

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6

FILE:

[REDACTED]
LIN-07-112-52822

Office: NEBRASKA SERVICE CENTER

Date: JAN 16 2009

IN RE:

Petitioner:
Beneficiary:

[REDACTED]

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

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

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

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

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (“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 is an accounting firm, and seeks to employ the beneficiary permanently in the United States as an auditor (“Auditor Benefit Plans”). 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, and, therefore, the beneficiary did not meet the minimum qualifications as listed on Form ETA 750.

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 seeks to classify the beneficiary as a professional worker or skilled 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.

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

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).

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).

Here, the Form ETA 750 was accepted for processing by the relevant office within the DOL employment system on September 6, 2002. The proffered wage as stated on the Form ETA 750 is \$50,000 per year based on a 40-hour work week. The Form ETA 750 was certified on September 19, 2006, and the petitioner filed the I-140 petition on the beneficiary's behalf on March 7, 2007. The petitioner listed the following information on the I-140 Petition: date established: 1973; gross annual income: "millions;" net annual income: "see attached;" and current number of employees: 27.

On July 31, 2007, the director issued a Request for Evidence ("RFE") for the petitioner to provide evidence of its ability to pay the proffered wage for the year 2002; evidence that the beneficiary had a bachelor's degree in Accounting as required by the certified labor certification as the evaluations that the petitioner submitted relied on a combination of educational programs; and evidence that the beneficiary had the required two years of experience as the letters submitted failed to adequately set forth the beneficiary's exact dates of employment and job duties.

On November 30, 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 establish that the beneficiary had the required education. The petitioner relied on a combination of the beneficiary's education, two separate three-year degree programs, which were evaluated as the equivalent of a bachelor's degree. However, the combined education would not meet the qualifications that the petitioner listed on the Form ETA 750. The petitioner appealed that decision to the AAO.

On August 12, 2008, the AAO Chief issued a Notice of Intent to Deny ("NOID"), which requested that the petitioner provide a copy of the recruitment file submitted to DOL in order to determine how the petitioner described the position to DOL and offered the position to the public in its labor certification advertisements. Additionally, the petitioner provided five separate evaluations with the initial filing and on appeal. **Several of the evaluations drew different conclusions. The NOID requested that the petitioner address the reasons for the differences between the five evaluations, or state which evaluation it sought to rely on conclusively.** It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner responded.

On appeal, counsel asserts that the beneficiary qualifies for the position as he has two foreign bachelor's degrees, each of which counsel asserts "is the foreign equivalent of a U.S. bachelor's degree." (Emphasis in the original).

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 Bachelor's degree in Accounting, and two years of experience. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.² DOL assigned the code of "Auditors," 13-2011. According to DOL's public online database at <http://online.onetcenter.org/link/summary/13-2011.00> (accessed October 13, 2008) and its description and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation." According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/13-2011.00#JobZone> (accessed October 13, 2008).³ 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. Because of those requirements and DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

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

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

² Section 101(a)(32) of the Act provides: "The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." This section does not include accountants.

³ DOL previously used the Dictionary of Occupational Titles ("DOT") to determine the skill level required for a position. The DOT was replaced by O*Net. Under the DOT code, the position of Auditor had a SVP of 8 allowing for four to ten years of experience.

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 Economics based on three years of education, as well as a second foreign bachelor's degree in Accounting, also based on three years of education. On appeal, the petitioner submitted evidence that the beneficiary passed the Institute of Chartered Accountants of India ("ICAI") exam. He additionally has related prior work experience. Thus, the issues are whether either of the beneficiary's three-year foreign degrees, or his ICAI credentials are equivalent to a U.S. baccalaureate degree individually, or, if not, whether it is appropriate to consider the beneficiary's additional education and work experience, as well as his initial degree. 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).⁴ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

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

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

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).

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

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree.

The petition and the beneficiary are also 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.

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

Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able,

willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). **The INS then makes its own determination of the alien’s entitlement to sixth preference status.** *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

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

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 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 *Snapshot.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 court determined that Citizenship & Immigration Services (“USCIS”) properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In the instant case, unlike the labor certification in *Snapnames.com, Inc.*, the petitioner’s intent regarding educational equivalence is clearly stated and does not include alternatives to a bachelor’s degree.

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 an Auditor Benefit Plans provides:

Compile, review and audit the employee benefit plan [for] clients of the firm. Plan for the engagement including drafting of the engagement letter, arranging for all audit confirmations being sent timely to the bankers, investment custodians, parties-in-interest, attorneys and all other relevant parties, as applicable. Complete all the workpapers in accordance with standards established by the American Institute of Certified Public Accountants. This includes setting up or updating the Permanent Audit File and completing all the current year workpaper files to ensure that the final trial balance is cross-referenced to the respective workpapers and each section is indexed and cross-referenced to the supporting workpapers. All audit evidence in the files should be appropriately referenced. Prepare draft financial statements for the designated benefit plan clients in accordance with the standards established by the American Institute of Certified Public Accountants. Present the files to the partners for their review in a timely manner and clear all the review points in a professional manner. Prepare Forms 5500 and 990, as applicable, for the designated benefit plans in accordance with the statutory requirements, together with the applicable statutory schedules. Liaise professionally with the clients and the TPA’s (Third Party Administrators) and meet all the statutory deadlines.

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: none listed;
 High School: none listed;
 College: 4 (years);
 College degree: not listed;⁵
Major Field of Study: BA Accounting.

Experience: 2 years in the job offered, Auditor Benefit Plans.⁶

Other special requirements: Must have 2 years experience in benefit plan auditing, current CPA certificate and WA practicing license.

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) Delhi University, Delhi, India; from June 1970 to June 1973, for which he received a Bachelor's degree; and (2) Deakin University, Warrnambool, Australia, Field of Study: Accounting; from January 1988 to December 1990, for which he listed he received a Bachelor's degree. The beneficiary listed in Section 13 that he had a CPA certificate, and a Washington state CPA license.

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

Evaluation One:

⁵ A petitioner would normally list the degree required in this field, however, the petitioner specified in the following field under "Major Field of Study" that a Bachelor's degree in accounting was required.

⁶ The petitioner initially listed that two years in an alternate occupation, unspecified would be accepted. DOL crossed that out and stamped the correction approved prior to certification, so that an individual would need two years prior experience in the position offered to qualify for the position.

- Evaluation: Foreign Academic Credentials Service, Inc., Glen Carbon, IL.
- The evaluation considered the beneficiary's studies, including his Bachelor of Arts (Honours) degree, which he completed at the University of Delhi, India in 1973, as well as the beneficiary's Bachelor of Business degree from Deakin University, Australia in 1991.
- The evaluator determined that the two degrees combined would be the equivalent of a bachelor's degree, and an additional one and one-half years of undergraduate study at an accredited college or university in the United States.
- The evaluator states that the beneficiary's studies included "a minimum of 24 semester hours in accounting subjects, including no more than ten (10) semester hours of lower division elementary courses; and a minimum of 24 semester hours in business administration courses that include Economics and Finance."
- The evaluator additionally notes that the beneficiary "was admitted as an Associate member and Fellow member by the Institute of Chartered Accountants of India." The evaluator further notes that the beneficiary was a designated Certified Practicing Accountant in Australia in 1994.

The evaluation relied on the beneficiary's combined studies from two different schools, and failed to show that the beneficiary had a bachelor's degree or foreign equivalent degree in the required field, based on one program of study, as listed on Form ETA 750. The petitioner did not draft Form ETA 750 to include a degree based on the "equivalent" of a bachelor's degree.

The petitioner provided a second evaluation:

Evaluation Two:

- Evaluation: eValReports, Mukilteo, Washington.
The evaluator summarized the beneficiary's qualifications: that he had the equivalent of a U.S. high school diploma, a bachelor's degree in business administration with a major in accounting from an accredited university in the United States, and is a certified public accountant in Washington.
- The evaluation considered the beneficiary's degree from the University of Delhi, a Bachelor of Arts (Honours Course) which he received in 1974 based on his passage of the Economics exam in 1973. The evaluator determined that the beneficiary's studies were equivalent to three years or six semesters of college credit in economics from an accredited university in the United States.
- The evaluation also considered a copy of the beneficiary's degree from Deakin University in Australia, which certified that the beneficiary was awarded a Bachelor of Business degree on May 24, 1991. The evaluator concluded that this degree was also equivalent to three years or six semesters of study in Accounting.
The evaluator determined that these two programs of study combined were the equivalent of a Bachelor's degree in Business Administration with a major in Accounting from an accredited university in the United States.

- The evaluator notes that the beneficiary submitted a copy of his license as a Certified Public Accountant in the state of Washington.

Similarly, this evaluation relied on a combination of education, which the language of the labor certification as drafted would not encompass. The director noted in his decision that both evaluations submitted were deficient as they relied on a combination of education.

On appeal, the petitioner submitted additional evaluations.

Evaluation Three:

- Evaluation: European-American University, Roseau Valley, Commonwealth of Dominica.⁷
- The evaluator considered only the beneficiary's Bachelor of Business degree in Accounting from Deakin University in Australia, which the beneficiary received in 1991.
- The evaluator states that Deakin University is a public university, which requires graduation from high school (equivalent to a U.S. accredited high school) for entry into the program.
- The evaluator states that the beneficiary completed three years of full-time postsecondary studies.
- He concludes that, on the basis of the Deakin University's credibility, the nature of the course work and related areas, that the beneficiary had the equivalent of a Bachelor of Business degree with a major in Accounting from a regionally accredited institution of higher education in the United States.
- To reach this conclusion, the evaluator looked at the beneficiary's coursework over the three years, assigned each course 4.65 credits and determined that those courses were equivalent to 120 credit hours.
- Notes to the evaluation state that the university "has adopted a variant of the traditional "Carnegie Unit" as a measure of academic credit. This unit is known by the familiar term, 'semester credit hour,' and is the primary academic measure by which progress toward a degree is gauged. In summary this states that 15 classroom (50 minute) hours equal 1 semester credit hour."

Evaluation Four:

- Evaluation: Marquess Educational Consultants,⁸ London, United Kingdom.

⁷ of the European-American University, who completed the evaluation, has a canonical diploma of Sacrae Theologiae Professor, equivalent to a Doctorate of Divinity. According to the European-American University's website, www.thedegree.org, it is an unaccredited "self-validating" university of which [REDACTED] of Marquess Education Consultants is the president. Where an evaluation is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

⁸ Similarly, [REDACTED] of Marquess Educational Consultants has a canonical diploma of Sacrae Theologiae Professor, equivalent to a Doctorate of Divinity. Where an evaluation is in any way

- The evaluator considered the beneficiary's Bachelor of Business (Accounting) degree from Deakin University, Australia, which he received in 1991 based on completion of a three-year program.
- The evaluation stated that, "it is vital in credential evaluation to look at what has been done in a course and not merely the time taken to do it. Were we not to do so we would do an obvious injustice to the significant number of accelerated programs at the bachelor's level now offered by accredited schools in the United States." The evaluation also states that several schools offer three-year bachelor's programs, which some have instituted as a way to reduce the cost of education.
- The evaluation cites studies⁹ and asserts that "there is a strong argument to be made that a more uniform response among U.S. universities to what is often called 'the (three-year) Bologna degree' is needed and/or inevitable if the U.S. is to remain competitive in the global graduate education market."¹⁰

questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

⁹ The evaluation references the United Nations Education Scientific and Cultural Organization ("U.N.E.S.C.O.") Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed December 3, 2008).

The evaluator finds further parallel in the Bologna process in the European Union where three-year first degrees are issued.

¹⁰ The evaluation additionally cites to and attaches: Findings from the CGS International Graduate Admissions Survey, Phase III: Admissions and Enrollment, October 2006. The survey discusses international enrollment and what countries students mainly come from to study in the United States, as well as the issue of three-year degrees. The survey states that three-year degrees have become less controversial in terms of student graduate admissions of those with three-year degrees, however, acceptance of such degrees is not universal; The Lisbon Convention related to the Recognition of Qualifications concerning Higher Education in the European Region, dated April 11, 1997. The Lisbon Convention discusses recognition of qualifications issued by other parties to meet the general requirements for access to higher education, "unless a substantial difference can be shown between the general requirements for access in the Party in which the qualification was obtained and in the Party in which recognition of the qualification is sought;" the European Centre for Higher

- The evaluator concludes that, “there is substantial functional and academic equivalency between [the beneficiary’s] degree and a U.S. four-year baccalaureate, and thus it is our

Education, Recommendation on Criteria and Procedures for the Assessment of Foreign Qualifications, dated June 6, 2001, which discusses the need for ability to establish the authenticity of documents, assessment of credentials in terms of academic equivalency, and an outline for procedures to assess foreign qualifications; The European Centre for Higher Education, Guidelines for the Mutual Recognition of Qualifications between Europe and the United States of America, dated 1995, which discusses U.S. evaluation of European degrees. The report notes that European degrees include more specialized studies early on, while the U.S. education system emphasizes broader studies and greater specialization in the later stages; the World Education News & Reviews (“WES”), “Evaluating the Bologna Degree in the U.S.,” dated March/April 2004. The article includes an assessment of the Bologna Process and terms “the new European bachelor’s” degree based on three years as “quite distinct from its U.S. counterpart;” a report from the American Educational Research Association, Re-engineering Four Years of College into Three: The Makings of a Competency-based Three Year Bachelor’s Degree, Annual Meeting 1998. The report discusses the potential development of a three-year, six semester, 120-credit bachelor’s degree program in business administration available to a select group of qualified students; Findings from the 2005 CGS International Graduate Admission Survey III: Admissions and Enrollment, revised and dated November 2005. The CGS report relates to a “multi-year examination of international graduate admissions trends,” and considers the number of students who applied, were accepted, where they were from, their field of study, as well as issues related to three-year degrees; materials from the Council of Graduate Students Annual Conference, Palm Springs, regarding “U.S. Recognition of International Qualifications: An Australian Perspective, When is Three Years as Good as Four?” dated December 8, 2005. The report recognizes the “lack of international framework for quality assurance and recognition of qualifications.” The report notes that some U.S. graduate schools do not recognize three year Australian or EU degrees; an article by [REDACTED] and [REDACTED] on “Strategies in Dealing with the Bologna Process,” from the International Educator, dated September and October 2006. The article discusses issues with the three-year European degree and its acceptance in the U.S. for graduate school admission; and Documentation of the Carnegie Unit and the US college credit hour, from “A Recipe for Incoherence in Student Learning,” by [REDACTED], Samford University, September 2002.” The article discusses the development of theoretical measures to gauge education. The article notes that the “Carnegie Unit” was defined and accepted in 1909, that it does not account for student learning accurately, and that it has become more complicated by distance learning.

We note that all the attached materials describe theoretical arguments for accepting three-year degrees, that there is a dispute within the academic community related to acceptance of three-year degrees for graduate admission, and that in the future with increasing numbers of international students, the U.S. may need to accept or address the three-year degree issue. However, no study or report conclusively states that all three-year degrees should be accepted. Further, acceptance of the Bologna degree system in Europe is different than acceptance of three-year Indian or Australian degrees in the United States, in the context of employment-based immigrant visa petitions filed with USCIS.

opinion that they should be regarded as equivalent.” Accordingly, the evaluator determined that the beneficiary had the equivalent of a four-year degree of “Bachelor of Business with a major in Accounting from a Regionally Accredited Institution of Higher Education in the United States of America.”

The first two evaluations that the petitioner submitted found that the beneficiary had the equivalent of a bachelor’s degree based on the combination of the beneficiary’s two bachelor’s degrees. The two subsequent evaluations submitted on appeal determined that the beneficiary had the equivalent of a U.S. bachelor’s degree based on one degree alone, the beneficiary’s degree from Australia. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner has not adequately explained the reasons for the substantial differences between the four evaluations submitted.

The petitioner submitted an additional evaluation while the appeal was pending.¹¹

Evaluation Five:

- Evaluation: Foundation for International Services (“FIS”), Lynnewood, WA.
- The evaluator summarized the credentials submitted: a copy of the beneficiary’s Bachelor of Arts degree received in 1973 from the University of Delhi based on passage of the examination in Economics. The evaluator states that the program was three years and that the beneficiary completed exams in 1971, 1972 and 1973. The evaluator determined that this program of study would be equivalent to three years of university-level credit from a regionally accredited college in the United States.
- The evaluator further considered the beneficiary’s Institute of Chartered Accountant credentials. The beneficiary submitted a copy of a certificate exhibiting passage of the final examination in May 1980. He also provided a copy of a certificate to verify his admission as a Fellow of the Institute on October 15, 1985, a certificate verifying his Associate membership on July 14, 1980, as well as the marks statements for each subject.
- The evaluator listed courses completed, including Accounting I and II, Statistics, General Commercial Knowledge, Economics, Advanced Accounting, Auditing and other courses.

¹¹ The director’s RFE requested that the petitioner submit documentation to demonstrate that the beneficiary met the minimum requirements of the certified labor certification. The petitioner did not provide the beneficiary’s ICIA documentation in response to the RFE, or provide an evaluation that addressed the beneficiary’s ICIA membership. Of the first four evaluations submitted, only one references the beneficiary’s ICIA membership. None of the four evaluations accredits any academic value to the membership separately or combined. 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 evaluator determined that the beneficiary's completion of the Final Exam certificate would be "similar in complexity and length to a course of study for which an institution in the United States would grant a bachelor's degree."
- The evaluator notes additional documentation submitted: the beneficiary's certificates showing admission as a Certified Practicing Accountant in Australia and a certificate for his admission as Certified Public Accountant from Washington State.
- The evaluator concludes that the beneficiary has the equivalent of a bachelor's degree in accounting from a regionally accredited college or university in the United States: "The Final Examination Certificate, which is the qualification that is equivalent to a bachelor's degree in accounting, requires the Bachelor of Arts in Economics for admission."

The petitioner did not explain why the first four evaluations submitted did not address the ICAI credential, and why it was only addressed six months after filing the appeal in the FIS evaluation.

The petitioner additionally submitted an Expert Letter from FIS:

- Letter: FIS, Lynnwood, WA.¹²
- The FIS letter reviewed a copy of the RFE and decision that the petitioner provided. The letter asserts that USCIS "has missed a critical element in denying the I-140 Immigrant Petition. In particular, The Final Examination Certificate was awarded by a recognized institution in India (by the Association of Indian Universities), which was based upon a 2-3 year course of study and examinations in accounting, which followed a 3 year Bachelor of Arts degree in Economics which was the entrance requirement."¹³ (Emphasis in original).
- The expert letter states that the ICAI credential Final Examination Certificate is recognized by over 39 colleges and universities in India. Further, the letter states that several U.S. universities would consider the ICAI credential as equivalent of a bachelor's degree for purposes of admission into graduate school.¹⁴
- The evaluator concludes that, "the Institute of Chartered Accountants of India Final Examination Certificate is a foreign equivalent to a U.S. Bachelor's degree in Accounting based upon its length and complexity and is an accepted academic credential for admission into graduate schools of business in the United States."

¹² The President of FIS additionally submitted a letter, which set forth the qualifications of FIS as a credential evaluation service. FIS has provided foreign credential evaluations since 1978. The letter states that FIS is a founding member of the National Association of Credentials Evaluations Services (NACES), which "sets the standards for this industry."

¹³ The evaluations that the petitioner provided prior to the petition's denial did not address the ICAI credential. Further, the petitioner did not raise this issue in response to the director's RFE. Additionally, the beneficiary did not list his ICAI certificate on Form ETA 750B.

¹⁴ Attached to the letter is a report related to the Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka from the Pier World Education Series, dated 1997, which confirms that the ICAI certificate, "may be considered for graduate studies."

The petitioner submitted a second expert letter from Seattle Pacific University.

- Letter: [REDACTED], Ph.D., Professor in the School of Business and Economics, Seattle Pacific University, Seattle, WA.
- The letter specifically considers “whether the Final Examination Certificate from the Institute of Chartered Accountants of India (ICAI) and the coursework leading up to the Final Examination Certificate would equate to an individual with a bachelor’s degree in accounting from a four year accredited college or university in the United States.”

The professor reviewed the beneficiary’s educational history and concluded that the beneficiary “has the equivalent of a bachelor’s degree in accounting from an accredited college or university in the United States.” He based this opinion on the beneficiary’s accounting courses taken in connection with his undergraduate study, the certification obtained from the ICAI, the beneficiary’s admission as a CPA in Australia, as well as his CPA admission in Washington state, and the beneficiary’s bachelor’s degree from the University of Delhi. The professor noted that completion of a bachelor’s degree is a requirement for entry into the ICAI program.

- The professor summarizes again in conclusion that after:

Reviewing [the beneficiary’s] education and professional certifications, it is my opinion that he has earned the equivalent of a bachelor’s degree in accounting from an accredited college or university in the United States. This opinion is based primarily on the fact that the coursework on the Final Examination Certificate from the ICAI is similar in complexity and length to a course of study for which an educational institution in the United States would grant a bachelor’s degree in accounting.

Further, in determining whether the beneficiary’s degrees or ICAI credentials are foreign equivalent degrees, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is “a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

EDGE provides that a Bachelor of Arts/Bachelor of Commerce/Bachelor of Science degree awarded in India represents the attainment of a level of education comparable to two years or three years of university study in the United States. Based on information in the record, the beneficiary’s bachelor’s degree from India would appear to be equivalent to three years of study towards completion of a bachelor’s degree in the U.S.

EDGE provides that an “ordinary” or “pass” Bachelor’s degree awarded in Australia is equivalent to three years of university study in the United States in contrast to the petitioner’s third and fourth evaluations, which conclude the degree is equivalent to a four-year Bachelor’s degree. *See Matter of Ho*, 19 I&N Dec. at 591-592. Therefore, based on the information in the record, the beneficiary’s bachelor’s degree from Australia would appear to be equivalent to three years of study towards the completion of a bachelor’s degree in the U.S.

EDGE further provides that two years of study beyond the required entry Bachelor of Arts/Commerce/Science and passage of the ICAI Final Exam and Associate Membership would represent “attainment of a level of education comparable to a bachelor’s degree in the United States.”

The beneficiary’s ICAI credentials standing alone would not represent the equivalent of a bachelor’s degree, but instead is contingent on the beneficiary’s three-year Bachelor’s degree, and therefore serves as a combined “equivalent” degree. The petitioner did not list on Form ETA 750 that it would accept an equivalency to a degree such as a membership in a professional association or through a combination of education, training, and/or experience to meet the qualifications of the certified labor certification. Further, we note that the beneficiary’s Form ETA 750 does not list the beneficiary’s ICAI membership. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board’s dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B lessens the credibility of the evidence and facts asserted.

The AAO sent the petitioner a Notice of Intent to Deny (“NOID”) for the petitioner to explain the five evaluations, several of which draw different conclusions.¹⁵ The NOID additionally sought evidence regarding the petitioner’s intent to hire individuals with the equivalent of a degree.

In response to the NOID, counsel¹⁶ asserts that the petition should be considered under the skilled worker category, and that the beneficiary has the equivalent of a bachelor’s degree based on his ICAI credentials.

Counsel cites to a recent AAO decision, *In Matter of [File Number Redacted]* (AAO June 14, 2007) in support. Counsel asserts that in that case, the AAO recognized that despite the petitioner’s listing four years of college was required, that the petitioner provided evidence that an equivalent degree should be accepted. Further, counsel asserts that the AAO considered DOL occupational guidance,

¹⁵ Where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

¹⁶ The petitioner retained new counsel who responded to the NOID on its behalf.

and such guidance should be accepted to find that the beneficiary qualifies as a skilled worker. Counsel asserts that while the present matter involves a different occupational classification, both cases had a similar standard vocational training code assigned, which allowed no more than four years of vocational preparation. In *In Matter of [File Number Redacted]* (AAO June 14, 2007), the AAO allowed the position to be classified as a skilled worker.

In Matter of [File Number Redacted] (AAO June 14, 2007) concerned a seafood import distribution company that filed for the position of a manager or sales representative. The position required a four year bachelor's degree. The beneficiary had the equivalent of a degree based on a combination of education and experience. The AAO looked to the recruitment submitted, which included a posting notice and advertisements. The posting notice and ads all included the phrase "Bachelor's Degree in Business or related field or equivalent." As the beneficiary only qualified for the position based on an equivalent combination degree, and not based on a four-year bachelor's degree, the AAO considered the petitioner's inclusion of "or equivalent" in its recruitment critical to sustaining the appeal for the beneficiary as a skilled worker.

The critical issue in sustaining the appeal cited by counsel, which is not precedent, was the petitioner's inclusion of "or equivalent" in its recruitment. In the present matter, the petitioner has not demonstrated that it included "or equivalent" as an express term on the labor certification or in any of the recruitment completed.

While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, prior AAO decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Counsel attached a second case, *In Matter of*, LIN-07-157-51482 (AAO February 19, 2008). In that matter, the petitioner was a manufacturer and distributor of dental care products and sought to employ the beneficiary as an operations research analyst. The position required a bachelor's degree in Business Administration or its foreign equivalent. The beneficiary similarly had a three-year Bachelor of Commerce degree and ICAI Associate Membership evaluated to be the equivalent of a bachelor's degree in the required field. The AAO determined that the position would qualify under the skilled worker category. Similarly, in that case, the petitioner critically indicated on Form ETA 750 that it would accept more than just a bachelor's degree, and included a designation regarding whether it would accept an equivalent. In the case at hand, the petitioner only listed on Form ETA 750: "BA Accounting," and made no designation that it would accept any equivalency.

While the instant petition may be considered under the skilled worker category, as noted above, the petitioner must still demonstrate that the beneficiary meets the requirements of the petition, including that he has a four-year bachelor's degree in Accounting. The petitioner has not established this.

Counsel asserts that as the AAO has recognized in its NOID that EDGE states the ICAI credential is equivalent to a bachelor's degree, and, therefore, the petition should be approved.

While EDGE does state that the ICAI credential is equivalent to a bachelor's degree, the NOID also specifically states that, "the beneficiary's ICIA credentials standing alone would not represent the equivalent of a bachelor's degree, but instead is contingent on the beneficiary's three-year **Bachelor's degree, and therefore serves as a combined 'equivalent' degree.**" Although the beneficiary may hold credentials equivalent to a degree, the petitioner did not list on Form ETA 750 that it would accept an equivalency to a degree such as membership in a professional association or a combination of education, training, and/or experience to meet the qualifications of the certified labor certification. The petitioner specifically required a bachelor's degree and recruited qualified applicants accordingly. The petitioner did not open its requirements for the job to include alternatives to a degree.

Counsel states that the petitioner seeks to rely only on the FIS evaluation as it is consistent with the AAO's prior interpretation of the ICAI credential and the EDGE evaluation. The petitioner submitted an additional letter from FIS to explain the differences in the evaluations. FIS notes that it subscribes to EDGE and drew the same conclusions regarding the ICAI equivalency as the AAO's EDGE interpretation. FIS asserts that the five evaluators were provided with different evidence and that "none of the five were provided with the entirety of [the beneficiary's] educational record." Related to the evaluations from the European University and Marquess Educational Consultants, the FIS letter terms those, "rather generous (but not altogether illegitimate) placement recommendation for a three-year bachelor degree (from a 12+3 system)." The evaluator continues that, "Most American universities are actually moving toward acceptance of such three-year bachelor degrees for purposes of graduate admission, so it is not completely outlandish to suggest that a graduate of such a program would have an education that is functionally equivalent to a U.S. bachelor degree holder as they can both seek admission to master and doctoral level programs in this country." The evaluator also notes that students in three-year bachelor degree programs in Europe, India and Australia, "actually spend more hours in their major subjects than do their American counterparts."

Regarding the evaluations from Foreign Academic Credentials Services, Inc. and e-ValReports, the FIS letter states that they "reveal a more moderate approach to foreign credential placement." The evaluator notes that between the beneficiary's completion of the Bachelor of Commerce degree and the Bachelor of Business Administration degree that the beneficiary would have completed more than 120 credit hours, and that graduates of both programs can be considered for admission to U.S. MBA programs.

FIS states that its evaluation is more conservative as, "We do not typically regard three-year degrees as equivalent . . . in part because there is a fundamental difference between a four-year education which includes elective/complementary studies (often termed 'general education') that prepares students in multiple ways for more than one field of study." In conclusion, FIS states that its evaluation may be relied on conclusively since it is in accordance with AACRAO. Further, it based its recommendation on the consideration of all factors: program length, entrance criteria, and complexity of the programs.

The FIS letter fails, however, to explain why the first evaluation from the Foreign Academic Credentials Service, Inc., referenced the ICAI certificate, but did not assign the credential any value.

Counsel next asserts that in order to obtain a CPA certification in the State of Washington, an individual must have a U.S. Bachelor's Degree or equivalent. As a result, counsel states that if anyone had a CPA license in Washington, the state board would have determined that they had a bachelor's degree or equivalent. Therefore, counsel concludes that "the petitioner's willingness to accept the equivalent of a U.S. Bachelor's Degree in Accounting based on something other than a four-year program was apparent to anybody who saw the advertisement listing 'a current CPA certificate and WA practicing license.'" Counsel cites to the Washington State rules and attaches Rule WAC 4-25-400, which allows the board to establish qualifications for a license.

Related to these issues, is the question of how the petitioner expressed its intent about its stated minimum educational requirements for the position. USCIS can review that intent by reviewing how the position's actual minimum requirements were expressed to DOL, advertised to U.S. workers, and whether a U.S. worker with the equivalency of a degree would have known that his or her combination of education and experience would qualify them for the position. To ascertain the petitioner's expressed intent in advertising the position requirements, the AAO sent the petitioner an NOID.

In the petitioner's response to the AAO's NOID, counsel submitted a copy of the Form ETA 750 as sent to DOL, including a copy of the petitioner's posting notice, and a copy of the recruitment ads underlying the labor certification.

An ad from a Sunday newspaper, dated June 16, 2002, listed the requirements as, "BA in accounting. Must have 2 years exp. in benefit plan auditing, current CPA certificate and WA practicing license." A second ad, undated, lists the same requirements. Similarly, the posting notice, dated September 3, 2002, listed the requirements as, "Bachelor's degree in Accounting, 2 years experience in auditing benefit plan, CPA certificate and WA practicing license." In a letter the petitioner submitted to DOL outlining the position requirements, the petitioner stated that its "minimum requirements for this position are a Bachelor's Degree in Accounting, at least 2 years experience in auditing of employees benefit plan, current CPA certificate and a WA practicing license."

As the ads specify that the petitioner requires both a Bachelor's degree in Accounting, as well as a CPA certificate, and a Washington practicing license, the employer is arguably indicating that licensure is not enough to qualify. Rather, the petitioner specifically advertised that it wanted a candidate with a Bachelor's degree in addition to two years of experience, a CPA certificate, and a Washington State practicing license.

The petitioner does not specify in relation to the Bachelor's degree that it is willing to similarly accept an equivalent. From the materials submitted, we would not conclude that the petitioner clearly expressed to DOL or to any potential qualified U.S. workers that it would accept the equivalent of a bachelor's degree in addition to candidates with bachelor's degrees.

The AAO disagrees that an individual reading the ad would understand "or equivalent" is inherent in the CPA certificate or licensure requirement. While a bachelor's degree or equivalent might be

required to obtain a CPA certificate or licensure, a candidate who saw the petitioner's recruitment ad might not necessarily assume that the petitioner would accept an equivalent to an actual four-year U.S. bachelor's degree for the position if those words were not clearly stated, and certainly not where a specific degree without an equivalency annotation was set forth in addition to a license and CPA certificate. Further, counsel submitted a letter from the State of Washington Board of Accountancy, which states "in 1999, the education requirement to sit for the exam was a baccalaureate or higher in any field with a concentration in accounting." The letter does not state "bachelor's degree or equivalent."¹⁷

Alternatively, counsel asserts that, "the beneficiary also qualifies for the job offered in this I-140 based on a permitted combination of education." Counsel explains that the petitioner informed DOL that the beneficiary qualified for the position:

Based on education reviewed and deemed equivalent to a U.S. Bachelor's degree in Accounting by the Washington State Board of Accountancy. As part of the Labor Certification, the Petitioner clearly stated the scope of acceptable language that would be understood by anybody holding a CPA certification and Washington State Board of Accountancy.

Counsel further looks to a 1993 letter from DOL Certifying Officer [REDACTED] to [REDACTED] [REDACTED] which states that, "the employer definitions of equivalency [are reviewed] on a case by case basis for compliance with the regulations concerning restrictive requirements and the actual minimum requirements." Counsel asserts that DOL did not request anything from the petitioner as the petitioner identified that "equivalent" was acceptable, and that the petitioner would not impose a requirement that would exclude the sponsored employee.

Counsel is mistaken. As noted above in *Madany*, 696 F.2d at 1008, the Ninth circuit stated, "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." The court continued, however, that it "does not appear that the DOL's role extends to determining if the alien is qualified for the job . . . That determination appears to be delegated to [USCIS]." Further, the petitioner does not state anywhere on Form ETA 750 that an education based on the equivalent of a bachelor's degree would be sufficient to qualify for the position. In the petitioner's letter to DOL, it states that the "minimum requirements for the position are a Bachelor's Degree in Accounting, at least 2 years of experience in auditing of employees benefit plan, current CPA certificate and WA practicing license." The letter does not state anywhere that it would accept an employee with the equivalent of a degree. As USCIS reviews and determines the beneficiary's qualifications, it is irrelevant that DOL did not request any further documentation.

¹⁷ The Washington State Board of Accountancy sets forth its education requirements at WAC 4-25-710. See <http://www.cpaboard.wa.gov/rules/Policies/edrequir.html> (accessed January 8, 2009). The rules distinguish the educational requirements for individuals applying currently, and those who applied for or took the CPA examination prior to July 1, 2000.

Counsel cites to *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967), and *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969), and argues that these cases would allow for equivalencies based on a combination of education and experience.

In *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967), the Regional Commissioner determined that the beneficiary's education, including a bachelor of commerce degree in accounting with postgraduate work toward a master of commerce degree, combined with nine years of specialized experience in accounting would "collectively" be equivalent to a bachelor's degree in accounting and that the beneficiary would qualify as a member of the professions within the meaning of Section 101(a)(32) of the Act.

In *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969), the Regional Commissioner determined that the beneficiary would qualify as a professional librarian under Section 101(a)(32) of the Act based on a combination of her education, three and a half years, and her experience, over twelve years. Part of the decision was based on "it is recognized that in a few areas of the professions, it is not always possible to obtain the usual formal education. In this case, it has been pointed out that in Israel, at the time the subject resided there, there were no schools offering degrees in library science."

We note that based on the time period for the cases cited that the preference categories were different. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job related basis: the third and sixth preferences under 8 U.S.C.A. § 1153(a) and (6). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended under 8 U.S.C.A. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled.

Further, prior to IMMACT 90, there was no definition of the term "professional." Now, however, professional is defined at Section 101(a)(32) of the Act as set forth above in footnote 2, and 8 C.F.R. § 204.5(l)(3)(ii)(C) explicitly requires a bachelor's degree. Therefore, the cases that counsel cites, which were all decided prior to IMMACT 90, are irrelevant.

Counsel cites to *Matter of Chawathe*, [REDACTED] (AAO Jan. 11, 2006),¹⁸ and asserts that the evidence provided would reflect by the preponderance of the evidence that the beneficiary has the

¹⁸ Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought. *See e.g. Matter of Martinez*, 21 I & N Dec. 1035, 1036 (BIA 1977) (noting that the petitioner must prove eligibility by a preponderance of the evidence in visa petition proceedings) . . .

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is

required experience, should be considered as a skilled worker and that the position was open to all applicants, allowing people to qualify based on a combination of education and experience.

While the beneficiary's combined education based on the ICAI credential and his bachelor's degree would be the equivalent of a bachelor's degree, the specific issue in this matter is the way that the petitioner drafted the labor certification. The petitioner did not specify that it would accept the equivalent of a Bachelor's degree through membership in a professional society and/or a combination of education and/or experience. The recruitment does not state that it would accept the equivalent of a degree. Further, we disagree that "or equivalent" would be inherent or understood in the "CPA certification" requirement.

As noted above, the Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, provided that while DOL must certify that there are insufficient domestic workers available to perform the job, following certification, "INS [now USCIS] 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). Further, the court provided, "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).

If we considered the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 750.¹⁹ As the petitioner specifies that a bachelor's degree is

made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I & N Dec. 77, 79-80 (Comm. 1989) . . .

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. See *U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as greater than 50 percent probability of something occurring.)

The substance of *Matter of Chawathe* related to the issue of whether a corporation was an "American firm or corporation" for purposes of calculating whether the alien had disrupted his U.S. residence in order to meet naturalization criteria.

¹⁹ 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

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.

required, and the certified Form ETA 750 does not allow for meeting the degree requirement through any equivalency at the bachelor's level, 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. *Matter of 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.

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 USCIS 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 certified 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) 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.

Based on the foregoing, the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. 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.