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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY



B6

DATE: **SEP 15 2011** OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE: Petitioner:
Beneficiary:

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

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

The petitioner is a financial services company. It seeks to employ the beneficiary permanently in the United States as a "Database Administrator III" under section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, a Form ETA 750,¹ Application for Alien Employment Certification, certified by the Department of Labor (DOL), accompanied the petition.

The Director denied the petition on the ground that the petitioner failed to establish that the beneficiary had the requisite educational degree as specified on the certified Form ETA 750 (labor certification).

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), 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 application's priority date, which is the date it was accepted for processing by the DOL. See *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, the Form ETA 750 was accepted for processing on January 22, 2004.² It was certified by the DOL on October 5, 2006. The Immigrant Petition for Alien Worker (Form I-140) was filed on November 6, 2006.

The duties of the proffered position are found on the labor certification in Part A, Item 13, where the job is described as follows:

As a Database Administrator III, an employee works with a team to provide 24/7 coverage to all production database environments. Specifically, [(s)he] is responsible for day to day administration and maintenance of SQL Server Databases using visual and non-visual administration tools like Space Management, Log Management. In this position, an employee performs scheduled task success/failure monitoring, monitors server performance, and provides backup support of the database. Such a

¹ After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089.

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.

position also entails duties of installation and configuration of SQL Server Clustered/Non-Clustered environments, Veritas Netbackup Data Center Clients for Backup/Restore, Iwatch & BigBrother for Monitoring of server and database statistics; creation of databases and objects; creation of user administration and implementation of security standards; writing of SQL Maintenance Scripts; tuning optimization of long-running queries; and writing of complex SQL queries to implement business logic for data transfer using different operating systems and programming languages.

Regarding the minimum level of education, training, and experience required for the proffered position, Part A of the labor certification sets forth the following requirements:

Block 14:

Education (number of years):

Grade school	--
High school	--
College	4
College Degree Required	Bachelor of Science
Major Field of Study	Computer Programming/Systems Analyst

Training: --

Experience:

Job Offered (or) Related Occupation	-- 2 years – Computer Programming and/or Database Developer
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Block 15:

Other Special Requirements Microsoft Certification for SQL Server. Knowledge and experience in both SQL Server and Oracle database management systems although SQL Server is the primary focus. Experience on Oracle 8i/9i in Sun Solaris environment is also required for the Oracle responsibility including: Writing of Unix Shell Scripts.

As set forth above, the proffered position requires four years of college culminating in a Bachelor of Science degree in Computer Programming and/or Systems Analysis, plus two years of experience in the related occupation of Computer Programming and/or Database Developer.

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 039.162-010 and title Database Administrator to the proffered position. The 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.³

In the instant case, the DOL categorized the offered position under the DOT occupational code of 039.162-010, which translates in the new SOC occupational code to 15-1061.00. The O*NET online database states that this occupation falls within Job Zone Four. 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.onetonline.org/link/summary/15.1061.00> (accessed August 29, 2011). Additionally, the DOL states the following about 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 the 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

³ See <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>.

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.

As evidence of the beneficiary's educational credentials – all earned in India – the petitioner submitted the following pertinent documentation along with the Form I-140:

- Certificates from the Maharashtra State Board of Secondary and Higher Secondary Education, dated September 27, 1982 and June 2, 1984, confirming that the beneficiary passed the secondary school certificate examination in March 1982 and the higher secondary certificate examination in March 1984.
- Diploma in Electronics and Radio Engineering awarded to the beneficiary by the Board of Technical Examinations, Maharashtra State, dated June 12, 1989.
- Diploma in Computer Studies awarded to the beneficiary by the Bureau of Information Technology Studies in Bombay, dated June 6, 1990.

In response to a Request for Evidence (RFE) from the Director asking, among other things, for additional evidence that the beneficiary's educational credentials in India are equivalent to a bachelor's degree in computer programming/systems analysis in the United States, the petitioner submitted an "Evaluation of Academics and Experience" from Morningside Evaluations and Consulting (Morningside), dated September 6, 2002. According to the Morningside evaluation, the beneficiary's Diploma in Electronics and Radio Engineering from the Board of Technical

Examinations plus twelve years of training and work experience in computer information systems and related areas is equivalent to a Bachelor of Science Degree in Computer Information Systems from an accredited institution of higher education in the United States.

The Director denied the petition on December 12, 2006. While finding that the evidence of record established the beneficiary's fulfillment of the labor certification requirement of two years experience in a related occupation, the Director determined that the beneficiary did not meet the educational requirement on the labor certification. With regard to the Diploma from the Board of Technical Examinations, the Director determined that the beneficiary's coursework and years of study met the four years of college requirement of the labor certification, but that the area of concentration – electronics and radio engineering – did not match the major field of study specified on the labor certification – which was computer programming/systems analysis. The Director noted that the petitioner did not claim any academic equivalency in the United States for the beneficiary's Diploma in Computer Studies from the Bureau of Information Technology Studies after a half-year course of study, and that Morningside did not include this credential in its evaluation.

On appeal, counsel asserts that the beneficiary meets the educational requirement of the labor certification because his Diploma in Electronics and Radio Engineering together with his Diploma in Computer Studies are equivalent to a Bachelor of Science in Computer Programming/Systems Analysis in the United States. According to counsel, the petitioner did not intend to restrict the proffered position to someone holding a single four-year baccalaureate degree, and the DOL certified the Form ETA 750 in full knowledge of the beneficiary's particular credentials. Counsel cites a series of cases involving immigrant visas in support of its position that the equivalent of a baccalaureate degree can be achieved with credentials other than a single four-year postsecondary degree. Counsel points out that the beneficiary was previously granted two H-1B non-immigrant visas for the same position with the petitioner, based on the same educational requirements as the current EB-3 immigrant visa petition, so that it would be illogical to decide the current petition differently. Lastly, counsel contends that the petitioner made an inadvertent error in its Form ETA 750 by not indicating that a bachelor's degree in a field related to computer programming/systems analysis would be acceptable, which should be ignored by the AAO since it did not harm anyone.

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

In this case the petitioner submitted additional evidence in response to an RFE issued by the AAO on August 18, 2008. In its RFE, the AAO requested the following evidence from the petitioner:

- Documentation proving that the beneficiary studied at the Maharashtra State Board of Technical Education in Mumbai (Bombay) from August 1984 to November 1989, as alleged in the labor certification.
- A copy of the petitioner's report to the DOL of its recruitment efforts for the proffered position during the labor certification process, as well as any other documentation incorporated into the Form ETA 750 as certified by the DOL.

In response to the RFE, counsel submitted the requested documentation of the petitioner's recruitment and labor certification process, as well as one additional document from the beneficiary's studies at the Maharashtra State Board of Technical Education – a transcript indicating that he did not pass his coursework in 1985. No further documentation was submitted to confirm how many years the beneficiary studied for the diploma he was awarded in 1989. Counsel stated, however, that the beneficiary earned his diploma after two years of study.

Is the Beneficiary Eligible for the Classification Sought?

As previously discussed, the Form ETA 750 in this case is certified by the DOL. The DOL's role is limited to determining (1) whether there are sufficient workers who are able, willing, qualified and available, and (2) whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that neither of the inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. It is left to U.S. Citizenship and Immigration Services (USCIS) to determine whether the proffered position and alien qualify for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

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

* * *

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

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

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

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 the 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 the DOL's responsibility to certify the terms of the labor certification, but it is the responsibility of United States 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 INS (now USCIS, or 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 combined education and work experience 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 Form ETA 750 labor certification.

There is no provision in the statute or the regulations that would allow a beneficiary to qualify as a professional under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Thus, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. 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.⁵

⁵ Furthermore, for classification as a member of the professions the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) 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

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.” 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. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). 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).

We also note the recent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D.Or. November 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. *Id.* 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. *Id.* at 14. However, in professional and advanced degree professional cases, where the beneficiary is

added.) It is significant, in this regard, 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. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress’ narrow requirement of a “degree” for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the dual requirement at section 203(b)(3)(A)(ii) that an eligible alien have a baccalaureate “degree” and be a member of the professions shows that a member of the profession 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 USCIS did not require “a” degree that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Id.* at 17, 19. 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 8. 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 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). 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 that the beneficiary has to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the terms of the labor certification are clear. The employer (petitioner) specified that four years of college education and a bachelor of science degree in computer programming and/or systems analysis (as well as two years of experience in a related occupation) were required for the proffered position of Database Administrator III. Counsel's assertion that the petitioner did not intend to restrict the position to someone with a single four-year baccalaureate degree is at odds with the language of the Form ETA 750, as certified by the DOL, which does not state that the petitioner would accept a combination of lesser degrees and/or a quantifiable amount of work experience as equivalent to a four-year bachelor's degree. Counsel's assertion is also at odds with the petitioner's advertisements for the position during the labor certification process. Among the materials submitted to the AAO in response to its RFE are the petitioner's job site posting and two website advertisements (www.commercialappeal.com and ITcareers.com), all of which stated that the minimum educational requirement for the position was a "Bachelor's degree in Information Systems or related Computer/Information degree." While this language is not identical with that on the labor certification, it is consistent with the labor certification in specifying that a single bachelor's degree in the computer field was required. The job advertisements did not indicate that a combination of lesser degrees and/or work experience would be accepted by the petitioner as equivalent to a bachelor's degree.

As previously discussed, the petitioner submitted an evaluation of the beneficiary's education and work experience from Trustforte in response to the Director's RFE. According to Trustforte, the beneficiary has the academic equivalent of a Bachelor of Science degree in Computer Information Systems from a U.S. university based on the coursework he completed in earning his Diploma in Electronics and Radio Engineering together with his 12 years of experience in the field of computer information systems – which Trustforte claims is equal to four years of college under “the equivalency ratio mandated by the [INS] of three years of work experience for one year of college training.” The record also includes an evaluation of the beneficiary's educational credentials from Foreign Credential Evaluations, Inc. (FCE), dated March 9, 2007. According to FCE, the beneficiary's Diploma in Electronics and Engineering was a three-year program equivalent to one year of university study, and his work experience after that included nine years in computer science. Like Trustforte, FCE applies a 3:1 ratio of work experience to education and determines that the beneficiary's work experience is equivalent to three years of university-level study in computer science. Combined with the one-year of university study equivalency of his Diploma, FCE concludes that the beneficiary has the equivalent of a Bachelor of Science degree in Computer Science from a U.S. university.

Thus, Trustforte and FCE reach the same result in their evaluations, though they do not appear to agree on either the educational or the work experience components. Whereas Trustforte credited the beneficiary with 12 years of qualifying experience in the computer field, for FCE the beneficiary's qualifying experience amounted to just nine years. Whereas FCE cited the beneficiary's Diploma in Electronics and Radio Engineering as the culmination of a three-year program, no such program length is cited by Trustforte, which appears to avoid any detailed discussion of the program's length. In any event, both evaluations are faulty insofar as they equate three years of experience for one year of university-level education. That equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). Furthermore, neither evaluation claims that the beneficiary's Diploma in Electronics and Engineering, standing alone, is either four years in length or equivalent to a U.S. Bachelor of Science degree in Computer Programming or Systems Analysis.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). For the reasons discussed above, the Trustforte and FCE evaluations have no probative value as evidence that the beneficiary has earned a foreign equivalent degree to a U.S. Bachelor's Degree in Computer Science or Systems Analysis.

Counsel asserts on appeal that the beneficiary's Diploma in Electronics and Radio Engineering and his Diploma in Computer Studies (ignored in the Trustforte and FCE evaluations) are in combination equivalent to a U.S. Bachelor of Science degree in Computer Programming/Systems Analysis. It is not at all clear that the second diploma can be considered a “degree” granted by a college or university, and even if it could the study program was only half a year in length. The two diplomas together comprise at most two and a half years of study – considerably less than the four-year standard of a U.S. baccalaureate degree. *See Matter of Shah, supra*. Furthermore, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) clearly requires that a beneficiary must produce one degree that is the

foreign equivalent of a U.S. baccalaureate degree in order to qualify as a professional for third preference visa category purposes. Likewise, the Form ETA 750 requires a bachelor's degree without indicating that this requirement could be met through a combination of degrees, diplomas, or work experience, as confirmed by the recruitment materials submitted in response to the AAO's RFE. Thus, counsel's claim has no merit.

The documentation submitted by the petitioner relating to the beneficiary's Diploma in Electronics and Radio Engineering appears to be incomplete, and does not confirm that it involved five years of study (August 1984-November 1989) as claimed on the labor certification (Part B, Item 11). One transcript, dated in September 1985, states that the beneficiary "failed" the "First Year Diploma Examination" in May 1985. Two subsequent transcripts, dated November 3, 1989, indicate that the beneficiary passed the "First Year" and "Final Year" examinations in May 1989, just prior to the awarding of his Diploma in Electronics and Radio Engineering in June 1989. Thus, it appears that the Diploma program was at most two years in length, which would accord with counsel's statement in response to the AAO's RFE. Accordingly, even if the Diploma was granted in the field specified on the labor certification – computer science and/or systems analysis – it would not be equivalent to a four-year bachelor's degree in the required field of study.⁶

As another resource to evaluate the beneficiary's educational credentials, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO).⁷ According to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in over 40 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

⁶ The Director was mistaken, therefore, in finding that the beneficiary's diploma was equivalent to a U.S. bachelor's degree in electronics and radio engineering. That determination is withdrawn. But the Director correctly denied the petition anyway because the beneficiary's field of study was not in computer programming or systems analysis, as specified on the labor certification.

⁷ 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 AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

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’s credential advice indicates that a Diploma in Engineering in India is awarded upon completion of three years of study beyond the secondary school certificate, and is “comparable to up to one year of university study in the United States.” This assessment is consistent with other documentation in the file indicating that the beneficiary, after his secondary school certificate, earned a higher secondary certificate two years later (equivalent to a high school diploma in the United States, according to EDGE), and that his subsequent Diploma in Electronics and Radio Engineering came at the end of a program no more than two years in length. Thus, the information available in EDGE confirms other evidence in the record that the beneficiary’s educational credentials in India are not equivalent to a bachelor’s degree in the United States.

Counsel’s claim that the beneficiary’s prior approval for H-1B visas based on the same educational and work experience credentials for the same position makes it illogical to deny this EB-3 petition is legally flawed. As noted earlier, for aliens seeking non-immigrant visa status as specialty workers (H-1B), the regulation at 8 CFR § 214.2(h)(4)(iii)(D)(5) specifically provides that three years of specialized training and/or work experience may be counted for each year of college-level education the alien lacks in determining equivalency to a baccalaureate degree. No such provision exists in the regulations (or in the Act) for aliens seeking immigrant visa status as professionals (EB-3). Moreover, the petitioner did not specify in the labor certification (Form ETA 750) that relevant work experience would be acceptable in determining the beneficiary’s degree equivalency.

Alternatively, counsel argues that the beneficiary’s work experience should be taken into account in determining degree equivalency without reference to the 3:1 ratio of work to education, citing some cases in Immigration & Naturalization Decisions from the 1960s. As previously discussed in this decision, however, those long ago cases have been trumped by the Immigration Act of 1990 and the implementing regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), which clearly provide that a U.S. baccalaureate degree or a foreign equivalent degree is required for an alien to qualify as a professional for third preference visa classification. Neither the statute nor the regulation make any provision for allowing work experience to substitute for some or all of the educational requirement. Furthermore, the petitioner in this case clearly stated on the Form ETA 750, as certified by the DOL, that a four-year bachelor’s degree in the field of computer programming or systems analysis was required to qualify for the proffered position. The petitioner did not indicate on the labor certification that the applicant’s experience in the computer field could substitute in any manner for the bachelor’s degree. The labor certification specified that two years of relevant experience was required in addition to the bachelor’s degree.

Finally, counsel’s claim that the petitioner made an inadvertent error on its labor certification by neglecting to state that a bachelor’s degree in a field related to computer programming or systems

analysis would be acceptable is irrelevant. As previously discussed, none of the beneficiary's educational credentials, singly or collectively, is equivalent to a U.S. bachelor's degree of any kind. Contrary to the Director's finding, the record does not demonstrate that the course of study leading to the beneficiary's Diploma in Electronics and Radio Engineering was anywhere close to a four-year program, which is the standard for a U.S. baccalaureate degree. *See Matter of Shah, supra.* Nor would the half-year program leading to the beneficiary's Diploma in Computer Studies, even if the AAO allowed for the combination of credentials, come close to bringing the beneficiary's post-secondary studies up to four years in length.

For all of the reasons discussed in this decision, the AAO determines that the beneficiary does not have the equivalent of a U.S. bachelor's degree in computer programming or systems analysis. Therefore, he is not eligible for preference visa classification as a professional under section 203(b)(3)(A)(ii) of the Act.

Does the Beneficiary have the Qualifications for the Job Offered?

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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 [visa category] 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)[(5)] 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 INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found in Form ETA 750, Part A, Box 14. This section of the application for alien labor certification – "MINIMUM education, training, and experience" – describes the terms and conditions of the job offered. It is important that the Form ETA 750 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* 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. *See 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 alien employment certification application form. *See id.* at 834. 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.

In this Case, Part A, Box 14, of the Form ETA 750 specifies that four years of college education and a Bachelor of Science degree in Computer Programming/Systems Analyst is the minimum level of education required for the position of Database Administrator III. It also specifies that two years of experience in the related occupation of computer programming and/or database developer is required. There is no indication in Box 14 (nor in Box 15 next to it – “Other Special Requirements”) that a combination of education and/or experience is an acceptable alternative to a four-year bachelor’s degree in the designated field of study and two years of experience in the designated occupation. The labor certification requirements are confirmed by the petitioner’s recruitment materials submitted in response to the AAO’s RFE.

As previously discussed, the beneficiary does not have a U.S. bachelor’s degree, or a foreign equivalent degree, in the field of computer programming or systems analysis. Therefore, the beneficiary does not qualify for the proffered position under the terms of the labor certification.

Conclusion

Since the beneficiary does not have U.S. bachelor’s degree or a foreign equivalent degree, he does not qualify for preference visa classification as a professional under section 203(b)(3)(A)(ii) of the Act. In addition, the beneficiary does not meet the job requirements on the labor certification for classification as a skilled worker. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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

ORDER: The appeal is dismissed.