

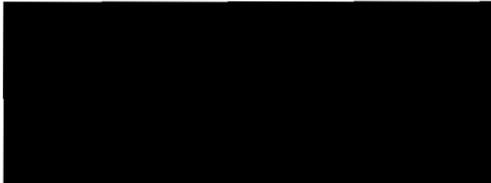
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

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FILE: LIN 07 119 52697 OFFICE: NEBRASKA SERVICE CENTER DATE: **AUG 13 2009**

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 financial management and advising company.¹ It seeks to employ the beneficiary permanently in the United States as a Senior Vice President, Financial Advisor. As required by statute, a Form ETA 750,² 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 director determined that the beneficiary's extensive work experience did not constitute a foreign equivalent degree.

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

¹ The AAO notes that the petitioner was acquired by Bank of America in January 2009. If the handling of immigration petitions has been affected by this acquisition, the petitioner should advise the United States Citizenship and Immigration Services (USCIS) of any changes in ownership that would affect the processing of any pending petitions, namely, whether Bank of America is a successor-in-interest to Merrill Lynch. This status requires documentary evidence that the petitioner has assumed all of the rights, duties, and obligations of the predecessor company. The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

² 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).

158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on December 17, 2004.³ The Immigrant Petition for Alien Worker (Form I-140) was filed on March 16, 2007.

The job qualifications for the certified position of Financial Advisor are found on Form ETA 750 Part A. Item 13 describes the job duties, in pertinent part, as providing financial advisory services to high net worth individual and businesses n Latin America; developing financial plans to meet short and long term financial objectives; structure and manage investment portfolios, and advise on retirement and estate planning.

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:

Block 14:

Education (number of years)

Grade school	8
High school	4
College	4
College Degree Required	Bachelor's Degree or equivalent
Major Field of Study	Business administration, finance, economics, accounting or engineering.

Experience:

Job Offered	One year
(or)	
Related Occupation	One year as a financial consultant, private banker or related

Block 15:

Other Special Requirements	Must be fluent in Spanish. Must have experience providing financial advisory services to Latin American investors
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As set forth above, the proffered position requires four years of college culminating in a bachelor's degree or equivalent in business administration, finance, economics, accounting or engineering and

³ 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.

one year of experience in the proffered position or in the related position of financial consultant, private banker or related. The position also requires fluency in Spanish and experience providing financial services to Latin American investors.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed her prior education as: studying law at the Universidad Santa Maria, Caracas, Venezuela from October 1974 to July 1976, with no degree or certificate received. She also listed studying accounting/English at St. Jules School of Languages, London, United Kingdom from May 1969 to August 1971, with no degree or certificate received. The Form ETA 750B also reflects the beneficiary's experience as follows: First Vice President of International Private Banking from 1974 to January 2002, with the Merrill Lynch Pierce, Fenner & Smith, Caracas, Venezuela. The beneficiary also listed her employment as a financial advisor with Merrill Lynch & Co., Inc., in Miami, Florida from January 2002 to June 18 2004, the date she signed the Form ETA 750-B.

The record contains no copies of the beneficiary's academic studies and fails to indicate whether she received a diploma for either her law studies or language studies. The record contains a copy of an undated training and experience credentials evaluation from [REDACTED], Assistant Professor, Frank G. Zarb School of Business, Hofstra University. Dr. [REDACTED] examines the beneficiary's employment experience and professional training and concludes that based on the beneficiary's approximately thirty-two years of employment experience and professional training in business administration, finance, and related areas, the beneficiary had completed the equivalent of a bachelor of business administration degree with a concentration in finance, from an accredited institution of higher education in the United States. The petitioner also submitted a letter from Dr. [REDACTED] Chairperson, Department of Finance, Hofstra University, dated December 1, 2003. [REDACTED] states that Hofstra University has a program through which college-level credit may be issued based on a candidate's foreign academic studies, training and or professional experience and that [REDACTED] has authority to grant college-level credit for experience.⁴

The petitioner submitted the evaluation of the beneficiary's work experience from Hofstra University to show that the beneficiary met the educational requirements of the labor certification. Although [REDACTED] states in his evaluation that he is providing an evaluation of education, training and experience, he in fact only examines the beneficiary's work experience that includes progressively responsible employment. Thus, [REDACTED] evaluation is given no weight in these proceedings.

On March 21, 2007, the director issued a request for evidence to the petitioner, noting that the Form ETA 750 indicates that the beneficiary has not earned any degrees through formal, post-secondary education that would be the equivalent of a U.S. baccalaureate degree. The director noted that the term "or equivalent" was not defined, and requested the petitioner to provide objective verifiable

⁴ The AAO notes that in its cover letter that accompanied the I-140 petition, the petitioner refers to an educational equivalency evaluation from the Trusteforte Corporation with regard to the beneficiary's credentials, but this document is not found in the record.

documentary evidence to establish its definition of “equivalent” as used during the occupational assessment and certification process. The director stated that such evidence could include but was not limited to a statement from the DOL explaining the interpretation of the terms as certified, copies of the petitioner’s recruitment documentation or evidence that no U.S. applicants for the proffered position that possessed the same or similar qualifications as the beneficiary were disqualified from selection.

In response, counsel submitted a letter from the petitioner that stated that its definition of equivalent was the definition used to define degree equivalence under the H-1B regulation at 8 C.F.R. § 214.2(h)(4)(D). Counsel submitted an affidavit from [REDACTED] Senior Specialist, Merrill Lynch Human Resources, that states the petitioner used the H-1B equivalency standard as set forth in the H-1B regulations. The petitioner stated that this definition was considered the most accurate and consistent definition of equivalency for immigration purposes. The petitioner did not submit its recruitment or DOL certification documentation, as requested by the director.

The director denied the petition on June 18, 2007, stating that although the preamble to the publication of the final rule on 8 C.F.R. § 204.5 specifically dismissed the option of equating “experience alone” to the required bachelor’s degree, the same reasoning applied to accepting an equivalency in the form of multiple lesser degrees, professional training, incomplete education with the award of a formal degree or any other level of education deemed to less than the foreign equivalent degree to a United States baccalaureate degree. The director determined that the evidence did not establish that the beneficiary held a four-year bachelor’s degree as of the priority date stipulated by the Form ETA 750 and thus the petitioner had not established that she was qualified for the proffered position. The director also noted that the Form ETA 750 did not state an alternative minimum requirement that would have allowed the beneficiary to qualify as a skilled worker.

On appeal, counsel submits a brief again citing the H-1B equivalency as its definition of equivalent, and stating the instant petition should be approved in the skilled worker classification. This argument is not persuasive. In assessing eligibility for a preference visa classification, USCIS must determine whether the beneficiary and the position qualify for the classification sought. The minimum requirements for the position, as set forth on the approved labor certification, determine the appropriate classification for the position. In the instant case, the Form ETA 750 clearly requires four years of college education, a Bachelor’s degree or equivalent, and at least one year of prior work experience. As explained more fully below, this position cannot qualify for the skilled worker classification under the Act.

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 13-2051 and title of Financial 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/crosswalk> (accessed on August 4, 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 Four requiring considerable preparation for the occupation type closest to the proffered position.

According to DOL, two to four years of work-related skill, knowledge, or experience are needed for Job Zone 4 occupations. DOL assigns a standard vocational preparation (SVP) range of 7-8 to Job Zone 4 occupations, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” 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. Thus, as the clearly stated minimum requirements for the position is a bachelor’s degree, and DOL’s standard occupational requirements usually require a bachelor’s degree, the proffered position is for a professional.

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.

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).⁵ *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.

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

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).

Therefore, it is DOL’s responsibility to certify the terms of the labor certification, but it is the responsibility of 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(1)(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.

The petitioner in this matter relies on the beneficiary's work experience to reach the "equivalent" of a degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification.

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 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.

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.

In the instant case, like the labor certification in *Snapnames.com, Inc.*, the petitioner's intent regarding educational equivalence is not clearly stated on the Form ETA 750. The petitioner does include the phrase "or equivalent" on the form. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the Form ETA 750 does not identify an equivalency to the requirement of four years of college culminating in a bachelor's degree in business administration, finance, economics, accounting or engineering.

As discussed previously, the director requested clarification of the petitioner's use of the phrase "or equivalent." The petitioner responded that it utilized the H-1B equivalency regulation as its equivalency standard, and did not submit any evidence with regard to its use of the phrase during the certification process of the Form ETA 750. As noted previously by the director, unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions. Thus the petitioner's use of the H-1B regulations on educational equivalency to define its phrase "or equivalent" is not determinative in this matter.

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.

The Form ETA 750 does not provide that the minimum academic requirements of a four-year baccalaureate degree might be met through work experience, or non-degreed academic studies or some other formula other than that explicitly stated on the Form ETA 750. The petitioner failed to submit copies of its Internet and newspaper advertisements and recruitment, when requested by the director. Thus, it did not establish that it advised DOL or any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency. Thus, the alien does not qualify as a professional as she 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 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.