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U.S. Department of Homeland Security
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Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: FEB 20 2009
LIN-07-008-52006

IN RE: Petitioner: [redacted]
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:

[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 ("director"), denied the employment-based immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office ("AAO"). The appeal will be dismissed.

The petitioner operates a business related to network storage, and seeks to employ the beneficiary permanently in the United States as a marketing manager ("Data Storage International Business Development Director"). As required by statute, the petition filed was submitted with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor ("DOL"). The director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a single degree that was the foreign equivalent of a United States bachelor's 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).[1]

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on July 19, 2004. The labor certification was approved on August 26, 2006, and the petitioner filed the I-140 Petition on the beneficiary's behalf on October 6, 2006.

On July 19, 2007, the director issued a Request for Evidence ("RFE"). The RFE stated that the petitioner's use of the term "equivalent," in its requirement of a "Bachelor's or 'U.S. equivalent,'"

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

was not defined. The director requested that the petitioner "provide objective, verifiable documentary evidence to establish the definition of 'equivalent' as it was defined during the occupational assessment and labor certification process." The RFE stated that such evidence might include, "a statement from the Department of Labor explaining the interpretation of the terms as certified; copies of the petitioner's recruitment documentation; or evidence that no U.S. applicants for the position who possessed the same or similar qualifications as the beneficiary were disqualified from selection." The RFE further sought evidence related to the beneficiary's education. The petitioner submitted one evaluation, which relied on a combination of the beneficiary's education and experience. The director found that this evaluation did not "contain sufficient information for consideration," and that an acceptable evaluation should: consider formal education only, not experience; state if the education was post-secondary; provide a detailed explanation of the mater evaluated; and state the qualifications of the evaluator that provided the opinion. The petitioner responded.

On October 23, 2007, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. The petitioner did not have a single degree that was a foreign equivalent degree to a U.S. baccalaureate degree. The petitioner appealed to the AAO.

On appeal, counsel asserts that the petition should be considered under the skilled worker category, and not just under the professional classification. Counsel further asserts that the beneficiary meets the educational requirements of the labor certification as he had the equivalent of a bachelor's degree in Business Administration.

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

The proffered position requires a four-year bachelor's degree, and four years of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. DOL assigned the occupational code of 11-2021, "Marketing Manager," 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/11-2021.00 (accessed February 18, 2009) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See http://online.onetcenter.org/link/summary/11-2021.00#JobZone* (accessed February 18, 2009). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

See id. Therefore, because of both the stated requirements on the labor certification and DOL's standardized occupational requirements, United States Citizenship and Immigration Services ("USCIS") will consider the position and the petition under both the professional and the skilled worker categories.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The beneficiary possesses a foreign bachelor's degree in Agriculture, as well as relevant work experience. Thus, the issues are whether the beneficiary's foreign diploma is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's additional work experience. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

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

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[2] 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.
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> 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

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

> two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

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

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree: "[B]oth the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*" 56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added).

For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) 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.)

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 member of the profession 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.

The petitioner in this matter relies on the beneficiary's combined education and 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 "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.

Authority to Evaluate Whether the Alien is Qualified for the Job Offered

The beneficiary is not eligible for a third preference immigrant visa under the skilled worker category. A beneficiary is required to document prior experience in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

> *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.

(Emphasis added.)

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).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 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.

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

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

On the Form ETA 750A, the "job offer" position description for a Data Storage International Business Development Director provides:

> Will establish OEM networks of electronic business data equipment resellers in US, Europe, Japan, China, Singapore, and Hong Kong using knowledge of: 1) local OEM management, product support plans, pricing, profit margins and discount rates; and 2) bug tracking, design change, RMA, and product quality management. Will negotiate agreements between manufacturer and OEMs regarding: 1) terms of minimum commitment, exclusivity, product quality policy, warranty, and 2) end user support; product development schedules; forecasting; product launch strategy; and RMA. Will support sales channels in Asia using knowledge of: pricing; localization; local electronic/radiation regulations; marketing; product launch, and technology partnering strategy and planning; training; PR activities; direct/indirect sales management; and production/sales forecasting. To perform duties will use knowledge of: Unix; Ethernet; TCP/IP; SCSI; SNMP; MIB; VPN; PKI; Kerberos; SAN; NAS; computer bus; device driver; PostScript, C, and command line. Will use legal knowledge of nondisclose; co-marketing; and distribution agreements; and business knowledge of finance and brand strategy, to develop marketing, sales, support and training.

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

Education: Grade School: "grad;"

High School: "grad;"
College: grad;
College degree: "B.S. (or U.S. equivalent);"

Major Field Study: Business Administration.

Experience: 4 years in the job offered, Data Storage International Business Development Director.[3]

Other special requirements: Resume required.

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).

In looking at the beneficiary's qualifications, on Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as: (1) Tokyo University, Tokyo, Japan; Field of Study: Agricultural Economics; from April 1979 to March 1981, for which he received a Bachelor of Agriculture degree; and (2) Tokyo University, Tokyo, Japan; Field of Study: General Culture; from April 1977 to March 1979, no degree received.

The petitioner submitted an evaluation of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification:

Evaluation:

- Evaluation: [redacted], Professor of Marketing, Lubin School of Business, Pace University, Westchester, NY, dated September 25, 2006.
- The evaluator considered the beneficiary's educational documents, including completion of studies at the University of Tokyo. The evaluation also considered the beneficiary's work experience, in the amount of fifteen years and two months of "increasingly advanced and progressively responsible employment experience and training, concentrated in management, under the supervision of managers, and together with peers, at a bachelor's level of practical experience."
- The evaluator describes the beneficiary's education, that he "completed post-secondary studies in a Bachelor of Agriculture program of study at The University of Tokyo." The courses included, "general subjects, as well as in his area of concentration, Agricultural

[3] The petitioner did not allow for qualification based on any experience in any related occupation.

Economics, including courses in Economics, Farm Management, Farm Accounting, Economic History, Applied Mathematics, History of Agriculture, and related subjects." Following completion of his courses and exams, the beneficiary "was awarded a Certificate for a Bachelor of Agriculture Degree by the University of Tokyo." Based on those studies, "the nature of the classes and credit hours indicates that he attained the equivalent of two years of study toward a Bachelor's degree, with coursework in Business and Economics, from an accredited US college or university."

- The evaluator then considered the beneficiary's work experience. The evaluator considered the beneficiary's employment only though July 1996 based on a "detailed letter from his former employer ." He states that the beneficiary had fifteen years and two months of professional experience in the areas of business management, sales, marketing, and related areas, "characterized by increasingly advanced responsibilities and progressively responsible job duties."
- Specifically, from April 1981 to June 1996, the beneficiary, "completed increasingly senior-level professional and managerial employment in business and management in positions with " The evaluator continues:

  He began with the firm in April 1981, after graduating from University, and was placed in a management training program in July of that year. His training was focused in sales, after which [the beneficiary] was assigned to the President's office as a management consultant specializing in the development of a computer program for analyzing affiliates' business performance. In 1986, [the beneficiary] joined the Business Operations Information System division, taking on duties including system planning, budget control, and marketing (for a desktop publishing technology). In 1987, [the beneficiary] was deployed to in Amsterdam, as Marketing Coordinator and System Engineer. His duties centered on the customization of a desktop publishing system, and the conversion of various Canon products into networked technologies, in partnership with several European companies. In 1993, he was promoted to Senior Engineer at the Coyping Development Center, with responsibility for developing digital color copiers. After a time as Assistant Manager of the Copy Machine Marketing and Product Planning Division, taking on full responsibility for marketing and business growth for the firm's white digital copiers. Finally, in 1996, [the beneficiary] was promoted to Manager of the System Product Planning Department, a key leadership role focused on business development for the PostScript controller unit. In this capacity, he developed a strategic partnership with Electronics for Imaging.

- The evaluator considered the employment experience to require "academic competency," which would be "comparable to the academic training of students in bachelor's-level programs in business and management." Further, the evaluator stated that the beneficiary's responsibilities "are indicative of bachelor's-level coursework in Marketing, Sales, Strategic Sales and Marketing Planning, Strategic Business Planning, Business Management, Systems Engineering, Engineering Management, Product Development, and related subjects."

The evaluator concluded that based on the beneficiary's fifteen years and two months of work experience, and an equivalency of three years of work experience for one year of college studies, that the beneficiary's background would be comparable "to bachelor's level studies in business, with a concentration in management."

- The evaluator concluded that based on a combination of the beneficiary's education at the University of Tokyo, and his fifteen years of work experience that the beneficiary, "attained the equivalent of a Bachelor of Business Administration Degree, with a concentration in Management, from an accredited institution college or university in the United States."

The director noted in his decision that the evaluation was based on a combination of education and experience and that the experience calculation used of three years of experience to one year of education applied to nonimmigrant petitions, but not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The director found that the beneficiary did not have a four-year bachelor's degree, and, therefore, did not meet the qualifications as stated on the labor certification.

On appeal,[4] counsel asserts that it was the petitioner's intention to accept a bachelor's degree based on education and experience, and that deference should be given to the employer's intent. Further, counsel states that the petitioner seeks classification under the skilled worker category, and that the director erred in failing to consider the petition as a skilled worker.

Counsel asserts that the skilled worker statute would allow for an equivalency based on education an experience, and cites to *Grace Korean*, that "it is the employer working under the supervision and direction of OED and DOL, that establishes the requirements for employment," and that "it is the responsibility of the employer, not [USCIS], to establish the criteria for the open position." *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179. Counsel contends that the petitioner has "expressly defined the phrase 'bachelor's degree or U.S equivalent' as a Bachelor's degree, or if a foreign degree, its U.S. academic equivalent, or a combination of education and experience." In further support, counsel cites to a statement submitted in response to the RFE.

In response to the RFE, the petitioner submitted a statement signed by its Immigration Coordinator, dated August 28, 2007, that states, "we would like to confirm that the company defines and has always defined the phrase 'Bachelor's or U.S. equivalent' as a Bachelor's degree, or if a foreign degree, its U.S. academic equivalent, or a combination of education and experience." Additionally, the letter states, "Further, it is the company's policy that it will accept any suitable combination of

[4] Counsel's brief asserts that the case meets the standards of a motion to reopen or reconsider. On Form I-290B, the petitioner checked that it wished to appeal the case, rather than be considered as a motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

education, training, or experience, if such a combination would qualify an applicant for a position." The letter continues that the company, "intended the language 'Bachelor's or U.S. equivalent' to include degree equivalency based on education and experience, because it drafted the labor certification with [the beneficiary] in mind."

The petitioner submitted the letter that it sent to DOL when it filed Form ETA 750. The letter describes the petitioner generally, the results of its recruitment, the position, and the position requirements. Related to the education requirements, the petitioner stated that it required a "B.S. (or U.S. equivalent) in Business Administration and 4 years direct experience." The petitioner states that, "these are the minimum requirements because the theoretical knowledge gained from a Bachelor's degree and requisite level of technical and analytical experience gained by an individual from such experience, will have provide him or her with the expertise to perform the duties of the position." Additionally, the petitioner states that, "we believe that only an individual who meets or exceeds our education and experience requirements has gained the required professional maturity and academic background that will enable him or her to effectively perform the duties of the position."

The petitioner's letter submitted to DOL does not precisely and explicitly outline alternatives to a bachelor's degree to include any combination of education and experience as counsel asserts. Additionally, the petitioner did not submit, despite the director's RFE request, any evidence related to recruitment ads placed in order to determine how the position's actual minimum requirements were expressed to DOL, advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position. [5]

The petitioner's letter also cites to a copy of the beneficiary's H-1B support letter dated October 20, 2004. The petitioner states in the H-1B letter that it will employ the beneficiary as a "Business Analyst, Asia," and that "based on upon the position's level of responsibility, the position of Business Analyst, Asia . . . we normally require a Bachelor's degree, or its equivalent for the position." The petitioner continues, "We would accept at a minimum, a Bachelor's degree in Business Administration, Marketing, Economics, or a related field; or if a foreign degree, its U.S. academic equivalent. We would also consider a combination of education and employment experience which is equivalent to a U.S. degree."

The AAO notes, however, that the labor certification is for the position of marketing manager, "Data Storage International Business Development Director," and not for a "Business Analyst, Asia," for which the petitioner might have considered and allowed for different requirements. Specifically, the H-1B support letter allows for additional fields of study not included in the labor certification, such as

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[5] The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Marketing and Economics. Therefore, we would not conclude that the petitioner had the same requirements for the Business Analyst, Asia position as for the Data Storage International Business Development Director.[6]

In looking at the petitioner's evidence submitted to determine the meaning of "U.S. equivalent," the petitioner's H-1B support letter states that it would require a, "Bachelor's degree in Business Administration, Marketing, Economics, or a related field; or if a foreign degree, its U.S. academic equivalent. We would also consider a combination of education and employment experience which is equivalent to a U.S. degree." The petitioner used similar language in response to the RFE. The labor certification as drafted stated, "Bachelor's degree or U.S. equivalent." The term "U.S. equivalent" is extremely vague, but based on the employer's definition exhibited by the H-1B letter, the first portion allows for a "Bachelor's degree" or if a foreign degree, its U.S. academic equivalent, so that essentially it would read, "Bachelor's or foreign equivalent degree," and not "or equivalent," or "equivalent based on education training and experience. "U.S. equivalent" is excessively vague, and the petitioner failed to submit evidence to exhibit how it expressed its minimum requirements to DOL and the public in its advertisements.[7]

Counsel asserts that the petitioner would have considered the beneficiary's background when completing the labor certification, and, therefore, an academic equivalency based on education and experience would have been acceptable.

The proper inquiry, however, is what are the position's actual minimum requirements, and how the position's actual minimum requirements were expressed to DOL, advertised to U.S. workers, and would a U.S. worker with the equivalency of a degree have known that his or her combination of education and experience would qualify them for the position. None of the evidence submitted would lead us to conclude that the petitioner explicitly set forth alternatives to a bachelor's degree to include a combination of education and experience. As noted above, the petitioner failed to submit evidence of recruitment in response to the director's RFE to establish what it expressed to the public regarding its minimum requirements.

The labor certification as drafted does not allow the individual to qualify for the position through the combination of education and/or experience to show a bachelor's degree to meet the requirements of Form ETA 750A. The petitioner specifically drafted the labor certification to require a Bachelor's degree or "U.S. equivalent." The petitioner did not list that the beneficiary, or any qualified U.S. worker could meet this standard through an alternate combination of education, training and experience. To read Form ETA 750 any other way at this juncture would be unfair to candidates without degrees, but with an alternate combination of education and experience that might have qualified, but were dissuaded from applying for the position. We would not conclude that the petitioner's intent concerning the actual minimum requirements of the proffered position would include equivalency alternatives to a four-year bachelor's degree.

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[6] The petitioner also states that the beneficiary was initially employed as a product planning manager.

[7] *See* 8 C.F.R. § 103.2(b)(14).

Further, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750. The petitioner specifies that a bachelor's degree, is required, and the certified Form ETA 750 does not allow for meeting the degree requirement through any equivalency, the beneficiary would not meet the qualifications listed on the certified ETA 750. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified ETA 750.

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

The petitioner, in the case at hand, did not list "or equivalent," only that the beneficiary must have a bachelor's degree, or U.S. equivalent, similar to a requirement of a "foreign equivalent."

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

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

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *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.

While we do not lightly reject the reasoning of a District Court, it remains that the *Grace Korean* and *Snapnames* decisions are not binding on us, the reasoning in those cases runs counter to Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Further, 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. The director did not identify that the petitioner failed to document that the beneficiary had the required work experience, or that the petitioner failed to establish its ability to pay the proffered wage. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

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

the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d).

The beneficiary must demonstrate that he had the required skills by the priority date. On the Form ETA 750A, the "job offer" states that the position requires four years of experience in the position offered as a Data Storage International Business Development Director.

On the Form ETA 750B, signed by the beneficiary on July 13, 2004, the beneficiary listed his prior experience as: (1) the petitioner, October 2001 to the present (date of signature), Product Planning Manager; (2) , Tokyo, Japan, July 1996 to October 2001, Planning Manager; and (3) Canon, Inc., Tokyo, Japan, January 1995 to June 1996, Marketing Manager.

To document a beneficiary's qualifications, the petitioner must provide evidence in accordance with 8 C.F.R. § 204.5(l)(3):

> (ii) *Other documentation*—
>
> > (A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
> >
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

As evidence to document the beneficiary's qualifications, the record contains the following certificate of experience:

> Certificate, issued by , Tokyo, Japan, dated September 21, 2001, signed by Chief Executive of Office Imaging Products Group and Director;
> Position title: currently "in charge of System Technology Planning & Management Center;"
> Dates of employment: April 1981 to September 2001;
> Description of duties: the letter describes the beneficiary's different positions throughout the company over the twenty year time period. He initially began as a copier salesman, and then from July 1982 to March 1986 worked as a management consultant and devised a computer program to analyze affiliate company performance; from April 1986 to June 1986 and January 1987 to March 1987, he worked in the Business Operations Information Systems Division; from July 1986 to December 1986, he worked in sales planning and promotion; from April 1987 to April 1993, he worked at Canon in Amsterdam as a Marketing

> Coordinator and System Engineer; from April 1993 to December 1993, he worked as a Senior Engineer; from January 1994 to April 1994, he was assigned to an Associate Staff Manager of the Copy Machine Product Planning Division; in January 1995 he was promoted to Manager of System Product Planning and was assigned to Copying Machine Marketing and Planning until June 1996; and from July 1996 to September 2001, the beneficiary served as the Manager of System Technology Planning.

The record additionally contains a confirmation of employment letter from the petitioner that the beneficiary has been employed from October 2001 to the present (letter dated July 10, 2007), and that the petitioner confirms its offer of employment to the beneficiary as a Data Storage International Business Development Director. The letter does not, however, state the length of time, if any, that the beneficiary has been employed in the position offered. The H-1B support letter submitted in response to the RFE indicated that the beneficiary was employed in product planning, and then as a business analyst.

While the Canon letter documents extensive experience, the petitioner's recruitment letter indicates that it rejected a number of candidates for not having specific skills listed in its extensive job description, for example, for not having four years of experience using, "knowledge of Unix, Ethernet, TCP/IP, SCSI, SNMP, MIB, VPN, PKI, Kerberos, SAN, NAS, computer bus, device drivers and command line interface to establish OEM networks." The Canon experience letter submitted on the beneficiary's behalf does not list that the beneficiary used any of the specified technologies to establish OEM Networks. The H-1B support letter, and letter of confirmation also fail to document that the beneficiary had four years of work experience using these specific skills.

As the petitioner has required that the individual have four years in the position offered using the specific technologies listed in the job description, the petitioner must document that the beneficiary has this experience in accordance with 8 C.F.R. § 204.5(l)(3). The petitioner has failed to do so. Accordingly, the director should have denied the petition on this basis as well.

The petitioner must establish that its ETA 750 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 750. The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant, which requires an offer of employment must be

> accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on July 19, 2004. The proffered wage as stated on Form ETA 750 is $130,000 annually based on a 40-hour work week. The petitioner listed the following information: established: 2001; gross annual income: $2.07 billion "NetApp Group;"[8] net annual income: $315 million "NetApp Group;" and current number of employees: 150.

In support of the petitioner's ability to pay, the petitioner submitted a letter signed by its Human Resources Manager, dated September 26, 2006, which states that the petitioner is a wholly-owned subsidiary of Network Appliance Inc., and that the petitioner employs "over 150 individuals worldwide." The petitioner additionally submitted Network Appliance Inc.'s Notes to Consolidated Financial Statements for the years ending April 30, 2005 and April 30, 2006. The Notes indicate that Network Appliance, Inc. "completed our acquisition of [the petitioner] on August 26, 2005."

The H-1B support letter that the petitioner submitted to evidence its intent regarding the minimum education requirements identifies that the petitioner employed approximately 75 workers in October 2004. As the petitioner had less than 100 employees in 2004, it must document its ability to pay through annual reports, federal tax returns, or audited financial statements in that year, or submit the beneficiary's Form W-2 statements to evidence that it paid the beneficiary the proffered wage for that year. Additionally, from the Network Appliance Inc.'s Notes to Consolidated Financial Statements, if the petitioner was acquired mid-year in 2005, the petitioner would need to submit additional evidence of the petitioner's ability to pay for the first half of 2005.[9]

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[8] The petitioner identified that it was a wholly-owned subsidiary of Network Appliance, Inc.

[9] To show that the new entity qualifies as a successor-in-interest to the original petitioner requires documentary evidence that the new entity has assumed all of the rights, duties, and obligations of the predecessor company, and has the ability to pay from the date of the acquisition. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Moreover, the petitioner must establish that the predecessor enterprise had the financial ability to pay the certified wage at the priority date. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986).

Accordingly, the petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.