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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: [redacted] Date: AUG 10 2010

IN RE: Petitioner: 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:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[redacted]

Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas 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 an information technology consultant firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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

To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on May 18, 2004.[3,4] The Immigrant Petition for Alien Worker (Form I-140) was filed on June 5, 2007.

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[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 20 C.F.R. § 656.17(a)(1).

[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).

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

[4] We note that the case involves the substitution of a beneficiary on the labor certification. Substitution of beneficiaries was permitted by the DOL at the time of filing this petition. DOL had published an interim final rule, which limited the validity of an approved labor certification to the specific alien named on the labor certification application. *See* 56 Fed. Reg. [redacted] (October 23, 1991). The interim final rule eliminated the practice of substitution. On December 1, 1994, the

The job qualifications for the certified position of computer programmer are found on Form ETA 750 Part A. Item 13 describes the job duties to be performed as follows:

> Software Developer/System Analyst needed to analyze, design & development of the application. Will be responsible for system analysis, design & implementing solutions. Experience in web technology, client/server & distributed architecture. Programming skills JAVA, JSP, Servlets, EJB, XML, Oracle 8 i, SQL Server, Web sphere, WASD and Unix Platform. Minimum two years experience reqd.

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

U.S. District Court for the District of Columbia, acting under the mandate of the U.S. Court of Appeals for the District of Columbia in *Kooritzky v. Reich*, 17 F.3d 1509 (D.C. Cir. 1994), issued an order invalidating the portion of the interim final rule, which eliminated substitution of labor certification beneficiaries. The decision effectively led 20 C.F.R. §§ 656.30(c)(1) and (2) to read the same as the regulations had read before November 22, 1991, and allow the substitution of a beneficiary. Following the DOL processed substitution requests pursuant to a May 4, 1995 DOL Field Memorandum, which reinstated procedures in existence prior to the implementation of the Immigration Act of 1990 (IMMACT 90). DOL delegated responsibility for substituting labor certification beneficiaries to U.S. Citizenship and Immigration Services (USCIS) based on a Memorandum of Understanding, which was recently rescinded. *See* 72 Fed. Reg. 27904 (May 17, 2007) (codified at 20 C.F.R. § 656). DOL's final rule became effective July 16, 2007 and prohibits the substitution of alien beneficiaries on permanent labor certification applications and resulting certifications. As the filing of the instant case predates the rule, substitution will be allowed for the present petition. An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

[5] The petitioner submitted a substitute Form ETA 750B as well as a Form ETA 750 listing the substituted beneficiary as the alien and clearly stated a four-year Bachelor's degree in computer science was required.

Major Field of Study Computer Science

Experience:

Block 15:

Other Special Requirements [blank]

As set forth above, the proffered position requires four years of college culminating in a Bachelor's degree in computer science and two years of experience in the job offered. The labor certification did not provide any alternative to the education or experience requirements found in Block 14.

On the Form ETA 750B, signed by the beneficiary on May 11, 2007, the beneficiary listed his prior education as: Bachelor of Science degree in Electronics and Masters in Business Administration. The Form ETA 750B also reflects the beneficiary's experience as follows: September 2001 to present (May 2007) with ZSL, Inc. as a systems analyst.

In support of the beneficiary's educational qualifications, the record contains a copy of the beneficiary's Bachelor of Science in Electronics from awarded September 5, 1995, Master of Business Administration from awarded December 2, 1996, and an Honours Diploma in Network-Centered Computing from The Academic Council of NIIT awarded February 27, 2000. The record also contains a copy of four credentials evaluations from of Morningside of Morningside Evaluations and Consulting, of the European-American University, and of Career Consulting International. All evaluations conclude that the beneficiary holds the equivalent of a four-year Bachelor of Science degree in the United States; conclusion is based on the combination of the beneficiary's three-year degree and experience while conclusion is based on a combination of the beneficiary's three-year bachelor degree in combination with a post graduate diploma from NIIT; and and conclusions are based on the combination of the beneficiary's three-year bachelor degree in combination with his two-year master's degree.[6]

The director denied the petition on February 29, 2008. He determined that the labor certification did not provide that the beneficiary's three-year degree from the could be combined with any other educational degree or with experience to establish that the beneficiary has a single-source bachelor's degree equivalent to a U.S. baccalaureate. Further, no evidence in the

[6] The and evaluations were submitted in response to the AAO's Request for Evidence. The evaluation was submitted with the petitioner's appeal.

record otherwise indicated that the petitioner intended it would accept a combination of degrees in lieu of a four-year degree in Computer Science at the time the labor certification was filed.

the AAO issued a Request for Evidence (RFE) to the petitioner stating that the labor certification did not specify that a combination of degrees or education and experience would be accepted as the equivalent of a four-year U.S. bachelor's degree and requesting recruitment and other evidence to establish the petitioner's intent for the minimum requirements of the position. The petitioner submitted its response on June 1, 2010.

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 15-1031, computer software engineer, applications to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at http://online.onetcenter.org/link/summary/15-1031.00 (accessed June 18, 2010) and its 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 are needed for Job Zone 4 occupations. DOL assigns a standard vocational preparation (SVP) range of 7-8 to Job Zone 4 occupations, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." *See* http://online.onetcenter.org/link/summary/15-1031.00 (accessed June 18, 2010). 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. Because of the requirements of the proffered position and DOL's standard occupational requirements, the proffered position is for a professional, but might also be considered under the skilled worker category.

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 regulation uses 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.

> 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 above regulation requires that the alien meet the requirements of the labor certification.

Because the petition's proffered position qualifies for consideration under both the professional and skilled worker categories, the AAO will apply the regulatory requirements from both provisions to the facts of the case at hand, beginning with the professional category.

Initially, however, we will provide an explanation of the general process of procuring an employment-based immigrant visa and the roles and respective authority of both agencies involved.

As noted above, the Form ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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 the position and the alien are qualified for a specific immigrant classification. 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-* In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[7] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> 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.

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.

(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,

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

> 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.*

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.

736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of U.S. Citizenship and Immigration Services (USCIS) to determine if the petition and the alien beneficiary are eligible for the classification sought. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires that the alien have a U.S. baccalaureate degree or a foreign equivalent degree and be a member of the professions. Additionally, the regulation requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." (Emphasis added.)

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).

Moreover, it is significant that both the statute, section 203(b)(3)(A)(ii) of the Act, and relevant regulations use the word "degree" in relation to professionals. A statute should be construed under the assumption that intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree that is the foreign equivalent of a U.S. baccalaureate degree, we would not consider education earned at an institution other than a college or university.

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 United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The term "bachelor's degree" is understood to mean a "United States baccalaureate degree or a foreign equivalent degree" unless the petitioner provides some sort of other understanding of the term on the Form ETA 750 or in its advertisements for the job. As the petitioner failed to delineate any defined equivalency, as discussed *infra,* the common definition must be used and the *Shah* precedent applies.

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 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 foreign equivalent is required. *Snapnames.com, Inc.* at *17, 19.

In the instant case, unlike the labor certification in *Snapnames.com, Inc.,* the petitioner did not include an "equivalency" possibility to the bachelor's degree requirement. The court in *Snapnames.com, Inc.* recognized that even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Id.* at *7. Thus, the court concluded that where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id. See also Maramjaya v. USCIS,* Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree). In this matter, the Form ETA 750 does not specify that an equivalency to a bachelor's degree would be acceptable nor does it specify what any equivalency would be. In response to the RFE, counsel stated that a combination of degrees can amount to a "foreign degree equivalency." Contrary to counsel's definition of the term "foreign degree equivalency," the term foreign equivalent or foreign degree equivalent refers to a single-source degree instead of a combination of degrees.

Counsel references *Hoosier Care, Inc. v. Chertoff*, 482 F.3d 987 (7th Cir. 2007), for the premise that DOL determines the requirements of the proffered position. *Hoosier Care* stands for the limited interpretation of what constitutes "relevant" post-secondary education under the skilled worker regulation and has no applicability to the facts of the current case.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *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.

Further, the employer's subjective intent may not be dispositive of the meaning of the actual minimum requirements of the proffered position. USCIS may look to the petitioner's intent concerning the actual minimum educational requirements of the proffered position and evidence of how it expressed those requirements to DOL during the labor certification process.

The Form ETA 750 does not provide that the minimum academic requirements of a four-year college degree in computer science might be met through anything less than a single-source degree. In response to the Request for Evidence ("RFE"), issued by this office on April 19, 2010, the petitioner submitted advertisements placed in *The Star Ledger* on April 4, 2004, in an unidentified publication on an undisclosed date, and on jobcircle.com. These advertisements stated that "Minimum two years experience reqd" and did not contain any education requirement and therefore failed to put candidates on notice of the position's full requirements. The ads also specified that the applicants should be experienced "in web technology, client/server & distributed architecture. Servlets, EJB, XML, Oracle 8I, SQL server, Websphere, WASD and Linux Platform." The recruitment report dated May 15, 2004 stated that the petitioner received eight resumes and that those eight applicants did not have the requisite amount of experience with the specific programs and platforms. The petitioner did not submit these applicants' resumes in response to the RFE so that we are unable to determine how much experience they had and with which operating systems, what kind of education they possessed, and whether the petitioner considered the candidates based on any equivalent education. Although the job advertisements did not state that a bachelor's degree was required, the recruitment information does not provide a complete picture of what the petitioner would have accepted as the minimum requirements for the position since it did not submit the applicants' resumes or other application materials for our review. On appeal, counsel states that we ignored the clarification submitted to DOL "confirming that [the petitioner] would accept any combination of foreign academic credentials as evidence of a Bachelor's degree equivalent by a credential evaluation service." The document referred to is a second Form ETA 750. This second Form ETA 750 does not bear any marking or indication that it was ever submitted to or accepted by DOL and does not state "Bachelor's or equivalent," or define any equivalency, so we are unable to determine that DOL had the revised qualifications at the time it certified the petitioner's Form ETA 750.[8,9] Additionally, the second Form clearly states:

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[8] The petitioner cited a BALCA decision, 2009-PER-00075, and stated that the decision held that fundamental fairness would be offended where language was not written on the ETA Form 9089 in keeping with the *Kellogg* decision, 1994-PER-465. First, the BALCA decision cited concerns the ETA Form 9089 and the PERM regulations that came into effect on March 28, 2005. This case utilizes the Form ETA 750 and is not governed by the PERM regulations having been filed prior to the PERM effective date. Second, the basis of the 2009 BALCA decision is that the ETA Form 9089 lacks sufficient space for the petitioning entity to include any alternatives to a single-source degree. The Form ETA 750 has sufficient space, such as in Part A, Blank 15, which the petitioner left blank, or Part B, Blank 14: "Documents . . . Submitted as Evidence that Alien Possesses the Education, Training, Experience, and Abilities Represented," which the petitioner claims it used to

In response to the AAO's RFE, the petitioner submitted a letter stating that "the previous Attorney while drafting the Form ETA 750A did not type the specific language stating that [the petitioner] will accept in lieu of bachelor's degree any suitable combination of education and experience as determined equivalent to bachelor's degree by credential evaluation service." Whether prior counsel omitted such language, USCIS must read the terms of the labor certificate as drafted. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). The petitioner, as discussed above, otherwise failed to state or provide evidence that it intended for the minimum requirements of the position to be different than the four-year, single-source college degree in Computer Science included on the Form ETA 750. The petitioner's intent must have been advertised to potential U.S. workers as well as communicated to DOL during the labor certification process; the petitioner presented no evidence that either occurred.

The evaluation from stated that the beneficiary's Master's degree in Business Administration (following completion of the beneficiary's bachelor degree) is the equivalent of a Master's of Business Administration degree in the U.S., also concludes that the beneficiary's five years of experience between September 2001 and March 2004 with ZyTechnologies and ZSL from April 2004 to May 2007 "are indicative of Bachelor's-level coursework in Computer Information Systems and related subjects." We note that close to three years of this experience was after the priority date. then uses the three years of experience to one year of education formula to conclude that the beneficiary holds "the equivalent of *at least a* ***Bachelor of Science degree in Computer Information Systems*** from an accredited institution of higher education in the United States." (Emphasis in original.) This conclusion is based on a combination of the beneficiary's bachelor's degree and five years of work experience combined, over half of which was obtained after the priority date and cannot be used to show that the beneficiary had the equivalent of a bachelor's degree by the priority date.

The evaluation from stated that the beneficiary's Bachelor of Science degree in combination with the Post-Graduate Diploma from NIIT amounts to the equivalent of a Bachelor of Science degree in Computer Information Systems from a U.S. university. The labor certification requires a degree in Computer Science and does not state that any related field of study such as

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modify the requirements before the DOL. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

[9] Additionally, as the original beneficiary stated on the original Form ETA 750B that he had a four-year Bachelor of Engineering degree, DOL would not have been on notice that the substituted beneficiary had an "equivalent" degree, or that the petitioner would accept an equivalent degree as this was not an issue until the petitioner substituted the instant beneficiary.

Computer Information Systems would be accepted. The beneficiary's diploma from NIIT was not listed on the Form ETA 750B and was only submitted on appeal. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary's experience, without such fact certified by on the beneficiary's Form ETA 750, lessens the credibility of the evidence and facts asserted). In addition, the information concerning NIIT indicates that it is not an accredited institution. Further, the AAO notes that based on a review of the All India Council for Technical Education site, accessed on June 15, 2010, NIIT is not an accredited institution within the state of Gujarat, India, or within any other Indian state. As the program of study was from an unaccredited institution, there are insufficient controls over the material to adequately assess any equivalency. Also, the other three evaluations do not consider this program 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. 582, 591-592 (BIA 1988).

In response to the AAO's RFE, the petitioner submitted two additional credential evaluations from [10] of the European American University and of Career Consulting International. states that the beneficiary's Master's degree in Business Administration, when combined with the earlier Bachelor of Science degree in Electronics, is equivalent to a U.S. four-year bachelor's degree in computer science. relies on a UNESCO document. In support of his evaluation he quotes Paragraph 1(e), which defines recognition as follows:

> 'Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that the combination of a three-year degree with an unrelated advanced degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable

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[10] indicates he has a "canonical diploma of from St. Occumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

[11] indicates that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from but does not indicate the field in which she obtained her doctorate. According to its website, www.sorbon.fr/index1.html, awards degrees based on past experience.

qualification." At the heart of this matter is whether the beneficiary's degrees are, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.[12]

In fact, UNESCO's publication, "The Handbook on Diplomas, Degrees and Other Certificates in Higher Education in Asia and the Pacific" 82 (2d ed. 2004) (accessed on June 14, 2010 at and incorporated into the record of proceedings), provides:

> Most of the universities and the institutions recognized by the UGC or by other authorized public agencies in India, are members of the Association of Commonwealth Universities. Besides, India is party to a few UNESCO conventions and there also exists a few bilateral agreements, protocols and conventions between India and a few countries on the recognition of degrees and diplomas awarded by the Indian universities. But many foreign universities adopt their own approach in finding out the equivalence of Indian degrees and diplomas and their recognition, just as Indian universities do in the case of foreign degrees and diplomas. The Association of Indian Universities plays an important role in this. *There are no agreements that necessarily bind India and other governments/universities to recognize, en masse, all the degrees/diplomas of all the universities either on a mutual basis or on a multilateral basis.* Of late, many foreign universities and institutions are entering into the higher education arena in the country. Methods of recognition of such institutions and the courses offered by them are under serious consideration of the government of India. UGC, AICTE and AIU are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.)[13]

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[12] 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. 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 June 14, 2010).

[13] The evaluation also cites to the following material:

related to the Recognition of Qualifications concerning Higher Education in the European Region, dated April 11, 1997. Convention discusses recognition of qualifications issued by other parties to meet the general requirements for access to higher education, "unless a substantial difference can be shown between the general requirements for access in the Party in which the qualification was obtained and in the Party in which recognition of the qualification is sought."

The evaluation also cites to the following cases:

Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988). In *Sea* the Commissioner determined that the beneficiary's education, experience and professional attainments would be equivalent to a bachelor's degree in electrical engineering, and that the beneficiary would therefore qualify as a member of the professions for a nonimmigrant petition. However, the decision in *Sea* case applied to the nonimmigrant category. *Inc.* relates to meeting the professional standard for a nonimmigrant petition, and would be relevant to whether education and experience could be combined to obtain nonimmigrant H-1B approval. The rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5).

In 12 I&N Dec. 17 (D.D. 1966), the District Director determined that the individual was a professional economist and qualified for an immigrant visa based on his extensive employment experience, and high level of occupational attainment, despite his lack of a degree in the field of economics, although he had completed coursework at several universities.

In *Matter of Arjani*, 12 I&N Dec. 649 (R.C. 1967), the Regional Commissioner determined that the beneficiary's education, including a bachelor of commerce degree in accounting with postgraduate work toward a master of commerce degree, combined with nine years of specialized experience in accounting would "collectively" be equivalent to a bachelor's degree in accounting and that the beneficiary would qualify as a member of the professions within the meaning of 101(a)(32).

In *Matter of Sun*, 12 I&N Dec. 535 (D.D. 1966), the district director determined that the position of a hotel manager is a profession based on the complexity of the duties involved, not the existence of a degree.

In *Matter of Yaakov*, 13 I&N Dec. 203 (R.C. 1969), the Regional Commissioner determined that the beneficiary would qualify as a professional librarian under section 101(a)(32) based on a combination of her education, three and a half years, and her experience, over twelve years. Part of the decision was based on "it is recognized that in a few areas of the professions, it is not always possible to obtain the usual formal education. In this case, it has been pointed out that in Israel, at the time the subject resided there, there were no schools offering degrees in library science."

In *Matter of Devnani*, 11 I&N Dec. 800 (Acting D.D. 1966), the Acting District Director determined that the beneficiary's high level of education, a master's degree from a U.S. university, combined

The credential evaluation from of Career Consulting International concluded that the beneficiary holds a "US Bachelor of Science Degree with a Major in Computer Science" based solely on the evaluation of the beneficiary's three-year Bachelor of Science degree and the beneficiary's two-year Master of Business Administration. Although the evaluation purports to undertake a course-by-course evaluation, it is unclear how the beneficiary's MBA degree is related to a degree in Computer Science as only a few courses listed on the transcript would seem to be relevant.

Moreover, as advised in the RFE issued to the petitioner by this office, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).[14] According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher

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with the beneficiary's "extensive specialized experience in the chemical industry qualifies him for professional status as an organic chemist." The beneficiary completed a bachelor of science in chemistry in India, determined to be the equivalent of two years of U.S. studies, as well as a master of business administration completed at a U.S. university. He additionally had over ten years of experience in the chemical industry.

We note that based on the time period for the cases cited that the preference categories, and immigration framework was different. Prior to the Immigration Act of 1990 (IMMACT 90), only two preference categories existed for individuals seeking to immigrate on a job related basis: the third and sixth preferences under 8 U.S.C.A. § 1153(a) and (6). To qualify for third preference, the beneficiary had to be a member of the professions, or a person of exceptional ability in the arts and sciences. IMMACT 90 created five categories under the amended under 8 U.S.C.A. § 1153(b), four of which were employment based, and the fifth related to investment or employment creation. The prior third preference became second preference, and the former sixth preference became third, including skilled and unskilled. The regulation now clearly states at 8 C.F.R. § 204.5(1)(3)(ii)(C) that if the petition is for a professional, the evidence must show that the beneficiary has a baccalaureate or foreign equivalent degree.

Further, prior to IMMACT 90, there was no definition of the term "professional." Now, however, professional is defined at 101(a)(32) and 8 C.F.R. § 204.5(l)(3)(ii)(C) explicitly requires a bachelor's degree. Therefore, the cases cited, which were all decided prior to IMMACT 90, are irrelevant.

[14] The petitioner states in its response to the AAO's RFE that the AAO's use of EDGE could be considered "an inappropriate endorsement of the AACRAO education evaluation service over other credential evaluation services." In *Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

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." Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.Aacrao.org/publications/guidetocreatinginternationalpublications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE provides that a Bachelor of Science "represents the attainment of a level of education comparable to two to three years of university study in the United States." The beneficiary's Master's degree in Business Administration is in an unrelated field, however, instead of Computer Science as required by the labor certification. In response to the AAO's RFE, counsel stated that EDGE was improperly relied upon because "it is not a publicly accessible source" and the use of EDGE amounts to the AAO's endorsement of an individual credential evaluation service in violation of government policy. *But see Confluence Intern., Inc. v. Holder,* 2009 WL 825793 (D.Minn. March 27, 2009), as noted in footnote 14.

In response, counsel challenges what he perceives as our reliance on the AACRAO materials to the exclusion of anything else. First counsel notes that EDGE is a subscription service and not publicly available. Counsel also expresses concern that by noting the inconsistencies between EDGE and the evaluations submitted, USCIS is recommending or endorsing EDGE above other evaluators. Counsel then asserts that EDGE does not provide the credentials of its authors and solicits the participation of users. Thus, counsel concludes that EDGE is similar to *Wikipedia*, an Internet encyclopedia that is entirely authored and amended by users with no reviewing authority to fact check the entries.[15] Counsel also asserts that the inconsistencies in the evaluations submitted reflect a difference of methodology and are not significant as they all are "consistent" in their conclusions that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate. However, we note that all four evaluations conflict significantly by combining the three-year degree with various other credentials or experience. Counsel's explanation for the discrepancies between the four evaluations is lacking.

Counsel misinterprets the materials we provided in support of our notice, a copy of which was sent to counsel and the petitioner with the Request for Evidence. While EDGE may solicit new information for review by AACRAO, there is no evidence that any user can update EDGE without review by the authors of the implicated section. We specifically notified the petitioner that authors

[15] *See* [redacted] (accessed February 26, 2009 and incorporated into the record of proceedings).

for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at . If placement recommendations are included, the works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.[16]

Moreover, the AAO did not obtain an evaluation from EDGE or AACRAO and rely on that evaluation to the exclusion of the evaluations provided. Rather, we reviewed the placement recommendations published by AACRAO in books and on EDGE and noted that they were inconsistent with the evaluations submitted. The petitioner has not countered this evidence with placement recommendations in other peer-reviewed publications or sufficiently explained the discrepancies in the four evaluations submitted. Rather, the petitioner relies on individual opinions supported by conventions and published materials that do not address how to evaluate specific Indian degrees. Specifically, counsel continues to rely on United Nations Education Scientific and Cultural Organization (UNESCO) materials. The recommendation provided relates to "recognition" of qualifications awarded in higher education. *See* Paragraph 1(e), *supra.*

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined by statute and regulation as eligible for immigration benefits. Nor does UNESCO suggest that a combination of degrees, one of which is in a different subject matter, is equivalent to a single-source U.S. bachelor degree. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

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[16] While not discussed in our previous notice, EDGE does, in fact, provide the credentials of the authors of each country section. The section on India is authored by . His credentials are listed on EDGE (accessed July 2, 2010 and incorporated into the record of proceedings) as follows:

> is currently the Assistant Professor of Medical Humanities, Assistant Dean of Graduate Medical Education and in International Medicine at the University of Missouri-Kansas City. He has a PhD in Higher Education Administration and a MPA in health care administration. has 15 years of experience in international recruitment, admissions, advising, immigration, programming and office administration. He is the co-author of Special Report on India published by AACRAO/NAFSA. He has presented at regional and national meetings of AACRAO and NAFSA on topics of Indian Higher Education to best practices in developing international programs office. He reviews applications for undergraduate and graduate placement of and other programs.

The AAO also never suggested that EDGE is the sole authority that will be accepted by USCIS or otherwise endorsed it. Rather, especially given the inconsistencies between the other evaluations of record, the AAO reviewed EDGE as another source of information. We reject counsel's assertion that the submission of two additional credentials evaluations resolves the original discrepancy between the prior evaluations as the two new evaluations use different reasoning for reaching their conclusions. Determining whether one degree or two degrees, where one degree is outside of the subject matter specified by the labor certification, is equivalent to a four-year degree is material to all of the evaluations. The four evaluations in the record reach different conclusions based on the same material submitted; the petitioner submitted no evidence to resolve the inconsistency between the conclusions reached by and the other three evaluators.

Counsel also references minutes from an teleconference liaison meeting with the Nebraska Service Center on April 12, 2007 that provides statements by the Service Center Director as to degree equivalencies and the use of credential evaluations. The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v.* 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Similarly, "liaison" minutes are not binding. Further, the Form ETA 750 states no equivalency. 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).

Counsel also references two letters dated January 7, 2003 and July 23, 2003, respectively, from of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the July 2003 letter states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

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

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is

no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. We do not find the determination of the credentials evaluation probative in this matter. It is further noted that a bachelor's degree is generally found to require four years of education. Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah,* 17 I&N Dec. at 245. Here, the petitioner seeks to combine an unrelated Master's program, prior experience, and/or an unaccredited program of study with a three-year bachelor degree to reach a four-year degree in the required field.

The Form ETA 750 does not provide that the minimum academic requirements of a bachelor's degree might be met through a degree less than four years in duration or some other defined equivalency explicitly stated on the Form ETA 750. The petitioner submitted incomplete recruitment materials. The beneficiary does not qualify as a professional since he does not have a four-year college degree in Computer Science as required by the labor certification. The beneficiary also does not qualify as a skilled worker as he does not meet the terms of the labor certification as explicitly expressed, which requires a four-year bachelor's degree in Computer Science and does not include any equivalency.

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

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

ORDER: The appeal is dismissed.