members.⁶

⁴ U.S. students “are assumed to spend two hours of outside preparation for every 1 hour of lecture.” Robert A. Watkins, The University of Texas at Austin, “Assigning Undergraduate Transfer Credit: It’s Only an Arithmetical Exercise,” from http://www.handouts.aacrao.org/am07/finished/F034p_M_Donahue.pdf accessed February 19, 2008.

⁵ The beneficiary’s studies as a mechanical technician seem to form the basis for his thirteen years of pre-undergraduate study.

⁶ We note that the record of proceeding does not include the UNESCO report. Further, UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed July 22, 2008).

The evaluator assessed each of the beneficiary's courses to be equivalent to 8 credit hours each based on "contact hours" equated to "Carnegie Unit" hours. As discussed above, it is not clear that a "contact hour" would be the same or directly equivalent to a U.S. "credit hour." In the Argentine system, students may spend more time in the classroom providing more "contact hours," whereas the U.S. system calculates time spent studying outside the classroom into the credit hour determination.

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, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

The beneficiary was issued "El titulo de Analista Programador y Analista de Sistemas de Computacion," or as translated: the degree of Computer Programmer Analyst and Systems Analyst. EDGE provides that a "bachillier universitario, Analista, Tecnico, or Programador" degree would "represent the attainment of a level of education comparable to three to four years of university studies in the United States. Credit may be awarded on a course-by-course basis."

EDGE does not provide that such education would be equivalent to a bachelor's degree, and only that it may be equivalent to three or four years of study.

The first evaluation concluded that the beneficiary's studies were equivalent to three years of university study, which is consistent with the EDGE report. However, both the first and second evaluations do not demonstrate that the beneficiary met the educational requirements of the certified ETA 750 as they relied on a combination of education and experience, and secondly a combination of secondary and post-secondary education. The third evaluation seeks to equate contact hours and Carnegie Unit hours to reach an equivalency when it is not clear that the two measures are comparable.

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 education in combination with education, work experience, and/or training.

Additionally, the petitioner provided a letter from Escuela Normal Superior, which counsel asserts confirms that the degree of Computer Programmer "is accepted in Argentina as a Baccalaureate degree or its equivalent."

Specifically, the letter provides:

This letter is to confirm that, under the educational system of the Argentine Republic, the studies completed by [the beneficiary] are comprehensive courses at a Post Secondary Level, which are accepted by universities and comply with the minimum requirements to qualify him as a graduate professional pursuant to the Argentine law.

The degree of Computer Programmer Analyst and Systems Analyst issued by the Escuela Normal, qualify[ies] him as a skilled graduate throughout the territory of the Argentine Republic, to practice his profession without any need or requirement to complete further courses of studies in schools or universities.

As the second evaluation provides that computer course work is vocational, and the letter refers to the beneficiary as a "skilled graduate," we would not interpret the letter to mean that the beneficiary's degree is considered as a bachelor's degree, or equivalent. Rather, the beneficiary earned the degree issued for computer related studies, which would be accepted as credits for another university, or serve as the required education for that field in Argentina.

In response to the AAO's RFE, counsel submitted a certification from Escuela Normal Superior that the beneficiary had completed 2,400 hours of studies. This was calculated as 25 weekly hours for 32 weeks, which would be equivalent to 800 hours for each of the three years attended to reach the total hours of 2,400. Counsel asserts that the beneficiary would therefore have completed more hours than a U.S. student who took 15 credits per semester for eight semesters, or four years, which would equal 1,920 units.

As noted above, the Argentine system of study is based on completion of different hours and the measure of contact hours, time in class, would not be equivalent to U.S. credit hours. Rather, as provided by EDGE, the degree would be equivalent to three or four years of university credit. In the beneficiary's case, the petitioner submitted an evaluation by Josef Silny who determined that the beneficiary's studies would be equivalent to only three years of university credit, and not to a bachelor's degree.

Additionally, counsel provided a letter from a professor at Escuela Normal Superior explaining the program of study, that it includes study of theoretical foundations, specific individual technologies, and advanced studies in specific areas related to algorithms and processing. The professor provides that for entry into the program, the candidate should have a commercial baccalaureate of 12 years, or a Specialized Technical Baccalaureate of 13 years for entry.

Presumably the beneficiary's admission to the Escuela Normal Superior computer program was based on the beneficiary's prior completion of a Mechanical Technician degree. None of the evaluations address this point directly. However, the beneficiary's completion of the Mechanical Technician degree does not change the fact that the beneficiary's computer studies were assessed as equivalent to three years of study. The Form ETA 750 is not drafted to consider the studies in combination to obtain the equivalent of a degree.

Further, counsel questions reliance on EDGE as "inconclusive."

EDGE provides an objective resource to refer to, and in the present matter, the EDGE description of the beneficiary's educational equivalency is in conformance with the first evaluation that the petitioner submitted. While the petitioner has submitted two other evaluations, counsel has not asserted that the first evaluation was in error.

Related to this issue is the question of how the position's actual minimum requirements were expressed to DOL and advertised to U.S. workers, and whether a U.S. worker with the equivalency of a degree would have known that his or her combination of education and experience would qualify them for the position. The AAO issued an RFE to determine how the minimum requirements were expressed to U.S. workers.

In response to the RFE, the petitioner submitted a copy of the recruitment conducted underlying the labor certification. The submitted materials contain copies of ads placed in the Sunday, August 5, 2001, Friday, September 28, 2001, Sunday, November 18, 2001, December 23, 2001, January 20, 2002 Daily News,⁷ and an in-house posting notice. The Daily News ads list the requirements as: “Bachelor in Computer Information Systems,” and the internal posting notice lists “Bachelor degree or equivalent in Computer Information Systems.”

Based on the copies of ads submitted, the petitioner listed only “Bachelor in Computer Information Systems,” and did not list or equivalent, or equivalent in education, training and experience, or any variation thereof. Therefore, we would not conclude that the petitioner’s intent concerning the actual minimum requirements of the proffered position would include equivalency alternatives to a four-year bachelor’s degree.

Once again, we are cognizant of the recent holding in *Grace Korean*, which held that CIS is bound by the employer’s definition of “bachelor or equivalent.” In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary’s credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993) at 719. In this matter, the court’s reasoning cannot be followed as it is inconsistent with the actual practice at DOL. Regardless, that decision is easily distinguished because it involved a lesser classification, skilled workers as defined in section 203(b)(3)(A)(i) of the Act. 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 the Ninth Circuit Court of Appeals.

⁷ Ads for filing a labor certification would remain valid for six months prior to filing. As the labor certification was filed in March 2002, the ad placed in August 2001 would have expired for purposes of filing the labor certification.

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, run counter to Circuit Court decisions that are binding on CIS, and are inconsistent with the actual labor certification process performed by 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)(A)(ii) 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.

Even if the petition is considered under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750.⁸ As 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, 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. The petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified labor certification.

Further, although not raised in the director’s decision, the application should have been denied as well on the basis that the petitioner has not demonstrated its ability to pay the beneficiary the proffered wage. 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*, 299 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 petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner’s filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the

⁸ 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.

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).

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 either 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 March 11, 2002. The proffered wage as stated on the Form ETA 750 is \$32.44 per hour, which is equivalent to \$67,475.20 per year based on a 40 hour work week. The Form ETA 750 was certified on August 3, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on April 18, 2005. The petitioner listed the following information on the I-140 Petition: date established: 1972; gross annual income: \$2 million; net annual income: not listed; and current number of employees: 24.

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.

The beneficiary listed on Form ETA 750B, which he signed on February 20, 2002, that he has been employed with the petitioner since July 1999 in the position of a computer systems analyst.⁹ The petitioner provided the beneficiary's 2001 Form W-2,¹⁰ which showed wages in the amount of \$44,939, and the beneficiary's 2002 Form W-2, which showed the petitioner paid the beneficiary \$44,939.

⁹ The record of proceeding contains the beneficiary's individual Form 1040 for the years 2001, 2002, and 2003, which list the beneficiary's occupation as "quality control," and not as a computer programmer. While the petitioner is not required to employ the beneficiary in the petitioned for position until permanent residency, the listing of "quality control" on the beneficiary's Forms 1040 conflicts with his representations on Form ETA 750B that he was employed as a computer systems analyst. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 591-592.

¹⁰ As the priority date is March 11, 2002, the petitioner would need to show its continuing ability to pay the proffered wage from March 11, 2002 onward. The beneficiary's 2001 W-2 Form is, therefore, not required, but will be considered generally.

As the proffered wage is \$67,475.20 per year, the petitioner cannot demonstrate its ability to pay the beneficiary the proffered wage through wage payments alone. The petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage in 2002, and that it can pay the full wage for the years 2003, and 2004.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner did not submit its tax returns, any annual reports, or audited financial statements for any year. As the record contains no other evidence to demonstrate the petitioner's ability to pay, the petition should have been denied on this basis as well.

Additionally, the beneficiary appears to be related to the petitioner's president as they share the same surname, although the specific relationship, if any, is not clear from the record. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000). Unless this relationship was properly disclosed to DOL, the bona fides of the position may be in question.

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. If this matter is pursued further, the petitioner must clarify the relationship, if any, between the petitioner's president and the beneficiary of the petition. 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.