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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 14 2010
LIN 07 215 50082

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

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 business software company.[1] It seeks to employ the beneficiary permanently in the United States as a systems developer. As required by statute, a Form ETA 750,[2] 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'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).

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

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[1] The current petitioner with new counsel submitted documentation in response to the AAO's RFE to establish that it is a successor in interest to , which in turn on appeal previously claimed to be a successor in interest to the initial I-140 petitioner. Based on a press release submitted to the record, acquired , a provider of drug safety and risk management solutions with advanced analytics for the health sciences industry on March 23, 2009, at which time the I-140 petitioner was merged into , under . The current petitioner also submitted a press release and certificate of merger dated February 15, 2010 between and under the name The present petitioner filed a subsequent I-140 petition (LIN 10 156 50845) under the skilled worker classification utilizing a copy of the previously filed ETA Form 9089 that the Nebraska Service Center approved on June 28, 2010. Based on correspondence dated March 25, 2010, this final I-140 petition was filed because the petitioner's EIN number had changed during internal restructuring within Corporation. The AAO will briefly comment on the successor in interest issue at the end of these proceedings.

[2] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The AAO notes that the initial I-140 petitioner filed a subsequent I-140 petition with Form ETA 9089 that was approved by the Nebraska Service Center. This petition is not found in the record. The present petitioner filed a subsequent I-140 petition (LIN 10 156 50845) under the skilled worker classification utilizing a copy of the previously filed ETA Form 9089 that the Nebraska Service Center approved on June 28, 2010. Based on correspondence dated March 25, 2010, this final I-140 petition was filed because the petitioner's EIN number had changed during internal restructuring within

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 23, 2003.[3] The Immigrant Petition for Alien Worker (Form I-140) was filed on June 27, 2007.

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

> Perform systems and [redacted] development, project management, quality assurance, testing, and training for [redacted] Optimize systems performance and [redacted] of existing and new [redacted] products. Create logical and physical database models, perform tuning and space management, data migration across customer applications, and backup and recovery strategies. Conduct space, user, security management, Write SQL and shell scripts for systems monitoring. Validate and create new tables, indexes, and constraints, and optimize procedures, triggers, and SQL queries.

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:

Block 14:

Education (number of years)

Grade school	Y
High school	Y
College	4
College Degree Required	N/A
Major Field of Study	N/A

Experience:

Job Offered	4

[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.

(or)
Related Occupation 4

(Database Administrator, Computer consultant, Territory Manager Systems)

Block 15:

Other Special Requirements None

As set forth above, the proffered position requires four years of college and four years work experience in either the proffered job or as a database administrator, computer consultant, or territory manager systems. The specific requirements for a college degree in a specific field of study are indicated as non applicable to the instant petition.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed his prior education as:

> University of Delhi, studying commerce, from April 1984 to May 1987, receiving a bachelor of commerce degree.
>
> International Data Processing Co. Ltd, Delhi, studying software applications, from August 1987 to April 1988, receiving a diploma.

In support of the beneficiary's educational qualifications, the record contains a copy of the beneficiary's diploma from the University of Delhi dated April 17, 1988 that states the beneficiary was found qualified for the degree of Bachelor of Commerce (pass) (10-2+3) degree. The record also contains a Provisional Certificate dated October 7, 1987. This document states the beneficiary was a student at the Shaheed Bhagat Singh (Eve) College (University of Delhi) for three years and passed an examination securing 561/1200 marks. This document is dated July 10, 1987. The record also contains one Statement of [redacted] for the year 1986 from the University of Delhi that indicates marks for Parts I and Parts II, taken simultaneously, with no marks received for Part III. There is no other documentation in the record with regard to any specific coursework taken, or marks received for the three year Bachelor of Commerce degree.

The record also contains documentation on the beneficiary's secondary studies, and a diploma in Software Applications from International Data Company, Ltd., New Delhi, India, for a course held from August 8, 1987 to April 27, 1988. The diploma was awarded on July 8, 1988, with an overall grade of C.

The record contains an initial academic evaluation written by [redacted] Providence, Rhode Island, dated June 18, 2007 that determined the beneficiary, based on his three year program at the University of Delhi, had the functional equivalent of a bachelor's degree in business administration. In response to the director's RFE dated August 24, 2007, the petitioner submitted two additional academic evaluations, dated

September 26 and 27, 2007, respectively. These evaluations were written by Both of these evaluators indicated the beneficiary's three-year bachelor's degree in commerce was the equivalent of a bachelor of business administration, representing 120 semester credit hours, from a regionally accredited U.S. institution of higher learning.

A letter from , dated September 27, 2007 is also submitted. This letter states that the beneficiary's education record represents a single-source degree that is the equivalent of a bachelor's degree in the United States. states that in the United States a bachelor's degree requires at least 1800 contact hours that translate to 120 semester credit hours, and that to his knowledge there is no three year Indian bachelor's degree that requires fewer than 1800 contact hours for graduation and that the majority of programs require well over 2000 contact hours.

The record also contains copies of UNESCO committee reports and documents, with addenda addressing innovations in education with regard to compressing four years of college level instruction into three or two years of college level instruction.

The director denied the petition on January 22, 2008. He determined that the certified labor certification did not require a bachelor's degree in a specific area of concentration, but rather it only required four years of college education. The director noted that the beneficiary did not qualify as he did not possess a bachelor's degree or equivalent in a specific field, nor was he a member of the professions. The director determined that the beneficiary could only qualify for the 8 C.F.R. § 203(b)(3)(A)(i) classification of skilled worker in which the beneficiary must possess at least two years of specialized experience as well as satisfy any other requirement set forth on the labor certification.

Based on the beneficiary's three year program of studies at the University of Delhi, the director determined that the beneficiary did not have the required four years of college. He also noted that the education evaluations from focused on equating the beneficiary's three year foreign college degree to a four year college degree from an accredited U.S. institution. The director noted that none of these evaluations focused on whether the beneficiary did in fact complete four years of college level education.

On appeal, with regard to the beneficiary's qualifying academic credentials, former counsel states that the academic evaluations establish that the beneficiary's three years of college education is the equivalent of four years of college education in the U.S and notes that in India the school year is longer than the school year in the United States and that the number of classes completed during the three academic years is equal to or more than the number of classes a student would complete in a U.S. institution. Specifically counsel states that an applicant with a bachelor's degree (pass) from India must complete 2880 hours of contact hours and that the U.S. four year bachelor's degree commonly represent 1800 contact hours and 120 credits. Counsel resubmits the evaluations from

. He also submits an Internet article written by entitled found at http:///.degree.com/articles/E-year-indian-degree.html as of February 21, 2008. Finally former counsel also submits additional letters of recommendation.

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 15-1051 and title, computer systems analyst, 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/crosswalk/ (accessed August 19, 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/* (accessed August 19, 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.

The regulation at 8 C.F.R. 204(5)(l)(3)(ii)(B) states the following:

> 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-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[4] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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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.

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*

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

> *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).

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 had 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 Congress 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.

1289m 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement in 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.

The petitioner in this matter relies on the beneficiary's three years of university-level studies with the receipt of a diploma in software applications to reach the "equivalent" of a degree, which is not a bachelor's degree based on a single degree in the required field listed on the certified labor certification. Further, the petitioner also did not specify that the position required a four year degree, but rather that he possessed four years of college level studies.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. More specifically, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a single-source "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," from a college or university in the required field of study listed on the certified labor certification, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. In addition the petitioner does not require a bachelor's degree, but rather four years of college level studies.

We are cognizant of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005), which finds that U.S. Citizenship and Immigration Services (USCIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the

analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church*, 437 F. Supp. 2d at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

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

In the instant case, unlike the labor certification in *Snapnames.com, Inc.,* the petitioner's intent regarding educational equivalence is not stated on the Form ETA 750 and the petitioner requires only four years of college level instruction with no specific degree or field of study and either four years of work experience in the proffered field or four years of experience as a database administrator, computer consultant, or territory systems manager. 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).

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. *Maramjaya v. USCIS,* Civ. Act. No. 06-2158, 14 n. 7. Thus, USCIS agrees that the best evidence of the petitioner's intent concerning the actual minimum educational requirements of the proffered position is evidence of how it expressed those requirements to DOL during the labor certification process and not afterwards to USCIS. The timing of such evidence is needed to ensure inflation of those requirements is not occurring in an effort to fit the beneficiary's credentials into requirements that do not seem on their face to include what the beneficiary has.

In the instant matter, the petitioner did not require a four year bachelor's degree in a specific field of study on the ETA Form 750 submitted to DOL. He required four years of college level studies and four years of work experience in the proffered position or as a database administrator, computer consultant or territory systems manager. However, all three evaluators and counsel on appeal maintain that the beneficiary's three years of college level studies are the equivalent of a four year Bachelor's degree of Business Administration.

Thus, the AAO issued a request for evidence (RFE) on April 26, 2010 soliciting such evidence. The AAO's comments in its RFE were geared toward the evaluators' claimed equivalency of the beneficiary's three years of college level studies to a four-year U.S. college degree of business administration.[5]

In response, the petitioner through current counsel, submitted the recruitment report submitted to the DOL and dated May 5, 2003. This document states that the company received eighteen resumes in response to its ads and internet posting, and that twelve of the job applicants were disqualified because they lacked knowledge of the minimum technical skills required to perform the job duties. The remaining six applicants were disqualified because they were recent college graduates who lacked the minimum required years of work experience, or the minimum required years of work in the proffered position or a related position.

The petitioner also submitted the initial petitioner's posting notice dated 2003 that stipulated four years of work experience in the job offered or in a related occupation are required, as well as two print advertisements from the *Orange County Register*, dated November 29, 2002 and January 2, 2003. These two advertisements do not reflect any required minimum education or work experience.

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[5] The AAO notes that the petitioner did not state any field of study on the ETA 750, and the beneficiary's transcripts do not reflect the specific studies undertaken in his three year bachelor of commerce degree. Thus, the record is not clear how or why all the evaluators determined that the beneficiary's three years of studies were equivalent to studies in business administration.

An advertisement on the Internet at California's JobBank dated April 2003 states a high school/GED education is required with four years of work experience.

While the petitioner consistently required only four years of work experience in these materials, the certified ETA 750 clearly indicates a much higher level of postsecondary education, namely, four years of college level studies with no specific degree or field of study and also four years of work experience. Thus the record reflects a significant discrepancy between the actual minimum requirements stated on recruitment materials and the minimum education level on the certified 750. Since the petitioner did not submit any further evidence on the applicants who responded to its advertisement, the record cannot establish whether these applicants did or did not have the stipulated four years of college level studies and four years of work experience. Based on the petitioner's cover letter, it appears that some applicants did have college degree with no work experience, while other applicants did not have the skills outlined in the job description. Current counsel in response to the AAO's RFE, now asserts that the Relsys International, the initial petitioner, intended the minimum requirements for the position to be a bachelor's degree or equivalent in any field and four years of related experience.

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

As stated previously, the petitioner submitted three evaluations of the beneficiary's education to show that the beneficiary met the educational requirements of the labor certification. All three evaluations focused on whether the beneficiary's three year bachelor degree in commerce was the equivalent of a four-year U.S. baccalaureate. As noted by the director, the issue in the instant petition is whether the beneficiary possesses four years of university level studies, and not whether his three year degree is equivalent to a U.S. baccalaureate degree.

The AAO will briefly comment on the educational equivalency reports.

both conclude that the beneficiary's three-year bachelor of science degree from the University of Delhi is equivalent to a 120 credit hour bachelor of science degree in business administration from a U.S. institution of higher education. It is noted that the

evaluations are fundamentally identical, with each evaluation referencing many of the same supporting materials.

The fundamental argument of the evaluations is that a three-year bachelor's degree from India is equivalent to a 120 credit hour U.S. bachelor's degree, because an Indian three-year degree requires the same number of classroom hours (or "contact hours") as a U.S. bachelor's degree. The evaluations claim that a student must attend at least 15 50-minute classroom hours to earn one semester credit hour under the U.S. system. Since U.S. bachelor's degree programs require 120 credit hours for graduation, the evaluations conclude that a program of study with 1800 classroom hours is equivalent to a U.S. bachelor's degree. Since a three-year bachelor's degree from India allegedly requires over 1800 classroom hours, the evaluations conclude that it is equivalent to a U.S. bachelor's degree.

The evaluations base this equivalency formula on the claim that the U.S. semester credit hour is a variant of the "Carnegie Unit." The Carnegie Unit was adopted by the Carnegie Foundation for the Advancement of Teaching in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject.[6] For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.[7] This unit system was adopted at a time when high schools lacked uniformity in the courses they taught and the number of hours students spent in class.[8] According to the foundation's website, the "Carnegie Unit" relates to the number of classroom hours a high school student should have with a teacher, and "does not apply to higher education."[9]

The AAO also notes that the record is not clear how in his evaluation concluded that the beneficiary had the equivalent of 120 credits, and a respective grade point average.[10] The only Statement of from the University of Delhi documents marks obtained for only Part I and Part II of the beneficiary's studies, which may or may not correspond to his first two years of studies. The document contains no grades and not indication of contact hours applicable to the beneficiary's studies. Further, the record is not clear if the beneficiary's studies were for evening classes, based on the abbreviations of "Eve" or "Even" found on the Statement of and provisional certificate,

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[6]The Carnegie Foundation for the Advancement of Teaching was founded in 1905 as an independent policy and research center whose charge is "to do and perform all things necessary to encourage, uphold, and dignify the profession of the teacher." http://www.carnegiefoundation.org/about/index.asp (accessed September 18, 2009).

[7]http://www.carnegiefoundation.org/about/sub.asp?key=17&subkey=1874 (accessed September 18, 2009).

[8]*Id.*

[9]*Id.*

[10] examines the beneficiary's coursework at the University of Delhi, examining Part I with papers I through IV, and Part II, with papers V through VII. concludes that the beneficiary received 60 credits for Part I, and 60 credits for part II, for a total of 120 credit hours, and a grade points average of 3.12.

respectively. Thus, the evaluations that all mention 120 credit hours are not based on any corroborating evidence in the record.

There is no support in the record for the argument that a three-year bachelor's degree from India is equivalent to a U.S. bachelor's degree because both degrees allegedly require an equivalent amount of classroom time. The evaluations fail to provide any peer-reviewed material (or other reliable evidence) confirming that assigning credits based on hours spent in the classroom is applicable to evaluating three-year bachelor of science degrees from India. For example, if the ratio of hours spent studying outside the classroom is different in the Indian and U.S. systems, comparing hours spent in the classroom would be misleading.[11]

Both evaluations also argue that the U.S. and India are members of United Nations Educational, Scientific and Cultural Organization (UNESCO) treaties, and that UNESCO "clearly recommends that the 3 and 4 year degree should be treated as equivalent to a bachelor's degree by all UNESCO members." In support of this claim, the evaluations reference the UNESCO 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.[12] Specifically, the UNESCO Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993 contains the language relating to "recognition" of qualifications awarded in higher education. Paragraph 1(e) 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

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[11]*See e.g.*, Robert A. Watkins, The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," at http://handouts.aacrao.org/am07/finished/F0345p_M_Donahue.pdf (accessed September 18, 2009)(stating that the Indian system is exam-based instead of credit-based, thus transfer credits from India are derived from the number of exams passed; and that, in India, six exams equates to 30 credit hours).

[12]*See* http://www.unesco.org (accessed September 18, 2009).

> 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 a three-year degree must be deemed equivalent to a four-year 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.

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), provides:[13]

> 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. The [University Grants Commission], [All India Council for Technical Education] and [Association of Indian Universities] are developing criteria and mechanisms regarding the same.

Id. at 84. (Emphasis added.). In summary, reliance on UNESCO for the proposition that a three-year Indian bachelor's degree is equivalent to a four-year U.S. bachelor's degree is misplaced.

The [redacted] evaluation contains an excerpt of an article titled "Brief History of the American Academic Credit System: A Recipe for Incoherence in Student Learning," by John Harris, Samford University, September 2002. The article discusses evolution and shortcomings of the U.S. credit hour system, and examines the arbitrariness of the credit hour as a purported unit of learning. It is noted that the article's criticism of the semester credit hour is equally applicable to the classroom

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[13] http://unesdoc.unesco.org/images/0013/001388/138853E.pdf (accessed on August 24, 2009).

contact hour. Accordingly, the article undermines the claims of the evaluations, which seek to directly equate the U.S. semester credit hour with the classroom contact hour when comparing bachelor's degrees from different countries.

Both evaluations assert that some U.S. institutions of higher education will consider holders of three-year bachelor's degrees from India for entry into their master's degree programs. However, the evaluations do not address whether those few U.S. institutions that accept three-year degrees from India do so subject to additional conditions, such as requiring the degree holder to complete extra credits prior to admission. Further, the fact that some U.S. graduate programs accept three-year degrees has little relevance to whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate.

Both evaluations also state that some U.S. institutions offer three-year bachelor's degree programs. It is noted that there exists accelerated degree programs in the United States. However, this fact provides no useful information about the degree obtained by the beneficiary in India. At issue is the actual equivalence of the specific degree the beneficiary obtained, not whether it is possible to obtain a baccalaureate in less than four years in an accelerated program in the United States. The beneficiary did not compress his studies to obtain a degree in less than four years from an institution that grants four-year degrees, and, even if this were the case, the petitioner would need to establish that the beneficiary's accelerated degree is equivalent to a four-year, 120 credit hour U.S. bachelor's degree.

With regard to the article "Does the Value of Your Degree Depend on the Color of Your Skin?" submitted on appeal, the record contains no evidence that this article was published in a peer-reviewed publication or anywhere other than on the internet. The article states that some British and U.S. colleges and universities accept three-year bachelor's degrees for admission to graduate school, but acknowledges that others do not. The article concedes:

> None of the members of [the National Association of Credential Evaluation Services] who were approached were willing to grant equivalency to a bachelor's degree from a regionally accredited institution in the United States, although we heard anecdotally that one, [World Education Services], had been interested in doing so.
>
> In this process, we encountered a number of the objections to equivalency that have already been discussed.
>
> James Frey, Ed.D., President of Educational Credential Evaluators, Inc. [(ECE)], commented thus,
>
> "Contrary to your statement, a degree from a three-year "Bologna Process" bachelor's degree program in Europe will NOT be accepted as a degree by the majority of universities in the Untied States. Similarly, the majority do not accept a bachelor's

> degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI."
>
> * * *
>
> International Education Consultants of Delaware, Inc., raise similar objections to those raised by ECE,
>
> "The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute [an] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year U.S. Bachelor's degree.
>
> The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly from Year 12 of your education. In the US, there are no degree programs entered from a stage lower than Year 12, and there are no 3-year degree programs. Without the additional advanced standing year, there's no equivalency.

Both evaluations also cite a Council of Graduate Schools survey concerning the acceptance of three-year degrees. The survey shows that a small number of U.S. graduate programs accept three-year degrees from India. The survey does not reflect how many of the limited number of institutions that accept three-year degrees from outside of Europe do so provisionally. If the three-year Indian baccalaureate were truly a foreign equivalent degree to a U.S. baccalaureate, the vast majority of U.S. institutions would accept these degrees for graduate admission without provision. The cited survey underlines that there is not wide acceptance within the academic community of three-year degrees for admission into graduate schools. The evaluations provide no study or report that conclusively states that all Indian three-year degrees are equivalent to a U.S. bachelor's degree, or even that Indian three-year degrees are generally accepted for admission into U.S. graduate degree programs.

Moreover, as advised in the RFE issued 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 education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission

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[14] 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.

"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 are not merely expressing their personal opinions. Rather, they 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 *www. Aacrao.org/publications/guide to creating international publications.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 states that EDGE provides a great deal of information about the educational system in India, and while it confirms that a bachelor of arts 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 four-year U.S. baccalaureate. Thus the beneficiary does not possess four years of college based on his diploma from the University of Delhi.

EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

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

The record does not indicate that the beneficiary's eight months of studies in software applications at the International Data Processing Company, Ltd., taken from August 8, 1987 to April 1988, were university-level studies or taken at a university or college. Thus the record does not establish that the beneficiary has a four-year Baccalaureate degree or four years of university-level studies.

The Form ETA 750 does not provide that the minimum academic requirements of four years of college level studies might be met through some other formula. The copies of the petitioner's notice(s) of Internet and newspaper advertisements and recruitment, provided with the petitioner's response to the RFE issued by this office, further support that the petitioner did not require a four year or a three year bachelor's degree in any field, but rather uniformly indicate that requirements for the job may be met through four years of work experience with no particular educational

requirements or equivalencies. Although the petitioner in these materials states that some applicants for the position did not have the required degree, the advertisements and posting notice do not indicate that any degree is necessary.

Further, the alien does not qualify as a skilled worker in the instant matter as he does not meet the terms of the labor certification as explicitly expressed or as extrapolated from the evidence of its intent about those requirements during the labor certification process. The labor certification requires four years of college level studies, and four years of work experience, while the petitioner's intent, as extrapolated from its recruitment report, is significantly different from those requirements on the ETA 750, requiring four years of work experience. The beneficiary does not meet the terms of the labor certification.

The beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, which does not disqualify him from meeting the requirements of the labor certification. However, based on the evidence in the record, he does not have four years of college level studies, and, thus, does not qualify for preference visa classification under section 203(b)(3) (i) of the Act. Thus the AAO concurs with the director's decision with regard to the beneficiary's qualifications. The petitioner has not established that the beneficiary is qualified for the proffered position.

In its RFE, the AAO also requested further evidence with regard to the acquisition by Inc. of the I-140 petitioner or of the successor-in-interest relationship between and the I-140 petitioner, and requested evidence regarding the acquisition of to prove that a successor-in-interest relationship exists, as well as ability to pay the proffered wage as of the actual acquisition and to the present time. The AAO requested that the claimed successor in interest submit evidence that the I-140 petitioner had the ability to pay the proffered wage during tax year 2007 and up to the claimed 20009 acquisition. Finally the AAO requested further clarification on the actual corporate status of the I-140 petitioner at the time that it merged with The AAO noted that the state of California corporate database, available at http://kepler.sos.ca.gov/cbs.aspx, (accessed on April 12, 2010), indicated that has the status of "merged out." The only date found in this report is April 13, 1987.

In response, the second claimed successor in interest, submitted materials to the record. Based on a press release submitted to the record acquired a provider of drug safety and risk management solutions with advanced analytics for the health sciences industry, on March 23, 2009, at which time the I-140 petitioner was merged into under The current petitioner also submitted a press release and certificate of merger dated February 15, 2010 between and under the name

The AAO also requested further evidence as to the initial I-140 petitioner's corporate status as of the 2003 priority date. As stated previously, has established its status as successor in interest to both and With regard to the initial I-140 petitioner's corporate status as of the 2003 priority date, the AAO notes that the current petitioner

provided no further information as to the petitioner's status, and stated that to the best of its knowledge, was an active corporation engaging in business at the time of filing the I-140 petition in 2007. The AAO has reviewed the materials submitted in response to its RFE. While the current petitioner has provided no further evidence as to the actual incorporation of as of the 2003 priority date, the AAO finds the petitioner's explanation to be reasonable. The record also reflects a continuing business operation based on several press releases and acquisition documentation. The AAO will address this issue no further.

The AAO also requested further evidence with regard to the ability of to pay the proffered wage of $76,500 during tax year 2007 and up to the claimed acquisition of the initial I-140 petitioner by in 2009. In response to the AAO's RFE, current counsel provided the beneficiary's W-2 Forms from the I-140 petitioner for tax years 2007, and 2008 that indicated that paid the beneficiary $90,973.05 in 2007; $101,266.44 in 2008 and $61,706 in 2009. An additional W-2 issued by for the beneficiary for tax year 2009 indicates that the beneficiary also received wages of $38,401.73 in tax year 2009. Thus, the I-140 petitioner and its successor in interest have answered the AAO questions with regard to this issue. The I-140 petitioner's ability to pay the proffered wage up to the 2009 merger has been established.

With regard to the questions raised about the corporate status of the initial I-140 petitioner, the press release and other materials submitted by . to the record, support the current claimed merge date of 2009, rather than the 1987 date found on the state of California. The W-2s submitted by for the beneficiary from 2003 to 2006 and other materials found in the record further support the continuing corporate existence of as a separate business entity up to tax year 2009. The AAO will address this issue no further in these proceedings.

While the current petitioner has established the ability to pay the proffered wage as of the priority date and the established more clearly the acquisition of the initial petitioner by a subsequent petitioner that was subsequently restructured into the current petitioner, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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.