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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner's business is operating a shipping and cargo line. It seeks to employ the beneficiary permanently in the United States as an application developer. As required by statute, a Form ETA 750,[1] Application for Alien Employment Certification approved by the U.S. Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a bachelor's degree (or foreign equivalent) when the request for certification was accepted, and that the beneficiary cannot be found to have met the minimum requirements stated on the Form ETA 750 as of that date. Therefore, the petition could not be approved.

The Form I-140 petition was filed by the petitioner on August 14, 2006, and it was denied by the director on November 8, 2006. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted on February 14, 2003. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

On appeal, counsel asserts, *inter alia,* that the petitioner filed an I-140 petition requesting a preference visa in the professional or skilled worker classification, and the director erroneously adjudicated the petition only under the professional worker classification. According to counsel, the beneficiary qualifies as a skilled worker because the beneficiary has a bachelor's degree or the equivalent of a bachelor's degree in education and professional employment experience.

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

[2] The submission of additional evidence on appeal is allowed by the instructions to the U.S. Citizenship and Immigration Services (USCIS) 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).

For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

The Labor Certification

According to counsel it is the job requirements of training and experience set forth by the employer as certified by DOL in the Application for Alien Employment Certification Form ETA 750 that is determinative. Counsel's statement must be qualified.

The key to determining the job qualifications is found on Form ETA 750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA 750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> *Minimum Education, Training, and Experience Required to Perform the Job Duties.* Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements in Blocks 14 and 15:

Block 14:

Grade School	XX
High School	XX
College	XX
College Degree Required	Bachelors Degree or equivalent:
Major Field of Study	CIS,[3] Physics, Computer Science or related field
Training	[all information blocks under "training" are lined out]
Experience [a heading]	
Job Offered, Yrs./Mos.	2 years
Or,	
Related Occupation, Yrs./Mos.	2 years
Related Occupation, (specify)	Database Administrator, System Analyst or related technical field.

[3] Computer Information Systems.

As stated above, the applicant must have two years of experience in the job offered or related occupation, the duties of which as delineated at Item 13 of the Form ETA 750A are stated below:

> Develop, implement, and maintain new and existing applications, including SAP/NAP/SILO. Analyze system requirements, design and develop reusable solutions according to system requirements. Create and maintain technical documentation and reports. Utilize Oracle, Powerbuilder, PL/SQL, Java COBOL, Basic, Unix, Shell Script to create and build complete applications. Develop and modify shell scripts for batch processing. Perform database administration tasks, performance tuning, backup/recovery, logical and physical database design, database installation.

Block 15

Block 15 of Form ETA 750A entitled "Other Special Requirements" was left blank.

According to the labor certification, the proffered position requires a college bachelor's degree and two years of experience in the position offered or two years in the designated related occupation. Because of those requirements, the proffered position is for a professional occupation. DOL assigned the occupational code of computer software engineer applications 15-1031.00 to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database (*See <http://online.onetcenter.org/link/summary/15-1031.00>* accessed May 29, 2009) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7.0-<8.0 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." Additionally, DOL states the following concerning the overall experience and training 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.

Therefore, the position may be properly categorized as a professional or skilled worker position.

Professional Classification

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.

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

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

On appeal, counsel contends that bachelor degree or equivalent means a combination of education or a combination of education and experience.

The above regulations use 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. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977).

The beneficiary possesses a foreign three-year Bachelor of Science degree attained by three years of university-level credit from Rajasthan University, Ajmer, India, as well as a diploma in computer applications. Thus, the issues are whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's additional education and/or employment experiences in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Authority to Evaluate Whether the Alien is Eligible for the Classification Sought

Counsel states on appeal 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." In support of this proposition counsel cites the cases of *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)), *Omar v. INS*, 298 F.3d 710, 714 (8th Cir. 2002), and, *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed 2d 271 (2004).

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

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

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

> Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:
>
> > (1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and
> >
> > (2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts, including the 9th Circuit that covers the jurisdiction for this matter.

> 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). 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).

Counsel asserts on appeal that the director erred when he found that the educational requirement for an immigrant employment based visa must be a single-source degree. Counsel cites as support for his contention the "Final Rule: Employment Based Immigrants," 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991); *Grace Korean United Methodist Church v. Chertoff,* 437 F. Supp. 2d 1174 (D. Ore. 2005); and, *Snapnames.com, Inc. v. Chertoff,* 2006 WL 3491005 (D. Ore. Nov. 30, 2006).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (now USCIS), 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, USCIS 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 (Nov. 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 244.

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 "foreign equivalent degree." In order to have experience and education equating to a bachelor's degree under section 203(b)(3)(A)(ii) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree.

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," the beneficiary does not qualify for preference visa classification under section 203(b)(3) of

the Act as he does not have the minimum level of education required for the foreign equivalent of a bachelor's degree.

Authority to Evaluate Whether the Alien is Qualified for the Job Offered

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

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

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

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the 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).

We are cognizant of the recent decision in *Grace Korean,* 437 F. Supp. 2d 1174 which finds that USCIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean,* 437 F. Supp. 2d at 1177 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since USCIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws and not with the delivery of mail. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

Additionally, we also note the recent decision in *Snapnames.com, Inc.,* 2006 WL 3491005. 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.,* 2006 WL 3491005 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.,* 2006 WL 3491005 at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that USCIS properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.,* 2006 WL 3491005 at *17, 19; *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).

Eligibility - Degree Equivalency or an Unrelated Degree

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

The beneficiary possesses a foreign three-year Bachelor's degree attained by three-years of university-level credit from Rajasthan University at Ajmer, India. As stated above, the petitioner required that an applicant for the proffered position have a college Bachelor's degree or equivalent in the major field of study of "CIS, Physics, Computer Science, or a related field." As already stated, a college bachelor degree in the United States is attained after a four-year college or university level education. *See Matter of Shah*, 17 I&N 244.

Education Evaluation Reports

The petitioner had submitted an education evaluation report from the IndoUS Technology & Educational Services Inc., Edison, New Jersey, by [redacted], dated July 26, 2001. [redacted] opined that the beneficiary obtained a three-year Bachelor of Science degree in physics, chemistry and mathematics from Rajasthan University at Ajmer, India, in 1985, and that the above degree is equivalent to 1.5 years of coursework towards a bachelor's of science degree in computer science from an accredited college or university in the United States.

As is evident from the above report, the evaluator is not granting the beneficiary full credit for the beneficiary's three years of university level education. Not all the subjects that the beneficiary took at Rajasthan University relate to the fields of study of CIS, physics, or computer science or a related field as is stated as a requirement for the proffered position of application developer in the labor certification.

A review of the beneficiary's mark sheet from Rajasthan University lists all the "subjects & papers, etc"' taken or completed by the beneficiary in 1983, 1984, and 1985. In 1983 the beneficiary received credit for the subject of physics, theory and practical; chemistry, theory and practical; and mathematics. In 1984 the beneficiary received credit for the subjects of physics and chemistry both theory and practical, and mathematics theory. In 1985 the beneficiary received credit for the subject of physics, theory and practical; chemistry, theory and practical; and mathematics.

Two out of the three acceptable major fields of study stated in the labor certification are CIS (i.e. Computer Information Systems) and Computer Science with the third study area, physics. There are no computer science courses stated in the Rajasthan University mark sheets taken by the beneficiary. Considering that some of the beneficiary's coursework was in the field of physics and physics is a stated acceptable field of study in the labor certification, physics is only a portion of the coursework taken at Rajasthan University.

[redacted] provided no explanation how three years of university level coursework in physics, mathematics and chemistry would equate to 1.5 years of coursework towards a bachelor's of science degree from an accredited college or university in the United States in the major fields of study of CIS, physics or computer science since the latter are separate and unique areas of study.

According to [redacted], after the beneficiary completed a three year degree program at Rajasthan University, he then received a Diploma in Computer Science and Applications from Gujarat University, India, in 1987.

Regarding the Diploma in Computer Science and Applications from Gujarat University, India, the evaluator opined that the diploma would equate to six months of coursework towards a bachelor's of science degree in computer information systems from an accredited college or university in the United States. [redacted] then stated that the beneficiary's combined educational attainments at Rajasthan University and Gujarat University equated to 1.5 years and six months of coursework towards a Bachelor of Science degree from an accredited college or university in the United States.

then recounted the beneficiary's professional employment experience in software development, design and coding from October 1986 to February 2001. The evaluator equated this employment to equal three years and four months of academic studies towards a Bachelor of Science degree from an accredited college or university in the United States. The evaluator then combined the two years of coursework at two universities and *ten years* of "progressive experience" together to be the equivalent of a Bachelor of Science degree from an accredited college or university in the United States.

The rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

The petitioner had also submitted an education evaluation report from the Trustforte Corporation, New York, New York, dated October 27, 2006. According to the evaluator, the beneficiary completed the equivalent of three-years of academic studies toward a Bachelor of Science degree at Rajasthan University, India.

Without mention of the actual course content stated in the beneficiary's mark sheets, the report concluded that the beneficiary's attainment of a Bachelor of Science degree at Rajasthan University, India, together with the beneficiary's attainment of a Diploma in Computer Science and Applications from Gujarat University, India, is the equivalent of a Bachelor of Science Degree in Computer Science from an accredited college or university in the United States.

Unlike the evaluation prepared by IndoUS Technology & Educational Services Inc., the Trusteforte evaluation does not mention the beneficiary's work experience. This evaluation relies on the beneficiary's combined studies. The evaluator does not conclude that either of the beneficiary's programs of study would be individually equivalent to a bachelor's degree in the required field.

In the Trusteforte evaluation, the beneficiary's academic accomplishments at two universities equated to a Bachelor of Science Degree in Computer Science from an accredited college or university in the United States; whereas, the IndoUS Technology & Educational Services Inc. evaluation concluded that the beneficiary's educational attainments at Rajasthan University and Gujarat University, India in 1987 equated to 1.5 years and six months of coursework towards a Bachelor of Science degree from an accredited college or university in the United States. It is only with the addition of the beneficiary's work experience does the IndoUS Technology & Educational Services Inc. evaluator determine that the beneficiary's two academic experiences together with his work experience equate to a Bachelor of Science degree from an accredited college or university in the United States. It is incumbent upon the petitioner to resolve any inconsistencies in the record by

independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

While the beneficiary in the labor certification stated that he attended Gujarat University, India, from October 1985 to February 1987, we note that the IndoUS Technology & Educational Services Inc. evaluation gives credit for only six months of coursework which correlates to the beneficiary's Gujarat University mark sheets in the record. Therefore, for the sake of argument even combining the Rajasthan University and Gujarat University educational attainments, neither singularly nor in combination total four-years of tertiary education.

We note that the petitioner has provided two differing evaluations without also providing any explanation or contention that we should rely upon one and not the other since there does exist disagreements among these two evaluators of just what constitutes education equivalency in the instant matter. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The Appeal

On appeal, counsel states that the petitioner "petitioned for [the beneficiary] as either a skilled worker or a professional worker."

According to counsel, the beneficiary qualifies as a skilled worker since he has obtained a "bachelor's in education and [has employment] experience." Counsel states that the beneficiary qualifies under the skilled worker preference classification since the beneficiary has six years of relevant experience as a database administrator and at least four years of relevant schooling before beginning work with the petitioner. According to counsel, the petitioner did not require a bachelor's degree on the Application for Alien Employment Certification Form ETA 750 because the petitioner required a bachelor's degree or its equivalent as defined by counsel above.

In the alternative, counsel asserts that the beneficiary qualifies as a professional since he has attained a three-year "Indian Bachelor of Science Degree" which he contends is the equivalent to a four-year Bachelor of Science degree attained in the United States since "more classroom hours are required for the Indian Three Year B.S. degree than a U.S. 4 [four] year Bachelor of Science degree."

Counsel submits on appeal a legal brief and the federal court decisions of *Grace Korean,* F. Supp. 2d 1174 and, *Snapnames.com, Inc.* 2006 WL 3491005 (credential evaluations from [redacted]

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

dated November 23, 2006, [redacted] and [redacted][5] dated November 22, 2006, [redacted]; copies of web pages printed from the Internet website <http://www.education.nic.in> accessed November 30, 2006; a letter dated June 28, 2006, and a statement dated October 25, 2006, by [redacted] Mumbai, India; an undated letter addressed to Career Consulting International by [redacted] and an newspaper article printed from the Internet web site http://timesofindia.com accessed November 10, 2006, as well as other documents.

Counsel on appeal contends that the beneficiary's three-year bachelor's of science degree is equivalent to a four-year United States bachelor's of science degree based upon the class time required in India.

Counsel cites as support for his contention evaluations from of Career Consulting International; a United Nations Educational, Scientific and Cultural Organization (UNESCO) article found on the Internet web site http://unesdoc.unesco.org, as well as the documents referenced above.

Additional Education Evaluation Reports

Career Consulting International

The petitioner submitted evaluations from [redacted] and [redacted]s. Both [redacted] and [redacted] conclude that the beneficiary completed 120 semester credit hours in three years of university education work with a concentration in physics.[6] On page two of [redacted] evaluation, she listed the courses undertaken by the beneficiary along with a letter grade and includes under the heading "credits" the number 8.57 as total credits for each course listed. At the bottom of this listing is the statement, "Total US credit equivalency per contract hours using the Carnegie Unit: 120."[7]

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[5] [redacted] indicated he has a "canonical diploma of Sacræ Theologiæ Professor" from St. David's Oecumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

[6] The 14 courses the beneficiary undertook in three years were in chemistry, mathematics, and physics. Only five courses were in physics. The evaluators' conclusion that the beneficiary's concentration was in physics is not supported by evidence in the record of proceeding. USCIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. at 817. As already stated, 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, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791.

[7] According to the Carnegie Foundation, the "Carnegie Unit" applies to secondary education (i.e. high schools). The Foundation explains on its website:

> The unit was developed in 1906 as a measure of the amount of time a student has

The beneficiary's mark sheets in the record do not include "letter grades," "credits," or the terminology "contact hours" or "Carnegie Unit." Both and [redacted] conclude that, despite the far greater number of courses in mathematics and chemistry, the beneficiary has a foreign equivalent of a bachelor of science with a concentration in physics.

[redacted] further provides that UNESCO (the United Nations Education Scientific and Cultural Organization) has produced several instruments, which provide that member states should "take all feasible steps" to provide recognition to qualifications in higher education awarded in other stated. did not provide the UNESCO report. UNESCO has six regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. *See* http://www.unesco.org (accessed January 16, 2007).

finds further parallel in the Bologna process in the European Union where three-year first degrees are issued. The authors additionally quote educators from different schools as to whether they would accept three-year degrees. Some programs indicate that a student with a three-year degree could "apply," or that they are "eligible to apply."
The article does not distinguish how such students would be accepted, whether such acceptance would be full acceptance to immediately begin master's level course work, or whether a student could apply, but would be conditionally accepted into the program to begin following completion of another year of studies.

[redacted] concludes that there are valid reasons to accept Indian three-year bachelor's degrees as equivalent to bachelor's degrees issued in the U.S.

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studied a subject. For example, a total of 120 hours in one subject -- meeting 4 or 5 times a week for 40 to 60 minutes, for 36 to 40 weeks each year -- earns the student one "unit" of high school credit. Fourteen units were deemed to constitute the minimum amount of preparation that may be interpreted as "four years of academic or high school preparation.

See http://www.carnegiefoundation.org/general/sub.asp?key=17&subkey=1874&topkey=17 accessed July 29, 2009.

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[redacted] in his evaluation made a blanket declaration that on the basis of comparison of coursework, the beneficiary's Indian three-year bachelor's degree is equivalent to a four-year bachelor's degree in the United States. [redacted] reached this conclusion by declaring that the beneficiary's Indian education includes more contact hours than the United States does in its four years, and that these would be equivalent to 120 U.S. credit hours when converted to the United States system. From the information provided, it is not clear that a "contact hour" would be the same or directly equivalent to a U.S. "credit hour." In the Indian system, students spend more time in the classroom providing more "contact hours," whereas the U.S. system calculates time spent studying outside the classroom into the credit hour determination.[8] The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable.

[redacted] provides theoretical arguments why the three-year Indian degree should be accepted. However, the arguments remain theoretical, and as the author notes, academics disagree on the proper interpretation of the three-year Indian degree. Further, unlike the British system, India does not have the 13th year of school similar to the "A" levels.

Counsel has submitted an undated letter statement from [redacted] president of Education Consultants and Evaluators International, Miami, Florida. The AAO has reviewed the statement. Since it was directed to [redacted] and not to the petitioner, does not purport to be an education evaluation and does not evidence that [redacted] examined the beneficiary's educational materials such as his diplomas, mark sheets or even the subject schools accreditations or course content, the statement has slight probative value in these proceedings.

Counsel has also submitted a letter dated June 28, 2006, and a statement dated October 25, 2006 by Mumbai, India, the former directed to and the other to "whom it may concern." Similarly to [redacted] statement, these statements do not purport to be an education evaluation and do not evidence that [redacted] examined the beneficiary's educational materials. The statements have slight probative value in these proceedings.

Counsel also submits on appeal a newspaper article printed from the Internet web site http://timesofindia.com accessed November 10, 2006. The article is entitled "With a 3-year BA, you can join a US varsity." The article in summary form reports on The Bologna Declaration of 1999, and admittedly "anecdotal evidence" that some university degrees from India allow acceptance into graduate schools in the United States which does not relate to the equivalency issue in this matter.

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[8] U.S. students "are assumed to spend two hours of outside preparation for every 1 hour of lecture." [redacted] The University of Texas at Austin, "Assigning Undergraduate Transfer Credit: It's Only an Arithmetical Exercise," from http:www.handouts.accrao.org/am07/finished/F034p_M_Donahue.pdf (accessed February 19, 2008). As the Indian system is not based on credits, but is exam based, transfer credits are based on a calculation of the number of exams taken multiplied to reach "a base line of 30" for credit conversion as the systems do not readily equate. *Id.*

As already stated, 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, USCIS is not required to accept or may give less weight to that evidence. S*ee Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Examining the four evaluations together, there are serious conflicts between the four submitted. *See Matter of Ho,* 19 I&N Dec. 582, 591-92, "It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence."

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(3)(A)(ii) of the Act.

A Request for Evidence by the AAO

On August 18, 2008, the AAO requested additional evidence from the petitioner. The AAO requested that the petitioner provide a "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. Since the actual minimum educational requirements of the offered position are in dispute, the RFE sought this evidence to clarify the petitioner's intent concerning the degree requirement as it was set forth on the labor certification application.

Under DOL's regulations, it is the responsibility of USCIS to ensure that the labor market test was *in fact* carried out in accordance with applicable law. *See* 20 C.F.R. § 656.30(d). The AAO requested the information, since submission of the evidence requested could demonstrate that U.S. workers without four years of college and without bachelor's degrees were in fact put on notice that they were eligible to apply for the proffered position, despite the stated requirements of the Form ETA 750, and/or that the petitioner did not in fact exclude U.S. workers with qualifications similar to those of the beneficiary from applying for and filling the position.

In response to the request for evidence, counsel submitted an explanatory letter dated October 30, 2008, and job recruitment newspaper advertisements along with an in-house internal job posting.

Content of the Newspaper Advertisements and Education/Experience Requirements

We note that the content of the job recruitment newspaper advertisements differs in part from that stated in the labor certification. In pertinent part the advertisements state the following job requirements: "[The petitioner] seeks Application Developers & *Team Leaders* [emphasis added] ... w/BS in Comp. Sci, Comp. Apps., Physics, Engineering, Electronics or related quantitative field or equiv combo of work exp. & edu. &/or exp in any of above or similar positions." Included with these additions to the job requirements, we note that more importantly, the advertisements do not list the additional two-years of required work experience requirement listed on Form ETA 750.

The employment or educational experiences in computer software and database applications required in the advertisement also differ in part from that stated in the labor certification. In the advertisement the petitioner is requesting experience in Sun/Solaris, JavaScript, Windows NT, HP-UX 11 and HTML, which are not skills requested in the labor certification. In contrast, the petitioner's actual job description requires the individual to develop applications in SAP/NAP/SLO and have skills in Oracle, PowerBuilder, PL/SQL, Java COBOL, Basic, Unix, and Shell Script.

The U.S. Department of Labor (DOL) has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as *throughout all phase of recruitment* [emphasis added] exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994).

Further, DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS)] to accept the employer's definition" and SESAs should "request the employer provide the specifics of what is meant when the word 'equivalent' is used." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992).

In this case, while the petitioner's education requirements were expansive, we would not conclude that the advertisements notified potential applicants of all the education, skills and experience requirements, as the advertisement fails to address the two-year experience requirement and required skills not encompassed in the Form ETA 750 job description or in the special skills listed in Box 15.

Additional Evidence

Counsel submitted several AAO decisions relating to foreign education and equivalency. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Skilled Worker Classification - section 203(b)(3)(A)(i) of the Act

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

> (A) ***General.*** Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers

> giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> (B) *Skilled workers.* 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.

To restate counsel's assertions on appeal, counsel contended that that the petitioner filed an I-140 petition requesting a preference visa in either the skilled worker classification or the professional worker classification, and the director erroneously adjudicated the petition under the professional worker classification.

As already stated previously, according to counsel the beneficiary qualifies as a skilled worker since he has obtained a "bachelor's in education and [has employment] experience." Counsel states that the beneficiary qualifies under the skilled worker preference classification since the beneficiary has six years of relevant experience as a database administrator and at least four years of relevant schooling before beginning work with the petitioner.

According to counsel, the petitioner submitted documentation to the U.S. Department of Labor (DOL) along with the Application for Alien Employment that made it "clear that that the petitioner would accept three years of relevant experience as the equivalent of one year of college education." Counsel also contended that "DOL applied this standard in determining whether the ETA-750 could and should be certified."

In support of the appeal counsel has submitted in response to the request for evidence by the AAO dated August 18, 2008, a letter dated August 8, 2006, from [redacted] of human resources; copies of web pages from the DOL Internet site *<http://online.onetcenter.org/link/summary/15-1031.00>*; a letter from [redacted] of Pioneer Data Systems Inc., dated September 5, 2002; a letter from [redacted] of InfoSolve Inc., dated September 19, 2001; a letter from Abacus Software Group Inc., by [redacted], dated February 28, 2001; a letter from Tata Telecom, by [redacted] (automation), dated January 22, 1999; an undated letter from Torrent Pharmaceuticals Ltd., from [redacted]; and a letter dated May 14, 1999, from Modern Denim Limited, from [redacted] commercial).

In summary the above job reference letters verify that the beneficiary has approximately five years job experience in the computer software development and applications field.

The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this skilled worker classification "must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification." As noted previously, the

certified Form ETA 750 requires a bachelor's degree or equivalent in CIS, computer science, physics, or a related field, and two years of experience in the job offered or in the occupations of Database Administrator or System Analyst or related fields. The certified labor certification does not define the term or "equivalent."

Based on conflicts in the four evaluations submitted, the evaluations fail to adequately demonstrate that the beneficiary has the equivalent of a bachelor's degree as the petitioner's four evaluations differ significantly on the interpretation of the beneficiary's education and experience. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore the petitioner has not demonstrated that the beneficiary meets the requirements of the labor certification and qualifies for eligibility as a skilled worker.

Additionally, the advertisements fail to demonstrate that the petitioner adequately set forth the full position requirements in the advertisements in that they failed to state the full requirements listed on Form ETA 750 of a bachelor degree and two years of prior experience.

The AAO affirms the director's decision that the evidence does not demonstrate that that the beneficiary satisfied the minimum level of education stated on the labor certification. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

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

ORDER: The appeal is dismissed.