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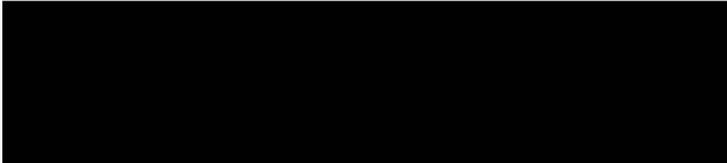
IN RE:

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.

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, 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 consulting firm. It seeks to employ the beneficiary permanently in the United States as an electrical engineering technician. 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 petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

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).

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.

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. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on February 7, 2003.² The Immigrant Petition for Alien Worker (Form I-140) was filed on March 6, 2007.

The job qualifications for the certified position of electrical engineering technician are found on Form ETA 750 Part A. 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:

¹ After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

Block 14:

Education (number of years)

Grade school	8
High school	4
College	3-4
College Degree Required	Degree in Engineering or
Major Field of Study	its Foreign Equivalent in Electronics

Experience:

Job Offered (or)	2
Related Occupation	2-reasonably related construction and/or civil engineering field

Block 15:

Other Special Requirements blank

As set forth above, the proffered position requires a three-four year degree in Engineering or its Foreign Equivalent in Electronics, and two years of experience in the job offered or two years of experience in a reasonably related construction and/or civil engineering field.

On the Form ETA 750B, signed by the beneficiary on February 5, 2003, the beneficiary indicated at part 11 that he completed four years of study from August 1988 to August 1992 and received a degree in electronic radio engineering from B & B Polytechnic in India; and that he studied two years from August 1993 to August 1995 and received a certificate in computer science from Lakhotia Computer Course in India.³ The Form ETA 750B also reflects that the beneficiary worked as a junior electronics engineer for Sharada Electronics from August 1992 to December 1995; that he worked as a senior electronics engineer for Vivid Systems from January 1996 to March 1999; and that he worked 40 hours per week as an engineering technician for the petitioner from May 2000 to the date he signed the Form ETA 750B.

In support of the beneficiary's educational qualifications, the record contains a copy of the beneficiary's diploma from B. & B. Polytechnic. It indicates that the beneficiary was awarded a diploma in electronics and radio engineering on January 29, 1993. The record also contains a copy of a credentials evaluation, dated February 3, 2000, from Globe Language Services, Inc. (Globe)

³ The beneficiary signed his name below a statement on the Form ETA 750B declaring "Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury the foregoing is true and correct."

stating that the beneficiary completed a three-year program and received the diploma in 1992 which is equivalent to three years of undergraduate course work in the United States.

The director denied the petition on March 13, 2007, because the petitioner failed to submit sufficient evidence to establish that the beneficiary held a three-year degree as required by the Form ETA 750.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel asserts that the beneficiary has a three-year degree in Electronics and therefore meets the requirements of the labor certification. Counsel submits the beneficiary's examination results, college record and transcripts from B. & B. Polytechnic, and a certificate dated May 17, 2007, from Bhailalbai & Bhikhabhai Institute of Technology, formerly known as B. & B. Polytechnic, certifying that the beneficiary studied "in Diploma in Electronics & Radio Engineering during the year Aug. 1989 to Aug. 1992."

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 17-3023 and title electrical engineering technician, 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/17-3023.03> (accessed July 23, 2009) and its description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone 3.

According to DOL, one or two years of training involving both on-the-job experience and informal training with experienced workers are needed for Job Zone 3 occupations. DOL assigns a standard vocational preparation (SVP) range of 6-7 to Job Zone 3 occupations, which means "[m]ost occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree." *See id.* Additionally, DOL states the following concerning the training and overall experience required for Job Zone 3 occupations:

Previous work-related skill, knowledge, or experience is required for these occupations. For example, an electrician must have completed three or four years of apprenticeship or several years of vocational training, and often must have passed a licensing exam, in order to perform the job.

See id. Because of the requirements of the proffered position and DOL's standard occupational requirements, the proffered position is for a skilled worker, but might also be considered under 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 regulation uses 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 regulation at 8 C.F.R. § 204(5)(l)(3)(ii)(B) states the following:

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.

The above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

As noted above, the Form 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.

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 the position and the alien are qualified for a specific immigrant classification. 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).

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,

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

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).

Therefore, it is DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires that the alien had a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation requires the submission of “an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study.” (Emphasis added.)

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).

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word “degree” in relation to professionals. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289m 1295 (5th Cir. 1987). It can be presumed that Congress’ narrow requirement in of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate “degree” and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education earned at an institution other than a college or university.

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). This office notes that in a letter dated March 2, 2007, counsel for the petitioner noted that the labor certification “does not require a Bachelors Degree (i.e. no Bachelors Degree requirement is stated on the labor certification only a three (3) year degree or its foreign equivalent in electronics is requires.” 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 single-source “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,” from a college or university in the required field of study listed on the certified labor certification, 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.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (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.” 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*, 437 F. Supp. 2d at 1179 (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).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 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 USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine “the language of the labor certification job requirements” in order to determine what the petitioner must demonstrate about the beneficiary’s qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS 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). USCIS’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). USCIS 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.

Further, the employer’s subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. *Maramjaya v. USCIS*, Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner’s intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary’s credentials into requirements that do not seem on their face to include what the beneficiary has.

Thus, the AAO issued a Notice of Derogatory Information (NDI) on October 22, 2008, soliciting such evidence. The AAO noted that the beneficiary's transcripts show that the beneficiary's diploma program was a four-semester (two-year) program and the beneficiary completed it in three years because he failed one semester examination. The AAO requested a complete copy of the Form ETA 750 as certified by DOL, including any documentation that summarizes the petitioner's recruitment efforts and its explicitly expressed intent concerning the actual minimum requirements of the proffered position. The AAO also requested a copy of all supporting documents summarizing the petitioner's recruitment efforts, as previously presented to DOL. Further, the AAO noted that the petitioner has been employing the beneficiary in the proffered position under H-1B status since 2000.⁵ The AAO requested a complete copy of all these I-129 nonimmigrant petitions and asked the petitioner to explain how the same proffered position for which the petitioner has been requiring a bachelor's degree in its six H-1B petitions since 2000 does not require a bachelor's degree as the minimum educational requirement in the instant immigrant petition.⁶

In response, counsel asserts that several typographical errors were made on the ETA 750. He states that the beneficiary attended five semesters at B. & B. Polytechnic from August 1989 to August 1992.⁷ He states that the beneficiary was enrolled in three consecutive years of study, which he asserts is equivalent to "roughly five years of undergraduate coursework in the United States."⁸ Counsel states that the "information provided by EDGE is simply a generic template of possible education equivalency between a foreign country and the United States." He asserts that "EDGE does not factor in semester length, quality of the school and other pertinent information that expert evaluators in the field must consider." He states that the evaluation prepared by Globe is consistent with the petitioner's requirements for the proffered position as listed on Form ETA 750.

Further, in response to the NDI, the petitioner submitted copies of four of the Form I-129 nonimmigrant petitions submitted by the petitioner on behalf of the beneficiary; previously submitted evidence regarding the beneficiary's educational qualifications; and a copy of supporting

⁵ USCIS records show that the petitioner has filed six Form I-129 nonimmigrant petitions on behalf of the beneficiary (EAC-00-105-52581, EAC-03-054-54463, EAC-05-051-50781, EAC-06-046-51468, EAC-07-156-53129, and EAC-08-067-51899), and all of them have been approved under H-1B nonimmigrant status.

⁶ *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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."

⁷ The College Record and Certificate from Bhailalbai & Bhikhabhai Institute of Technology, formerly known as B. & B. Polytechnic, support this period of study.

⁸ Counsel's opinion is not consistent with EDGE or with the credentials evaluation submitted by the petitioner, which equates the beneficiary's education to three years of undergraduate course work in the United States. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

documents summarizing the petitioner's recruitment efforts, as previously presented to DOL. Included in these recruitment documents is a summary of the petitioner's responses received from the petitioner's recruitment efforts. In light of counsel's assertion in response to the NDI that the petitioner "is willing to accept a variety of combinations of education and experience combinations for the position," it is unclear why many of the applicants were rejected by the petitioner. Several of the applicants had degrees and experience that was reasonably related to the proffered position. The petitioner's newspaper advertisement for the position, and the petitioner's notice of posting, recite the job description on the ETA 750 and state "'Degree in Electrical Engineering (or equivalent) and 2 yrs or related exp req'd.'" The petitioner's degree equivalency was not defined, and applicants were not alerted to the requirement that the related two years of experience must have been obtained in a reasonably related construction and/or civil engineering field.

To determine whether a beneficiary is eligible for a preference immigrant visa, 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).

The petitioner submitted an evaluation of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification. The evaluation from Globe states that the beneficiary completed a three-year program and received the diploma in 1992, which is equivalent to three years of undergraduate course work in the United States. The Globe evaluator, George R. Fletcher, cites as his reference source an American Association of Collegiate Registrars and Admissions Officers (AACRAO) publication.

However, as advised in the NDI issued to the petitioner by this office, we have reviewed the Electronic Database for Global Education (EDGE) created by AACRAO.⁹ 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." *Id.* According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation

⁹ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

of foreign educational credentials.” Despite counsel’s judgments regarding EDGE, authors for EDGE are not merely expressing their personal opinions. Rather, they 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.

EDGE states that the Diploma in Engineering in India is awarded upon completion of three years of study beyond the Secondary School Certificate (or equivalent) or the Post Secondary Diploma following the Higher Secondary Certificate and *represents attainment of a level of education comparable to up to one year of university study in the United States.*¹⁰

The Form ETA 750 does not provide that the minimum academic requirement of a 3-4 year degree in Engineering or its Foreign Equivalent in Electronics might be met through the attainment of a level of education comparable to up to one year of university study in the United States or some other formula other than that explicitly stated on the Form ETA 750. The copies of the posting notice and newspaper advertisement, provided with the petitioner’s response to the NDI issued by this office, also fail to advise DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or other defined equivalency. Thus, the alien does not qualify as a skilled worker as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and fails to meet the requirements of the labor certification, and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act.

Further, although not raised in the director’s denial, we find that there is an issue related to the position’s minimum qualifications. 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis). The petitioner has listed different educational requirements on Form ETA 750, and on numerous Forms I-129, in filings related to the beneficiary’s nonimmigrant status for what appears to be the same position.

The petitioner has filed six Petitions for a Nonimmigrant Worker, Form I-129, for an Electronics Engineer pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). The

¹⁰ We note that admission to the Diploma in Engineering program in India requires only ten years of primary/secondary study.

petitions were approved by the director on May 16, 2000, May 5, 2003, January 13, 2005, February 21, 2006, August 30, 2007, and April 7, 2008, respectively.

The most recent I-129 letter of support from the petitioner, dated December 19, 2007, provided the following job description for the position of Electronics Engineer:

The position of Electronics Engineer includes the duties of programming, operating, and troubleshooting of electronics equipment for soil, asphalt, concrete, and water testing, which includes environmental testing of soil and water using gas chromatography mass spectroscopy. The Electronics Engineer also performs laboratory testing, such as tri-axial shear and asphalt-thermo dyne extractor testing. He also prepares final reports of testing using Geosystem software.

Further, the I-129 letter of support specifically noted the following education requirements: "Due to the complex nature of the duties involved, the minimum educational requirement for the position of Electronics Engineer is the attainment of a Bachelor's degree or its equivalent in Electronics Engineering, Electronics Technology, Computer Science, or a related field."

The petitioner filed the ETA 750 on behalf of the present beneficiary for the position of Engineering Technician. The ETA 750 was filed on February 7, 2003, listed a pay rate of \$25.04 per hour, and that the position would be full-time.

Further, the job description on the ETA 750 read as follows:

Calibrate and/or modify (chromatography, spectroscopy and spectrophotometer) equipment for soil, asphalt, concrete, and water testing; determine test requirements and procedures; conduct test/experiments, including lab testing of asphalt for tri-axial shear and thermoline asphalt binder ignition tests; analyze and evaluate test results and prepare reports on findings and recommendations using "Geosystem" software.

The ETA 750 position description listed was essentially very similar in job duties to the position description for the H-1B position of Electronics Engineer. Since the ETA 750 position appears to be the same as the I-129 H-1B position, this would be expected. However, as noted previously, the ETA 750 requires a 3-4 year degree in Engineering or its Foreign Equivalent in Electronics. The position certified did not require a Bachelor's degree or its equivalent in Electronics Engineering, Electronics Technology, Computer Science, or a related field as listed in the H-1B petition. In a letter dated March 2, 2007, counsel for the petitioner noted that the labor certification "does not require a Bachelors Degree (i.e. no Bachelors Degree requirement is stated on the labor certification only a three (3) year degree or its foreign equivalent in electronics is requires."

In its NDI, the AAO director requested that the petitioner explain discrepancies within the record:

Submit a complete copy of all these I-129 nonimmigrant petitions and explain how the same proffered position for which your organization has been requiring a bachelor's degree in its six H-1B petitions since 2000 does not require a bachelor's degree as the minimum educational requirement in the instant immigrant petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "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." In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. See *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

In response to the NDI, counsel for the petitioner asserts that the petitioner's qualifications have remained consistent. He states that the petitioner "is willing to accept a variety of combinations of education and experience combinations for the position; however, due to the inconsistencies between DOL's SVP system and USCIS' regulations in the H-1B context, the requirements had to be expressed differently on Form ETA 750A." Counsel asserts that the beneficiary is qualified for the position based on his education and experience.

The regulation related to the H-1B nonimmigrant category at 8 C.F.R. § 214.2(h)(4)(ii) provides that a specialty occupation:

Means an occupation which requires theoretical and practical application of a body of highly specialized and practical knowledge of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which required the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

For the position to qualify as an H-1B position, under 8 C.F.R. § 214.2(H)(4)(iii)(A), the position must meet one of the following criteria:

- (1) a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular

position is so complex or unique that it can be performed only by an individual with a degree;

(3) the employer normally requires a degree or its equivalent for the position; or

(4) the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The beneficiary must establish that he or she holds a U.S. baccalaureate degree or higher required by the specialty from an accredited college or university; holds a foreign degree equivalent to a U.S. baccalaureate or higher degree required by the specialty; holds an unrestricted state license, registration, or certification required by the specialty; or has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation. 8 C.F.R. § 214.2(H)(4)(iii)(C).

If the position required a bachelor's degree, the petitioner should have listed the degree on the ETA 750. If the petitioner were willing to advertise and hire a qualified candidate without a bachelor's degree, then the position truly does not require one. The petitioner has failed to set forth any criteria to show that the "Electronics Engineer" position as listed on the Form I-129 requires a bachelor's degree, other than the assertion that the petitioner required a bachelor's degree when it filed the H-1B and not when it filed the ETA 750 "due to the inconsistencies between DOL's SVP system and USCIS' regulations in the H-1B context." However, the petitioner has not distinguished the H-1B position from the position as listed on the ETA 750. We are satisfied that the position does not require a bachelor's degree. However, this leaves the beneficiary's underlying H-1B status in question, which may be revoked.¹¹

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.

¹¹ 8 C.F.R. § 214.2(h)(11)(B) provides that the director may revoke an H-1B petition at any time, even after the expiration of the petition.