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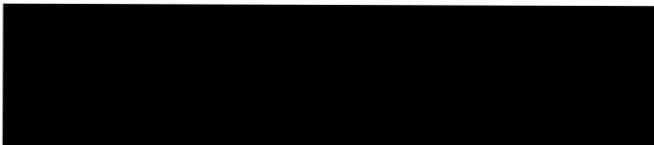
FILE: LIN 06 202 51551 Office: NEBRASKA SERVICE CENTER Date: JUL 30 2009

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

John F. Grissom,  
Acting Chief, Administrative Appeals Office

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

The petitioner is a newspaper. It seeks to employ the beneficiary permanently in the United States as a database development and administrator. As required by statute, an Application for Permanent Employment Certification, ETA Form 9089 approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary does not have a U.S. bachelor's degree or foreign degree equivalent required by the terms of the labor certification application.

The I-140 petition was filed by the petitioner on June 29, 2006, and it was denied by the acting director on January 16, 2007. Here, the Form ETA 9089 was accepted on November 2, 2005. The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Alien Employment Certification as certified by the U.S. DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.<sup>1</sup>

With the initial I-140 petition, the petitioner submitted a copy of the beneficiary's Bachelor of Science degree in Physics, Mathematics, and Computer Science from Bangalore University, Bangalore, India dated April 1995, along with copies of the beneficiary's three Statement of Marks documents. The Statements of Marks clearly identify the program offered by Bangalore University as a "three-year B. Sc. Degree." The petitioner also submitted an Academic Equivalency Evaluation, dated April 6, 2005, written by [REDACTED], Trusteforte Corporation, New York, New York. The petitioner also submitted a letter written by [REDACTED], President, SSE, Inc., Bowie, Maryland. In his letter, [REDACTED] verified the beneficiary's work experience as a data-warehousing consultant with The Barry Group, Inc. from March 2000 to November 2001, while he was the beneficiary's direct supervisor.

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<sup>1</sup> The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

In response to the director's request for evidence dated January 4, 2007, the petitioner submitted a second educational equivalency evaluation written by ██████████ Career Consulting International, Sunrise, Florida<sup>2</sup> which contained a copy of the beneficiary's Honours Diploma in Software Technology & Systems management from the National Institute of Information Technology (NIIT), Bangalore, India dated November 11, 1998. The petitioner also submitted the beneficiary's two transcripts for Semester P and Q of the NIIT program, each of which is noted as being 26 weeks in length.<sup>3</sup> Based on the transcripts, the beneficiary received overall grades of C (Satisfactory) and E (Excellent) in these two program semesters in February and April 1995.

In a cover letter accompanying these materials, ██████████ the petitioner's Circulation Systems Manager, states that the beneficiary's combined foreign degree from Bangalore University and post-secondary certification from NIIT are fully acceptable to the petitioner for the position of Circulation Marketing Database Developer/Administrator. Counsel in the response to the director's RFE states that the Form ETA 9089 provides no sufficient fields in Part H, Item 9 for the petitioner to elaborate upon whether an equivalent foreign degree or a foreign degree equivalent is acceptable to qualify for the proffered position although the previous Form ETA 750 A did provide such an opportunity at Item 14a. The AAO notes that in Part H of the ETA Form 9089, the petitioner required a bachelor's degree in computer science, and that the petitioner's ETA Form 9089 as filled out did not allow for any alternative combination of education plus experience in Section H.8.<sup>4</sup>

Counsel states that it is abundantly clear that the beneficiary completed the equivalent of a U.S. Bachelor of Science degree in Computer Science upon his completion of his Bachelor of Science degree at Bangalore University and his post-secondary NIIT program in computer science.

On appeal, counsel asserts that the petitioner filed an I-140 petition requesting a preference visa in the professional classification. Counsel states that the professional academic evaluations submitted are evidence of the beneficiary's qualifications for the offered position of Circulation Marketing Database Developer and Administrator. Counsel states given the highly technical nature of the job duties, the requirements of the proffered position were that the beneficiary hold a bachelor's or equivalent. Counsel identifies this equivalency on appeal as an equivalent foreign degree or the equivalent of a bachelor's degree in computer science plus one year of professional experience in the field. Counsel further notes that when the petitioner marked "Yes" on Part H, Item 9 of the ETA 9089, "Is a foreign educational equivalent acceptable" it could validly be interpreted to mean that the equivalent foreign degree or the equivalent of the degree through a combination of sources is acceptable.

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<sup>2</sup> This evaluation was also evaluated by the AAO in its RFE to the petitioner dated December 1, 2008 and will be discussed further in these proceedings.

<sup>3</sup> The beneficiary's NIIT diploma states that the program is for one year.

<sup>4</sup> Further, the AAO does not find counsel's assertion on appeal that the Form ETA 9089 did not provide an opportunity to list alternative education and/or experience on the form to be persuasive. Part H, Item 8 and 8-A specifically ask if there is an alternate combination of education and experience that is acceptable, and if so, what alternate level of education was required.

Counsel also asserts that the director denied the petition because of an erroneous finding that the beneficiary did not gain the required bachelor's degree from a single educational institutional source. Counsel cited the Federal case of *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) in support of her contention. According to counsel the *Grace Korean* court held that the language of "B.A or equivalent" in the context of a labor certification includes a degree equivalency based on education and experience." Counsel also contends that USCIS' requirement that the beneficiary's education must constitute a single educational institution or source degree is not supported by a valid legal basis.<sup>5</sup>

On December 1, 2008, the AAO sent the petitioner a Request for Evidence (RFE). The AAO reviewed the ETA Form 9089 submitted by the petitioner and noted that Part H set forth the minimum requirements, namely, a bachelor's degree in computer science, MIS or related field and 12 months (1 year) of experience in the job offered or 12 months (1 year) of experience as a software development consultant /system analyst as an acceptable alternative occupation.

In its RFE, the AAO reviewed the two educational equivalency reports previously submitted to the record. The AAO noted that [REDACTED] states in his report that the beneficiary's Bachelor of Science degree from Bangalore University, India is the equivalent of three years of academic studies in the U.S. [REDACTED] also notes that the beneficiary completed a post-secondary program resulting in an "Honours Diploma" in software technology and systems management from the NIIT in India which, in [REDACTED] opinion, is "analogous" in content and duration to classes offered in bachelor's-level programs in U.S. universities. [REDACTED] states that the beneficiary has completed coursework at Xavier University "towards" a Master of Business Administration degree. [REDACTED] concludes that based on the Bachelor of Science degree and program of study at NIIT, the beneficiary has attained the equivalent of a Bachelor of Science Degree in Computer Science from an accredited U.S. college or university. [REDACTED] does not conclude that the beneficiary possesses a single source degree that is equivalent to a U.S. bachelor's degree.

Counsel also submits an educational equivalency report from [REDACTED] stating that the beneficiary has completed a Bachelor of Science degree at Bangalore University, India, from 1992 to 1995, and that the beneficiary then completed instruction in software technology and systems management at the NIIT in India in 1998. She equated the two programs together as 126 "semester credit hours."<sup>6</sup> Therefore, based on these two programs, according to [REDACTED], the beneficiary "has satisfied

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<sup>5</sup> Counsel raised two other issues relating to the Paperwork Reduction Act (44 U.S.C. § 3500, *et seq.*; See <<http://uscode.house.gov/download/pls/44C35.txt>>) and alleged "pernicious" practices of USCIS concerning adjudications of visa petitions. These matters are outside the jurisdiction of the AAO.

<sup>6</sup> The AAO notes that although [REDACTED] makes an estimation of the beneficiary's "semester credit hours," she does not provide evidence or prove the criteria she utilized to convert the beneficiary's "statement of marks" from Bangalore University and NIIT "performance (%)" for tertiary education and technical non-tertiary education courses taken by the beneficiary into "126 semester credit hours."

requirements *substantially similar* to those required towards the completion of a Bachelor of Science in Computer Science from an accredited institution of higher education in the United States.”<sup>7</sup>

The AAO also notes that in determining whether the beneficiary possesses a U.S. bachelor’s degree in computer science or a foreign equivalent, it reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO).<sup>8</sup>

The AAO notes that AACRAO, according to its website, [www.aacrao.org](http://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.”

The AAO notes that EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. The AAO states that EDGE further asserts that a Postgraduate Diploma following a three-year bachelor’s degree “represents attainment of a level of education comparable to a bachelor’s degree in the United States.” The section “Advice to Author Notes,” however, provide:

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

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<sup>7</sup> [REDACTED] indicates that she has a master’s degree from the Institute of Transpersonal Psychology and a doctorate from Ecole Superieure Robert de Sorbon but she does not indicate the field in which she obtained her doctorate. According to the website of that latter institution accessed at [www.sorbon.fr/index1.html](http://www.sorbon.fr/index1.html) Ecole Superieure Robert de Sorbon awards degrees based upon past experience.

<sup>8</sup> In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

The AAO notes that in the instant case, the record does not contain any evidence showing the beneficiary held a four-year U.S. bachelor's degree in one of the required fields based upon a single program of study, and that the record does not contain any evidence showing that the honors diploma in software technology and systems management from the Academic Council of NIIT was a postgraduate diploma issued by an accredited university or institution approved by AICTE and its entrance requirement is the three-year bachelor's degree.

On December 1, 2008, the AAO requested that the petitioner submit further evidence to support any such assertions and provided twelve weeks for a response. To date, the petitioner has submitted no such evidence.

The AAO states that the record does not contain evidence showing that the petitioner actually defined or used equivalent requirements in the petitioner's labor market test, and thus, the RFE was issued to obtain evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the DOL while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application.

The AAO also notes that on the ETA Form 9089 Part I, DOL requests "recruitment information" and DOL's regulations require that notice of the filing of the application for permanent employment certification be given; to conduct required pre-filing recruitment including placing a job order and advertisements in a newspaper or professional journal, and to prepare a recruitment report as part of a pre-filing recruitment effort in order to allow DOL to determine whether the petitioner put forth good faith efforts to recruit U.S. workers in accordance with the regulatory attestations found at 20 C.F.R. §§ 656.10(c)(8) and (9).

The AAO states that nothing in the record addressed these efforts as required under 20 C.F.R. §§ 656.10(c)(8) and (9). Because such material could illustrate the petitioner's intent about the actual minimum requirements of the proffered position and that it tested the U.S. labor market with those actual minimum requirements, the AAO requested that the petitioner provide the audit file prepared, *at the time it submitted to DOL, its ETA Form 9089 application and attachments*, including the requisite "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. *See* 20 C.F.R. §§ 656.21(b) or 656.17(e) and (g).<sup>9</sup> The AAO requested specifically a complete copy of the petitioner's recruitment efforts, including the notice of the filing, job order, advertisements in newspapers or professional journals and additional recruitment

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<sup>9</sup> Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). Your submission of the evidence requested therefore may help demonstrate that U.S. workers without four years of college and without bachelor's degrees were in fact put on notice that they were eligible to apply for the proffered position, despite the stated requirements of the ETA Form 9089, and that your organization did not in fact exclude U.S. workers with qualifications similar to those of the beneficiary from applying for and filling the position.

efforts for a professional job, and the recruitment report to establish that the petitioner intended to delineate an equivalency to the bachelor degree requirement as set forth in Part H items 1-13 of the ETA Form 9089 to include a combination of a three-year degree and a diploma as the actual educational minimum requirement in the instant labor certification application during the labor market test.

Guidance on the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: “[USCIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Additionally, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate.

With regard to the credentials evaluation reports submitted to the record, [REDACTED] evaluation report is only given limited evidentiary weight. In his report, the evaluator combined the beneficiary's three-year program along with the one-year NIIT program in India to arrive at his conclusion that the beneficiary's university level studies are the equivalent of a U.S bachelor's degree in computer information systems. However, the evaluator did not provide any explanation of how he arrived at his conclusions with regard to credit hours earned by the beneficiary. The AAO acknowledges that the petitioner was not provided with the PIER materials that suggest that the NIIT program would not be considered the equivalent of a third year of university-level studies.

As stated previously, the AAO does not accept the combination of degrees as the foreign equivalent degree to a four-year U.S. baccalaureate degree. The AAO also notes that the beneficiary's three years of studies at Bangalore University document that only approximately one third of the beneficiary's coursework was in the field of computer science. For his first year of studies, the beneficiary earned grades of 33 and 23 in theory and practical parts of coursework in computer science which is less than the 35 percent required for a passing grade. In his second year of studies in 1994, the beneficiary passed the theory part of his computer science studies while not passing the practical part. In his third year he passed both the theory and practical papers coursework in computer science. Such coursework even in combination with an additional year of university-level studies in computer systems and applications, would not necessarily equate a four-year U.S. baccalaureate program in computer studies accredited by a U.S. college or university.

With regard to [REDACTED] evaluation, she also combined the beneficiary's three-year degree in physics, mathematics and computer science at Bangalore University with the one year NIIT program in stating that that the beneficiary has the equivalent to a U.S. baccalaureate degree. Again, the AAO does not accept this combination of degrees as a substitute for a four year U.S. baccalaureate degree or foreign equivalent degree. The AAO also notes that [REDACTED] has misrepresented the

beneficiary's grades provided on the NIIT transcripts, with no further explanation.<sup>10</sup> For this reason, her evaluation report is given no evidentiary weight. Thus, the petitioner has not established that the beneficiary has a single source foreign equivalent degree. 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.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. Here, the ETA Form 9089 was accepted for processing on November 2, 2005.<sup>11</sup> The Immigrant Petition for Alien Worker (Form I-140) was filed on June 29, 2006.

The proffered position's requirements are found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. The instructions for the ETA Form 9089, Part H, 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

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<sup>10</sup> The NIIT grades listed by \_\_\_\_\_ on her evaluation vary from the actual grades and points indicated on the NIIT transcripts. For example, the Semester Q transcript from NIIT indicates a score of 53, or a grade of E, for coursework identified as FoxPro, Application Development, while \_\_\_\_\_ assigns a grade of B to this same course on her explanation of the NIIT coursework. The AAO notes other grade discrepancies between the actual NIIT transcripts and Ms. Danzig's analysis of the coursework, for which \_\_\_\_\_ provided no explanation.

<sup>11</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

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 ETA Form 9089, the "job offer" position description for a circulation marketing database developer/administrator, in pertinent part, includes developing a new IQube circulation marketing database and interface to new SAP circulation system, along with maintaining existing IQube system and providing support including daily maintenance and development of future enhancements with outside vendor for IQube database. Job duties also include, among others performing all database administration tasks and utilizing SQL Server development tools to create new version to interface with SAP circulation system.

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

H.4. Education: Minimum level required: Bachelor's.

H4-A. States "if Other is indicated in question 4 [in relation to the minimum education], specify the education required." Petitioner left this section blank.

H4-B. Major Field Study: Computer Science.

H7. Is there an alternate field of study that is acceptable.

The petitioner checked "yes" to this question.

H7-A. If Yes, specify the major field of study:

The petitioner indicated "MIS or related field."

H8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

H8-A. If yes, specify the alternate level of education required:

The petitioner left this section blank.

H9. Is a foreign educational equivalent acceptable?

The petitioner listed "yes" that a foreign educational equivalent would be accepted.

H6-&A. Is experience in the job offered required for the job?

The petitioner indicated “yes” and “12” months in the proffered position and indicated in Section 7 and 7-A that the alternate field of study of MIS or a related field was acceptable.

H-10. Is experience in an alternate occupation acceptable.

The petitioner indicated “yes” to this question.

H-10B Identify the job title of the acceptable alternate occupation:

The petitioner indicated “Software development consultant/systems analyst.”

H-14. Specific skills or other requirements: The petitioner indicated “none.”

At the outset, it is noted that section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

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

(I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to USCIS to determine whether the proffered position and alien qualify 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 [USCIS]. 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).<sup>12</sup> *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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<sup>12</sup> Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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).<sup>13</sup>

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS), 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).

We note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or.) November 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. *Id.* at 11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was

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<sup>13</sup> The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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 (9<sup>th</sup> Cir. 1984).

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. *Id.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* 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 on the ETA 9089 and does not include alternatives to a four-year bachelor's degree. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at 7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* See also *Maramjaya v. USCIS*, Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008)(upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the Form ETA 9089 does not specify an equivalency to the requirement of a Bachelor of Science 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). Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate that the beneficiary has 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.

The regulations define a third preference category "professional" as 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." See 8 C.F.R. § 204.5(1)(2). 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 single source baccalaureate degree. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order

to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Moreover, 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.) 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. 1289, 1295 (5<sup>th</sup> Cir. 1987). It can be presumed that Congress' narrow requirement 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. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

As stated previously, the AAO reviewed the EDGE program created by the AACRAO. We further note that authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at [www.aacrao.org/publications/guide\\_to\\_creating\\_international\\_publications.pdf](http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf). If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12. Finally, EDGE's credential advice provides that a (3 year) Bachelor's degree is comparable to "3 years of university study in the United States. Credit may be awarded on a course-by-course basis."

The AAO also accessed NIIT's website to determine what type of educational services it provides. NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student. In the instant matter, there is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program.

According to the NIIT website<sup>14</sup> which identifies several facilities in India for NIIT programs:

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<sup>14</sup>See <http://niit.com/services/ITEducationforIndividuals/careerCourses/Pages/SelectionProcedur->

The GNIIT program is designed to be pursued along with graduation. The minimum qualification for enrolment to this program is successful completion of Class XII.

Nowhere on its website does NIIT indicate that it is accredited by AICTE. In the instant matter, the record does not indicate that the beneficiary completed the NIIT and GNIIT studies in an accelerated mode, but rather took the courses and practical experience over one year. Thus, while the beneficiary may have undertaken additional coursework in a relevant field, the petitioner has not established that the beneficiary's further studies would constitute a fourth year of upper level baccalaureate studies, and thus warrant describing the beneficiary's three-year baccalaureate degree and additional studies at NIIT as the equivalent of a four-year baccalaureate degree in computer science, MIS or a related field. The beneficiary therefore does not meet the statutory requirements to be considered a professional.

The AAO notes that on appeal, counsel refers to letters dated January 7, 2003 and July 23, 2003, respectively, from Efrén Hernández III of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2).<sup>15</sup> Within the July 2003 letter, Mr. Hernández opines that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

Private discussions and correspondence soliciting advice from USCIS are not binding on the AAO or other USCIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) clearly only allows for the equivalency of a single foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. Hernández' correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree.

We do not find the determination of the credentials evaluation that combined the beneficiary's three-year baccalaureate in science degree with his NIIT studies to be probative in this matter. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science

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andAligibility.aspx (available as of June 22, 2009.)

<sup>15</sup> This issue was not referenced in the AAO's RFE, but will be addressed briefly in these proceedings.

degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study.

The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language 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.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of one year of employment experience. However, in the instant petition, the petitioner has to establish that the beneficiary qualifies for the proffered position based on the terms of the labor certification application, not on the basis of USCIS regulations on educational levels for skilled workers. The proffered position requires a Bachelor of Science degree in computer science, MIS or a related field, and one year of experience. The petitioner did not describe any alternative educational levels to the minimum educational level on the Form ETA 9089, although Items H-4, or Item H-8 A or B do provide opportunities to further define alternate educational levels.

DOL assigned the occupational code of 15-1061.00, Level II, Database Administrator, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=15-1061.00+&g+Go> (accessed June 11, 2009) and its extensive description of the position and requirements for the positions most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring “considerable preparation” for the occupation types closest to the proffered position that identify Job Zones in their descriptions.<sup>16</sup> According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor's degree, but some do not.” See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed June 11, 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

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<sup>16</sup> The DOL database found the proffered position of software engineer analogous to the following DOT occupations: 15-1011.00, computer and information scientists, research; 15-1031.00, computer software engineers, applications, and 15-1032.00, computer software engineers, systems software. The latter two occupations both identify the relevant Job Zone as Four. The first occupational excerpt does not identify the relevant Job Zone.

occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

*See id.*

The proffered position may be analyzed as professional or skilled worker since the position, as described on the Form 9089, requires a bachelor's degree and one year of work experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation.

Thus, when analyzed as a skilled worker position, the beneficiary does not meet the terms of the labor certification, and the petition should be denied on this basis as well. See 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification).

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

**ORDER:** The appeal is dismissed.