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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

[redacted]

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FILE: LIN 07 132 52260 Office: NEBRASKA SERVICE CENTER Date: JAN 21 2010

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 is an information technology services firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. An ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification.

On appeal, the petitioner, through counsel, submits additional evidence and contends that the beneficiary's educational credentials satisfied the terms of the labor certification and that the petition should be approved if not as a professional, then as a skilled worker.

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).

For the reasons discussed below, we concur with the director's denial of the petition, and find that the beneficiary would not qualify for a visa classification in either a professional or skilled worker category, and would also note that various 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.

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 petitioner must demonstrate that a beneficiary has the necessary education and experience specified on the labor certification as of the priority date, the day the ETA 750 was accepted for processing by any office within DOL's employment system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 750 was accepted for processing on May 14, 2004. Part B of the ETA 750, signed by the beneficiary on April 15, 2004, indicates that the petitioner has employed the beneficiary since January 1, 2002. The Immigrant Petition for Alien Worker (I-140) was filed on April 4, 2007.

The ETA 750 sets forth the minimum requirements for the position of programmer analyst. Item 13 on Part A of the ETA 750 describes the duties of the proffered position as researching, analyzing, designing, and developing programs, implementing and supporting hardware and software applications; identifying new software for upgrades and conversions; writing Stored Procedures and Triggers; developing and designing user interfaces, and web development by utilizing interwoven, XML and SHTML. Env: Java, C++, EJB, Unix, Perl, Oracle, Sybase, WebSphere and Windows NT. Item(s) 14 and 15 instruct the employer to specify the minimum education, training, and experience for the certified job. They contain the following:

Education (enter number of Years)	College		College Degree Required	Major Field of Study
	4		Bachelor's degree	Comp. Sc./Inf.Sys/ Elec.&/or Maths.
Training	(none specified)			
Experience	Job Offered Number Yrs. Mos.		Related Occupation Yrs. Mos.	Related Occupation
	3	OR	3	Software Engineer/ System Engineer

In determining whether a beneficiary is eligible for a preference immigrant visa, United States Citizenship and Immigration Services (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).

As stated on the labor certification, the proffered position requires a four-year bachelor's degree in computer science, information systems, electronics and/or math. The position also requires an applicant to have three years in the job offered as a programmer analyst or three years in a related occupation defined as either a software engineer or a system engineer. Because of the certified position's academic requirements set forth on the labor certification, the proffered position will be evaluated as a professional. DOL assigned the occupational code of 15-1021, computer programmer, 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/link/summary/15-1021.00*[1] and the description of the position and requirements for the job, the position falls within Job Zone Four requiring "considerable

[1] (Accessed 12/18/09).

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 7-8 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/15-1021.00.*[2] Additionally, DOL states the following concerning the training and overall experience required for these occupations:

> A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

More specific to this position, O*NET provides that 73 percent of respondents have a bachelor's degree or higher.[3] Further, DOL's Occupation Outlook Handbook, available online at http://www.bls.gov/oco/ocos303.htm, relevant to computer programming jobs provides:

> Education and Training. For software engineering positions, most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The usual college major for software engineers are computer science, software engineering, or mathematics. Systems software engineers often study computer science. Or computer information systems. Graduate degrees are preferred for some of the more complex jobs.
>
> Many programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

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

[2] (Accessed 12/18/09).
[3] *See http://online.onetcenter.org/link/details/15-1021.00.*

> concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The above 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.

As noted above, the ETA 750 in this matter is certified by DOL. 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.

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

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

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

In this matter, in item 11 of Part B of the ETA 750, the beneficiary indicates that he completed a Bachelor of Science degree in computer science in April 1997 at Osmania University, Hyderabad, India. Also indicated is the receipt of a diploma in Systems Management in March from the National Institute of Information Technology (NIIT) located in Hyderabad, India, representing studies completed in March 1998.

The record contains copies of the beneficiary's diploma and marks transcript indicating that he was awarded a Bachelor of Science in mathematics, physics and computer science on November 28, 1998, following a three-year course of study. The marks transcript reflects that his last year of passing was 1997. The record also contains a diploma, dated November 3, 1998, from NIIT at Hyderabad, India, indicating that the beneficiary received the "Title of GNIIT in Systems Management," following a two-year program. Copies of transcripts submitted with the diploma reflect that the beneficiary engaged in this course of study beginning in 1996.

The petitioner provided an academic evaluation, from who signs the evaluation as the vice-president of Foreign Credential Evaluations, Inc. The evaluation is dated November 9, 1999. [redacted] states that the beneficiary's three-year degree from Osmania University may be transferable to a regionally accredited university in the United States. She further states that the beneficiary's GNIIT diploma from NIIT represents a "two-year program of study in Computer Science." [redacted] concludes that the beneficiary has a U.S. equivalent to a Bachelor of Science degree with an additional concentration in computer science. It is noted that the evaluation fails to claim that the beneficiary's NIIT diploma itself is the equivalent of any specific term of academic studies towards a U.S. Bachelor's degree at an accredited U.S. college or university.

In the AAO's request for evidence, issued on April 20, 2009, the petitioner was advised that the AAO had 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://aacraoedge.accrao.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, and while it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE 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.

The AAO further advised the petitioner that the record did not contain any evidence showing the beneficiary holds a four-year U.S. bachelor's degree in computer science, information systems, electronics, and/or math as set forth on the ETA 750, nor does the record contain any evidence showing that the NIIT documents represent a *postgraduate diploma* issued by an accredited university or institution approved by AICTE and its entrance requirement was the three-year bachelor's degree. Therefore, the petitioner was requested to submit such evidence.

As the director denied the petition on April 11, 2007, based on his determination that the petitioner had failed to establish that the beneficiary's combination of certificates and diplomas satisfied the terms of the labor certification requiring a four-year bachelor's degree, the petitioner was requested to provide evidence of its recruitment efforts. This evidence was requested in order to demonstrate whether the petitioner communicated to otherwise available qualified U.S. workers that some other

kind of combination of certificates, diplomas or degrees were acceptable to qualify for the offered position.

On appeal, contending that the beneficiary's credentials fulfilled the terms of the labor certification, the petitioner, through counsel, asserts that USCIS has accepted the educational equivalency of a U.S. bachelor's degree based on a combination of educational programs. He asserts that USCIS' failure to accept the combination of a three-year bachelor's degree, followed by a two-year postgraduate diploma in computer science is erroneous. In support, counsel cites two 2003 letters from Efren Hernandez written in response to inquiries from counsel.

This office notes that authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_internation_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12. Thus EDGE represents a peer-reviewed evalaution that has been vetted by a council of experts. This office finds that the distinction drawn between a diploma representing post-secondary studies and a diploma representing post-graduate studies based on an admission requirement of an underlying three-year degree required accreditation to be credible.

It is further noted that *the P.I.E.R. World Eduation 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, 46-47* (1997) refers to three different NIIT diplomas. In the section referring to placement recommendations, a GNIIT diploma is characterized as "primarily a vocational/technical qualification; admission and placement should be based on other credentials." The entrance requirement is stated as a "Class/Grade XII certificate."

In this matter, it is noted that the petitioner failed to provide evidence that the prerequisite for admission to the NIIT program was a three-year degree as advised by AACRAO. Additionally, the record fails to indicate that NIIT was empowered to confer university accredited hours at the time of the beneficiary's admission or attendance. EDGE does not provide that NIIT is recognized as an official university level credential or that it would have any U.S. educational equivalent. Also, it is noted that based on a review of the AICTE listings shown at the (http://www.nba-aicte.ernet.in/nmna.htm) site,[4] the NIIT program attended by the beneficiary was not included as an accredited institution in the state of Maharashtra, India. Finally, although referenced by counsel as a post-graduate diploma, it is clear that the beneficiary attended both programs of study at Osmania University and NIIT simultaneously, which would preclude the Osmania degree as being the admission requirement for the NIIT program.

[4] (Accessed March 27, 2009).

Counsel asserts that the language of the ETA 750 was sufficient to permit a foreign educational equivalent to consist of a combination of degrees or diplomas. If this was the petitioner's intent on the ETA 750, it was not expressed as such until the appeal and by two documents, both dated July 7, 2009, submitted in reponse to the AAO's request for evidence. Signed by [redacted] the petitioner's chief operating officer, his declaration in support of the petition's approval states that the beneficiary's credentials were acceptable in lieu of a bachleor's degree and that in another case, the company had amended the language of another labor certification addressed to the Department of Labor to express such intent. The other letter adopts counsel's argument submitted in appeal and asserts that the petitioner's intent was to interpret the terms of the ETA 750 to include a suitable equivalent of a four-year bachelor's degree. The AAO notes that the term "equivalent" is not stated anywhere on the instant Form ETA 750 and the amended ETA 750 submitted on appeal relates to another beneficiary and would not demonstrate the petitioner's intent in the present case to accept an equivalent combination of degrees and/or diplomas.

Based on the foregoing, with respect to the credentials evaluation submitted to the record, the AAO does not find it to be probative of the beneficiary's possession of a four-year bachelor's degree in computer science, information systems, electronics, and/or math as required by the labor certification. It is noted that the evaluation failed to attribute any baccalaureate credit, standing alone, to the NIIT diploma. USCIS may, in its discretion, use advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). USCIS, however, is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

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 combination of certificates and diplomas, will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). 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 equivalent of a bachelor's degree. Even if considering at most, the beneficiary's attainment of three years of undergraduate university studies represented by the Indian bachelor of science degree, this would not qualify as full bachelor's degree in science, systems management or computer science as indicated on the ETA 750. If a defined alternate combination of diplomas or degrees was acceptable, then the petitioner could have

described this alternative in item 15 where other special requirements are permitted to be specified. The fact that a different ETA 750 filed in behalf of a different beneficiary was actually amended before it was certified for approval by DOL does not support the petitioner's assertion that it intended the same thing in this case, where the ETA 750 was not amended.

With reference to the 2003 correspondence written by [redacted] of the Business and Trade Services of USCIS Office of Adjudications, it is noted that such letters were not provided to the record. Moreover, the [redacted] letters are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000)(copy incorporated into the record of proceeding).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

Even if this job could also be considered in the skilled worker category as defined in section 203(b)(3)(A)(i) of the Act,[5] the evidence related to the petitioner's intent as to the acceptable alternative requirements pertinent to the employer's recruitment efforts remains relevant.

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[5]The regulation at 8 C.F.R. § 204.5(l)(3) further provides:

> (ii) *Other documentation*—
>
> > (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.

We are cognizant of the decision in *Grace Korean United Methodist Church v. Michael Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005, as cited by counsel, which found 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." *Id.* At 1178. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from the Circuit Court decisions cited above. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (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). In reaching this decision, the court also concluded that the employer in that case tailored the job requirements to the employee and that DOL would have considered the beneficiary's credentials in evaluating the job requirements listed on the labor certification.[6]

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[6] Specifically, as quoted above, the regulation at 20 C.F.R. § 656.21(b)(6) requires the employer to "clearly document . . . that all U.S. workers who applied for the position were rejected for lawful job related reasons." BALCA has held that an employer cannot simply reject a U.S. worker that meets the minimum requirements specified on the Form ETA-750. *See American Café,* 1990 INA 26 (BALCA 1991), *Fritz Garage*, 1988 INA 98 (BALCA 1988), and *Vanguard Jewelry Corp.* 1988 INA 273 (BALCA 1988). Thus, the court's suggestion in *Grace Korean* that the employer tailored the job requirements to the alien instead of the job offered actually implies that the recruitment was unlawful. If, in fact, DOL is looking at whether the job requirements are unduly restrictive and whether U.S. applicants met the job requirements on the Form ETA 750, instead of whether the alien meets them, it becomes immediately relevant whether DOL considers "B.A. or equivalent" to require a U.S. bachelor degree or a foreign degree that is equivalent to a U.S. bachelor's degree. We are satisfied that DOL's interpretation matches our own. In reaching this conclusion, we rely on the reasoning articulated in *Hong Video Technology*, 1998 INA 202 (BALCA 2001). That case involved a labor certification that required a "B.S. or equivalent." The Certifying Officer questioned this requirement as the correct minimum for the job as the alien did not possess a Bachelor of Science degree. In rebuttal, the employer's attorney asserted that the beneficiary had the equivalent of a Bachelor of Science degree as demonstrated through a combination of work experience and formal education. The Certifying Officer concluded that "a combination of education and experience to meet educational requirements is unacceptable as it is unfavorable to U.S. workers." BALCA concluded:

> We have held in *Francis Kellogg,* et als., 94-INA-465, 94 INA-544, 95-INA-68 (Feb. 2, 1998 (en banc) that where, as here, the alien does not meet the primary job

Additionally, we also note the subsequent decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Ore. Nov. 30, 2006). In that case, the ETA 750 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 as a "specific level of *educational background.*" *Snapnames.com, Inc.* at *6. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. However, in professional and advanced degree professional cases, where the beneficiary is statutorily required to hold a baccalaureate degree, the court determined that [USCIS] properly concluded that a single foreign degree or its equivalent is required. *Snapnames.com, Inc.* at *17, 19. In this case, the language on the Form ETA 750 does not include "equivalent" and simply requires a bachelor's degree.

Moreover, in *Maramjaya v. USCIS,* Civ. Act. No. 06-2158 (RCL) (D.C. Cir. March 26, 2008) the court upheld an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree in a professional category and additionally noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) required skilled workers to submit evidence that they meet the minimum job requirements of the individual labor certification. In that case, the Form ETA 750 described the educational requirement as Bachelor's or equivalent and that it required a four-year education. The court additionally upheld the USCIS denial in this context as well, where it would have necessitated the combination of the alien's other credentials with his three-year diploma to meet the requirements of the ETA 750. *Id.* at *13-14. In this case, the beneficiary must possess a bachelor's degree in computer science, information systems, electronics, and/or math. The petitioner failed to specify any defined equivalency on the ETA 750. The beneficiary's baccalaureate education does not equate to a four-year bachelor's degree or satisfy the requirements of the labor certification in either a professional or skilled worker category.

> requirements, but only potentially qualifies for the job because the employer has chose to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 656.21(b)(5), unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable. Therefore, the employer's alternative requirements are unlawfully tailored to the alien's qualifications, in violation of [20 C.F.R.] § 65[6].21(b)(5).
>
> In as much as Employer's stated minimum requirement was a "B.S. or equivalent" degree in Electronic Technology or Education Technology and the Alien did not meet that requirement, labor certification was properly denied.

It is noted that that as referenced in *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984), USCIS is obliged to "examine the certified job offer *exactly* as it is completed by the prospective employer." (Emphasis added). USCIS' interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added).

A review of the job advertisements and recruitment efforts undertaken by the petitioner is also relevant is order to discern the petitioner's intent as expressly communicated to outside applicants. A copy of the notice of job posting submitted in response to the AAO's request for evidence reflect the same educational requirements as set forth on the Form ETA 750 and requires "Bachelor's degree . . ." The posting does not reference "or equivalent." A copy of an internet advertisement and two newspaper advertisements that encompassed other open IT positions as well as programmer analysts did not describe any educational requirement and referred to IT skills that were not included in the ETA 750 description of job duties in this case. Therefore, based on a review of the recruitment submitted, it may not be concluded that the petitioner's intent to accept a defined equivalency of lesser diplomas, degrees or certificates in lieu of a four-year bachelor's degree for the proffered position was explicitly addressed to otherwise qualified U.S. workers.

The beneficiary has not completed four years of college culminating in a Bachelor's degree in computer science, information systems, electronics, and/or math and does not meet the terms of the labor certification whether considered for a preference visa classification under section 203(b)(3)(A)(ii) of the Act as a professional. Additionally as the beneficiary does not have the required education and the petitioner failed to state on the ETA 750 and failed to establish through its recruitment that it would accept any defined equivalency, the beneficiary would not qualify as a skilled worker under 203(b)(3)(i) of the Act.

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

ORDER: The appeal is dismissed.