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Office: NEBRASKA SERVICE CENTER

Date: NOV 02 2009

IN RE:

Petitioner:

Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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

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


Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a computer consulting/software development firm. It seeks to employ the beneficiary permanently in the United States as a quality assurance analyst. A Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification and denied the petition accordingly.

On appeal, the petitioner, through counsel, submitted additional evidence and contends that the beneficiary's educational credentials satisfied the terms of the 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).

For the reasons discussed below, we concur with the director's denial of the petition, but would also note that various decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

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

The petitioner must demonstrate that a beneficiary¹ has the necessary education and experience specified on the labor certification as of the priority date which is the day the Form ETA 750 was

¹The instant beneficiary was substituted for the originally sponsored beneficiary on the ETA 750. DOL amended the administrative regulations at 20 C.F.R. part 656 through a final rulemaking published on May 17, 2007, which took effect on July 16, 2007(71 FR 27904). The regulation at 20 C.F.R. § 656.11 prohibits the alteration of any formation contained in the labor certification after the labor certification is filed with DOL, to include the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. For individual labor certifications filed with [DOL] prior to March 28, 2005, a new Form ETA 750 (sic), Part B signed by the substituted alien must be included with the preference petition. For individual labor certifications filed with the

accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on November 16, 2001.²

The Immigrant Petition for Alien Worker (I-140) was filed on February 6, 2007. Part 5 of the petition indicates that the petitioner was established on January 1, 1975, claims a gross annual income of \$300 million dollars and currently employs 1750 workers.

The Item 14 of the Form ETA 750, sets forth the minimum requirements for the position of a quality assurance analyst. The proffered position requires a Bachelor's degree in Computer Science, Math. As noted in the AAO's request for evidence, on the line underneath in training, the form lists in different typeface, "engg or equiv." This reference also contains "whiteout" and is not stamped corrected by DOL. It is unclear when the petitioner made this change. The AAO instructed the petitioner to provide documentation in response to the request for evidence. It is noted that the petitioner failed to respond to the AAO's request for evidence. Therefore, the educational requirements will be considered as only a Bachelor's degree in Computer Science or Math. Item(s) 14 and 15 of the ETA 750 contain no other requirements.

The job duties are set forth on Part 13 of the ETA 750 and are described as testing and maintaining "client software for API (EDA) functionalities in Unix. Develop Jdbc applications using Java to test Jdbc extender. Create test plans, execute test scripts and track issues."

In determining 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).

DOL on or after March 28, 2005, a new ETA Form 9089 signed by the substituted alien must be included with the petition. USCIS will continue to accept Form I-140 petitions that request labor certification substitution that were filed prior to July 16, 2007. As the instant I-140 was filed on February 6, 2007, its request to substitute its beneficiary was accepted.

² If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

As stated on the labor certification, the proffered position of quality assurance analyst requires a Bachelor's degree in Computer Science or Math.

DOL assigned the occupational code of 030.262-010, to the proffered position. The DOT code assigned to the proffered position is analogous to 15-1099.01, Software Quality Assurance Engineers and Testers. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1099.00>³ and extensive description of the position and requirements for the job, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See id.* 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.

More specific to this position, O*NET provides that 68 percent of responding software quality assurance engineers and testers have a bachelor's degree or higher.

Based on the position's job title, job duties, the educational requirements as set forth on the Form ETA 750, the SVP identified by DOL, the majority percentage of respondents that have a bachelor's degree or higher, the job in this case would be characterized as a professional position. Additionally, however, the petitioner has not established that the petition would be eligible for approval as a skilled worker.

The regulation at 8 C.F.R. § 204.5(1)(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

³ (Accessed 10/22/09).

petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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

As noted above, the Form ETA 750 in this matter is certified by DOL. Section 212(a)(5)(A)(i) of the Act provides:

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

In this matter, on Part B of the Form ETA 750, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation is a Bachelor of Science in Math, Physics, Chemistry from Osmania University, India, following the completion of a three-year course of study.

As noted in the request for evidence issued by the AAO, in corroboration of the Form ETA 750, the petitioner provided a copies of the following relevant to the beneficiary’s education:

- 1) A copy of the beneficiary’s diploma and marks transcript from Osmania University, Hyderabad, India, indicating that he completed a three-year course of study in Mathematics, Physics and Chemistry in 1996 and received his diploma on November 27, 1998.
- 2) A copy of a professional diploma in software technology & systems management issued on May 26, 2000 by the National Institute of Information Technology (NIIT) after a two-year course of study. A copy of a certificate from NIIT indicating that the beneficiary completed a program called “Sybase & Rdbms” conducted by NIIT from December 1997 to January 1998.⁴
- 3) A copy of a certificate from Sun Microsystems indicating that the beneficiary completed training for Java 2 Platform on July 6, 2000. There is no indication of the duration of this training.
- 4) Copies of three certificates from Brainbench reflecting that the beneficiary was certified as a Javascript programmer on July 25, 2000; as a HTML programmer on July 25, 2000; and as a Java 1.2 programmer on July 19, 2000. There is no indication of the duration of

⁴ It is noted that the beneficiary failed to list this education on Part B of the ETA 750. See *Matter of Leung*, 16 I&N Dec. 2530(BIA 1976), where the Board’s dicta notes that he beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750B lessens the credibility of the evidence and facts asserted.

this training.

- 5) A copy of a diploma from Strayer University, submitted on appeal, indicating that the beneficiary received a Master of Science degree in Information Systems, which was conferred on June 19, 2006. As noted in the AAO's request for evidence, as the priority date in this proceeding is November 16, 2001, consideration of this degree is not relevant to this proceeding.

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

EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.⁵

⁵ EDGE discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

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

As noted in the AAO's request for evidence, the record indicates that the petitioner submitted two academic evaluations. With the initial Immigrant Petition for Alien Worker (Form I-140), the petitioner provided a document titled "Purpose of Evaluation: Immigration," dated June 5, 2001. It is authored by [REDACTED] Education Evaluations, Pleasanton, California. [REDACTED] evaluates the beneficiary's Bachelor's degree from Osmania University as the U.S. equivalent of three years of undergraduate study from an accredited university or college. [REDACTED] listed the beneficiary's diploma and transcripts from Osmania University and from NIIT, as well as the certificates from NIIT and from Sun Microsystems and Brainbench. She describes the NIIT diploma, the NIIT certificate related to training in Sybase & RDBMS, and the certificates from Brainbench as being equivalent to computer-training courses from a private computer center in the United States. [REDACTED] further notes that the Sun Microsystems certificate relating to the beneficiary's certification as a Java2 Platform programmer is the equivalent of a Sun Microsystems certification in the United States. She concludes that by combining the beneficiary's 3-year bachelor's degree and his computer-training courses, the beneficiary has the U.S. equivalent of a Bachelor of Science in Computer Science.

On appeal, counsel also provides a copy of an academic equivalency evaluation written by [REDACTED] of The Trustforte Corporation, New York, New York, dated February 27, 2007. [REDACTED] determines that the beneficiary's diploma from Osmania University represents the U.S. equivalent of three years toward a Bachelor of Science degree at an accredited college or university. He subsequently describes the beneficiary's studies at NIIT as representing both a post-secondary and a post-graduate program of study. [REDACTED] concludes that the beneficiary's three-year Bachelor of Science degree from Osmania University combined with his professional diploma in software technology & systems management from NIIT represents the U.S. equivalent of a Bachelor of Science degree in Computer Science.⁶

The AAO does not find the evaluations to be probative of the beneficiary's possession of a Bachelor's degree in Computer Science or Math. It is noted that the ETA 750 does not provide for an equivalency of a bachelor's degree based on a combination of educational programs. Moreover, the opinions expressed by [REDACTED] and [REDACTED] are different, relevant to the review of the beneficiary's NIIT professional diploma in software technology & systems management. [REDACTED] describes this course of study as equivalent to courses at a private computer center. [REDACTED] characterizes it as baccalaureate level studies. 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,

⁶ The Trustforte Evaluation also reviews the beneficiary's U.S. Master of Science degree from Strayer University, which as noted above, was completed in 2006, after the priority date of November 16, 2001 established by the ETA 750. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

in fact, lies, will not suffice. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). USCIS may, in its discretion, use advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). USCIS, however, is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

Further, as noted in the AAO's request for evidence, the record does not contain any evidence showing that the program of studies completed at NIIT is a postgraduate diploma issued by an accredited university or institution approved by AICTE and that its entrance requirement is the three-year bachelor's degree. Additionally, the petitioner failed to establish that NIIT was empowered to confer university accredited hours at the time of the beneficiary's admission or attendance.⁷ As noted in the AAO's request for evidence, the AACRAO, 1986 *P.I.E.R. World Education Series India: A special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at page 17, NIIT is described as a proprietary nonuniversity postsecondary program. In appendix D, the Professional Diploma in Software Technology and Systems Management as a two-year program consisting of 80 units. Therefore, it appears that NIIT does not require a college degree in order to admit a student and as in the instant case, the petitioner has presented no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree. Thus, while the beneficiary may have undertaken additional computer training courses, the petitioner has not demonstrated that the beneficiary's further studies would constitute a fourth year of upper level baccalaureate studies or a postgraduate diploma in computer science. They would not represent attainment of a bachelor's degree upon which the beneficiary would qualify for the classification sought.

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 combination of certificates and diplomas, 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). Under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Even if considering at most, the beneficiary's attainment of three years of undergraduate university studies

⁷ Based on a review of the AICTE listings at the AICTE (<http://www.nba-aicte.ernet.in/nmna.htm>) site, listing accredited programs from January 2009 onward, NIIT in Hyderabad is not included among the institutions accredited. (Accessed 10/23/09).

represented by the Bachelor of Science degree, this would not qualify as full Bachelor of Science degree as indicated on the Form ETA 750. Moreover, the petitioner failed to delineate any acceptable equivalency on the ETA 750 such as in Item 15 where other requirements are permitted to be stated.

The petitioner was also requested to provide evidence of its recruitment efforts in order to demonstrate whether it communicated to otherwise available qualified U.S. workers that some other kind of combination of certificates, diplomas or degrees were acceptable to qualify for the offered position. As noted above, the petitioner, did not respond to the AAO's request for evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act, the beneficiary must still meet the terms set forth on the labor certification. 8 C.F.R. § 204.5(l)(3)(B). Additionally, in such a case, USCIS will also examine whether the petitioner's intent to accept some other form of an academic equivalency was communicated to DOL and to U.S. workers in the labor market test.

For this qualification, 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 that:

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 beneficiary is not eligible for a skilled worker classification in this case. As mentioned above, the record supports a finding that the certified position was appropriately classified as a professional by the petitioner's intent expressed in the record, the job title, job duties, the educational requirements as set forth on the Form ETA 750, and the majority percentage of software quality assurance engineers and tester respondents that have a bachelor's degree or higher as indicated in O*Net.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d, 1174 (D. Or. 2005) which found that [USCIS] "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." 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* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a). In reaching this decision, the court also concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification.⁸

⁸ Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café*, 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

We have held in *Francis Kellogg, et als.*, 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).

Additionally, we also note the subsequent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. November 30, 2006) that was rendered in the same district. In that case, the ETA 750 labor certification application specified an educational requirement of four years of college and a ‘B.S. or foreign equivalent.’ The district court determined that ‘B.S. or foreign equivalent’ relates solely to the alien’s educational background, precluding consideration of the alien’s combined education and work experience as a “specific level of *educational background*.” *Snapnames.com, Inc.* at *6. Additionally, the court determined that the word ‘equivalent’ in the employer’s educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer’s intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that [USCIS] properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. It is noted that in the instant case, there is no equivalency designation clearly approved by DOL on the ETA 750.

It is additionally noted that in *Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the ETA 750 described the educational requirement as Bachelor’s or equivalent” and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien’s other credentials with his three-year diploma to meet the requirements of the ETA 750. *Id.* at *13-14.

In this case, the beneficiary must possess a Bachelor’s degree in Computer Science or Math. The petitioner failed to specify any defined equivalency on the Form ETA 750. The beneficiary’s formal education does not equate to the requisite four-year degree. A bachelor’s degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary’s degree from Osmania University cannot be considered a foreign equivalent degree for this purpose. The record fails to indicate that the position should be considered in a skilled worker category. Even if it were, however, the beneficiary’s course of instruction at NIIT was not accredited by the AICTE and was not a post-graduate diploma as characterized by EDGE such that it would be considered in combination with a three-year degree. Moreover, the petitioner failed to provide any evidence of any recruitment efforts that might have demonstrated its intent to otherwise qualified U.S.

In as much as Employer’s stated minimum requirement was a “B.S. or equivalent” degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

workers that it would accept a defined equivalency to a Bachelor's degree in Computer Science or Math. The beneficiary's qualifications do not satisfy the requirements of the labor certification in either a professional or skilled worker category.

It is noted that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984), USCIS is obliged to "examine the certified job offer *exactly* as it is completed by the prospective employer." (Emphasis added). USCIS' interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (Emphasis added).

As noted above, the petitioner failed to provide evidence as requested showing that the diploma from NIIT represents a recognized Indian post-graduate degree such as could be used to calculate a foreign equivalency to a baccalaureate degree if considering the petition within a skilled worker classification. Further, the petitioner also failed to provide evidence of its recruitment advertisements in order to demonstrate if it communicated its intent to otherwise qualified U.S. workers that it would accept some kind of lesser combination of degrees, diplomas or certificates in lieu of a Bachelor's degree in Computer Science or Math as required on the ETA 750. The beneficiary educational credentials do not meet the terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional or as a skilled worker under 203(b)(3)(i) of the Act.⁹

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.

ORDER: The appeal is dismissed.

⁹ A skilled worker category requires that a petitioner must show that a beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification."