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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship
and Immigration
Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 25 2008
LIN-04-125-52655

IN RE: Petitioner:
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 Acting Director, Nebraska Service Center ("director"), denied the employment-based immigrant visa petition. The petitioner filed an appeal, which was late-filed. The director treated the late-filed appeal as a Motion to Reopen and Reconsider, and affirmed her prior decision. The petitioner then appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner is an information technology and development company. The petitioner seeks to employ the beneficiary permanently in the United States as a Software Engineer. 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 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 obtain permanent residence and 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.

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).

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[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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on April 16, 2003. The Form ETA 750 was certified on November 26, 2003, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 26, 2004.

On June 1, 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 as listed on the certified labor certification. The petitioner appealed to the AAO, but the appeal was not timely filed and the director treated the appeal as a Motion to Reopen and Reconsider. The director dismissed the petitioner's Motion to Reopen and affirmed her prior decision. The petitioner appealed that decision to the AAO.

On October 4, 2007, the AAO 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 did not respond.

On appeal, counsel argues that the beneficiary has the foreign equivalent of a Bachelor's degree in Management Information Systems, and would, therefore, be qualified for the position.

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 Master's degree and two years of experience, or a bachelor's degree, and five years of prior experience. Because of those requirements, the proffered position is for a professional, [2] but might also be considered under the skilled worker category. If considered under the skilled worker category, the petitioner would need to demonstrate the beneficiary meets the requirements of that category. DOL assigned the occupational code of 030.162-010, "Software Engineer," to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database, ONET, 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."[3] Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

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[2] Section 101(a)(32) of the Act provides: "The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." This section does not include information technology or computer related positions in the category of professionals, or professional positions.

[3] DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O*Net. Under the DOT code, the position of software engineer has a SVP of 8 allowing for four or more years of experience.

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 Bachelor of Commerce degree based on three years of study as well as an "Advanced Diploma" in Information Technology, and a "Diploma" in Management. 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 other education and work experience in addition to his initial degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

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

> (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
>
> (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[4] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
>
> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

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

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

"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 meet the requirements stated by the petitioner on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which states, in pertinent part:

> *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....

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 Software Engineer provides:

Design, Develop, Implement and Administer the next generation IP platforms using tools and backend Netware and Windows NT databases, to implement the next generation IP platforms such as Oracle and UNIX, TCP/IP.

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: not listed; College degree: "Master's degree"
Major Field Study:	Engineering (any), Computer Science, Math, or Science.
Experience:	2 years in the position offered, as a Software Engineer, or 2 years in the related occupation of Computer Network Consultant, Assistant Manager (Networking), Network Support Engineer.
Other special requirements:	Will Consider Bachelor's Degree with 5 years of experience in the job offered or in any related occupation.

To determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) Lal Bahadur Shastri Institute of Management, R.K. Puram, New Delhi, India; Field of Study: Management; from July 1997 to June 2000, for which he received a Diploma; (2) Centre of IT & Software Learning, New Delhi, India; Field of Study: Information Technology; from June 1992 to August 1994, for which he received an Advanced Diploma; and (3) P.G.D.A.V. College, New Delhi, India; Field of Study: Commerce; from April 1991 to March 1994, for which he received a Bachelor's degree.

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:

- Evaluator: International Credentials Evaluation and Translation Services, New York, New York.
  The evaluation considered the beneficiary's educational documents, including his Bachelor of Commerce degree program completed at the University of Delhi.
  The evaluator states that to complete the three year program, the first and second years would include core curriculum classes in English, Mathematics, the Social Sciences and the Sciences. The

beneficiary additionally completed specialized coursework in the areas of Mathematics, Commerce, and related subjects.

- Completion of the Bachelor of Commerce program would be equivalent to the completion of three years of academic study toward a bachelor's degree at an accredited institution in the United States.
- The evaluator additionally considered the beneficiary's Advanced Diploma in Corporate Information Systems from the Centre for Information Technology and Software Learning, which he received in 1994.
- The evaluator states that students in the Advanced Diploma program complete "sufficient specialized coursework in Advance Computer Organization & Architecture, Systems Analysis, Programming in MS DOS, Data Communication & Networking, Advance Applications in "C", Concept of OOPS in "C++", ORACLE, Management Information Systems, Troubleshooting in Hardware and Software and other related courses."
- Based on the specialized coursework completed, the evaluator states that the coursework would be equivalent to "the completion of one year of specialized academic coursework in Computer Science in a Bachelor of Science Degree program at an accredited institution of tertiary education in the United States."

The director denied the petition as the petitioner did not provide evidence that the beneficiary had a four-year U.S. bachelor's degree, or had the foreign equivalent of a U.S. bachelor's degree based on one program of study. The labor certification did not specify that the degree requirement could be met through a combination of education, and/or experience.

The petitioner submitted a second evaluation on appeal:

Evaluation Two:

- Evaluator: International Credentials Evaluation and Translation Services, New York, New York.
- The evaluation considered the beneficiary's educational documents, including his Bachelor of Commerce degree program completed at the University of Delhi.
- The evaluator states that to complete the three year program, the first and second years would include core curriculum classes in English, Mathematics, the Social Sciences and the Sciences. The beneficiary additionally completed specialized coursework in the areas of Mathematics, Commerce, and related subjects.
- Completion of the Bachelor of Commerce program would be equivalent to the completion of three years of academic study toward a bachelor's degree at an accredited institution in the United States.
- The evaluator additionally considered the beneficiary's Post-Graduate Diploma in Management (Information Technology) from Lal Bahadur Shastri Institute of Management program.
- The evaluator states that the Lal Bahadur Shastri Institute is regionally accredited in India, and that the beneficiary would have satisfied similar requirements to the completion of specialized academic coursework in Management Information Systems in a U.S. Bachelor of Business Administration degree program at an accredited institution of study in the U.S.
- Based on the specialized coursework completed at the University of Delhi and Lal Bahadur Shastri Institute, the evaluator concludes that the beneficiary would have the equivalent of a Bachelor of Business Administration Degree in Management Information Systems from an accredited institution of tertiary education in the United States.

The second evaluation similarly relied on a combination of educational programs to conclude that the beneficiary has a degree in a field of study not listed as a required field on Form ETA 750.

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."

EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science degree awarded in India represents the attainment of a level of education comparable to two or three years of university study in the United States. The beneficiary's diploma indicates that the program was three years of study.

The beneficiary further completed a post-graduate diploma in management at Lal Bahadur Shastri Institute of Management, in Delhi, India. The evaluation that the petitioner submitted does not address this program of study. According to EDGE, attainment of a post-graduate diploma following a three-year bachelor's degree would represent attainment of education comparable to a bachelor's degree. The National Board of Accreditation (NBA), http://www.nba-aicte.ernet.in/nmna.htm accessed on July 25, 2008, indicates that the Lal Bahadur Shastri Institute of Management in Delhi, India was accredited on May 4, 2007 for a time period to last three years. The school, however, was not accredited at the time that the beneficiary completed his post-graduate diploma. Further, management is not a required field of study on the labor certification. Therefore, the beneficiary's completion of this diploma would not individually demonstrate that he met the requirements of the certified labor certification.

The beneficiary further completed an "Advanced Diploma" at the Centre of IT & Software Learning, New Delhi, India. Evidence in the record provides that the document issued was a diploma, however, the Centre of IT & Software Learning, New Delhi, India does not appear to be an accredited institution based on a review of the NBA website. As the program is unaccredited, its comparable U.S. equivalency cannot be assessed. None of the beneficiary's programs of study would be equivalent to either a bachelor's degree or master's degree as required by the certified labor certification. The petitioner did not specify on the Form ETA 750 that the beneficiary could meet the degree requirement through a combination of educational programs and training.

On appeal, counsel asserts that the beneficiary has a foreign equivalent of a bachelor's degree based on his three-year bachelor's degree combined with his Advanced Diploma from the Centre for Information Technology & Software Learning. Counsel cites to the educational evaluation of the beneficiary's studies that concludes his education is the equivalent of a bachelor's degree in management information systems. The petitioner, however, did not draft Form ETA 750 to accept equivalent degrees. Further, management information systems is not a required field of study listed on the certified Form ETA 750.

Counsel cites to the beneficiary's total education: his three-year Bachelor of Commerce degree from the University of Delhi; his Postgraduate Diploma in Computer Applications from the Centre for Information Technology and Software Learning; his "Advanced Diploma" from the Centre for Information Technology

and Software Learning; a three-year Post-Graduate Diploma in Management with specialization in Information Technology from Lal Bahadur Shastri Institute of Management; and six different software certifications from Cisco, Microsoft, and Novell collectively.

We note that Form ETA 750 did not indicate that the beneficiary received both a Post-graduate Diploma in Computer Applications and an Advanced Diploma from the Centre for Information Technology and Software Learning. Further, the evaluation does not separately address these credentials, but rather found that one year of specialized studies could be accorded. As EDGE does not provide that the Centre for Information Technology and Software Learning is an accredited institution in India, the AAO disagrees with this conclusion. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

Additionally, the AAO notes that the first evaluation the petitioner submitted did not consider or provide any equivalency for the three-year Post-Graduate Diploma in Management with specialization in Information Technology from Lal Bahadur Shastri Institute of Management. The second evaluation did not consider the beneficiary's studies at the Centre for Information Technology and Software Learning. Accordingly, both evaluations do not consider all of the beneficiary's education relevant, and the two evaluations are inconsistent. The beneficiary's certificates from Cisco and Microsoft would represent professional training, but would not have any educational equivalency. None of the evaluations referenced the beneficiary's additional training certificates, or assigned any educational value to those courses.

Counsel asserts that the government of India considers the beneficiary's Diploma from the Lal Bahadur Shastri Institute of Management to be equivalent to a Master's degree in Business Administration. The second evaluation that the petitioner submitted did not assess the beneficiary's degree to be the U.S. equivalent of an M.B.A. Further, business administration is not listed as a required field of study on Form ETA 750.

Counsel further contends that prior letters from CIS allow for the combination of degrees. In support, counsel submitted copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from Efren Hernandez III of the legacy INS Office of Adjudications (now CIS) to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). At the outset, we note that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi,* 22 I&N 169, 196-197 (Comm. 1968); *see also,* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

In his January 2003 letter, [redacted] addresses issues related to I-140 petitions for members of the professions holding advanced degrees. The [redacted] letter addresses a different preference category than the petition under consideration here. [redacted] states in the letter that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree. [redacted] further notes that while "five years of progressive experience in the specialty," in 8 C.F.R. § 204.5(k)(2), can be obtained outside the U.S., he further provides that "in this context education and experience many not be combined to satisfy the degree requirement. An actual degree is required."

Similarly, the July 2003 letter addresses issues related to I-140 petitions for members of the professions holding advanced degrees. "You ask if the completion of a three-year university course of study resulting in a bachelor's degree, followed by completion of a PONSI-recognized post-graduate program may be deemed to be the equivalent of a four-year U.S. bachelor's degree. In my opinion, such a combination may be deemed the equivalent of a four-year U.S. bachelor's degree." We further note that [redacted] adds a caveat regarding some of his interpretations in the letter, "While it is my personal opinion that this should be the case, this is not currently contemplated in the regulations and I cannot state that a case should currently be treated this way."

Counsel argues that 8 C.F.R. § 204.5(k)(2) would only prohibit combining professional studies, training or experience to show the equivalent of a bachelor's degree, and that the [redacted] letters should apply to the situation at hand.

As noted above, the letters are not binding, and they were written in reference to a different preference category. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree. Had the petitioner presented a singular post-graduate Master's degree in one of the relevant fields of study, such as a Master's degree in Engineering, Computer Science, or Mathematics, this would have been accepted to meet the requirements. In the case at hand, the beneficiary's post-graduate diploma in Business Administration would not qualify him for the position based on that degree alone. The petitioner instead seeks to rely on the combination of the beneficiary's post-graduate work with his undergraduate studies, which fails to meet the singular degree requirement, and combined results in fields of study not listed on the ETA 750.

Counsel argues that the beneficiary qualifies based on a combination of education, or that the beneficiary's education "combined with the work experience with fortune 500 companies . . . is aptly qualified for the position."

The petitioner could have defined Bachelor's or "equivalent" on the Form ETA 750 to specify what the petitioner would accept as "equivalent," such as the equivalent in education, training, or experience, but did not do so. Had the petitioner defined equivalency, the position requirements would have been clear to any potential U.S. workers who might have applied for the position.

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. The petitioner did not respond. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify as a professional under 8 C.F.R. § 204.5(l)(2), and section 203(b)(3)(A)(ii). In viewing the beneficiary's education under the skilled worker category, the petitioner cannot demonstrate that the beneficiary meets the educational requirements of the certified labor certification. For these reasons, the petition may not be approved.

Further, although not raised in the director's decision, the petition should have been denied based on the petitioner's failure to demonstrate that the beneficiary had the required work experience and that it had the 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*, 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.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The job offer required the following experience:

Experience: 2 years in the position offered, Software Engineer, or 2 years in the related occupation of a Computer Network Consultant, Assistant Manager (Networking), Network Support Engineer.

Other special requirements: Will consider Bachelor's degree with 5 years of experience in the job offered or in any related occupation.

As the petitioner submitted an evaluation seeking to show that the beneficiary had a Bachelor's degree, the petitioner would need to demonstrate that the beneficiary had five years of prior experience in the position offered, or in a related occupation.

On the Form ETA 750B, the beneficiary listed his relevant experience as: (1) the petitioner, Woodbridge, New Jersey, from November 2001 to present (date of signature: April 15, 2003), position: Computer Network Consultant; (2) Samtech Infonet Ltd., New Delhi, India, from December 1996 to November 2000, Assistant Manager/Lead Engineer (Networking); (3) Newzen System Pvt. Ltd., New Delhi, India, from March 1995 to October 1996, System Network Support Engineer.

A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3), which states:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers

giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

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

As evidence to document the beneficiary's qualifications, the petitioner submitted the following letters:

1. Letter from Director, Samtech InfoNet Limited, New Delhi, India, dated November 17, 2000;
   Dates of employment: December 29, 1997 to November 4, 2000;
   Title: "Assistant Manager, Customer Support;"
   Job Duties: not listed.

2. Letter from Proprietor, Newzen Systems, New Delhi, India, undated; Dates of employment: March 1996 to October 1997;
   Title: "Sr. System Engineer;"
   Job Duties: not listed.

Neither letter provides a description of the beneficiary's job duties as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). More specifically, the beneficiary's title "Assistant Manager, Customer Support" is vague and could relate to job duties unrelated to those of a software engineer.

On appeal, although not addressed in the decision, the petitioner submitted the following additional letters to document the beneficiary's experience.

3. Letter from [redacted], Associate Director, Information Management Quality Assurance, Bristol-Myers Squibb, New Jersey, dated August 27, 2004;
   Dates of employment: "began his first contract assignment . . . on August 20, 2001."[5] No end date listed;
   Title: "senior validation contractor;"
   Job Duties: "qualify the infrastructure of a system." The beneficiary was assigned to other infrastructure qualification projects.

4. Letter from Managing Director, Michelin India Pvt. Ltd., New Delhi, India, dated November 10, 2000;
   Dates of employment: August 1999 to September 2000;
   Title: "Network Administrator. His services were hired . . . from Samtech Infonet Ltd."

[5] The beneficiary lists that he began employment with the petitioner in November 2001. It is unclear from the record whether the beneficiary worked for another company that assigned him to work at Bristol-Myers, and whether he continued that assignment after he began employment with the petitioner.

Job Duties: "He handled all issues related to setting up & maintaining the hardware, software and network of the IT division. He was responsible for IT network setup for IT & Telecom division, which consist of HP LH3 NetWare 4.11 server, NT W/S clients, Wingate Proxy and Web-based CCMail on intranet."

5. Letter from Director, R.S. Communication Network Pvt. Ltd., New Delhi, India, dated July 1, 1996;
Dates of employment: January 1995 to February 1996;
Title: "Customer Support Executive."
Job Duties: not listed.

6. Letter from Director, Centre for Information Technology & Software Learning, New Delhi, India, dated January 1, 1995;
Dates of employment: April 25, 1994 to December 30, 1994;
Title: "Faculty Member."
Job Duties: Not listed.

Of the letters submitted on appeal, letters five and six similarly fail to provide a description of the beneficiary's job duties as required by 8 C.F.R. § 204.5(l)(3)(ii)(A). The beneficiary's titles "Customer Support Executive" and "Faculty Member" do not seem related to the position offered. The third letter does not provide an end date to the beneficiary's work at Bristol Myers, and therefore, would not confirm the total length of his experience. As the priority date is April 16, 2003, the most experience the letter would document would be approximately one-year and one-half from August 2001 until the priority date. A petitioner must establish eligibility at the time of filing. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The fourth letter would confirm one year of experience.

In reviewing the six letters together, in total, as four of the letters do not meet the requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), the petitioner cannot demonstrate that the beneficiary has the required five years of prior experience to meet the requirements of the certified labor certification, and the petition should have been denied on this basis as well.

The petition also should have been denied based on the petitioner's failure to demonstrate that it had the ability to pay the beneficiary the proffered wage.

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 priority date in the instant petition is April 16, 2003. The proffered wage as stated on the Form ETA 750 is $86,694 per year based on a 40 hour work week. The petitioner listed the following information on the I-140 Petition: date established: 1998; gross annual income: $5 million; net annual income: not listed; and current number of employees: 50.

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. In the instant case, on the Form ETA 750B, signed by the beneficiary on April 15, 2003, the beneficiary listed that he has been employed with the petitioner since November 2001. As the petitioner did not submit any evidence of prior wage payment to the beneficiary, the petitioner is unable to establish its ability to pay the beneficiary the proffered wage based on prior wage payment.

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).

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The record demonstrates that the petitioner is a C corporation. For a C corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. Line 28 demonstrates the following concerning the petitioner's ability to pay the proffered wage:

Tax year	**Net income or (loss)**
2003[6]	not submitted
2002	$1,353

Based on the foregoing, the petitioner cannot establish its ability to pay the beneficiary the proffered wage from the time of the priority date onward.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18, or, if filed on Form 1120-A, on Part III. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets, and, thus, would evidence the petitioner's

[6] Based on the date of filing the I-140, the petitioner's 2003 federal tax return may not have been available.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

ability to pay. The net current assets, if available, would be converted to cash as the proffered wage becomes due.

Tax year	Net current assets
2003	not submitted
2002	$71,081

Based on the foregoing, the petitioner would not be able to pay the proffered wage from its net current assets. Additionally, we note that CIS records reflect that the petitioner has filed immigrant petitions for multiple beneficiaries.[8] The petitioner would need to establish that it could pay the proffered wage for each respective beneficiary for the duration of the petitions validity periods for the nonimmigrant workers, and from the time of the priority date onward until each obtains permanent residence for the beneficiaries of its immigrant petitions.

The petitioner additionally submitted bank statements for the time period March 1, 2003 through June 30, 2003. First, we note that bank statements, or information related to bank accounts are not among the three types of evidence listed in 8 C.F.R. § 204.5(g)(2) as required to establish a petitioner's ability to pay a proffered wage. This regulation allows for consideration of additional material such as bank accounts "in appropriate cases." Further, as a fundamental point, the petitioner's tax returns are a better reflection of the company's financial picture, since tax returns address the question of liabilities. Bank statements do not reflect whether the petitioner has any outstanding liabilities. The limited bank statements submitted would reflect the amount that the petitioner had in its accounts from March 1, 2003 through June 30, 2003, and would not demonstrate the petitioner's ability to pay from April 2003 to the present.

Accordingly, the record does not contain evidence that the petitioner can pay the proffered wage for the instant beneficiary in addition to the wages of all its sponsored beneficiaries from the time of the priority date in April 2003 onward. The petition should have been denied on this basis as well.

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.

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[8] Further, CIS records reflect that the petitioner has filed for a large number of H-1B workers. The exact amount of currently employed H-1B workers is unclear. The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.