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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 2 6 2009
LIN 06 227 52100

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, 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 wireless retail business. It seeks to employ the beneficiary permanently in the United States as a purchasing manager. An ETA Form 9089, Application for Permanent Employment Certification, 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.

On appeal, the petitioner, through counsel, submits additional evidence related to the beneficiary's employment experience. Counsel contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petition should be approved.

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).

For the reasons discussed below, we concur with the director's denial of the petition, but would also note that various 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.

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.

The petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the ETA Form 9089 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA Form 9089 was accepted for processing on June 15, 2006. It indicates that the petitioner has employed the beneficiary since February 10, 2003. The Immigrant Petition for Alien Worker (I-140) was filed on July 31, 2006.

The ETA Form 9089, Part H sets forth the minimum requirements for the position of purchasing manager. Part H, Item(s) 4 and 4-B reflect that the proffered position requires a Bachelor's degree in business administration or equivalent (field of study). Part H, Item 7, however, indicates that the

employer will not accept an alternate field of study. Part H-6 reflects that the employer requires 24 months of work experience in the job offered as a purchasing manager. Part H, Item 8 indicates that the employer will not accept an alternate combination of education and experience. Part H, Item 9 indicates that a foreign educational equivalent is acceptable. Part H, Item 10 indicates that the employer will not accept experience in an alternate occupation. Part H-14 does not list any other specific skills or requirements.

Part I, Item a-1 of the ETA Form 9089, indicates that the petitioner considers the certified position as a professional occupation. Additionally, the petitioner's cover letter, dated July 6, 2006, submitted with the petition and signed by its president indicated that the position required the skills of a professional and noted that DOL had classified the position as a professional one.

In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (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).

As stated on the labor certification, the proffered position requires a bachelor's in business administration or equivalent (field of study), as well as 24 months of experience in the job offered. Because of the certified position's academic requirements set forth on the labor certification as well as the petitioner's classification of the occupation as a professional on Item I, a-1 of the ETA Form 9089, the proffered position will be evaluated as a professional. In some circumstances it might also be considered as a skilled worker position. DOL assigned the occupational code of 11.3061.00, purchasing manager, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at *http://online.onetcenter.org/link/summary/11-3061.00*[1] and extensive description of the position and requirements for the job, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not. Additionally, DOL states the following concerning the training and overall experience required for these occupations:

[1] (Accessed 5/2709).

> 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.

> More specific to this position, O*NET provides that 57 percent of respondents have a bachelor's degree or higher.[2]

However, even if we consider the petition under the skilled worker classification, the petitioner still must demonstrate that the beneficiary meets the terms of the labor certification which includes a bachelor's degree.

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

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

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

As noted above, the ETA Form 9089 in this matter is certified by DOL. 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

[2] *See http://online.onetcenter.org/link/details/11-3061.00.*

> 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). Id. at 423. The** necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
>
> * * *
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so

> that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth circuit stated:

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

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

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, 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).

In this matter, in Part J, Item 11 of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is "Bachelor's." Part J, Item (s)

12,13, and 14 of the ETA Form 9089 indicate that he completed relevant education in 1994 at the University of Bombay located in Bombay, India. The beneficiary's major field of study is specified as "Commerce with concentration in accounting and CS."

The petitioner provided copies of the beneficiary's educational documents, which include the following:

1. A copy of his 1994 diploma from the University of Bombay indicating that the beneficiary was awarded a Bachelor of Commerce (three year integrated course), with the subject of financial accounting & auditing (special).
2. A copy of the beneficiary's statement of marks supporting his three-year degree from the University of Bombay reflecting courses taken in computer system(s), financial accounting and auditing and economics systems.
3. A copy of a Sinai Computer Centre (Bangalore) post graduate diploma in systems management indicating that the beneficiary completed the requirements and was awarded the diploma on December 6, 1991. The requirements for admission and the statement of marks supporting this diploma are not contained in the record.
4. A copy of a Genysys Computers certificate, dated July 23, 1998, (Bangalore, India) indicating that the beneficiary had attended a five week training in Windows '95 and Office '97.
5. A copy of a diploma in pharmacy from the Board of Examining Authority of the Government of Karnataka awarded to the beneficiary on July 22, 1994. It also contained an earlier date of May 1993 but did not offer further explanation as to why both dates were given. No statement of marks, requirements of admission, or indication of the duration of this course of study were provided.

An academic equivalency evaluation from [redacted] of The Trustforte Corporation was also provided to the record. [redacted] describes the beneficiary's pharmacy diploma as a post-secondary program under the auspices of the Board of Examining Authority of the Government of Karnataka Drugs Control Department, in India. He further determines that the diploma program was the U.S. equivalent to two years of studies toward a bachelor of science degree in pharmaceutical science at an accredited college or university. [redacted] then indicates that the beneficiary entered the University of Bombay with "advanced standing" based on his prior completion of post-secondary studies in the pharmacy diploma program. His diploma from the University of Bombay is concluded to be the U.S. equivalent of three years of studies toward a Bachelor of Business Administration degree at an accredited college or university. Combined together with the pharmacy diploma, [redacted] states that the beneficiary completed the U.S. equivalent of a "Bachelor of Science Degree, with a dual major in Business Administration and Pharmaceutical Science," from an accredited college or university.

The evaluation relies on a combination of educational programs, which Form ETA 9089 was not drafted to include. Accordingly, the director denied the petition on February 2, 2007, based on his determination that the petitioner had failed to establish that the beneficiary's combination of

diplomas satisfied the terms of the labor certification requiring a bachelor's degree in business administration or equivalent (field of study).

On appeal, counsel submits a letter, dated July 23, 2003, signed by Efren Hernandez III as the Director of Business and Trade Services for the former Bureau of Citizenship and Immigration Services, now USCIS. The letter was addressed to outside counsel. Mr. Hernandez opines that the completion of a three-year university course of study resulting in a bachelor's degree followed by the completion of a PONSI-recognized post-graduate diploma may be considered as the equivalent of a four-year U.S. bachelor's degree. Counsel also asserts that in Part H-9 of the ETA Form 9089, the petitioner indicated that the a foreign education equivalent was acceptable and that the petitioner did not intend to limit the minimum educational requirement to a single four-year degree but to accept any foreign academic credentials equivalent to a bachelor's degree. In this case, counsel claimed that the beneficiary completed a total of five years of academic education that has been evaluated to be the equivalent of a four-year bachelor's degree in business administration. He further asserts that the petitioner wanted the petition considered under the skilled worker third preference category, which only requires two years of training or experience, and that the beneficiary would qualify for this classification.

In the AAO's request for evidence, the petitioner was advised that the AAO had 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.accrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of commerce 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. EDGE discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. 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 "Advice to Author Notes," however, provides:

> 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.

The AAO further advised the petitioner that the record did not contain any evidence showing what institution the beneficiary pursued his pharmacy studies at, and failed to provide the underlying supporting documentation reflecting the duration of the post-secondary program. It was noted that Mr. Silberzweig stated that various polytechnics offer accredited programs of post-secondary study on behalf of the state government of Karnataka, inferring that such programs are university level, however EDGE placed polytechnics in the non-university education ladder. The AAO observed that the record failed to establish how the beneficiary's coursework in pharmacy would be considered for credit equivalency in a Bachelor of Commerce university program. The AAO further requested copies of the petitioner's recruitment efforts to determine the petitioner's expressed intent about the actual minimum requirements of the proffered job and that those minimum requirements were clear to potential qualified U.S. candidates.

The petitioner did not submit a response to the AAO's request for evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

With respect to the Trustforte evaluation, as mentioned above, it is noted the record failed to provide any corroboration in the form of statement of marks, requirements of admission, location of the institution where the beneficiary attended or indication of the duration of the pharmacy course attended by the beneficiary. The AAO does not find this evaluation to be probative of the beneficiary's possession of a bachelor's degree in business administration or an equivalent field of study. USCIS may, in its discretion, use advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). USCIS, however, is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). Additionally, the Trustforte evaluation relies on a combination of educational programs, which the labor certification was not drafted to include.

Additionally, relevant to the Hernandez letter, it is noted that private discussions and correspondence solicited to obtain 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). Further, as reflected within Mr. Hernandez' letter, his opinion was offered pertinent to the discussion of petitions filed on behalf of members of the professions holding advanced degrees pursuant to 8 C.F.R. § 204.5(k)(2), not to the instant visa classification.

A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). 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) of the Act. Even if considering at most, the beneficiary's attainment of three years of undergraduate university studies represented by the Bachelor of Commerce degree, this would not qualify as a full bachelor's degree in business administration or an equivalent field of study as indicated on the ETA Form 9089. Moreover, as noted above, the petitioner affirmed in H-8 of the ETA Form 9089 that it would not accept an alternate combination of education and experience. If a defined alternate combination was acceptable, then the petitioner could have described this alternative in other provisions in part H-8 or even in H-14 where other requirements are also permitted to be specified.

As noted above, the petitioner designated this occupation as a professional position. Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act,[3] the evidence related to the petitioner's intent as to the acceptable alternative requirements pertinent to the employer's recruitment efforts remains relevant. Further, as also noted above, the petitioner failed to submit any evidence in response to the AAO's RFE to document its recruitment, or that it expressed its intent to accept alternatives to a four-year bachelor's degree to DOL or any potential qualified U.S. workers.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005) which found that [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." *Id.* At 1178. 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

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[3]The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation*—
>
> > (B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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* at *8 (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). In reaching this decision, the court also 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.[4]

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[4] Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café,* 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA FORM 9089, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

> We have held in *Francis Kellogg,* et als., 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the

Additionally, we also note the subsequent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006) and as relied upon by counsel on appeal. 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 as a "specific level of *educational background.*" *Snapnames.com, Inc.* at *6. 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 [USCIS] properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

Additionally, in *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, labor certification described the educational requirement as "Bachelor's or equivalent" and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien's other credentials with his three-year diploma to meet the requirements of the ETA Form 9089. *Id* at *13-14.

In this case, the beneficiary must possess a bachelor's degree in business administration or an equivalent field of study. The petitioner failed to specify any defined equivalency on the ETA Form 9089. The beneficiary's formal education does not equate to a bachelor's degree in business administration or satisfy the requirements of the labor certification in either a professional or skilled worker category. The petitioner failed to respond or submit any evidence in response to the AAO's RFE.

It is noted that that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984), USCIS is obliged to "examine the certified job offer *exactly* as it is completed by the

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> employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).
>
> In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

prospective employer." (Emphasis added) USCIS' 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).

The beneficiary has not completed four years of college culminating in a Bachelor's degree in business administration or equivalent field of study and does not meet the terms of the labor certification under section 203(b)(3)(A)(ii) of the Act as a professional. For petitioners seeking a visa classification as a skilled worker under 203(b)(3)(i) of the Act, the petitioner must demonstrate that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification " as directed by the regulatory provision. Therefore, regardless of the category sought, the beneficiary must satisfy the terms of the ETA Form 9089 in that he must possess a full bachelor's degree in business administration or an equivalent field of study. The evidence submitted does not establish that the beneficiary has such a degree or that he qualifies for third preference classification as a professional or a skilled worker. The petitioner in the instant matter relied on a combination of educational programs, which the terms of the labor certification was not drafted or certified to include.

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.