

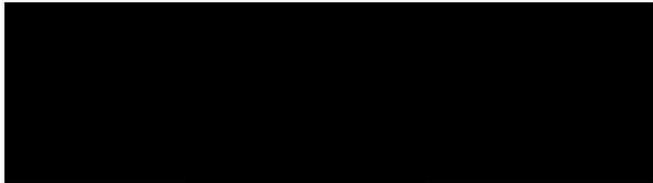
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



FILE: [REDACTED]
LIN-08-003-59735

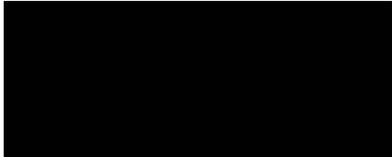
Office: NEBRASKA SERVICE CENTER

Date: **MAR 24 2009**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (“director”), denied the employment-based immigrant visa petition. The petitioner appealed and the matter is now before the Administrative Appeals Office (“AAO”). The appeal will be dismissed.

The petitioner’s business relates to software consulting. The petitioner seeks to employ the beneficiary permanently in the United States as a computer software engineer, systems software (“Systems Engineer II”). As required by statute, the petition filed was submitted with Form ETA 9089, Application for Permanent Employment Certification,¹ approved by the Department of Labor (“DOL”). 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 did not possess a four-year bachelor’s degree based on a single program of study to meet the requirements of the certified labor certification.

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).²

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

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

¹ On March 28, 2005, pursuant to 20 C.F.R. § 656.17, the Application for Permanent Employment Certification, ETA 9089 replaced the Application for Alien Employment Certification, Form ETA 750. The new Form ETA 9089 was introduced in connection with the re-engineered permanent foreign labor certification program (PERM), which was published in the Federal Register on December 27, 2004 with an effective date of March 28, 2005. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004).

² 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).

Here, the Form ETA 9089 was accepted for processing by the relevant DOL national processing center on September 22, 2005. DOL certified the Form ETA 9089 on November 8, 2005. The petitioner filed Form I-140 on August 16, 2007.³

On June 11, 2008, the director issued a Notice of Intent to Deny (“NOID”), which stated that Form ETA 9089 required that the individual have a bachelor’s degree in Computer Science, Mathematics, Management Information Systems, Physical Sciences or a related field, and 60 months (five years) of experience as a Software Engineer or in Applications. Alternatively, the director read the form that it would allow a candidate to have a Master’s degree in the same fields of study with no experience. The director cited to the beneficiary’s three-year program of study, and noted in contrast that the two evaluations that the petitioner submitted concluded the beneficiary’s education would be the equivalent of a four-year degree. Based on the *Higher Education in India, Academic Qualifications Framework – Degree Structure*, Government of India, Department of Education, the director found that Bachelor of Science degrees in India, as well as Bachelor of Arts, and Bachelor of Commerce degrees, are equivalent to three years of study, but not a four-year bachelor’s degree. He noted in other cases that a Bachelor’s degree in Agriculture, Dentistry, Engineering, or Technology would require four years of education, and, therefore, might be deemed a “foreign equivalent degree.” However, both the evaluations submitted found the beneficiary’s three-year program of study to be equivalent to a four-year degree in conflict with the information available. Further, the evaluations failed to list an area of concentration. The record failed to demonstrate that the beneficiary had a bachelor’s degree.

On July 18, 2008, the director issued a Request for Evidence (“RFE”) for the petitioner to submit copies of the recruitment ads listed on Form ETA 9089 supporting the labor certification, and the petitioner’s notice of filing. The petitioner responded.

On August 28, 2008, the director denied the petition on the basis that the petitioner failed to establish that the beneficiary met the qualifications of the certified labor certification. Specifically, the petitioner did not establish that the beneficiary had the required Bachelor’s degree or foreign equivalent degree. The petitioner appealed to the AAO.

On appeal, the petitioner contends that the beneficiary qualifies for the position offered as the beneficiary has the “foreign education equivalent” of a bachelor’s degree, and the director wrongly focused on the term “foreign equivalent degree.”

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.

³ The petitioner filed a prior I-140 petition on the beneficiary’s behalf based on the same Form ETA 9089. In that filing, the petitioner requested classification as a member of the professions holding an advanced degree. The director denied the petition as the petitioner failed to demonstrate that the beneficiary had the required education.

The proffered position requires a bachelor's degree, and five years of prior experience, or alternatively, a Master's degree. Because of those requirements, the proffered position is for a professional, but might also be considered under the skilled worker category. If considered under the skilled worker category, the petitioner would need to demonstrate that the beneficiary meets the requirements of labor certification.

DOL assigned the code of Computer Software Engineers, Systems Software, 15-1032. According to DOL's public online database, O*Net, and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1032.00#JobZone> (accessed February 20, 2009). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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

See id. Therefore, because of both the stated requirements on the labor certification and DOL's standardized occupational requirements, USCIS will consider the position and the petition under both the professional and the skilled worker categories.

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

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

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

The beneficiary in this matter possesses a Bachelor of Science degree based on three years of study, as well as related work experience. Thus, the issues are whether the beneficiary's three-year diploma is equivalent to a U.S. baccalaureate degree, or, if not, whether it is appropriate to consider the beneficiary's work experience in addition to his degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

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

As noted above, the ETA 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

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

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

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

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

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

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

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

There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. See *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).⁴ Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

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

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

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

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.

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

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

The beneficiary is also not eligible for a third preference immigrant visa under the skilled worker category. A beneficiary must meet the petitioner’s requirements as stated on the labor certification in accordance with 8 C.F.R. § 204.5(l)(3)(ii)(B), which provides:

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

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

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

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

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

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

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

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

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

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

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (USCIS) “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). In that case, the labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19.

The key to determining the job qualifications is found on Form ETA 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 9089 be read as a whole. The instructions for the Form ETA 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 or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

On the Form ETA 9089, the "job offer" position description for a Computer Software Engineer, Systems Software provides:

Architect-based applications; Develop system that calculates capacity of gas flowing through pipeline; Develop reservoir engineering and storage management system; Develop gas loss for pipeline; Frequent overnight travel.

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 degree.

4-A. States "if other indicated in question 4 [in relation to the minimum education], specify the education required."

The petitioner left this blank.

4-B. Major Field Study: Computer Science, Mathematics or related.

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

The petitioner checked "yes" to this question.

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

Management Information Systems, or Physical Science.

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

The petitioner checked "yes" to this question.

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

Master's degree.

9. Is a foreign educational equivalent acceptable?

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

6. Experience: 0 in the position offered,
10. or 60 months (5 years) in the related occupation of a Software Engineer, Applications.
14. Specific skills or other requirements: SQL Server 2000, ASP 3.0, XML, Visual Basic, C++, Java.

To determine whether a beneficiary is eligible for a preference immigrant visa, USCIS must ascertain whether the alien is, in fact, qualified for the certified job. USCIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In looking at the beneficiary's qualifications, on Form ETA 9089, signed by the beneficiary, the beneficiary listed his highest level of achieved education related to the requested occupation as "Bachelor's degree." He listed the institution of study where that education was obtained as the Nagpur University, Nagpur, Maharastra, India, and the year completed as 1993.

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

Evaluation One:

- Evaluation: [REDACTED] Sunrise, Florida.
- The evaluation states that the beneficiary has the equivalent of a Bachelor of Science degree from a regionally accredited institution of higher learning in the U.S. based on his Bachelor of Science degree from the Nagpur University, India, which he completed in 1993.

⁵ [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 does not indicate the field in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, Ecole Superieure Robert de Sorbon awards degrees based on past experience.

- In making this determination, the evaluator considers that the beneficiary had 120 “contact hours” using the “Carnegie Unit,” similar to a semester hour credit.
- The evaluator cites to UNESCO (the United Nations Education Scientific and Cultural Organization) and that UNESCO recommends that 3 and 4 year degrees should be treated as the equivalent of a bachelor’s degree by all UNESCO members and that the U.S., England, and India are all UNESCO members.⁶
- The evaluator cites to a number of U.S., and U.K. universities that issue bachelor’s degrees based on three-year programs.

The evaluation fails to state that the beneficiary obtained his degree in any particular field of study.

Evaluation Two:

- Evaluation: [REDACTED]⁷ London, United Kingdom.
- The evaluator considered the beneficiary’s Bachelor of Science degree from Nagpur University, which the beneficiary completed in 1993.
- The evaluator determined that the beneficiary’s three-year bachelor’s degree was equivalent to a four-year U.S. bachelor’s degree.
- Specifically, the evaluator draws this conclusion as he states, “the Indian BS program contains more contact hours during its three years than the US BS does in four.”⁸ Thus, for all

⁶ We note that the record of proceeding does not include the UNESCO report. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed January 16, 2007).

⁷ Similarly, [REDACTED] has a canonical diploma of Sacrae Theologiae Professor, equivalent to a Doctorate of Divinity. Where an evaluation is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

⁸ U.S. students “are assumed to spend two hours of outside preparation for every 1 hour of lecture.” [REDACTED] The University of Texas at Austin, “Assigning Undergraduate Transfer Credit: It’s Only an Arithmetical Exercise,” from <http://www.handouts.acrao.org/am07/finished/> [REDACTED] (accessed February 19, 2009). As the Indian system is not based on credits, but is exam based, transfer credits are based on a

its shorter duration, measured in terms of content, the Indian BS is not merely equivalent to a US BS but in fact often of higher standing.”

- The evaluation cites to the U.N.E.S.C.O report⁹ in support.
- The evaluator concludes that, “there is substantial functional and academic equivalency between [the beneficiary’s] degree and a U.S. four-year baccalaureate, and thus it is our opinion that they should be regarded as equivalent.” Accordingly, the evaluator determined that the beneficiary had the equivalent of a four-year degree, but did not specify that the degree was in any particular field of study.

The director denied the petition as he found that the evaluations, which both determined that the beneficiary had the equivalent of a four-year U.S. bachelor’s degree based on his three-year program of study, were in conflict with information from the Government of India, Department of Education. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988). As the evaluations were not in accord with the evidence, the director found that the petitioner failed to demonstrate that the beneficiary had the required education for the position.

On appeal, counsel argues that the petition should be considered under both the professional, as well as the skilled worker category. Counsel asserts that the director erred in its determination that the position required a “foreign equivalent degree,” and not a “foreign educational equivalent” as listed on Form ETA 9089.

The petitioner cites to *Grace Korean*, 437 F. Supp. 2d at 1174,¹⁰ that it is the employer that establishes the educational requirements for the position, and asserts that the petitioner would have had the beneficiary in mind when it drafted the requirements.

In support, the petitioner submits a statement from the petitioner’s president:

calculation of the number of exams taken multiplied to reach “a base line of 30” for credit conversion as the systems do not readily equate. *Id.*

⁹ The evaluation references the United Nations Education Scientific and Cultural Organization (“U.N.E.S.C.O.”) Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. *See also* footnote 6 above.

¹⁰ We note that *Grace Korean* was decided based on a labor certification filed in 1996, which would have used a different, prior Form ETA. That form did not address the issue of alternate combinations of education and/or experience. The new form, Form ETA 9089, has been revised and now specifically allows the petitioner to address what level of alternate education that the petitioner requires. The petitioner listed the alternate level of education as a Master’s degree, but did not list that it would accept any alternate combinations based on education and experience, or attempt to define an equivalent in lieu of a bachelor’s degree.

The minimum education and experience requirements for the position listed on the Form ETA 9089 are a Bachelor's degree in MIS, or related, and a minimum of 5 years of experience.¹¹ We also stated on Form ETA 9089 that we would accept a foreign equivalent to a Bachelor's degree.

When we used the term 'foreign equivalent' on the Form ETA 9089, we meant that we would accept any foreign academic credentials submitted as evidence of a B.S. equivalent by a reliable credentials evaluation service . . . at the time of the DOL application we were aware that [the beneficiary] holds a Bachelor's degree of Science in Physics, Chemistry and Mathematics . . . we were also aware that [the beneficiary] had more than nine years experience with software development at the time of the application.

¹¹ In response to the director's Notice of Intent to Deny, counsel argued that the Form ETA 9089 could be read that if the individual had a Bachelor's or Master's degree that no experience would be required. Alternatively, counsel argued that an individual could qualify based on five years of experience with no degree. The petitioner's president's statement would evidence the contrary that the labor certification would require a Bachelor's degree and five years of experience. The petitioner does not raise this issue on appeal.

In response to the NOID, the petitioner submitted a copy of the recruitment conducted underlying the labor certification. The submitted materials contain a copy of a posting notice. The posting lists "Bachelor's degree in MIS or related and five years of experience;" an internet posting from the "Yahoo Hot Jobs," which listed the required education and experience as "BS in MIS or related and 5 years experience," and directly after a heading experience, "5-10 years;" copy of a newspaper ads dated June 19, 2005 and June 26, 2005, from the "Omaha World Herald," which listed the requirements as "BS in MIS or related and 5 years of experience." The petitioner also posted an ad on its company website, which advertised a number of positions. The posting for Software Engineer listed that "2-5 yrs" of experience was required, but did not list whether a degree was required. Another job posting specifically listed "minimum requirements," but the software position did not.

In examining the petitioner's recruitment, none of the ads state that an "equivalent" would be acceptable or define any alternatives to equivalent. Additionally, the ads viewed together as a whole do not support the view that the petitioner was willing to accept an individual with either a Bachelor's degree, or five years of experience. The newspaper ads, and Hot Jobs ad specifically require that the individual have both a Bachelor's degree *and* five years of experience to qualify for the position. Accordingly, we would not conclude that the petitioner adequately expressed its intent that it would accept the equivalent of a bachelor's degree, or that it would accept five years of work experience in lieu of a bachelor's degree to DOL or potential applicants for the proffered position during the labor certification process and the labor market test.

Counsel asserts that both evaluations are reliable, and should be accepted as they demonstrate that the beneficiary had a bachelor's degree.

On appeal, however, counsel fails to address the director's point that the evaluations conflicted with information from the Government of India, Department of Education. Specifically, the director questioned that the evaluations could determine that the beneficiary's three-year program of study was equivalent to a four-year U.S. bachelor's degree. Additionally, both evaluations failed to state that the beneficiary's degree was in any particular field of study, and thus, even if accepted, would not evidence that the beneficiary had a Bachelor's degree in the required field of study. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592.

Related to the issue of "foreign educational equivalent," counsel asserts that the petitioner would have considered the beneficiary's background when completing the labor certification, and, therefore, the academic equivalency submitted would have been acceptable to show a "foreign educational equivalent."

As noted above, there is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. 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.

Form ETA 9089 allows the petitioner an opportunity to specify an alternate combination of education and/or experience to qualify for the position offered, and set forth an "equivalency." The petitioner here allowed for the alternate education and experience or equivalent to a Bachelor's degree and five years as a Master's degree and no experience. The foreign educational equivalent designation relates to whether a petitioner would accept a foreign equivalent degree, and would not be read to include situations where the beneficiary only qualifies based on an equivalent.

Further, the petitioner failed to address the director's comments related to the conflicts in the educational evaluations submitted and information from the Government of India, Department of Education, which would evidence that the beneficiary's three-year program of study was less than a full U.S. bachelor's degree. *See Matter of Ho*, 19 I&N Dec. at 591-592. Accordingly, we would not accept that the beneficiary has a foreign equivalent degree, a foreign educational equivalent of a U.S. Bachelor's degree, or an equivalent of a bachelor's degree.

Although the petitioner cites that the beneficiary has nine years of experience in addition to his three-year degree, the labor certification as drafted does not allow the individual to qualify for the position through the combination of education and/or experience to show a bachelor's degree to meet the requirements of Form ETA 9089. Further, the petitioner's evaluations do not assess or evaluate the beneficiary's education and experience combined to conclude that the beneficiary would have a bachelor's degree based on an equivalency.

As the beneficiary only has a three-year Bachelor's degree, and the petitioner failed to address the conflicts between the beneficiary's education and the evaluations, the petitioner failed to demonstrate that the beneficiary has the required education for the position offered.

Further, even considering the petition under the skilled worker category, the beneficiary would not meet the requirements of the certified ETA 9089.¹² The petitioner specifies that a bachelor's degree is required, and the certified Form ETA 9089 does not allow for meeting the degree requirement through any equivalency. The beneficiary would not meet the qualifications listed on the certified Form ETA 9089. Therefore, the beneficiary cannot qualify as a skilled worker based on the certified Form ETA 9089.

Once again, we are cognizant of the recent holding in *Grace Korean*, which held that USCIS is bound by the employer's definition of "bachelor or equivalent." In reaching this decision, the court concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification. As stated above, the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, but the analysis does not have to be followed as a matter of law. *Matter of K-S-*, 20 I&N Dec. 715, 719 (BIA 1993). In this matter, the court's reasoning cannot be followed as it is inconsistent with the actual practice at DOL. The court in *Grace Korean* specifically noted that the skilled worker classification does not require an actual degree, whereas the classification sought in this matter does.

The petitioner in the case at hand did not list "or equivalent," only that the beneficiary must have a bachelor's degree, and five years of experience, or alternatively, a Master's degree.

¹² 8 C.F.R. § 204.5(1)(3)(ii)(B) sets forth the requirements for skilled workers:

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

(Emphasis added.)

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

Significantly, when DOL raises the issue of the alien's qualifications, it is to question whether the Form ETA 9089 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 9089, a determination reserved to USCIS for the reasons discussed above. Thus, DOL's certification of an application for labor certification does not bind us in determinations of whether the alien is qualified for the job specified. As quoted above, DOL has conceded as much in an amicus brief filed with the Ninth Circuit Court of Appeals.

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

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

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification. For these

reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

Further, an application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. The director did not identify that the petitioner failed to establish its ability to pay the proffered wage. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

The petitioner must establish that its ETA 9089 job offer to the beneficiary is a realistic one. A petitioner's filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later filed based on the approved ETA 9089. The priority date is the date that Form ETA 9089 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d). Therefore, the petitioner must establish that the job offer was realistic as of the priority date, and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2).

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

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

In the case at hand, the petitioner filed Form ETA 9089 with the respective DOL national processing center on September 22, 2005. The proffered wage as stated on Form ETA 9089 is \$80,000 annually based on a 40-hour work week. The petitioner listed the following information: established: 1994; gross annual income: \$1.7 million; net annual income: \$68,000; and current number of employees: 25.

First, in determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship & Immigration Services ("USCIS") will examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. On Form ETA 9089, signed by the beneficiary on November 18, 2005, the beneficiary listed that he has been employed with the petitioner since January 2003. With the initial I-140 petition filing, the petitioner submitted the beneficiary's 2004 W-2 statement, which exhibited wages paid in the amount of \$74,844, and the beneficiary's 2005 W-2 statement, which showed wages paid in the amount of \$76,307. The record also contains a copy of a pay stub dated June 9, 2006, which showed that the petitioner had paid the beneficiary \$39,418.50 as of that date. With the instant I-140 petition, the petitioner submitted a copy of the beneficiary's pay stub for the time period ending June 8, 2007, which demonstrated that the petitioner had paid the beneficiary \$43,971.62 as of that date. As the W-2 statements, and pay reflect wages less than the proffered wage, the petitioner must demonstrate that it can pay the difference between the wages paid and the proffered wage.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

The petitioner's tax returns reflect that it is a C corporation. For a C corporation, USCIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of Form 1120 U.S. Corporation Income Tax Return, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The tax returns submitted state amounts for taxable income on line 28 as shown below:

<u>Tax year</u>	<u>Net income or (loss)</u>
2005	\$57,659 ¹³
2004 ¹⁴	-\$62,857

Based on the petitioner's net income, it is unable to demonstrate its ability to pay the proffered wage, but could establish its ability to pay the instant beneficiary in 2005 based on its combined net income and wages paid to the beneficiary. The petitioner, however, did not submit its 2006 tax return, or the beneficiary's 2006 W-2 statement, which should have been available at the time of filing. Therefore, we cannot determine whether the petitioner can establish its ability to pay the proffered wage in 2006, or thereafter.

We additionally note that USCIS records reflect that the petitioner has filed over 400 I-129 H-1B or I-140 petitions for other workers. The petitioner would be required to demonstrate that it could pay the proffered wage for all sponsored workers.¹⁵ From the record, it is unclear whether the petitioner can pay each respective proffered wage for each sponsored beneficiary from the time of the priority date onward.

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

¹³ If a petitioner cannot demonstrate its ability to pay based on wages paid or net income, USCIS would then consider the petitioner's ability to pay under a second test based on an examination of net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. According to Barron's Dictionary of Accounting Terms 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. As the petitioner can demonstrate its ability to pay in 2005 based on the petitioner's combined net income and wages paid to the beneficiary, it is unnecessary to calculate the petitioner's net current assets in this case.

¹⁴ As the priority date is September 2005, the petitioner's 2004 federal tax return would not demonstrate its ability to pay the beneficiary the proffered wage from September 2005 onward.

¹⁵ The petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

ORDER: The appeal is dismissed.