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U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted]  
SRC 04 245 51577

Office: TEXAS SERVICE CENTER

Date:

**MAR 03 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:

SELF-REPRESENTED

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, Texas Service Center, denied the employment-based immigrant visa petition,<sup>1</sup> which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner's business is an architect, G. C.<sup>2</sup> design-build firm. It seeks to employ the beneficiary permanently in the United States as an operation systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification (the Application) approved by the Department of Labor (DOL), accompanied the petition.<sup>3</sup> Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification, and the director determined that the beneficiary did not possess the requirements listed on the ETA 750 and thus does not qualify for the position offered. Therefore the petition was not approved.

The I-140 petition was filed by the petitioner on September 20, 2004, and it was denied by the director on November 14, 2005. Here, the Form ETA 750 was accepted on April 30, 2001.<sup>4</sup> The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

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), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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<sup>1</sup> On February 13, 2004, the beneficiary withdrew her adjustment application related to a prior petition. The petition associated with that application is identified in the records of U.S. Citizenship and Immigration Services (USCIS) as MSC 03-224-61203.

<sup>2</sup> "G. C." (i.e. general contractor).

<sup>3</sup> July 13, 2004 was the date of the letter informing the petitioner of the labor certification. April 30, 2001 is the priority date of the labor certification.

<sup>4</sup> It has been approximately seven years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states "The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work." However, the petitioner must show in accordance with the regulation at 8 C.F.R. § 204.5(a)(2) that it can pay the proffered wage from the time of the priority date.

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>5</sup>

On appeal, the petitioner asserted that the director based her decision upon the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) that 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.

The petitioner contends that the beneficiary qualifies for the proffered position of operation systems analyst with ten years of training and experience in the requirements of the offered position.

Further, the petitioner asserts that the beneficiary has an education equivalent to a U.S. bachelor or master degree in business administration with an "emphasis in superior studies in cybernetic sciences."

On appeal and in response to a notice of derogatory information ("NODI") issued June 18, 2008, the petitioner filed a legal brief and additional evidence. The record contains the following relevant documents: explanatory and cover letters from the petitioner dated February 19, 2007, November 20, 2005, June 20, 2005, September 7, 2004, and April 26, 2001; a two page "Exhibit B" document which details the petitioner's recruitment efforts and interview results for the offered position in 2001; five pages of job inquiry/resume material received in response to the petitioner's job advertisement in April 2001; "Exhibit D" entitled "Notice for Bulletin Board;" various 'tear sheets' of the job advertisements placed in the Miami Herald newspaper in April 2001, according to DOL instructions; an educational evaluation report of the beneficiary's credentials prepared by the Foundation for International Services Inc., dated April 2, 2001, by [REDACTED] of Bothell, Washington; and an educational evaluation report of the beneficiary's credentials and employment experience prepared by the Foundation for International Services Inc., dated April 19, 2002, by [REDACTED] of Bothell, Washington.

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<sup>5</sup> 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).

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. Further, those decisions, in conjunction with decisions by the Board of Alien Labor Certification Appeals (BALCA), support our interpretation of the phrase “B.A. or equivalent.”

*Minimum Education, Training, and Experience Required to Perform the Job Duties*

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.

Regarding the minimum level of education and experience required for the proffered position of an operation systems analyst in this matter, Part A of the labor certification reflects the following requirements in Blocks 14 and 15:

Block 14:

|                            |  |
|----------------------------|--|
| Grade School               | <u>6</u> <sup>6</sup>                        |
| High School                | <u>4</u>                                     |
| College                    | <u>2 years</u> <sup>7</sup>                  |
| College Degree Required    | <u>Bachelors [degree], B.A.</u> <sup>8</sup> |
| Major Field of Study       | <u>Computer Science</u>                      |
| Experience                 | <u>2 years in the job offered</u>            |
| Related Occupation         | <u>Research Analyst</u>                      |
| Related Occupation (Years) | <u>2 years</u>                               |

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<sup>6</sup> Number of years.

<sup>7</sup> A two-year bachelor’s degree does not exist in the United States. After consulting with DOL on this specific case, the AAO has been informed that “2” is a typographical error and the actual minimum requirement for the position is a four-year bachelor’s degree in business administration.

<sup>8</sup> According to correspondence dated June 18, 2008, from the petitioner in the record of proceeding, “Bachelors [degree], B.A.” means a Bachelor Degree in Business Administration that is sometimes abbreviated in the record to “BBA.” The abbreviation appears in the petitioner’s print advertisements and job notice postings. We note that “B.A.” is listed as the degree required and would be interpreted as Bachelor of Arts.

The applicant also must have two years of experience in the job offered, the duties of which are delineated at Block 13 of the Form ETA 750A and since this is a public record, need not be recited in this decision, or two years of experience in the related occupation of research analyst.<sup>9</sup>

*DOL O\*NET OnLine*

According to the labor certification, the proffered position requires a bachelor's degree in the major field of study of computer science and two years of experience. It is necessary to analyze the job title, operation system analyst, in O\*NET OnLine to find the required knowledge, skills and abilities, education and training necessary for the proffered job.

DOL assigned the occupational code<sup>10</sup> of 030.167-014, which references the job title "system analyst," to the proffered position. The designation "computer systems analysts" (15-1501.00) is applied to the occupation "system analyst" in the DOL O\*NET OnLine database which provides wage information and other criteria data associated with this occupational title.

According to DOL's public online database<sup>11</sup> and its extensive description of the position and requirements for the position, the occupation 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:

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

*See id.*

Thus, the position may also be properly analyzed as a skilled worker since the standardized occupation requirements do not always include a bachelor degree.

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<sup>9</sup> Block 15 of the labor certification concerning "Other special requirements" states "N/A."

<sup>10</sup> From another DOL database called the *Dictionary of Occupational Titles* that can be correlated in the O\*NET OnLine database.

<sup>11</sup> See <<http://online.onetcenter.org/link/summary/15-1051.00>> (accessed February 10, 2009).

*The Director's Finding*

The director determined that the petitioner requested that the beneficiary be accorded the visa preference classification under the skilled worker prong of section 203(b)(3)(A)(i) of the Act. However, the director determined that the beneficiary did not possess the educational requirements listed on the ETA 750 and thus did not qualify for the position offered, and the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification.

*Preference Classification - Professional*

The petitioner checked the box on the petition requesting classification as a professional or skilled worker under the third preference employment-based immigrant category. The proffered position requires a bachelor degree. Thus the petition may be similarly reviewed under the professional prong of the third preference category. However, the petition is not approvable as a professional for the reasons stated in this discussion.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 beneficiary attended the Universidad Incca de Colombia where she was enrolled in the Facultad de Ciencias Tecnicas, Escuela Profesional de Ingenieria de Alimentos.<sup>12</sup> Thus, the issues under the professional preference classification are whether the beneficiary's education attainments are a bachelor's degree or the foreign degree equivalent to a U.S. bachelor's degree or, if not, whether it is appropriate to consider the beneficiary's employment experiences in addition to that degree under the professional preference classification. We must also consider whether the beneficiary meets the other job requirements such as the stated employment experience of the proffered job as set forth on the labor certification.

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<sup>12</sup> Incca University of Columbia, Faculty of Technical Sciences, Professional School of Food Engineering.

*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 ... Act (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, including the 9<sup>th</sup> Circuit that covers the jurisdiction for this matter.

There is no doubt that the authority to make preference classification decisions rests with INS [now 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). *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 (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, USCIS 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).

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.

A United States baccalaureate degree or a foreign equivalent degree under the section 203(b)(3)(A)(ii) of the Act means a four-year degree and does not include equivalencies gained by 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 (9<sup>th</sup> 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 9<sup>th</sup> 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).

Additionally, we note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff, Id.* 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 pages 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 page 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 pages 17, 19.

*Eligibility - Degree Equivalency and an Unrelated Degree*

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).

As stated above, the petitioner required that an applicant for the proffered position of operation systems analyst have a four-year college bachelor's degree in business administration in the major field of study of computer science and two years of experience as an operation systems analyst or two years of experience in the related occupation of research analyst.

*Two Educational Evaluation Reports by the Foundation for International Services Inc.*

The petitioner submitted the following documents all concerning the beneficiary's education and/or training: a copy of the beneficiary's diploma from El Colegio Distrital "Jose Maria Cordoba" in Bogota, Columbia (a secondary education program); a certificate from El Servicio Nacional de Aprendizaje "SENA" in Bogota, Columbia (a vocational learning service); three certificates from the Universidad Incca de Colombia where the beneficiary was enrolled in the Facultad de Ciencias Tecnicas, Escuela Profesional de Ingenieria de Alimentos from 1983 to 1985; a copy of the permanent academic record from Miami-Dade Community College, Miami, Florida, listing courses completed and credit hours earned between 1991 to 1994; an award from Miami-Dade Community College, Miami, Florida, certifying that the beneficiary completed a computer training course in the Office Technology Department of the College; a diploma from La Sale Extension University, Chicago, Illinois certifying that the beneficiary was awarded a diploma in Advanced Computer Sciences; and a copy of a diploma from the American School in Chicago, Illinois certifying that the beneficiary was awarded a diploma in Business Administration.

There is evidence in the record of proceeding that the beneficiary has a wide variety of education, both in and out of college, but it does not appear she has a single four-year university degree or foreign equivalent. The beneficiary's attendance at the Incca University of Columbia from 1983 to 1985 is equivalent to a lesser degree or certificate(s) in engineering according to credentials evaluator [REDACTED] of the Foundation for International Services Inc., Bothell, Washington.

██████████ opined that the beneficiary has received from the Incca University of Columbia university-level course credits equivalent to “completion of 1½ years of university-level credit in food science from an accredited college or university in the United States, has 50 semester credits of university-level work from an accredited community college in the United States and has, as a result of her educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor’s degree in business administration from an accredited college or university in the United States.”

A second educational evaluation report prepared by the Foundation for International Services Inc. dated April 19, 2002, was submitted by the petitioner. In this evaluation prepared by ██████████ ██████████ the evaluator stated that the beneficiary has attained from the Incca University of Columbia 50 semester university-level course credits equivalent to the completion of 1½ years of university-level credit from an accredited college or university in the United States and adds that as a result of the beneficiary’s educational background and employment experiences on the basis of “3 years of experience = 1 year of university-level credit” the beneficiary has the equivalent of a bachelor’s degree in business administration from an accredited college or university in the United States.

The evaluations in the record equated three years of experience for one year of education, but that equivalence applies to *non-immigrant* H1B petitions, not to *immigrant* petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Although the evaluator relied upon a combination of education and experience, the petitioner did not draft the Form ETA 750 to allow for any such combinations.

USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). 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).

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

According to the evidence in the record of proceeding, the beneficiary does not have a U.S. bachelor’s degree or foreign equivalent based upon one program of study. Thus, the petition cannot be approved under the professional prong of the employment-based third preference immigrant visa category.

#### *The Roles of the Employer, DOL and USCIS in the Employment-based Immigration Process*

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.*

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (*emphasis added*). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (*emphasis added*). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

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

#### *Preference Classification - Skilled Worker*

As already stated, the director determined that the petitioner requested that the beneficiary be accorded the visa preference classification under the skilled worker prong of section 203(b)(3)(A)(i) of the Act. However, the director determined that the beneficiary did not possess the requirements listed on the ETA 750 and thus does not qualify for the position offered.

The regulation at 8 C.F.R. § 204.5(1)(3)(B) provides that a petition for an alien in this classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." The singular degree requirement found under the professional classification is not applicable to skilled workers and the regulation governing skilled workers only requires that the beneficiary meet the requirements of the labor certification in

addition to showing two years of qualifying employment experience. However, the petitioner must show that the beneficiary met the requirements of the labor certification.

The AAO sent a Notice of Derogatory Information (NODI) to the petitioner on June 18, 2008, to determine the petitioner's intent.<sup>13</sup> According to the petitioner's letter dated September 12, 2008, in response to the AAO's NODI, the petitioner stated that the original Application for Alien Employment Certification Form ETA 750 as submitted to DOL required a four-year Bachelor's Degree "which is our [the petitioner's] requirement for the offered position."

According to the correspondence in the record, the petitioner made amendments to the five Applications for Alien Employment Certifications submitted as requested by the Florida State workforce agency (SWA) and DOL that resulted in differing job requirements. We are only concerned with the stated requirements found on the Application as certified. We note that the record of proceeding contains various postings notice that contained inconsistent requirements. Further, we note that after consultation with USCIS required by section 204(b) of the Act, DOL informed USCIS that the "2" years found on the labor certification is a typographical error and that the actual minimum requirement for the position is a four-year bachelor's degree in business administration.

#### *Job Advertisements and the Notices of Posting*

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."

Therefore, in response to a NODI of the AAO, the petitioner submitted on June 18, 2008, approximately 223 pages of documents detailing DOL's supervised job recruitment process. The petitioner's Application for Alien Employment Certification Form ETA 750 was amended multiple times commencing April of 2000 until June of 2004. As the matter progressed, the petitioner made internal job postings, newspaper and professional journal advertisements, Internet postings<sup>14</sup> and interviewed job applicants based upon the applications submitted. The fifth Application for Alien Employment Certification (Form ETA 750) in the record was signed by the petitioner on June 15, 2004, and was certified by DOL on July 13, 2004. The priority date is April 30, 2001.

The petitioner by his letter dated March 1, 2004, found in the record of proceeding, stated that revised newspaper and Internet job advertisements were placed in the Miami Herald Newspaper on October 25, 26, and 27, 2003, and in the Miami Herald Internet website linked to a job seekers

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<sup>13</sup> The petitioner's intent concerning the alternatives to the stated minimum education and requirements is not clear as stated to DOL and inconsistent through the labor certification and petition process.

<sup>14</sup> Newspapers will publish job advertisements in a print edition and also place at the same time the advertisement on an Internet Website as in this case, "Careerbuilder," linked to the newspapers' classified website. Generally the Internet publication has the same content as that published in the newspaper print edition.

website, "Careerbuilder," the Miami Herald Business Monday's magazine on October 27, 2003, as well as the EL Nuevo Herald newspaper on October 25, 26, and 27, 2003. No copies (i.e. tear sheets) of the newspaper advertisements were submitted by the petitioner in response to the NODI.<sup>15</sup> 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).

Along with the above advertisements, the petitioner was required by DOL to provide an in-house notice of filing the Application which in this case is entitled "Notice of Job Availability." Two notices were posted by the petitioner on October 23, 2003, and removed January 23, 2004. The first notice of posting stated in pertinent part:

- Title:** Operations Systems Analyst.
- Duties:** The Operation Systems Analyst (OSA) will be in charge of operations and research analysis. Must prepare reports (in English and Spanish) using scientific methods and mathematical principals to be solved by computers and highly sophisticated software programs. Will establish methods of improvements of work performance, will prepare proformas; forecast income expenses and earnings.
- Requirements:** Strong administrative/organization/composition skills. Master's in Management Science+ 2 years in computers and specialty programs. W.P. 2000, Excel, Lotus, Xactomate & ACAD 2000 required, payroll; typing 60 wpm; Dictaphone helpful. AIA document, specs, permitting processing. Fluent in Spanish/English and Metric System a+. Excellent grammar. Free to travel & some weekend work. Excellent local references/background.
- Salary/Overtime:** Commensurate with ability and experience. Fifty Thousand Dollars (\$50,000.00) yearly. 36.00 hourly for overtime.

The second notice also posted on October 23, 2004, differed from the above notice content. It stated the following:

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<sup>15</sup>Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

- Title:** Operations Systems Analyst.
- Duties:** The Operation Systems Analyst (OSA) will be in charge of operations and research analysis. Must prepare reports (in English and Spanish) using scientific methods and mathematical principals to be solved by computers and highly sophisticated software programs. Will establish methods of improvements of work performance, will prepare proformas; forecast income expenses and earnings.
- Requirements:** Strong administrative/organization/composition skills. Bachelor in Business Administration + 2 years in computers and specialty programs. W.P. 2000, Excel, Lotus, Xactomate & ACAD 2000 required, payroll; typing 60 wpm; Dictaphone helpful. AIA document, specs, permitting processing. Fluent in Spanish/English and Metric System a+. Excellent grammar. Free to travel & some weekend work. Excellent local references/background.
- Salary/Overtime:** Commensurate with ability and experience. Fifty Thousand Dollars (\$50,000.00) yearly. 36.00 hourly for overtime. Accident free Florida Driver's License. EOE/S.D.F./WP.

As stated above, the job requirements were originally stated as requiring a Master's in Management Science and then Bachelor in Business Administration. The petitioner's job advertisements did not list the position's job duties as stated in the labor certification and did not set forth that the degree required could be met by any alternate combination of education and experience. Further, the labor certification would not allow qualification for the position based upon an alternate combination of education and experience. Therefore, the beneficiary does not meet the minimum educational requirements of the offered position.

#### *The Beneficiary's Qualifying Job Experience*

A review of the beneficiary's employment experience stated on the labor certification shows that the beneficiary was employed in a job position termed "merchandise research" for the [REDACTED], Miami, Florida from October 5, 1990 to January 30, 1993; from February 1993 to November 1997, the beneficiary was employed as an operations systems analyst by the petitioner; and from November 1997 to present (i.e. April 25, 2001), the petitioner employed the beneficiary as an administrative assistant analyst on a full-time basis.<sup>16</sup>

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<sup>16</sup> The petitioner by letter dated September 12, 2008, submitted letters from two other individuals who are not the beneficiary's employers. These letters are in the nature of professional recommendations. Our review is restricted to that employment the beneficiary stated on the Application.

The application requires that the beneficiary have education relating to the job of operation systems analyst described in the Application as a Bachelor Degree in Business Administration in the major field of study of computer science or in the related occupation of research analyst with two years of experience in either occupation. According to the credentials evaluation of [REDACTED] of the Foundation for International Services Inc., Bothell, Washington the beneficiary has received from the Incca University of Columbia university-level course credits equivalent to “completion of 1½ years of university-level credit from an accredited college or university in the United States.”

Based upon the evidence as presented by the petitioner we find that the beneficiary has less than a four-year college degree, the petitioner set forth no equivalency to the degree requirement.

Therefore for the reasons stated above, the beneficiary does not possess the requirements listed on the ETA 750 and thus did not qualify for the position offered.

Based upon the evidence presented beneficiary did not possess the requirements listed on the ETA-750 under the professional prong of Section 203(b)(3)(A)(ii) of the Act or the skilled worker prong of section 203(b)(3)(A)(i) of the Act and thus does not qualify for the position offered of operation systems analyst.

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 met not that burden.

**ORDER:** The appeal is dismissed.