

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: LIN 06 210 52880 Office: NEBRASKA SERVICE CENTER Date: **AUG 03 2009**

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

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

ON BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

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

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and computer consulting firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. An ETA 750, 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.

On appeal, the petitioner, through counsel, submits additional evidence related to the beneficiary's employment experience. Counsel contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petition should be approved.

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).

For the reasons discussed below, we concur with the director's denial of the petition, but would also note that various 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.

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 petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 750 was accepted for processing on October 10, 2002. It indicates that the petitioner has employed the beneficiary since January 2001. The Immigrant Petition for Alien Worker (I-140) was filed on July 10, 2006.

The ETA 750 sets forth the minimum requirements for the position of programmer analyst. Item 13 on Part A of the ETA 750 describes the duties of the proffered position as analyzing, designing, developing, testing, and implementing software applications using Oracle, Developer 2000, Mercury

Testing Tools, and Novell NetWare on Unix and Windows platforms. Item(s) 14 and 15 instruct the employer to specify the minimum education, training, and experience for the certified job. They contain the following:

Education (enter number of Years)	College 4	College Degree Required Bachelor's degree	Major Field of Study Science, Syst. Mgmt., Comp. Science
Training	(none specified)		
Experience	Job Offered Number Yrs. Mos.	Related Occupation Yrs. Mos.	Related Occupation Computer Programmer, Analyst Programmer
	2	2	

In a letter, dated June 13, 2006, signed by the petitioner's president and submitted with the petition, it states that it supports the petition for the beneficiary as a professional.

In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (USCIS) must ascertain whether the alien is, in fact, qualified for the certified job. USCIS 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, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS 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).

As stated on the labor certification, the proffered position requires a four-year bachelor's degree in science, systems management, or computer science. The position also requires an applicant to have two years in the job offered as a programmer analyst or two years in a related occupation defined as either a computer programmer or analyst programmer. Because of the certified position's academic requirements set forth on the labor certification as well as the petitioner's classification of the occupation as a professional, the proffered position will be evaluated as a professional. In some circumstances it might also be considered as a skilled worker position. DOL assigned the occupational code of 030.162-014, programmer analyst, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1021.00>¹ and the description of the position and requirements for the job, the position falls within Job Zone Four requiring

¹ (Accessed 05/29/09).

“considerable preparation” for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” See <http://online.onetcenter.org/link/summary/15-1021.00>.² Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

See id.

More specific to this position, O*NET provides that 73 percent of respondents have a bachelor’s degree or higher.³ Further, DOL’s Occupation Outlook Handbook, available online at <http://www.bls.gov/oco/ocos110.htm>, relevant to computer programming jobs provides:

Education and Training. Most programmers have a bachelor’s degree, but a two-year degree or certificate may be adequate for some jobs. . . In 2006, more than 68 percent of computer programmers had a bachelor’s degree or higher, but as the level of education and training by employers continues to rise, this proportion is expected to increase.

The regulation at 8 C.F.R. § 204.5(1)(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.

² (Accessed 05/29/09).

³ See <http://online.onetcenter.org/link/details/15-1021.00>.

baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

As noted above, the ETA 750 in this matter is certified by DOL. 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). *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14)

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

* * *

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

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

In this matter, in item 11 of Part B of the ETA 750, the beneficiary indicates that he completed a three-year Bachelor of Science degree in physics, chemistry and math in July 1992 at Udala College, Utkal University, Mayurbhanj, Orissa, India. Also indicated is the receipt of an advanced diploma in Systems Management from the National Institute of Information Technology (NIIT) located in Bombay, Maharashtra, India. The record indicates that this diploma was awarded in February 1996 after the completion of four semesters.

The record additionally contains copies of four professional training certificates including three Certificates of Achievement from Mercury Interactive designating the completion of "Introduction to TestDirector Training Course" on January 18, 1999; the completion of "Introduction to WinRunner Training Course" on January 20, 1999, and the completion of the "Advanced WinRunner Training Course" on January 22, 1999. The other document is dated September 11, 2000 and states "CMC Limited," (a Govt. of India Enterprise), certifies that the beneficiary completed a course in Java. According to the Indian date system, the beneficiary attended from October 10, 2000 to November 3, 2000 and received a certificate of completion on November 9, 2000.

As noted in the AAO's request for evidence, the petitioner provided two academic evaluations. A credentials evaluation from INdoUS Technology & Educational Services Inc. found that: 1) the beneficiary's bachelor of science degree in physics, chemistry and mathematics represented two years of academic studies transferable to a U.S. accredited university; 2) mentions that the beneficiary graduated with a 1995 degree from Osmania University of which there is no evidence related to that degree in the record, and determines that; 3) the beneficiary's NIIT advanced diploma is the equivalent of two years of academic studies towards a U.S. Bachelor's degree in Computer Information Systems from an accredited college or university. This evaluation then mentions the beneficiary's professional training from Mercury Interactive and describes it as a leading software testing company based in the USA. The evaluation claims that; 4) this training, along with the CMC Limited Java training is the equivalent of 3 months of academic studies towards a Bachelor's degree in Computer Information Systems from an accredited college or university in the U.S.

Finally, the evaluation from INdoUS Technology and Educational Services Inc. concludes that the combination of the beneficiary's bachelor's degree from Utkal University, his advanced diploma from NIIT, and his professional training from Mercury Interactive and CMC Limited signified by the certificates submitted, is the equivalent of a U.S. bachelor's degree in Computer Information

Systems. The evaluation relies on a combination of educational programs, which the labor certification did not designate that it would accept.

Another academic equivalency evaluation from the Trustforte Corporation analyzes the beneficiary's formal education at Utkal University as representing the U.S. equivalent of three years of academic studies toward a U.S. bachelor of science degree and not two years as determined by the IndoUS evaluation and that the resulting combination with the NIIT diploma, which is determined to represent two years of bachelor's level studies, is the foreign equivalent degree of a U.S. bachelor of science degree in computer science. This evaluation does not mention the beneficiary's other training certificates and similarly relies on a combination of educational programs to meet the bachelor degree equivalency.

In response to the AAO's request for evidence which instructed the petitioner to provide evidence of the admission requirements during the period that the beneficiary studied at NIIT, along with evidence that it was empowered to grant university accredited hours or that it was accredited by the AICTE during the time that the beneficiary attended, the petitioner submitted another credentials evaluation from [REDACTED] of Pace University. His resume submitted with his evaluation indicates that he is also affiliated with The Trustforte Corporation. [REDACTED] characterizes the beneficiary's studies at NIIT as a post-graduate program. He also indicates that the combination of the beneficiary's degree from Utkal University and studies at NIIT represents five years of post-secondary education, which are the U.S. equivalent of a bachelor's degree in computer science. Finally, he declares that the beneficiary's studies at NIIT, by themselves, represent a single-source degree, equivalent to a U.S. Bachelor of Computer Science.

In the AAO's request for evidence, the petitioner was advised that the AAO had 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/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, and while it confirms that a bachelor of science 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. EDGE discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance

requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The AAO further advised the petitioner that the record did not contain any evidence showing the beneficiary holds a four-year U.S. bachelor's degree in science, systems management, or computer science as set forth on the ETA 750, nor does the record contain any evidence showing that the NIIT documents represent a *postgraduate diploma* issued by an accredited university or institution approved by AICTE and its entrance requirement is the three-year bachelor's degree. Therefore, the petitioner was requested to submit such evidence.

As the director denied the petition on April 30, 2007, based on his determination that the petitioner had failed to establish that the beneficiary's combination of certificates and diplomas satisfied the terms of the labor certification requiring a bachelor's degree, the petitioner was requested to provide evidence of its recruitment efforts. This evidence was requested in order to demonstrate whether the petitioner communicated to otherwise available qualified U.S. workers that some other kind of combination of certificates, diplomas or degrees were acceptable to qualify for the offered position.

On appeal, contending that the beneficiary's credentials fulfilled the terms of the labor certification, counsel discounts that the IndoUs and Trustforte evaluations were inconsistent and asserts that the AACRAO EDGE generalized observations are not as reliable as compared to the individualized credentials evaluations submitted to the record.

This office notes that authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at [www.aacrao.org/publications/guide to creating international publications.pdf](http://www.aacrao.org/publications/guide%20to%20creating%20international%20publications.pdf). If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12. Thus EDGE represents a peer-reviewed evaluation that has been vetted by a council of experts. This office finds that the distinction drawn between a diploma representing post-secondary studies and a diploma representing post-graduate studies based on an admission requirement of an underlying three-year degree to be credible. It is further noted that *the P.I.E.R. World Education Series India: A*

Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States (1997) refers to three different NIIT diplomas. Although none are exactly the same as the beneficiary's NIIT advanced diploma, in the section referring to placement recommendations, all are characterized as "primarily a vocational/technical qualification; admission and placement should be based on other credentials."

Further, it is noted that the petitioner failed to provide evidence that the prerequisite for admission to the NIIT program was a three-year degree as advised by AACRAO. Additionally, the record fails to indicate that NIIT was empowered to confer university accredited hours at the time of the beneficiary's admission or attendance. EDGE does not provide that NIIT is recognized as an official university level credential or that it would have any U.S. educational equivalent. Also, it is noted that based on a review of the AICTE listings shown at the (<http://www.nba-aicte.ernet.in/nmna.htm>) site,⁴ the NIIT program attended by the beneficiary was not included as an accredited institution in Maharashtra, India.

Counsel asserts that the language of the ETA 750 was sufficient to permit a foreign educational equivalent to consist of a combination of degrees or diplomas would suffice. If this was the petitioner's intent on the ETA 750, it was not expressed as such until a letter, dated May 21, 2007 was submitted on appeal. Signed by the petitioner's technical services director, it asserts that it intended the terms of the ETA 750 to include an equivalent of a four-year bachelor's degree as interpreted by an accredited credentials evaluator. The term "equivalent" is not stated anywhere on Form ETA 750.⁵

Based on the foregoing, with respect to the credentials evaluations submitted to the record, the AAO does not find any of the three evaluations to be probative of the beneficiary's possession of a four-year bachelor's degree in science, systems management or computer science. It is noted that the IndoUS evaluation attributed baccalaureate credit to vocational certificate courses, referred to a nonexistent diploma from Osmania University and found that the beneficiary's degree from Utkal University represented a different duration of study than described by Trustforte or [REDACTED] evaluation. Dr. [REDACTED] evaluation claims that the beneficiary's NIIT credential, standing alone, somehow represents the U.S. equivalent of a bachelor's degree. The other two evaluations do not conclude anything similar to this contention. USCIS may, in its discretion, use advisory opinions statements submitted as expert testimony. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). USCIS, however, is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; see also *Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). It is incumbent on the petitioner to

⁴ (Accessed May 29, 2009).

⁵ USCIS 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. at 406.

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).

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 combination of certificates and diplomas, 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). 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) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor’s degree. Even if considering at most, the beneficiary’s attainment of three years of undergraduate university studies represented by the bachelor of science degree, this would not qualify as full bachelor’s degree in science, systems management or computer science as indicated on the ETA 750. If a defined alternate combination of diplomas or degrees was acceptable, then the petitioner could have described this alternative in item 15 where other special requirements are permitted to be specified.

As noted above, the petitioner initially identified the proffered position to be filled by a professional position. Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act,⁶ the evidence related to the petitioner’s intent as to the acceptable alternative requirements pertinent to the employer’s recruitment efforts remains relevant.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) which found that [USCIS] “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.” *Id.* At 1178. 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).

⁶The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

(ii) *Other documentation*—

(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.

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 USCIS, 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). In reaching this decision, the court also 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.⁷

⁷ Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

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

Additionally, we also note the subsequent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006). In that case, the ETA 750 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 as a “specific level of *educational background*.” *Snapnames.com, Inc.* at *6. 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 [USCIS] properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In this case, the language on the Form ETA 750 does not include “equivalent” and simply requires a bachelor’s degree.

However, in *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the Form ETA 750 described the educational requirement as Bachelor’s or equivalent and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien’s other credentials with his three-year diploma to meet the requirements of the ETA 750. *Id.* at *13-14. In this case, the beneficiary must possess a bachelor’s degree in science, systems management or computer science. The petitioner failed to specify any defined equivalency on the ETA 750. The beneficiary’s baccalaureate education does not equate to a bachelor’s degree or satisfy the requirements of the labor certification in either a professional or skilled worker category.

It is noted that that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984), USCIS is obliged to “examine the certified job offer *exactly* as it is completed by the prospective employer.” (Emphasis added) USCIS’ 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).

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.

A review of the job advertisements and recruitment efforts undertaken by the petitioner is also relevant in order to discern the petitioner's intent as expressly communicated to outside applicants. A copy of the notice of job posting submitted in response to the AAO's request for evidence reflects the same educational requirements as set forth on the Form ETA 750 and requires "Bachelor's." The posting does not reference "or equivalent." Copies of internet advertisements that encompassed other open IT positions as well as programmer analysts did not describe any educational requirement. Copies of two newspaper advertisements recruiting various IT jobs advise that some positions require a "Bachelor/Master's degree or equivalent education/experience." They also required specifically "2yrs. exp. In Business Systems Analyst, Oracle DBA/Informatica, Business Objects/Olap, and Oracle Developer/Pl/Sql." These specific requirements are not included in the Form ETA 750 pertinent job experience or experience required to this case. The Form ETA 750 job description references different computer programs and skills as noted above, including Mercury testing tools, Novell Netware on Unix and Windows. Further, the skills required of potential consultants described on the petitioner's letter requesting a reduction in recruitment includes a number of technical skills that are not set forth on the Form ETA 750 in this matter. Therefore, based on a review of the recruitment submitted, it may not be concluded that the petitioner clearly expressed the position requirements or its intent to accept a defined equivalency of lesser diplomas, degrees or certificates in lieu of a four-year bachelor's degree for the proffered position was to otherwise qualified U.S. workers.

The beneficiary has not completed four years of college culminating in a Bachelor's degree in science, systems management or computer science and does not meet the terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional or as a skilled worker under 203(b)(3)(i) of the Act.

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

ORDER: The appeal is dismissed.