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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



B6

DATE: SEP 28 2011 OFFICE: TEXAS SERVICE CENTER

FILE: [Redacted]

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



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,
Elizabeth McCormack

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.¹

The petitioner is a software development company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification,² approved by the Department of Labor (the DOL), accompanied the petition. Upon reviewing the petition, the director determined that the petitioner failed to demonstrate that the beneficiary satisfied the minimum level of education stated on the labor certification.

The 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 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.³

As set forth in the director's May 6, 2009 denial, the single issue in this case is whether or not the beneficiary meets the minimum educational and work experience requirements, as set forth by the petitioner on the Form ETA 750.

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.

¹ Although the appeal in this case is dismissed, the AAO notes that the beneficiary has an approved I-140 for a different petitioner (File SRC-10-241-51852).

² After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089, Application for Permanent Employment Certification. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

³ 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).

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). The priority date of the petition is April 23, 2004, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).⁴ The Immigrant Petition for Alien Worker (Form I-140) was filed on September 17, 2007.

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

Research, design, and develop software systems for telecommunication industry specifically in the areas of customer care and billing solutions and voice recognition applications. Analyze software requirements and determine the feasibility of the design within time and cost constraints. Formulate and design software systems. Develop and implement software system testing procedures, programming, and documentation. Consult with customer regarding implementation and maintenance. Must have good communication skills, available 24/7 for system maintenance as needed, and some domestic and international travel required. Strong knowledge of customer care (account management), billing, rating, mediation between Provisioning Systems and Network elements (switches), Voice recognition engines, text-to-text speech engines, VXML Browsers and Interpreters, Telephony integration in Voice platforms.

The minimum education, training, experience and skills required to perform the duties of the offered position are set forth at Part A of the labor certification and reflect the following requirements:

Block 14:

Education (number of years)

Grade school:	X (indicating "yes")
High school:	X (indicating "yes")
College:	X (indicating "yes")
College Degree Required:	BS or Equivalent
Major Field of Study:	Computer Science or related

Experience:

⁴ 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.

Job Offered:	3 years
(or)	
Related Occupation (specify):	5-7 years as a developer or programmer analyst with minimum 3 years in customer care/billing solutions for telecom industry.

Block 15:

Other Special Requirements [blank]

Under item 13, the petitioner additionally listed the following required skills for the position:

(Operating Systems) Windows NT/2000, Sun Solaris; (Languages) C, C++, Java, SQL, PL/SQL, VXML, SSML, CCXML, GSL, GrXM; (Technologies) EJB2, JavaRMI, Web Services, XML-RPC; (Network Protocols) TCP, UDP, HTTP, SOAP; (Databases) Oracle RDBMS9i; (Voice Platforms/Engines – one required) Nuance, ScanSoft Speech WORKS, Motorola; (Hardware APIs) NMS Communications Telephony API, AI-Logix SmartWORKS Telephone API; (Hardware APIs) NMS Digital Telephony Boards, Intel-Dialogic Telephony Boards, AI-Logix Passive TAP Telephony Boards.

As set forth above, the proffered position requires a B.S. (Bachelor's of Science) degree or equivalent in Computer Science or in a related field and three (3) years of experience in the job offered or 5-7 years in a related occupation as specified above.

On Part B of the labor certification, signed by the beneficiary, the beneficiary listed his prior education as follows:

- From 1983 to 1993 – High School 179, Kiev, Ukraine, Diploma.
- From September 1997 to October 1999 – International Open College, Thames Valley, U. Kiev, Ukraine, Certificate in Information Systems.

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

- From September 1997 to January 2001 worked at a software development company in Kiev, Ukraine, called "Intasys Billing Technologies" as a Software Architect and Developer.
- From January 2001 to December 2001 worked at a software development company in Hertfordshire, United Kingdom, called "Lamy Management, Ltd." as a Senior Software Architect and Developer.

- From June 2002 to present (April 2004) worked at Net2Voice, Inc. (the petitioner) as a Programmer Analyst.

In support of the beneficiary's educational qualifications and prior work experience, the petitioner submitted copies of the following documents:

- The beneficiary's high school certificate of graduation granted by Ukraine Ministry of Education in 1993;
- A certificate issued by International Open College, Joint-Stock Company, Training Research and Production Center "Ukrtehprogress" to the beneficiary on March 15, 1999 stating that the beneficiary has completed the full course of the First Level Education in Thames Valley University (London, UK) in the specialty "Information Systems" and has successfully passed tests in the following disciplines: Information Systems, 4th Programming Language Generation (4GL), Introduction into Programming, Quantitative Methods, Systems Analysis, and Operation Systems and Tools;
- A letter of employment dated December 12, 2001 from [REDACTED] stating that the beneficiary was a Software Architect and Developer responsible for the design, development, and implementation of Customer Care and Billing Solution (CCBS), CBill™, JBill™ from September 1997 to January 2001;⁵ and
- A letter of employment from [REDACTED] stating that the beneficiary was a Software Architect and Developer responsible for the design and implementation of Customer Care and Billing Solution (CCBS) Noor™, Declarative 4GL, application for Client/Server applications Idrisi™ - a 100% java application for rapid development front-end applications to various databases from January 2001 to December 2001.

In adjudicating the petition, the director found that the beneficiary did not have a bachelor's degree or a foreign equivalent to a U.S. bachelor's degree prior to the priority date. Thus, on October 28, 2008, the director issued a Request for Evidence (RFE) advising the petitioner to submit additional evidence to demonstrate that the beneficiary possessed a bachelor's degree or foreign equivalent in the relevant field before the priority date.

In response to the director's RFE, counsel for the petitioner acknowledged that the beneficiary did not have a bachelor's degree or a foreign equivalent degree in the relevant field (Computer Science), but, based on his combined education and work experience, the beneficiary had the equivalent of a U.S. bachelor's degree in Computer Science.

The following documents were submitted to demonstrate that the beneficiary had the equivalent of a U.S. bachelor's degree in Computer Science based on a combination of his education and work experience:

⁵ The letter bears a signature and an official stamp or seal of the directorate of the company.

- The beneficiary's resume, school certificates, and letters of employment.⁶
- A copy of an evaluation of the beneficiary's educational credentials prepared and signed by [REDACTED] (J. S. & A) on December 10, 2001. The evaluation states that the certificate from the International Open College (an affiliate of the Thames Valley University, U.K.) is equivalent to completion of one year of undergraduate study in Computer Information Systems and related courses at a regionally accredited institution of higher education in the United States.
- A copy of an evaluation of the beneficiary's credentials prepared and signed by [REDACTED] on January 10, 2002. The evaluation indicates that the beneficiary has achieved, through his education and work experience, the equivalent of a bachelor's degree with a major in Computer Information Systems.

Counsel also contended at this time that even if the beneficiary did not have a bachelor's degree and could not be classified as a professional worker, he still could be classified as a skilled worker. To support that contention, counsel cited and provided a copy of a non-precedent AAO decision, file number [REDACTED] issued on January 30, 2008. In that case, the AAO determined that although the alien beneficiary could not be approved as a professional because he did not have a U.S. baccalaureate degree or a foreign equivalent degree, the proffered position could also be properly analyzed as a skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience.

In addition, counsel noted that even though the petitioner listed "BS or equivalent" on the Form ETA 750, it did not necessarily intend to hire someone with a bachelor's degree, nor did it require any interested applicant to have a bachelor's degree to qualify for the job, but rather, the petitioner wanted to hire someone who had the skills, experience, and technical knowledge in the job offered. The petitioner, according to counsel, deliberately did not use the words "foreign degree equivalent" but instead it used the word "equivalent" on the Form ETA 750, block 14, because the word "equivalent" in connection with the educational requirements meant the petitioner would take any interested applicant who had any combination of education, training, and experience.

⁶ In addition to the letters of employment from [REDACTED] the petitioner also included the letters of employment from [REDACTED]. The letter from [REDACTED] stated that the beneficiary was employed as Software Architect & Developer by Ukrainian Department of State, Registration Trade Marks and Patents Office, from March 1996 to September 1997. The letter from [REDACTED] stated that the beneficiary was an employee of Joint Stock Bank from September 1993 to December 1994 and an employee of Inkosoft Ltd. from January 1995 to March 1996. In both places, the beneficiary worked as a software programmer. The letter from [REDACTED] stated that the beneficiary worked as a software programmer responsible for development of various utilities, including Hewlett-Packard PCL language processing and Adobe PostScript conversion, from September 1992 to August 1993.

To demonstrate that the petitioner did not intend to hire someone with a bachelor's degree or that a bachelor's degree was not required for the position, counsel submitted the following evidence:

- A letter dated November 18, 2008 from [REDACTED] of the petitioning company, asking the director to adjudicate the petition as a skilled worker.
- An affidavit dated November 19, 2008 from [REDACTED]. In his affidavit, [REDACTED] states that the word "equivalent" in relation to a bachelor's degree listed on the Form ETA 750 was used to allow someone who does have some education and training or experience in the job offered, but not a bachelor's degree, to apply for the position. [REDACTED] [REDACTED] also states that in 2004, no universities in the world taught the voice platform technology at the bachelor's degree level in computer science or other related degree programs. He also notes that, at the time when he tried to recruit somebody for the position, no applicant was either deterred or discouraged from applying for the position simply because he or she had no bachelor's degree, and that he would have hired anybody who had the skills and technical knowledge in the job offered even if he or she had no bachelor's degree.⁷

⁷ Specifically [REDACTED] states:

In my nearly 30 years of experience, I have hired hundreds of computer professionals. The key to successful hiring has always been providing a detailed job description – giving applicants as much information as possible about the actual job duties they will be required to perform and the skill sets needed to perform those duties.

In this case, our labor certification indicated a "BS or equivalent" was required. In section 13 of the form, we provided a detailed explanation of job duties and job skills required. In my experience, any applicant who is capable of performing the job duties specified will apply for the job and understand the words "BS or equivalent" to mean the ability to perform the job duties however those skills have been acquired.

In our print ad we referred applicants to our website. On the website, applicants could read about Net2Voice and the kinds of projects we were doing. The job posting again listed in detail the job duties for the position and the skills needed to perform those duties. Again, based upon my experience in the industry, no applicant was deterred from applying for want of a bachelor's degree. If they could perform the duties listed, they would have applied and been hired.

- Copies of the *Washington Post* advertisement.⁸ The ads specifically stated:

Software Engineer – dev, design, implem apps for telecom ind inc customer care, billing solutions, voice recog. BS or equiv in com sci, software eng or rel +3 yrs exp in cust care/billing solutions OR 5-7 yrs verif exp w/ min 3 yrs in cust care/billing sol for telecom ind. See www.Net2Voice.com for detail. FT. comp. salary. Send resume to Net2Voice 6867 Elm St., #300 McLean, VA 22101.

- A copy of the job posting posted at the company's headquarters from January 5, 2004 to January 18, 2004. The posting specifically stated:

BS or equivalent in Computer Science or related; 3 yrs experience in the job or 5-7 years in a related occupation with 3 yrs experience in customer care/billing solutions. Must have Windows NT/2000, Sun Solaris, C, C++, Java, SQL, PL/SQL, VXML, SSML, CCXML, GSL, GrXM; EJB2, JavaRMMI, Web Services, XML-RPC, TCP, UDP, HTTP, SOAP, Oracle RDBMS9i. Nuance, ScanSoft Speech WORKS, Motorola; NMS Communications Telephony, API, AI-Logix Smart WORKS Telephone API; NMS Digital Telephony Boards, Intel-Dialogic Telephony Boards, AI-Logix Passive TAP Telephony Boards. Need good communication skills. Detailed duties provided on request.

- Copies of the questionnaire used to evaluate interested applicants during the labor certification recruitment process.⁹
- A copy of the Employer's Supplement to ETA 750, part A, dated April 20, 2004. The Employer's Supplement to ETA 750A contains a description of the petitioner's efforts to recruit applicants for the job offered. Submitted along with the Employer's Supplement

⁸ Three copies of the ad were submitted. The dates on the two legible ads are: Saturday, January 31, 2004 and Monday, February 2, 2004. The date on one ad is not clear. They all contain the same language as shown above.

⁹ The questionnaire has seven questions. Question 1, Are you authorized to work permanently in the United States? Question 2, Do you have any experience in developing Interactive Voice Response (IVR) or Voice Enabled Applications? Questions 3, Do you have any experience using VXML (Voice XML)? Language used to design Voice User Interaction Interface. Question 4, Do you have any experience using CCXML (Call Control XML)? Language used to design call flow and call control. Question 5, Do you have any experience using grammar design, development using GSL or GrXML languages? Question 6, Are you familiar with any Voice Recognition platforms? If yes please briefly describe. Question 7, Have you been involved into any Customer Care and Billing System development life cycle? If yes, please describe (position, responsibilities).

is a copy of a list of nine names of interested applicants. All nine applicants filled out the questionnaire; copies of their answers to the questionnaire are attached. According to the petitioner, all nine were interviewed, but none was either qualified or willing to fill the position.

Upon review, the director denied the petition, finding that the beneficiary did not have a bachelor's degree or foreign equivalent to a U.S. bachelor's degree. Accordingly, the director determined that the beneficiary did not meet the minimum requirements of the Form ETA 750.

On appeal, with regard to the beneficiary's qualifying academic credentials, counsel for the petitioner maintains that the beneficiary is qualified to perform the duties of the position as either a professional or skilled worker. Counsel claims that the word "equivalent" in the Form ETA 750 is ambiguous. To clarify the meaning of the word equivalent, counsel submits the following evidence:

- Memorandum from [REDACTED] dated March 20, 2000 entitled [REDACTED] on EB-2 Requirements." The Memorandum from [REDACTED] discusses the adjudication of cases based on a labor certification application requiring a master's degree plus three years of experience. One of the questions discussed in the [REDACTED] on EB-2 Requirements is whether a petitioner can include an alien beneficiary's five years' post-baccalaureate experience both to establish the alien beneficiary's equivalence to the master's degree and to meet the three years' experience required of a person who actually has a master's degree. According to the Cronin Memo on EB-2 Requirements on page 6, the answer depends on what the ETA 750 actually says. According to the Cronin Memo on EB-2 Requirements, the alien beneficiary with a bachelor's and five years of experience will be eligible for petition approval unless the ETA 750 clearly and explicitly requires that the level of experience that a master's applicant must have must be post-magisterial. Similar to the situation described in the Cronin Memo above, counsel argues in this case that the Form ETA 750 does not require – either explicitly or implicitly – that the three years experience in the job offered must be post-baccalaureate. In essence, counsel contends that the beneficiary's training/education plus his over nine years of work experience in the job offered equal are the equivalent of a bachelor's degree.
- A letter dated June 30, 2009 from [REDACTED] Certified Personnel Consultant with a specialty in recruiting information technology professionals.¹⁰ Regarding the word "BS

¹⁰ [REDACTED] claims to have more than 35 years of experience in the Washington, D.C., metropolitan market, and to have recruited thousands of software engineers, developers, programmers, developers, system engineers, project engineers, certified software architects, and candidates for numerous other technical positions. He also states he closely works with executive hiring managers and human resources representatives to develop, implement, and manage recruiting strategies. Further, he notes his experience includes assessing technical and

or equivalent” on the Form ETA 750, [REDACTED] states that it is common understanding in the IT recruitment world that the word “equivalent” in connection with the educational requirements does not strictly mean a foreign degree equivalent to a U.S. bachelor’s degree, but rather the word equivalent in that context has a broader meaning to include a foreign degree and/or combination of training/schooling and experience.¹¹ In [REDACTED] opinion, the beneficiary, though he does not have a bachelor’s degree or equivalent foreign degree, has sufficient training and experience to qualify for the position.

Essentially, the petitioner in this matter contends that the words “BS or equivalent” under the sub-heading “College Degree Required” at Block 14 does not mean that the beneficiary must have a bachelor’s degree or foreign equivalent to a U.S. bachelor’s degree to qualify for the position, but rather it means that the petitioner will hire anybody who is qualified – who has the experience, skills, and technical knowledge in the job offered.

In the alternative, the petitioner through its counsel also relies on the beneficiary’s combined education/training 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 labor certification.

Part A of the ETA 750 indicates that the DOL assigned the occupational code 030.062-010 (Software Engineer) to the proffered position. The DOL found the occupational code above from the Dictionary Occupational Titles (DOT) and had assigned it based on normalized

management needs, developing job descriptions and minimum experience and educational requirements, drafting and placing advertisements and other recruitment, pre-screening candidate resumes, and conducting interviews, reference checks and employee orientation.

¹¹ Specifically, [REDACTED] states:

In my experience drafting numerous advertisements and interviewing thousands of applicants, the phrase “BS or equivalent” as used in IT recruitment is commonly broadly understood to require either the degree or anything that is equivalent. In other words, this requirement is not customarily or generally interpreted by either employers or job applicants as requiring a formal bachelor’s degree, whether U.S. or foreign. This is because, by its very nature, the IT industry is technical. Thus, while education, of course, is relevant (to some employers more than others), the primary consideration and predictor of a successful hire is whether the candidate possesses the technical experience, skills, and tools needed to perform job duties. Therefore, I accept as entirely reasonable, accurate, and consistent with industry practice [REDACTED] statement that Net2Voice’s intention in requiring a “BS or equivalent” in computer science was to provide and accept an alternative to the degree requirement in terms of experience or any combination of education and experience.

occupational standards.¹² 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. See <http://www.bls.gov/soc/socguide.htm>.

In the instant case, the DOL did not categorize the offered position under the SOC code.¹³ Counsel, however, in response to the director's RFE, states that either SOC code 15-1031.00 (Computer Software Engineers, Applications) or SOC code 15-1032.00 (Computer Software Engineers, Systems Software) is the closest position to the DOT code that the DOL assigned to the position (030.062-010).

The AAO agrees. 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 DOT code 030.062-010 to the offered position. Using the O*NET crosswalk, this translates to SOC code 15-1011.00 (Computer and Information Scientists, Research), 15-1031.00 (Computer Software Engineers, Applications), and 15-1032.00 (Computer Software Engineers, Systems Software). Based on the description of the job duties on the Form ETA 750, we determine that the best fit SOC code for the position offered is either 15-1031.00 (Computer Software Engineers, Application) or 15-1032.00 (Computer Software Engineers, Systems Software).

Both SOC codes fall within Job Zone Four (requiring considerable preparation or 2-4 years of work-related skill, knowledge, or experience). Further, the standard vocational preparation (SVP) for Job Zone 4 is 7 to <8 which means "most of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/help/online/zones> (accessed July 7, 2011).

Additionally, the DOL states the following concerning the training and overall experience required for Job Zone Four 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

¹² The DOT codes can be accessed online at <http://www.occupationalinfo.org> (last accessed August 31, 2011).

¹³ Prior to O*NET, the DOL used the Dictionary of Occupational Titles (DOT) occupational classification system.

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.

We note that even though the occupational classification of the offered position (Software Engineer) is one of the occupations statutorily defined as a profession at section 101(a)(32) of the Act,¹⁴ some Software Engineer positions (Job Zone Four, SVP 7 to <8) do not require a four-year bachelor's degree, as indicated above.

Upon review of the evidence submitted and under the facts stated above, the AAO acknowledges that the proffered position might occasionally be considered under the skilled worker category because of the requirements of the proffered position and the DOL's standard occupational requirements. However, the position offered in the instant proceeding clearly requires applicants to have a bachelor's degree or equivalent in computer science or in related field and four years experience in the job offered or in a related occupation as a programmer/analyst, which is more than the minimum required by the regulatory guidance for professional positions found at 8 C.F.R. § 204.5(1)(3)(ii)(C).

For instance, the Washington Post advertisements submitted in response to the director's RFE, in pertinent part, read, "BS or equivalent in computer science, software engineer, or related plus 3 years experience in customer care/billing solutions, or 5-7 years verified experience with minimum 3 years experience in customer care/billing solutions." Similarly, the in-house posting, in pertinent part reads, "BS or equivalent in Computer Science or related; 3 yrs experience in the job or 5-7 years in a related occupation with 3 yrs experience in customer care/billing solutions. Therefore, based on the evidence submitted and combined with the DOL's classification and assignment of educational and experiential requirements for the occupation, the certified position must be considered as a professional occupation.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that

¹⁴ Section 101(a)(32) of the Act 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."

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.

Before we discuss the merits of the matter in this instant proceeding, 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 the DOL. Thus, at the outset, it is useful to discuss the 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 left to United States 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. 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).¹⁵ *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.

¹⁵ Based on revisions to the Act, the current citation is section 212(a)(5)(A) as set forth above.

* * *

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).¹⁶

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).

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

¹⁶ The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

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).

(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.

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 DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

Moreover, for classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(1)(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 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 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the professions is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, the requirement at section 203(b)(3)(A)(ii) that an eligible alien both have a baccalaureate "degree" and be a member of the professions reveals that a member of the professions must have a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Thus, even if we did not require "a" degree

that is the foreign equivalent of a U.S. baccalaureate, we could not consider education earned at an institution other than a college or university.

Because the beneficiary in this case does not have a U.S. 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.

Moreover, the Form ETA 750 does not provide that the minimum academic requirements of BS or equivalent might be met through a combination of education/training and work experience or some other formula other than that explicitly stated on the Form ETA 750. For these reasons, we decline to accept the beneficiary's credential evaluations that suggest that the beneficiary has a bachelor's degree through a combination of his education/training and nine plus years of work experience in the job offered.

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. *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).

We are also aware of 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.

The employer's subjective intent, however, 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 the 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 the beneficiary does not have.

Here, unlike the labor certification in *Snapnames.com, Inc. id.*, the petitioner's usage of the word "equivalent" in relation to the college degree requirements is not ambiguous. Although the petitioner did not specify the number of years that an applicant needed to finish college, the petitioner typed, under "College Degree Required," at block 14, these words: "BS or equivalent." The term equivalent in that context is not ambiguous.

First, the *Washington Post* advertisement clearly lists bachelor's degree in computer science or in a related field, among other things, as one of the requirements for the job offered. Similarly, the in-house posting also requires interested applicants to have a bachelor's degree in computer science or in a related field to qualify for the job offered. As noted earlier, 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 the DOL during the labor certification process and not afterwards to USCIS.

With the exceptions of the copies of the advertisement and the questionnaires, all of the supporting documentation submitted in response to the director's RFE and on appeal was created after the labor certification process, and is not the best evidence. Therefore, the affidavit dated November 19, 2009 from [REDACTED] and the letter dated June 30, 2009 from [REDACTED] both have little probative value.

As to the questionnaires provided by the petitioner to evaluate a potential candidate for the job, we acknowledge that none of the questions specifically asks any of the applicants if he or she has a bachelor's degree, and that all of the questions seek answers about the applicant's knowledge, technical skills, and experience in computer programming. However, it is not clear from the evidence submitted whether those nine people who filled out the questionnaire and expressed interest in the job actually had a bachelor's degree, and whether those who responded to the ads responded because they had a bachelor's degree in computer science or in a related field.

In summary, the AAO finds that the petitioner fails to demonstrate that the position offered is for a skilled worker classification. The beneficiary does not have a United States baccalaureate degree or a foreign degree equivalent to a U.S. bachelor's degree as set forth on the labor certification; and he does not qualify for preference visa classification under section 203(b)(3)(ii) 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.