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



U.S. Citizenship
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Services

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FILE:



Office: TEXAS SERVICE CENTER

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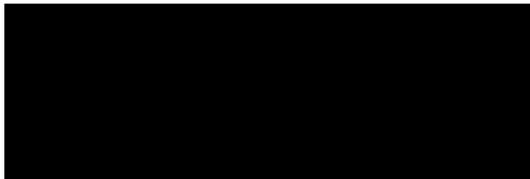
Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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 \$630. 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, 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 a manufacturer of machine parts. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification. Specifically the director found that the beneficiary does not possess a single source foreign degree equivalent to a four year U.S. baccalaureate degree.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

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 December 8, 2003.² The Immigrant Petition for Alien Worker (Form I-140) was filed on May 16, 2007.

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

¹ 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).

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

Analyze the specific needs of the business, locate and design system; devise and design a customized computer program and database tailored exclusively to our industry; correct program errors that arise by alternating various programs; maintain integrity of that particular system and maintain the computer hardware e.g. monitors, hard disks, motherboard, printers, serial cards and internal and external disk drives; design the system that can be interfaced; train the employees in the maintenance of use of that particular system and make any necessary corrections.

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	8
High school	4
College	4
College Degree Required	Bachelors
Major Field of Study	Science/Engineering

Experience:

Job Offered	2
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Block 15:

Other Special Requirements None

As set forth above, the proffered position requires four years of college culminating in a Bachelor's degree in science or engineering, and two years of experience in the job offered.

On the Form ETA 750B, signed by the beneficiary, the beneficiary represents that he has a diploma in Electronic and Communications from St. Xavier Polytechnic, studying technical subjects from 1986 to 1989; a diploma in Production and Quality Management, from the National Council for Labor Management, Tamilnadu, India studying from 1989 to 1990; a diploma in Business Management from the same entity studying from 1990 to 1993; and a Bachelor of Arts in English from Bharathidasan University, Tamilnadul, studying from 1991 to 1994.³

The Form ETA 750B also reflects the beneficiary's experience⁴ as follows:

³ The beneficiary does not represent that he attended the University of Madras and received a three year bachelor's degree in computer science from the university on Part B of the ETA Form 750.

⁴ The AAO notes that all three jobs contain identical job descriptions.

Employer	Title	Dates of Employment
Merlin Machine & Tool Company	System Analyst	January 2003 to October 10, 2003 ⁵
Beeperland, Fairfield, CT	System Analyst	June 2001 to December 2002
Alderbridge Mgmt Ltd, Kampala, Uganda	System Analyst	January 1998 to June 2000

In support of the beneficiary's educational qualifications, the record contains a copy of the beneficiary's diploma in Electronic and Communications from St. Xavier Polytechnic, studying technical subjects from 1986 to 1989; a diploma in Production and Quality Management, from the National Council for Labor Management, Tamilnadu, India studying from 1989 to 1990; a diploma in Business Management from the same entity studying from 1990 to 1993; and a Bachelor of Arts in English from Bharathidasan University, Tamilnadul, studying from 1991 to 1994. The record also contains a copy of a diploma in Computer Application for a course from August 1997 to December 1997 in C++ Java from Computer Aalaya, Madras, India; and a Post Graduate Diploma in Computer Applications for a course from August 1996 to July 1997 from Computer Aalaya, Madras, India. The record also contains the beneficiary's Secondary School Leaving Certificate dated July 7, 1986. On appeal, the petitioner submits a diploma from the University of Madras, with statements of marks for a three-year degree in computer science.

In response to the director's Notice of Intent to Deny (NOID) the petition, the petitioner submitted an academic evaluation by [REDACTED]. In [REDACTED] evaluation, he determined that the beneficiary's first two years of study at St. Xavier for his three-year diploma in electronics and communications is equivalent to a completion of a U.S. high school diploma. He then combines the beneficiary's final year at St. Xavier Polytechnic with the beneficiary's three year Bachelor of Arts degree from Bharathidasan University to find the beneficiary's studies equivalent to a U.S. bachelor's degree in science, electronics, communications, engineering and literature.

The director denied the petition on February 27, 2008. He determined that the petitioner had not established that the beneficiary's bachelor's degree was in electronics or engineering, the required fields of study.

The AAO notes that the director in his decision agreed with the academic evaluation of [REDACTED] that the beneficiary had the equivalent of a U.S. baccalaureate degree, based on his Diploma studies at the State Board of Technical Education and Training and three-year Bachelor's of Arts degree from Bharathidasan University. The AAO does not concur with the director and withdraws this part of the director's decision.

⁵ The date that the beneficiary signed the ETA Form 750, Part B.

On appeal, the petitioner submits the beneficiary's diploma from the University of Madras for a three-year bachelor's degree in computer science, along with his course transcripts, along with a second educational evaluation written by [REDACTED]. The [REDACTED], dated April 25, 2008. [REDACTED] examines the beneficiary's academic credentials and determines that the beneficiary has the equivalent of a four-year bachelor of science degree with a major in electronic engineering, English, Computer Science, and Business Management, from a U.S. accredited college or university.

The occupational classification of the offered position is not one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act, which states: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

Part A of the ETA 750 indicates that the DOL assigned the occupational code of 030.167-014 and title, system analyst, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. The occupational classification of the offered position is determined by the DOL (or applicable State Workforce Agency) during the labor certification process, and the applicable occupational classification code is noted on the labor certification form. O*NET is the current occupational classification system used by the DOL. Located online at <http://online.onetcenter.org>, O*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States.⁶

In the instant case, the DOL categorized the offered position under the DOT code 030.167-014. The O*NET online database states that this occupation falls within Job Zone Four.⁷

According to the DOL, two to four years of work-related skill, knowledge, or experience are needed for Job Zone 4 occupations. The DOL assigns a standard vocational preparation (SVP) of 7 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 *). Additionally, the DOL states the following concerning the training and overall experience required for these occupations:

⁶See <http://www.bls.gov/soc/socguide.htm>. Prior to O*NET, the DOL used the Dictionary of Occupational Titles (DOT) occupational classification system. The O*NET website contains a crosswalk that translates DOT codes into SOC codes. See <http://online.onetcenter.org/crosswalk/DOT>. Here, the DOL assigned the offered position the DOT code 030.167-014. Using the O*NET crosswalk, this translates to SOC code 15-1051.00, computer systems analysts.

⁷According to O*NET, most of the occupations in [REDACTED] Four require a four-year bachelor's degree. <http://online.onetcenter.org/help/online/zones> (accessed July 20, 2010).

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).⁸ *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.

* * *

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

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

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

⁸ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

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

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

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

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

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

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

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

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(1)(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. Thus the beneficiary’s diploma for studies undertaken at St. Xavier’s Polytechnic cannot be considered in combination with the beneficiary’s three year degree from the University of Bharathidasan University.

The petitioner in this matter relies on the beneficiary’s combined education 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.

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.

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 clearly stated on the Form ETA 750 and does not include alternatives to a four-year bachelor's degree. 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 an equivalency to the requirement of a four-year bachelor's degree in science or engineering.

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, c.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.

Thus, the AAO issued a request for evidence (RFE) on May 26, 2010 soliciting such evidence. As stated previously, the AAO withdrew the director's comment with regard to the beneficiary's three year bachelor of arts degree in English from Bharathidasan University and studies at St. Xavier's Polytechnic being the equivalent of a U.S bachelor degree in English literature. The AAO also noted that it provided the petitioner with an incorrect Receipt Number on its RFE. The correct receipt number as indicated on the cover sheet of this decision is SRC 07 164 50362.

In response, the petitioner resubmits a letter dated May 1, 2008 submitted in response to the director's NOID that states in relevant part, the petitioner did not intend to mandate that all four years of required college level education come from the same degree program, and that the petitioner is only seeking approval of the I-140 petition under the skilled worker classification. The petitioner states that former counsel failed to provide the credentials evaluator with all the beneficiary's academic credentials and states that the beneficiary has a bachelor's degree in science from the University of Madras.

The petitioner also submitted seventeen resumes for individuals who have either bachelor's degrees, associate's degrees or other educational credentials.. The petitioner also submitted six newspaper advertisements in what appears to be two newspapers, for July 25, 2003 to July 27, 2003. Each newspaper contains two job advertisements for the petitioner: the first advertisement states "Mgt Analyst for an engg corpn. Dpl/Associate with two years exp; and the second advertisement states "Systems Analyst for an engg corpn. Bachl deg. w/2yrs exp." The latter advertisement is for the proffered position. There is no indication in these advertisements of a specific field of study for the required bachelor's degree. The record is not clear which candidates were interviewed for which position, although many candidates indicated they had bachelor's degrees. The petitioner's letter to DOL dated November 20, 2003 states that it received resumes of candidates but that the candidates did not have the required qualifications.

The petitioner also submitted its Job Notice with the dates August 20, 2003 to October 19, 2003 listed. The document states that the proffered position requires a bachelor's in Science/Engineering and two years of work experience. Thus the job notice is much more specific than the advertisements placed in newspapers with regard to the required field of study although both the job notice and the advertisements for the proffered position required a bachelor's degree with two years of work 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 response to the director's Notice of Intent to Deny (NOID) the petition, the petitioner submitted an academic evaluation by [REDACTED] evaluation, he determined that the beneficiary's first two years of study at St. Xavier for his three-year diploma in electronics and communications is equivalent to a completion of a U.S. high school diploma. He then combines the beneficiary's final year at St. Xavier Polytechnic with the beneficiary's three year Bachelor of Arts degree from the University of Bharathidasan to find the beneficiary's studies equivalent to a U.S. bachelor's degree in science, electronics, communications, engineering and literature. On appeal, current counsel submits the beneficiary's diploma from the University of Madras for a three-year bachelor's degree in computer science, along with his course transcripts.

Counsel also submits a second educational evaluation written by [REDACTED] The Trustforte Corporation, dated April 25, 2008. [REDACTED] examines the beneficiary's academic credentials and determines that the beneficiary has the equivalent of a four-year bachelor of science degree with a major in electronic engineering, English, Computer Science, and Business Management, from a U.S. accredited college or university.

With regard to the beneficiary's academic credentials and the second educational equivalent report from the [REDACTED], the AAO stated in its RFE that the petitioner could not submit an additional evaluation and new credentials on appeal, noting that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). The AAO noted that the petitioner was provided an opportunity by the director to submit the initial academic evaluation and did so.

In response, counsel stated that the beneficiary's bachelor's degree in science from the University of Madras was not new, and should be accepted. The AAO does not find counsel's comments to be persuasive. The AAO notes that the beneficiary in Part B of the instant ETA Form 750 did not represent that he had a degree from the University of Madras. *See Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), where the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B lessens the credibility of the evidence and facts asserted. This would also apply to academic degrees not mentioned or certified by DOL on Part B.

AAO notes that on appeal and its response to the AAO RFE, the petitioner indicated negligence on the part of former counsel for the submission of the first educational evaluation from MEIS, Inc., that did not include the beneficiary's claimed studies for a Bachelor of Science degree at the University of Madras. The petitioner submits an affidavit from the beneficiary dated May 1, 2008 that describes a list of academic documents submitted by the beneficiary to former counsel. These documents include the beneficiary's claimed bachelor of science diploma and mark sheets from the University of Madras. The beneficiary states that under penalty of perjury his statement is true and correct.

The AAO notes that the beneficiary's statement provided on appeal is not an affidavit as it was not sworn to by the declarant before an officer that has confirmed the declarant's identity and administered an oath. *See Black's Law Dictionary* 58 (West 1999). Statements made in support of a motion, and by extension, on appeal, are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Although the petitioner claims that its former counsel was negligent, in this matter, the petitioner did not properly articulate a claim for ineffective assistance of counsel under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *affd*, 857 F.2d 10 (1st Cir. 1988). A claim based upon ineffective assistance of counsel requires the affected party to, *inter alia*, file a complaint with the appropriate disciplinary authorities or, if no complaint has been filed, to explain why not. The instant appeal does not address these requirements. The petitioner does not explain the facts surrounding the preparation of the petition or the engagement of the representative. Accordingly, the petitioner did not articulate a proper claim based upon ineffective assistance of counsel. Thus the AAO does not find the petitioner's assertions persuasive with regard to negligence on the part of former counsel. As stated in the RFE, the AAO does not accept the submission of the Trustforte Corporation evaluation report on appeal. Thus, the petitioner has not established that the beneficiary has a three-year bachelor's

degree in science or engineering.

Counsel makes further assertions in the petitioner's response to the AAO RFE on which the AAO will briefly comment.

Counsel states that the AAO imputes the petitioner's intent in its RFE remarks. Counsel stated that the petitioner did not state or imply on the ETA Form 750 that an applicant had to have a four-year bachelor's degree or a single source foreign equivalent degree to qualify for the position. Counsel asserted that the word "bachelor's" was meant to indicate a bachelor's degree "of any sort" and the petitioner's intent was to require a cumulative four years of coursework and to allow for a combination of degrees to total the four years of coursework. Counsel states that the petitioner intentionally used the word "bachelor's" and did not use the words "U.S. bachelor's" or "U.S. bachelor's or equivalent" in order to allow for more than a U.S. bachelor's degree or a single source degree to qualify applicants for the position. Counsel notes that the petitioner's intent was to accept bachelor's degrees from around the world, irrespective of the number of years required to complete the degrees, as long as the degrees were in the required field of science or engineering and the applicants had completed four years of college level coursework.

Counsel again noted that the petitioner seeks approval of the petition under the skilled worker category, not the professional category and that, as such, a four-year bachelor's degree is not required for approval of the petition under the skilled worker classification. Counsel stated that regardless of what the petitioner indicates on its Form ETA 750A and regardless of the petitioner's request for classification under the skilled worker category, the AAO ignored the petitioner's requirement on the Form ETA 750 and ignored the fact that no regulation requires a four-year U.S. bachelor's degree. Counsel states that instead AAO relied on the DOL's occupational code assigned to the position to require that the beneficiary have a four-year bachelor's degree for classification as a skilled worker.

Finally, counsel notes that the AAO misquoted and misconstrued the words of [REDACTED], in her 1994 memorandum sent to DOL SESA and JTPA Administrators. Counsel points out that the AAO stated that if the beneficiary has a "four-year" bachelor's degree in computer science from the University of Florence, there is no requirement that the employer include "or equivalent" after the degree requirement. Counsel points out the Hall memo does not say if the beneficiary has a "four-year" bachelor's degree in computer science from the University of Florence and that the AAO paraphrased the memo, adding the additional element of the bachelor's degree being a four-year degree.

The AAO finds counsel's comments to be without merit. With regard to counsel's assertion that the AAO imputes a four-year degree requirement to the petitioner's requirements for the proffered position, the AAO notes that when a petitioner indicates on the ETA Form 750 that four years of college is required for the proffered position and that a specific degree is required, USCIS interprets that information to mean that the petitioner requires a four-year U.S. baccalaureate degree or a foreign equivalent degree. This interpretation follows the intent of the DOL memos referenced in the AAO RFE.

Further the purpose of the RFE is to provide the petitioner with the opportunity to clarify its intent with regard to any equivalency identified on the ETA Form 750. In the instant matter, the petitioner's certified ETA Form 750 does not indicate any equivalency. While counsel's claims that the petitioner actually would accept a bachelor's degree "of any sort," the certified ETA Form 750 indicates that the petitioner actually required a specific bachelor's degree of a specific length of time.

Finally, the AAO did not change the meaning of the section by putting the phrase "four-year" prior to "BS in Computer Science" quote in its reference to [REDACTED]. Within the context of the complete sentence from which this phrase is taken, the AAO paraphrase is correct. The entire sentence states "if the employer is requiring a BS in Computer Science and the alien has a BS in Computer Science from the University of Florence which has been determined to be equivalent to a Bachelor's degree in Computer Science awarded from an accredited university in the United States, there is no requirement for the employer to include "or equivalent" after the degree requirements. As noted elsewhere in this decision, based on the precedent decision *Matter of Shah*, 17 I & N 244, 245 (Comm. 1977), a baccalaureate degree in the United States usually requires four years of study.

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) in particular reference to Indian polytechnics.⁹ According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." 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](http://www.aacrao.org/publications/guide%20to%20creating%20international%20publications.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 indicates that Indian polytechnics appear to be on the non-university level education track. An exemplar of a polytechnic diploma in engineering contained in the EDGE database and provided to the petitioner, states that a diploma in engineering represents attainment of a level of education comparable to up to one year of university study in the United States, that credit may be awarded on a course-by-course basis, that undergraduate credit for diploma studies are taken from the final year

⁹ 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.

of the three-year program and that the credit is awarded upon completion of three years of study beyond the Secondary School certificate (or equivalent). As previously stated, [REDACTED] combined the beneficiary's final year of polytechnic studies with his three years of studies for his Bachelor of Arts degree to determine that the beneficiary has the equivalent of a bachelor's degree in Science, electronics, communications, engineering and literature. This combination is not equivalent to a four year U.S. baccalaureate degree in science and engineering. Further even if the AAO had accepted the submission of the Trustforte evaluation report on appeal, the beneficiary's three year Bachelor of Science degree from the University of Madras combined with the polytechnic studies would still not be the equivalent of a U.S. baccalaureate degree in science and engineering.

The Form ETA 750 does not provide that the minimum academic requirements of four years of college level education and a bachelor's degree in science or engineering might be met through a combination of degrees or diplomas and degrees, or some other formula other than that explicitly stated on the Form ETA 750. The copies of the notice(s) of newspaper advertisements and recruitment, provided with the petitioner's response to the RFE issued by this office, indicate that a bachelor's degree is required for the proffered position. The evidence provided with the petitioner's response to the request for evidence issued by this office, also does not advise any otherwise qualified U.S. workers that the educational requirements for the job may be met through a quantitatively lesser degree or defined equivalency.

In the instant matter, counsel states that the petitioner's intent was to accept a bachelor's degree "of any sort." The AAO notes that the resumes submitted to the record are primarily from U.S. applicants with bachelor's degrees of varying degrees and length and fields of study. One applicant has a degree in visual arts, while others have bachelor's degrees in business administration, among other fields. The petitioner found all U.S. candidates to be unqualified and then posted a job notice requiring a more specific bachelor's degree in science or engineering for the same position. It would appear the petitioner had an unspecific baccalaureate degree requirement for his U.S. recruitment and another specific standard for the labor certification submitted to the DOL. The AAO does not find that the recruitment process or the certified labor certificate support counsel's assertions that the petitioner sought an individual with a bachelor's degree "of any sort." Thus, the alien does not qualify as a skilled worker 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 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.

