



U.S. Citizenship
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FILE:

WAC-06-130-51187

Office: TEXAS SERVICE CENTER

Date:

MAR 06 2008

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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


Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is an international nurse recruitment company. It seeks to employ the beneficiary permanently in the United States as a management analyst (business manager). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as required on the Form ETA 750. Accordingly, the director denied the petition on June 14, 2006.

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.

On appeal counsel asserts that with "Bachelor's Degree or equivalent" the petitioner allowed for an equivalency of the degree and not necessarily the four-year degree itself and that the submitted evaluation showed that the beneficiary's three-year degree from Mangalore University is equivalent to a four-year bachelor's degree in business administration from an accredited university in the United States. However, the record does not contain any evidence showing that the beneficiary's three-year degree from India is the equivalent to a U.S. bachelor's degree, or that the petitioner specified on the Form ETA 750 that the minimum academic requirements of a bachelor's degree in engineering, computer science or mathematics might be met through a combination of lesser degrees and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. In order to determine whether the instant petition could be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on November 21, 2007 granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. The AAO received the response on January 18, 2008.

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

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

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

The original Form ETA 750 was accepted on July 24, 2002 and approved on February 17, 2006. The approved labor certification in the instant case requires a Bachelor's Degree or equivalent in business administration. DOL assigned the occupational code of 161.167-010, management analyst, the closest type of occupation as 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/crosswalk/DOT?s=161.167-010+&g+Go> (accessed February 25, 2008) and its extensive description of the position and requirements for the position most analogous to programmer analyst position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to programmer analyst 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/13-1111.00#JobZone> (accessed February 25, 2008). 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.

Therefore, a management analyst position could be properly analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.² In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A) of the Act by checking box e in Part 2 of the I-140 form. The box e is for either a professional or a skilled worker. Therefore, Citizenship and Immigration Services (CIS) will examine the petition under the professional and skilled worker categories, which requires a showing that the alien has two years of training or experience and meets the specific

² A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that management analyst positions are not included in this section.

education, training, and experience terms of the job offer on the alien labor certification application. 8 C.F.R. § 204.5(l)(3)(ii)(B).

For the professional 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is July 24, 2002. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended Mangalore University in Mangalore, India in the field of "Commerce" from June 1987 to January 1991, culminating in the receipt of a "Bachelors Degree." He provides no further information concerning his educational background on this form, which is signed by the beneficiary under penalty of perjury that the information was true and correct.

In corroboration of the beneficiary's educational background, the petitioner provided a copy of the beneficiary's Bachelor of Commerce degree and transcripts from Mangalore University, Diploma in Systems Management and transcripts from the National Institute of Information Technology (NIIT) in India, and evaluation reports from U.S. Credentialing, Inc., and Westwood Evaluations.

The beneficiary possesses a three-year bachelor's degree from Mangalore University, and a diploma from NIIT. The record does not contain any evidence showing that the diploma from NIIT is a degree. In determining whether the beneficiary possessed a single U.S. bachelor's degree or a foreign equivalent degree in business administration, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, <http://www.aacrao.org>, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records

management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” EDGE provides a great deal of information about the educational system in India. While it confirms that a bachelor of commerce degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

On appeal, the petitioner asserts that the beneficiary’s three-year bachelor’s degree is equivalent to a U.S. bachelor’s degree according to private credential evaluations from U.S. Credentialing, Inc. and Westwood Evaluations, which evaluate the beneficiary’s three-year bachelor of commerce degree from the Mangalore University in India as the equivalent of a bachelor’s degree in business administration from an accredited institution of higher education in the United States. However, a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary’s degree from India cannot be considered a foreign equivalent degree. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. 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)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor’s degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director’s ground denying the petition under professional category must be affirmed.

As previously noted, the AAO will also discuss whether the beneficiary would meet the educational requirements set forth on the Form ETA 750 and thus be qualified for the proffered position as if the petitioner had requested the proffered position be analyzed under the skilled worker category.

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

While no single degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, and any other requirements of the individual labor certification.”

The certified Form ETA 750 requires a bachelor’s degree or equivalent in business administration as the minimum educational requirement for the proffered position and the evidence submitted in the record shows that the beneficiary’s education includes a three-year bachelor of commerce degree from Mangalore

University and a one-year diploma in systems management from NIIT. Thus, the issues are whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's diploma in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered position 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 Act 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). *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 (now CIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, 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.

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 CIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at 17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated.

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

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

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

14. EDUCATION	
Grade School	6 [years]
High School	6 [years]
College	4 [years]
College Degree Required	Bachelors Degree or equivalent
Major Field of Study	Business Administration

The applicant will also supervise three (3) employees. Item 15 does not reflect any special requirements.

Moreover, 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).

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

matter, the court's reasoning cannot be followed as it is inconsistent with the actual practice at DOL. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree.

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

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

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

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

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA-750 properly represents the job qualifications for the position offered. DOL is not reaching a decision as to whether the alien is qualified for the job specified on the Form ETA 750, a determination reserved to CIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with a federal court.

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 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.

The regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." As noted previously, the certified Form ETA 750 requires a Bachelor's degree or equivalent in business administration. The petitioner clearly required a bachelor's degree or equivalent in business administration, however, the labor certification does not further define the degree equivalent. Nor does the certified labor certification demonstrate that the petitioner would accept a combination of degrees that are individually all less than a U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. The employer, now the petitioner, did not specify on the Form ETA 750 that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees, diplomas, and/or quantifiable amount of work experience. It is noted that the Form ETA 750 shows that after the initial filing the employer defined the bachelor's degree "equivalent" as "evaluation from U.S. Credentialing stating that the alien's education and experience is 'comparable to a BA degree' ..." on June 16, 2003, however, that definition was deleted, and the DOL regional office approved the correction on February 17, 2006.

Furthermore, the AAO's RFE dated November 21, 2007 requested the petitioner to submit evidence showing that the petitioner specified that the minimum academic requirements of a bachelor's degree might be met through a combination of lesser degrees and/or quantifiable amount of work experience in the petitioner's labor market test. The AAO specifically requested evidence demonstrating that the petitioner communicated its express intent about the actual minimum requirements of the proffered position to DOL during the labor certification process. The AAO received the response on January 18, 2008. Counsel submits recruitment efforts conducted related to the relevant labor certification, including the internal posting notice, newspaper advertisements and internet job posting. All these recruitment documents require "Bachelors Degree in Business Administration or equivalent." The record does not contain any documents indicating that the employer would accept a combination of lesser degree(s) and quantifiable amount of work experience as an "equivalent" to meet the minimum educational requirement of a bachelor's degree in business administration.

The AAO does not find that US workers were on notice that a combination of lesser degree(s) and work experience as an equivalent would meet the minimum educational requirement of a bachelor's degree in business administration. Therefore, the petitioner failed to demonstrate its intent to accept a combination of lesser degree(s) and work experience as an equivalent of a bachelor's degree in business administration on the Form ETA 750 and the relevant recruitment materials.

Additionally, the court in *Snapnames.com, Inc.* 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. See *Snapnames.com, Inc.* at 11-13. In the instant case, the petitioner failed to submit any documentary evidence showing that the petitioner ever defined or specified that the bachelor's degree requirement might be met through a combination of education and quantifiable amount of work experience during any stage of the labor certification application processing.

As previously discussed, the beneficiary holds a three-year bachelor of commerce degree, which alone represents attainment of a level of education comparable to three years of university study in the United States, but cannot be deemed as an equivalent of a U.S. bachelor's degree in business administration. The beneficiary also holds a diploma in systems management from NIIT in India. The AAO accessed NIIT's website to determine what type of educational services it provides. NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. The AAO also accessed the All-India Council for Technical Education (AICTE)'s website, which does not list NIIT as an institute accredited by AICTE. Therefore, the beneficiary's diploma from NIIT cannot be considered as a post-graduate diploma or senior year level of undergraduate diploma from an accredited institute following a three-year bachelor's degree, and thus, the beneficiary's three-year bachelor's degree plus his diploma are not equivalent to a U.S. baccalaureate.

Therefore, the AAO finds that the petitioner failed to demonstrate that the beneficiary met the minimum educational requirements for the proffered position prior to the priority date under the skilled worker category. The director's June 14, 2006 decision is affirmed.

Beyond the director's decision and the petitioner's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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 regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. DOL. *See* 8 CFR § 204.5(d). The priority date in this case is July 24, 2002. The proffered wage as stated on the Form ETA 750 is \$70,919 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) allows the director accept a statement from a financial officer of the organization which established the prospective employer's ability to pay the proffered wage for the petitioner with more than 100 workers. The petitioner submitted a letter dated March 9, 2006 from [REDACTED] Chief Executive Officer (CEO) of Global Nurses Online Inc., claiming that the petitioner employs 260 workers, has gross annual income in excess of \$2.8 million and thus has the ability to pay the proffered wage. However, the letter does not explain how the CEO of Global Nurses Online Inc. is in the position to verify the ability to pay of the petitioner in the instant case, [REDACTED] Global Nurses Online. Nor does the letter indicate any net income or net current assets with which the petitioner could pay the proffered wage. The record does not contain any documentary evidence showing the number of the employees, the gross annual income, the net annual income or the net current assets of the petitioner. Given the record as a whole and the petitioner's history of filing petitions, we find that CIS need not exercise its discretion to accept the letter from [REDACTED]. CIS records indicate that the petitioner filed another Form I-140 petition with the Vermont Service Center in 2005.³ In addition, the petitioner also filed two Form I-129 nonimmigrant petitions.⁴ It is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. Therefore, we cannot accept the letter from [REDACTED] referencing the ability to pay a single unnamed beneficiary. As we decline to rely on [REDACTED]'s letter, the petitioner must submit the regulatory-prescribed evidence, such as annual reports, tax returns or audited financial statements, for the relevant years from 2002, the year of the priority date, to the present. However, the record does not contain such evidence.

³ The petitioner filed the I-140 petition (WAC-05-183-53031) on June 15, 2005 with a priority date of June 15, 2005. The petition was approved on July 26, 2005, and the beneficiary of the petition obtained lawful permanent residence on October 11, 2005.

⁴ WAC-01-061-52924 and EAC-06-145-53161.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will first 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. In the instant case, the petitioner did not submit the beneficiary's W-2 forms, 1099 forms or any other documentary evidence to establish its ability to pay the proffered wage through the examination of wages actually paid to the beneficiary in the years 2002 through the present although the beneficiary claimed on the Form ETA 750B that he has been working for the petitioner since November 2001 and CIS records show that the petitioner had a I-129 H-1B nonimmigrant petition approved on behalf of the beneficiary for a period from July 16, 2001 to January 2, 2004 with an offered annual salary of \$52,008.⁵

Therefore, the petitioner had not established that it had the ability to pay the beneficiary the proffered wage for the year 2002 onwards through an examination of wages paid to the beneficiary, or its net income or its net current assets.

In addition, the record shows that [REDACTED] located at [REDACTED] filed a Form ETA 750 on behalf of the instant beneficiary on July 24, 2002. However, later but before the Form ETA 750 was certified, the employer changed its name to [REDACTED] Global Nurses Online, and its address to [REDACTED]. The labor certification was approved on February 17, 2006 for American Allied International Corporation, Global Nurses Online. On March 16, 2006, [REDACTED] Global Nurses Online filed the instant I-140 immigrant petition based on the certified labor certification. On the petition, it claimed to have been established in 1999, to have a gross annual income of \$2.8 million, and to currently employ 260 workers, however, did not provide its IRS Tax number. Therefore, the employer, now the petitioner, in the instant case is [REDACTED] Global Nurses Online.

However, the record does not contain evidence about the petitioner, [REDACTED], Global Nurses Online. The letter dated March 9, 2006 from [REDACTED] submitted as a statement of the financial officer of the petitioner to establish the petitioner's ability to pay the proffered wage is on letterhead of Global Nurses Online Inc. and from the CEO of Global Nurses Online Inc.⁶

⁵ WAC-01-061-52924 was filed on December 14, 2000 and approved on July 18, 2001.

⁶ This office accessed the California official business database at <http://kepler.ss.ca.gov> (accessed on February 25, 2008). The database shows that [REDACTED] was established on June 22, 2000 as a California corporation with an address of [REDACTED] 25 and an agent of [REDACTED] at [REDACTED] however, is dissolved; Global Nurses Online Inc. as a Nevada corporation was registered on October 12, 2004 with an address of [REDACTED] and an agent of [REDACTED] at [REDACTED] [REDACTED], and is currently active. The Nevada office business database also confirms that Global Nurses Online Inc. is a Nevada domestic corporation with a filed date of January 12, 2004 and active on April 12, 2007. See <https://esos.state.nv.us/SOSServices/AnonymousAccess/CorpSearch/CorpSearch.aspx> (accessed February 25, 2008). Neither the California official business database nor the Nevada official database lists any business entity under the name of A [REDACTED] Global

The record does not contain any evidence showing that Global Nurses Online Inc. qualifies as a successor-in-interest to [REDACTED] that they are the same entity, or that [REDACTED] on, Global Nurses Online exists and has the ability to pay the proffered wage. This status requires documentary evidence that the successor-in-interest has assumed all of the rights, duties, and obligations of the predecessor company. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The fact that the alleged [REDACTED], Global Nurses Online appears doing business at the same location as Global Nurses Online Inc. does not establish that one of them is a successor-in-interest to the other, and does not establish that [REDACTED] Global Nurses Online exists. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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.

Nurses Online. The databases show that [REDACTED] was a separate California corporation but now dissolved, and that Global Nurses Online, Inc. is a Nevada corporation and currently active.