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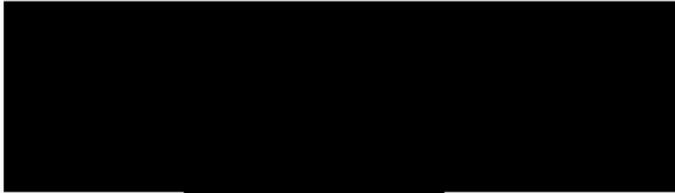
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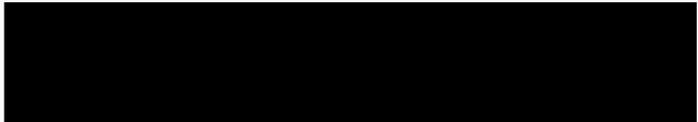
NOV 25 2008
Date:

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IN RE:

Petitioner:

Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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.

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a telecommunications company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary met all the minimum requirements stated on Parts 14 and 15 of the Form ETA 750 as of the priority date. The director stated that these minimum requirements required the beneficiary to possess a bachelor's degree or foreign equivalent degree, rather than the combination of the beneficiary's two separate degrees/diplomas documented in the record. The director denied the petition accordingly.

The record shows that the appeal is properly filed and 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.

As set forth in the director's May 26, 2005 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position. For the reasons discussed below, while we concur with counsel that the petition should be evaluated under the skilled worker classification, the petitioner has not demonstrated that the beneficiary's education, considered in the aggregate, constitutes four years of "college" education or is equivalent to a U.S. baccalaureate in one of the requisite fields as specified on the labor certification.

The instant petition seeks to classify the beneficiary's classification as a "skilled worker." 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.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(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.

The petitioner must 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 the U.S. Department of Labor and

submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the priority date is the date the Form ETA 750 was accepted, September 13, 2001. 8 C.F.R. § 204.5(d).

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.¹ On appeal, counsel submitted a brief.²

The record contains a credential evaluation report written by ██████████, Director, Degree Evaluation Division, A.E.S.F., Inc. Hypoluxo, Florida. In his report, ██████████ examined the beneficiary's university studies at the College of Science at Kurukshetra University, India where he studied from 1990 to 1993, and the beneficiary's subsequent part-time advanced diploma course work in systems management at the National Institute of Information Technology (NIIT), Secunderabad, India, from 1994 to 1997. Based on these studies, ██████████ concluded that the beneficiary had the equivalent of a bachelor of science degree in computer information systems at a regionally accredited U.S. institution. The record also contains copies of the beneficiary's degree and credit recommendations from NIIT, as well as letters verifying the beneficiary's previous work experience. The record does not contain any other evidence relevant to the beneficiary's qualifications.

With the initial submission of the petition, and on appeal, counsel asserts that the instant I-140 petition is filed under the skilled worker classification.³ On appeal, counsel noted that the singular term "degree" rather than "degrees" as specified in the regulations has been used to justify a restrictive position by service centers in petitions involving professionals. Counsel acknowledged that the AAO has held that the combination of degrees is not a degree or degree equivalent, and that the alien is not eligible under the "United States baccalaureate degree or a foreign equivalent degree" requirement of section 203 (b)(2) of the Act.⁴ Counsel further stated, however, that a similar provision does not exist for skilled workers. Counsel states that the petitioner only has to establish that the beneficiary is qualified for the position as described in the labor certification. Counsel then stated that the academic equivalency document prepared by Dr. Szabo states that

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² On appeal, counsel stated that correspondence from Efren Hernandez III, Citizenship and Immigration Services (CIS) Office of Adjudications to counsel in another case is attached to the brief; however, no such document was submitted with the brief. Rather, this correspondence dated July 23, 2003, was submitted to the record in support of a previous I-140 petition submitted by the petitioner on behalf of the beneficiary under the professional classification.

³ In counsel's cover letter submitted with the instant petition, he stated that the petition was the second filing of a Form I-140 for the beneficiary, and that the first petition, filed under the professional classification under Section 203(b)(3)(A)(ii), was denied. Counsel stated that the first I-140 filing had been appealed to the AAO. It is noted that the AAO denied this appeal on January 26, 2005.

⁴ The section cited by counsel relates to advanced degree professionals. The section related to professionals is Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii).

the beneficiary's two academic credentials are the equivalent of a Bachelor of Science degree in Computer Information Systems. Counsel noted that A.E.S.F. is a member of the American Association of Collegiate Registered Admission Officers Evaluations (AACRAO). Counsel asserted that the director did not challenge the academic equivalency document or find it faulty, but rather focused on his interpretation that the foreign equivalent of a bachelor's degree has to be contained in one degree. According to counsel, the director concluded that because the petitioner did not clarify what it meant by equivalent, it is implied that the equivalent must be a single degree, not a degree and a diploma.⁵

Counsel relied on private correspondence for the proposition that "it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement. Provided that the proper credential evaluations services find that the foreign degree or degrees are the equivalent of the required U.S. degree, then the requirements may be met." Counsel acknowledged that Citizenship and Immigration Services (CIS) is not bound by such correspondence, but asserts that there is no contrary authority in the statutes, regulations, or interpretation of the CIS for the skilled worker classification. Counsel questioned why the beneficiary's three-year program of studies in combination with his advanced studies at the NIIT, could not be the foreign equivalent of a U.S. Bachelor's degree. Counsel also stated that there is no rationale for making the distinction between the single degree requirements and allowing a combination of degrees to constitute a foreign equivalent degree. Counsel stated that no reasonable employer could have anticipated at the time the instant petition was filed that the beneficiary would not be found qualified unless the employer specified "a combination of degrees" to be equivalent to the U.S. bachelor degree.

Counsel asserted that while the director states that CIS and DOL have held that the term "equivalent" means an equivalent foreign degree; there is not a single citation to support the director's conclusion. Counsel asks where CIS has previously held this equivalency standard in the context of the skilled worker classification. Counsel noted that CIS has rather determined in its Operations Instructions that the educational evaluation should consider formal education only, and does not state that there should be a distinction made between one degree and a combination of degrees. Counsel stated that the clear implication of such instructions is that if a foreign education is evaluated to be the equivalent of a bachelor's degree, then this should be sufficient.

Counsel noted the director's statement that DOL has stated that the employer has the responsibility to define what is meant by the term "equivalent." Counsel stated that in the instant petition, the petitioner has stated that the position requires a Bachelor of Science degree or foreign equivalent. Counsel stated that the petitioner did not state "or foreign degree" but rather "foreign equivalent." Counsel asserted that the beneficiary has the foreign equivalent of a U.S. bachelor degree as stated by the academic credential evaluation. Counsel noted that the educational requirements were also stated this way in the letter that accompanied the petitioner's Labor Certification Application. Counsel concluded that if the director made the distinction between a single degree and a combination of degrees, it should have a rational basis for doing so. Counsel stated that the petitioner is looking for a skill set and training that qualifies an individual for the job, and questioned whether a person with a single Indian degree that has been evaluated to be the equivalent of a U.S. bachelor's degree would be more qualified for the proffered position than a person with a combination of Indian degrees also evaluated to be the equivalent of a U.S. degree.

On July 23, 2007, the AAO issued an RFE to the petitioner, stating that the documentation in the record of proceeding was ambiguous concerning the actual minimum requirements of the proffered position. Although the clearly stated requirements of the position on the certified labor certification application did not include

⁵ Within the context of counsel's remarks, the AAO assumes that counsel meant a degree from one institution and a diploma for another program of studies from another institution.

alternatives to a four-year U.S. bachelor's degree, the AAO noted that it was the petitioner's contention during the petition process before CIS that the actual minimum requirements do include at least what the beneficiary has achieved through a combination of three years of college-level studies and a diploma course. The AAO also noted that the petitioner filed the instant petition in the skilled worker classification, a classification that only requires two years of experience instead of the four-year bachelor degree and three years of experience required by the proffered position that makes the position more appropriate for the professional category.

In its RFE, the AAO requested evidence of the petitioner's intent concerning the actual minimum requirements of the position as that intent was explicitly and specifically expressed to the U.S. Department of Labor (DOL) while that agency oversaw the labor market test and determination of the actual minimum requirements set forth on the certified labor certification application. Such intent may have been illustrated through correspondence with DOL, amendments to the labor certification application initialed by DOL and the petitioner, results of recruitment, or other forms of evidence relevant and probative to illustrating the petitioner's intent about the actual minimum requirements of the proffered position and that those minimum requirements were clear to potential qualified candidates during the labor market test.

On Form ETA 750, Part A, Item 21, DOL requested information that describes "efforts to recruit U.S. workers and the results," "specify[ing] sources of the recruitment by name." This item requests recruitment information in order to allow DOL to determine whether petitioners put forth good faith efforts to recruit U.S. workers which meet the regulatory guidelines found at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii)⁶ or 20 C.F.R. § 656.21(j)(1)(i)-(iv),⁷ depending on whether or not the Form ETA 750 was submitted under a supervised

⁶ The regulation at 20 C.F.R. §§ 656.21(b)(1)(i)(A)-(F) and (ii) states the following (for the reduction in recruitment process permitting the employer to advertise and recruit without the supervision of DOL):

If the employer has attempted to recruit U.S. workers prior to filing the application for certification, the employer shall document the employer's reasonable good faith efforts to recruit U.S. workers without success through the Employment Service System and/or through other labor referral and recruitment sources normal to the occupation:

(i) This documentation shall include documentation of the employer's recruitment efforts for the job opportunity which shall:

- (A) List the sources the employer may have used for recruitment, including, but not limited to, advertising; public and/or private employment agencies; colleges or universities; vocational, trade or technical schools; labor unions; and/or development or promotion from within the employer's organization;
- (B) Identify each recruitment source by name;
- (C) Give the number of U.S. workers responding to the employer's recruitment;
- (D) Give the number of interviews conducted with U.S. workers;
- (E) Specify the lawful job-related reasons for not hiring each U.S. worker interviewed; and
- (F) Specify the wages and working conditions offered to the U.S. workers; and

(ii) If the employer advertised the job opportunity prior to filing the application for certification, the employer shall include also a copy of at least one such advertisement.

⁷ The regulation at 20 C.F.R. § 656.21(j)(1) states the following (for a traditional submission of a Form ETA 750 and directed recruitment by the local state workforce agency):

or unsupervised advertising or recruitment process.⁸ The AAO stated that it had found no document in the record addressing such efforts as required under 20 C.F.R. §§ 656.21(b) or (j). Because such a document could illustrate a petitioning organization's intent about the actual minimum requirements of the proffered position and that it tested the U.S. labor market with those actual minimum requirements, the AAO requested that the petitioner provide evidence that it provided, *at the time it submitted to DOL its Form ETA 750 application and attachments*, the requisite "signed, detailed written report" of its reasonable good faith efforts to recruit U.S. workers prior to filing the application for certification. *See* 20 C.F.R. §§ 656.21(b) or (j).⁹

Specifically, the AAO requested a complete copy of the Form ETA 750 as certified by DOL including any documentation that summarized the petitioner's recruitment efforts and its explicitly expressed intent concerning the actual minimum requirements of the proffered position.

In response, counsel submitted the following documentation:

A letter dated August 27, 2001 written by [REDACTED], the petitioner's immigration coordinator, entitled "Request for Reduction in Recruitment" to [REDACTED], State of Missouri Employment Security, Kansas City, Missouri. In this letter, [REDACTED] states that the

The employer shall provide to the local office a written report of the results of all the employer's post-application recruitment efforts during the 30-day recruitment period; except that for job opportunities advertised in professional and trade, or ethnic publications, the written report shall be provided no less than 30 calendar days from the date of the publication of the employer's advertisement. The report of recruitment results shall:

- (i) Identify each recruitment source by name;
- (ii) State the number of U.S. workers responding to the employer's recruitment;
- (iii) State the names, addresses, and provide resumes (if any) of the U.S. workers interviewed for the job opportunity and job title of the person who interviewed each worker; and
- (iv) Explain, with specificity, the lawful job-related reasons for not hiring each U.S. worker interviewed.

⁸ The regulatory scheme governing the alien labor certification process contains certain safeguards to assure that petitioning employers do not treat alien workers more favorably than U.S. workers. The current DOL regulations concerning labor certifications went into effect on March 28, 2005. The new regulations are referred to by the DOL by the acronym PERM, for Program Electronic Review Management. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The PERM regulation was effective as of March 28, 2005, and applies to labor certification applications for the permanent employment of aliens filed on or after that date. However, the instant labor certification application was filed prior to March 28, 2005 and is governed by the prior regulations. This citation and the citations that follow are to the DOL regulations as in effect prior to the PERM amendments.

⁹ Under DOL's regulations, it is the responsibility of CIS 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 pointed out that the petitioner's submission of the evidence requested therefore may help 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 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.

petitioner currently had fifty nine openings for Software Engineers in the greater Kansas City metropolitan area, that the position has not been described in a restrictive way, and that the petitioner required a bachelor of science or foreign equivalent in the fields of computer science, computer information systems, engineering or a related field plus three years of progressive experience in the proffered position;

A copy of the ETA 750, Parts A and B, that indicated the minimum education for the proffered position is four years of college, and a bachelor of science "for" foreign equivalent in "Computer Science, Computer Info Sys., Engineering or related field";

A copy of the Posted Notice dated August 6, 2001 for the position of software engineer, Kansas City, Missouri. The notice stated that the job requirements are a Bachelor of Science or foreign equivalent in computer science, computer information systems, engineering or related field plus three years of progressive experience in the job offered. This notice indicates that there were no responses to the posting;

Copies of two newspaper classified ads for Sprint-one printed in the *Dallas Morning News*, for a variety of computer positions listing no specific qualifications, and the other printed in the *Kansas City Star* on July 29, 2001 for Customer Care Applications Specialist, Software Engineers. This advertisement also does not list any specific academic requirements;

A print ad placed in *Telephony*, February 26, 2001, for positions in Dallas, Texas; Reston, Virginia; Overland Park, Kansas; and Atlanta, Georgia. This ad also does not list specific academic requirements for the eleven types of jobs described;

Copies of five job announcements posted on Monster.com taken off the Internet in February 2001 that identified job openings at the Overland Park, Kansas Sprint office. The positions were identified as Software Engineer III and Software Engineer. For the Software Engineer III positions, the knowledge/skills were either a college degree in computer related field or equivalent experience, a minimum of three to five years of experience in developing info processing solutions and a minimum of one to three years experience in business requirements analysis in support of a client-service development organization; or a BA/BA in computer science, computer info systems, or similar field of study or equivalent education/experience, with three to five years in developing information processing solutions and more than five years experience in mainframe COBOL systems with at least three years in an IBM mainframe environment, and more than three years experience with DB2/SQL. The Software Engineer positions required a college degree in a computer related field or equivalent experience, and a minimum three to five years of work experience in data processing, including testing responsibilities; and

A letter written by [REDACTED], Director of Architecture, sprintpcs.com, Kansas City, Missouri dated April 4, 2001. In her letter, [REDACTED] discussed the job description utilized by Sprint for its Software Engineer positions and also the job description used in the application of alien employment certification filed on behalf of three Sprint employees, and job description for the Department of Labor alien labor certification database for Computer Software Engineers, Systems Software and Computer software engineers, Applications. [REDACTED] noted that all

three positions filled by the employees for whom Sprint was filing alien certification applications were Computer Software Engineers, Applications.¹⁰

The petitioner also submitted a copy of a three-page document identifying the petitioner's contingency search firm listings; a list of university job fairs held from February to June 2001 in the states of Missouri and Arizona areas; a list companies at Career Day 2001 presented by Southern Polytechnic State University and a seven-page document listing 469 hard to fill positions, of which three pages refer to the Sprint offices in Overland Park, Kansas.

In his response, counsel stated that although the RFE mentions in several places that a combination of academic background and experience cannot meet the degree requirements, the petitioner has never indicated that its degree requirement on the ETA 750 can be satisfied through a combination of education and experience. Counsel stated that by looking only at the academic background of the beneficiary, the requirements listed on the Form ETA 750 of "bachelor's degree or foreign equivalent" are met. Counsel stated that the petitioner submitted evidence from educational credential evaluators that the beneficiary's combination of academic study alone was the equivalent of a U.S. four-year bachelor's degree and precisely meets the language of the ETA 750, which states "or foreign equivalent."

Counsel also noted that in the cover letter of the initial petition, the petitioner did not state that a foreign equivalent "degree" was required, which might lend some support to the CIS assertion that only a single degree equivalent was contemplated, but rather the petitioner stated "foreign equivalent." Counsel noted that the posted notice provided with the petitioner's initial I-140 petition also includes the same requirements, "BS or foreign equivalent." Counsel further noted that none of the print ads submitted initially to DOL indicates any specific degree requirements and that the ads placed on Monster.com indicated that even experience could be substituted for the degree, although the petitioner did not indicate this clearly on the ETA form. Counsel noted that in the second ad listed on Monster.com, the petitioner indicated that a BA/BA computer information systems, or a similar field of study or equivalent education/experience were the job requirements.

Counsel also noted that at the time the recruiting was being done for the Reduction in Recruitment (RIR) petition, the petitioner had openings for 92 software engineers throughout the nation, 59 of which were in the greater Kansas City metropolitan area, and that the petitioner was casting the largest possible net for software engineers at many different levels. Counsel concluded by saying that the petitioner never indicated that it would only accept a single degree equivalent to a U.S. bachelor's degree, and the petitioner's job requirements for the position were quite open and flexible, encompassing combinations of education and experience. Counsel stated that if the Department of Labor was interested in determining the petitioner's intent at the time the petition was filed, it is impossible to conclude that in filling out the ETA 750, the petitioner intended that the position could only be filled by someone with a four-year U.S. bachelor's degree or a single degree equivalent foreign degree. Counsel stated that it is more reasonable to conclude from the advertisement and other evidence, including the precise language of the Form ETA 750 and the petitioner's letter accompanying the petition that "foreign equivalent" means any academic equivalent.

Counsel also reiterated that the instant petition was filed as a skilled worker classification because this classification does not have any specific degree requirements, and only mandates that the proffered position require at least two years of work experience or the equivalent. Counsel also reiterated that the beneficiary,

¹⁰ The record is not clear why this letter is submitted to the record. The beneficiary is not one of the three employees listed on [REDACTED]'s letter, nor does the ETA 750 identify the proffered position as Software Engineer, Applications.

having a foreign degree equivalent to a U.S. bachelor's degree, considering only the academic credentials of the beneficiary and not his experience, clearly meets the requirements of the Form ETA 750.

In its deliberations in the instant matter, in determining whether the beneficiary's diploma from Kurukshetra University in combination with the NIIT award is a foreign equivalent degree, the AAO reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, <http://accraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

EDGE provides a great deal of information about the educational system in India. It discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

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

AACRAO has also published the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in an earlier 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual. In this publication on page 46, it states that the GNIIT title, within the NIIT system, is primarily a vocational/technical qualification, and that the entrance requirement is a class/Grade XII certificate.

The AAO accessed NIIT's website to determine what type of educational services it provides. NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student; however, in the instant case, it did clarify that the diploma it issued was pursuant to completion of post-graduate studies. There is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program.

According to the NIIT-Hyderabad website,¹¹ the prerequisite for their program is an All-India examination taken prior to admission. Nowhere on its website does it indicate that it is accredited by AICTE. Thus, while the beneficiary may have undertaken additional coursework in a relevant field, the petitioner has not established that the beneficiary's further studies would constitute a fourth year of upper level baccalaureate studies, and thus warrant describing the beneficiary's three-year baccalaureate degree and additional studies at NIIT as the equivalent of a four-year baccalaureate degree in computer science, computer information systems, engineering or a related field.

Thus the information presented by ██████████ in his evaluation and the information contained in EDGE were in conflict. 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).

Since the AAO had not addressed this issue in its RFE, on August 18, 2008, the AAO issued a Notice of Derogatory Information (NDI) in which it requested that the petitioner review the AACRAO materials and ██████████'s academic evaluation and submit any further comments to clarify the discrepancy in evidence. The AAO also noted that ██████████ did not provide a list of the resources on which his comments with regard to NIIT are based, although he and counsel indicated that his organization was a member of AACRAO.

On September 17, 2008, counsel responded to the AAO's NDI. Counsel submitted a document dated March 31, 2001 from ██████████. Although the March 31, 2001 date is the original date for the initial academic evaluation report written by ██████████, in the document submitted in response to the NDI, ██████████ expands on his analysis of the beneficiary's coursework undertaken through the NIIT program. ██████████ restates that in order to be accepted into the advanced diploma course in systems management program at NIIT, the beneficiary had to have a relevant Bachelor of Science degree (or senior academic status) from an accredited institution of higher education. ██████████ also reiterates that NIIT is a Microsoft-certified educational institution, also recognized by the Indian Computer Society.

██████████ then does a course-by-course evaluation of the beneficiary's academic semester credits at NIIT, assigns equivalent credit hours to the various courses, and concludes that the beneficiary completed the equivalent of thirty nine (39) academic credit hours. ██████████ states that all the courses are directly applicable toward the Bachelor of Science Degree in Computer Information Systems. ██████████ makes no reference to the AACRAO materials in the AAO's Notice of Derogatory Information and does not provide any further clarification of the discrepancies between his academic evaluation and the AACRAO materials.

Counsel also submitted additional documentation with regard to the beneficiary's studies at NIIT that were not submitted previously. These included a provisional December 15, 1997 certificate from NIIT giving the beneficiary the title of GNIIT in Systems Management and four transcripts of coursework undertaken by the beneficiary in the NIIT program. The documents are identified as Semester P, Q, R and S with duration of 26 weeks. The dates on these four documents are June 29, 1994, March 23, 1995, October 26, 1995 and February 19, 1996. The transcripts do not identify credit hours, but rather identify the beneficiary's performance as a percentile. Counsel also submits two additional transcripts for the beneficiary's professional practice dated November 14, 1996 and June 12, 1997. These two documents indicate that the beneficiary completed his

¹¹ Available at <http://www.iiit.net/academics/admissionsgadmissions/pgadmin.php#top> as of November 15, 2007. The AAO notes that the institute identified on this website is the International Institute of Information Technology, formerly known as the Indian Institute of Information Technology.

professional practice at the L.V. Prada Eye Institute and that he received 20 units with a grade of B and A respectively.

Upon review of the record, the AAO finds that the evidence submitted in response to the AAO's request for further evidence does not resolve all of the issues raised in the AAO's notices.

The regulations defined a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(l)(2). The regulation uses a *singular* description of foreign equivalent degree. Thus, the plain meaning of the regulatory language 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. As noted by counsel, however, the petitioner is not seeking to classify the beneficiary as a professional.

Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a "professional" because the regulation requires it and for a "skilled worker" because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of three years of employment experience. Thus, counsel's assertion that the regulations do not establish that the skilled worker classification *also requires a baccalaureate degree is correct. However, in the instant petition, the petitioner has to establish that the beneficiary qualifies for the proffered position based on the terms of the labor certification application, not on the basis of CIS regulations on educational levels for skilled workers.*

The proffered position requires a four year Bachelor of Science degree or foreign equivalent, and three years of experience. DOL assigned the occupational code of 030.062.010, software engineer, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.062-010+&g+Go> (accessed December 4, 2007) and its extensive description of the position and requirements for the positions most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation types closest to the proffered position that identify Job Zones in their descriptions.¹² 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 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed December 12, 2006). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

¹² The DOL database found the proffered position of software engineer analogous to the following DOT occupations: 15-1011.00, computer and information scientists, research; 15-1031.00, computer software engineers, applications, and 15-1032.00, computer software engineers, systems software. The latter two occupations both identify the relevant Job Zone as Four. The first occupational excerpt does not identify the relevant Job Zone.

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.

The proffered position may be analyzed as professional since the position requires a four-year bachelor's degree and three years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. In the alternative, the DOL classifications most analogous to the proffered position also state that some jobs in these classifications do not require a four-year degree, which supports the petitioner's assertion that the position is that of a skilled worker.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth Circuit stated:

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

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

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

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

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 United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. 2005), which finds that Citizenship and Immigration Services (CIS) “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.”

Snapnames.com, Inc. v. Michael Chertoff, 2006 WL 3491005 *8-9 (D. Ore. Nov. 30, 2006) arises in the same district as *Grace Korean* after that decision was issued. *Snapnames.com, Inc.* held that DOL certification does not preclude CIS from considering whether the alien meets the educational requirements specified in the labor certification. *Id.* at *5. The court acknowledged the decision in *Grace Korean* and then stated:

Here, SnapNames also filled out the labor certification with [REDACTED] in mind. However, CIS has an independent role in determining whether the alien meets the labor certification requirements, and where the plain language of those requirements does not support the petitioner’s asserted intent, the agency does not err in applying the requirements as written. In fact, the agency is obligated to “examine the job offer *exactly as it is completed* by the prospective employer.” *Rosedale & Linden Park Co.*, 595 F. Supp. at 833 (emphasis added).

Finally, while the court concluded that it was not reasonable to require a single degree as equivalent to a bachelor’s degree for skilled workers, the court found that it *was* reasonable for CIS to consider only *education* as equivalent to a degree. *Id.* at *8-9. In this matter, the petitioner requests that CIS consider experience in combination with education as equivalent to the bachelor’s degree requirement certified by DOL. *See also Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) (upholding an interpretation that a “bachelor’s or equivalent” requirement necessitated a single four-year degree).

In 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.

In this matter, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, has held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

In evaluating the beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS 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 v. Smith*, 696 F.2d at 1008; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of software engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	Complete
	High School	Complete
	College	4
	College Degree Required	B.S. For [sic] Foreign Equivalent
	Major Field of Study	Computer Science, Computer Info. Sys., Engineering or related field

The applicant must also have three years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A. Item 15 of Form ETA 750A does not state any other special requirements.

Based on the newspaper and other print ads, and the monster.com ads submitted to DOL with the petitioner's RIR request, the petitioner's academic requirements were either sometimes broad or unstated. Nevertheless the petitioner in both its Form ETA 750 and the cover letter to DOL stated that it required a bachelor's degree or foreign equivalent.¹³

It is clear that the petitioner, in attempting to fill numerous vacancies, chose to cast a wide net. While the documentation submitted to the record indicates that a range of educational and/or work experience might be sufficient for some software engineer positions, the evidence does not further illuminate evidence as to what specific work or education requirements were required for the proffered position. Nor has the petitioner provided any further evidentiary documentation relating to any candidates interviewed for the proffered position or a similar position, and the academic and experience credentials for these individuals.

Counsel refers to letters dated January 7, 2003 and July 23, 2003, respectively, from Efren Hernandez III of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the July 2003 letter, Mr. Hernandez states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

Private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

The petitioner clearly delineated four years as the required number of years of "college" education required for the bachelor's degree requirement on the Form ETA 750A. Furthermore, it is noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

¹³ The ETA 750 specifically requires a four-year college degree.

The record contains evaluations of the beneficiary's credentials. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[CIS] 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."

With regard to the credentials evaluation report submitted to the record, it is given evidentiary weight. In the report, the evaluator combined the beneficiary's three-year program along with credit hours received from NIIT in India to arrive at his conclusion that the beneficiary's university level studies were the equivalent of a U.S bachelor's degree in computer information systems. However, the evaluator did not provide any explanation of how he arrived at his conclusions with regard to credit hours earned by the beneficiary. Nor did the evaluator provide sufficient evidence to clarify the discrepancy between his evaluation and the PIER materials that suggest that the NIIT program would not be considered the equivalent of a third year of university-level studies. The AAO further notes that the beneficiary's three years of studies at Kurukshetra University included only one course in computer studies. Thus, even in combination with an additional year of university-level studies in computer systems and applications, the three-year degree would not necessarily equate a four year U.S. baccalaureate program in computer studies accredited by a U.S. college or university. Thus, the petitioner's evidence provided in response to the director's NDI does not provide sufficient evidence to rebut the AACRAO's statements with regard to the NIIT program.

In light of the above, the petitioner has not established that the beneficiary, as a skilled worker, has the four years of "college" education or the equivalent of a four-year baccalaureate degree in one of the requisite fields as stipulated by the Form ETA 750. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

Since that was not done, the director's decision to deny the petition must be affirmed. The appeal will be dismissed.

ORDER: The appeal is dismissed.