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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: **OCT 06 2005**
WAC 04 004 52985

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a software development and consultancy firm. It seeks to employ the beneficiary permanently in the United States as a senior software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess the equivalent of an advanced degree as she did not hold a “United States baccalaureate degree or a foreign equivalent degree.” The director also found that the beneficiary’s major field of study is not related to the fields specified on the labor certification.

On appeal, counsel asserts that the petitioner made “an inadvertent mistake in indicating the petition type on Form I-140,” and that the beneficiary possesses a foreign degree equivalent to a United States baccalaureate degree. In support of the appeal, counsel submits a new evaluation of the beneficiary’s foreign degree and a copy of a letter from Citizenship and Immigration Services’ (CIS) Office of Adjudications.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). Regarding the “equivalent” of an advanced degree, the regulations state: “A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.” *Id.* The regulations thus allow post-baccalaureate experience to serve in lieu of an actual master’s degree; but for the underlying bachelor’s degree, there is no comparable provision to allow experience to serve in lieu of actual course credit at an actual degree-granting institution. The minimum educational requirement is a United States baccalaureate degree, or a foreign degree that is equivalent to such a degree.

The beneficiary possesses a foreign three-year bachelor’s degree; at issue in this proceeding is whether that degree may be considered a “foreign equivalent degree” to a United States baccalaureate degree so that the beneficiary would have the equivalent of an advanced degree.

The record contains an approved Department of Labor Form ETA-750, Application for Alien Labor Certification (labor certification). Regarding the minimum level of education and experience required for the proffered position, Part A of the labor certification reflects the following:

College Degree Required: “Master’s degree Or Bachelor’s Degree plus 5 years of progressive experience”

Major Field of Study: “Computer Science/Management Information Systems/Engineering or related major”

Under “number of years” of “College,” the petitioner entered “All.”

The beneficiary provides the following educational history:

University of Mysore	Bachelor of Business Management	7/1987 – 11/1991
Brilliant’s Computer Centre	Course in Business Computing	8/1992 – 3/1993

While the beneficiary’s time at Mysore University spanned a period of over four years, university documents in the record indicate that the beneficiary took six semesters (three years) of classes.

The original petition was accompanied by a credentials evaluation from [REDACTED] of the Foundation for International Services, Inc. The evaluator stated that the beneficiary’s Bachelor of Business Management degree “is equivalent to three years of university-level credit from an accredited college or university in the United States.” The evaluator did not indicate that this credit is comparable to credit in a major field of study relating to computer science, management information systems, or engineering.

After considering the beneficiary’s university studies, the evaluator evaluated the beneficiary’s employment experience. The evaluator did not discuss the beneficiary’s “Business Computing” course at Brilliant’s Computer Centre. The evaluator concluded:

[I]t is the judgment of the Foundation that [the beneficiary] has the equivalent of three years of university-level credit from an accredited college or university in the United States and as a result of her educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor’s degree in computer science from an accredited college or university in the United States.

While three years of employment experience may serve in lieu of one year of undergraduate study for purposes of nonimmigrant H-1B status, the formal education requirement of the H-1B petition is much more flexible than the standard for the classification sought in this proceeding. *Cf.* 8 C.F.R. § 214.2(h)(4)(iii)(D).

On December 13, 2004, the director issued a notice of intent to deny, stating:

The beneficiary does not have a United States advanced degree or foreign equivalent. Moreover, the beneficiary does not have a baccalaureate degree or its foreign equivalent. The beneficiary does have a three-year degree in Business Management, however, this is less than a baccalaureate degree. There is no provision under this section allowing experience in conjunction with education of less than a baccalaureate degree to equate to an advanced degree. Experience may only be considered in conjunction with a baccalaureate degree for this determination.

In response to the notice, counsel states that the petitioner had meant to petition for the beneficiary as a professional or skilled worker, under section 203(b)(3) of the Act:

First of all, we are sincerely sorry for that we have made an inadvertent mistake in indicating the petition type on the form I-140. The type of petition in this instant case should be:

Form 140, Part 2, e: A professional or a skilled worker

This is not an advanced degree case because the Petitioner had an alternative requirement on the Labor Certification application. The Petitioner did not intend to ONLY hire someone who has either an advanced degree or its equivalent. Instead, the Petitioner accepts two kinds of people to fill this job.

The Petitioner's Requirements

In this instant case, the Petitioner accepts:

1. Has Master's degree;
2. **Or** has Bachelor's degree plus lengthy progressive experience – five years.

Applicant who matches one of the above-mentioned requirements will be considered a qualified worker.

The petitioner did not mean that a Bachelor's degree plus lengthy progressive experience – five years [would be] equivalent to an advanced degree in this instant case because they are not equivalent according to DOL/SVP experience and educational guidelines. DOL/SVP's experience and educational guidelines indicate that: A specialized university degree will count for 2 years of experience and a master's degree will count for 4 years of experience.

(Emphasis in original.) While the director could have changed the classification sought, as a courtesy to the petitioner, the director was under no obligation to do so; a petitioner seeking a different classification may file a new petition under the newly sought classification. Because the new petition would rely on the same underlying labor certification, the petition would retain the same potential priority date (i.e., the filing date of the Form ETA 750).

Counsel's argument for the change of classification is not persuasive. Counsel asserts that the petitioner never intended for a bachelor's degree plus five years of progressive experience to be equivalent to a master's degree. If the two sets of requirements are not equivalent, it is not clear why the petitioner would deem each of them to be equally acceptable. Furthermore, the labor certification contains the phrase "Master's degree Or Bachelor's degree plus 5 years of progressive experience," a term taken almost verbatim from the regulatory definition of "advanced degree" at 8 C.F.R. § 204.5(k)(2). Thus, whatever the petitioner's intentions, the job requirements listed on the labor certification do, in fact, conform more or less exactly to the regulatory

definition of “advanced degree.” The director was fully justified in adjudicating the petition under that classification.

With regard to the beneficiary’s three-year degree, counsel states:

On the Labor Certification application, the Petitioner did not specially require that the Bachelor’s degree must be issued from a four-year US university or must be equivalent to it. The Petitioner **respects and accepts** Bachelor’s degree[s] from any accredited universities of other countries.

There is no evidence in the record to show that the petitioner, when it submitted Form ETA 750, informed the Department of Labor that the term “bachelor’s degree” was intended to mean anything other than a United States bachelor’s degree (or a foreign equivalent degree). The position described is in the United States, for a United States employer. Unless the petitioner specifies otherwise, the default presumption is that the petitioner is referring to a bachelor’s degree that is, or is equivalent to one that is, from a United States college or university.

By the petitioner’s standards, a student who had completed seven semesters of a four-year degree at a U.S. college or university would not be considered to hold a bachelor’s degree, whereas the beneficiary, with only six semesters of college-level study, is said to meet that requirement. It is not apparently the case that university study in India is more intensive and rigorous than in the United States, resulting in a bachelor’s degree in less time. Rather, the petitioner’s own evaluator specified that the beneficiary’s six semesters of university study are equivalent to three years (six semesters) of study at a U.S. college or university. Thus, the record indicates that the petitioner would have rejected the beneficiary, had she completed exactly the same amount of study in the United States instead of India. Indeed, the evidence of record suggests that possibility that the petitioner has done exactly that to some U.S. workers. Documentation in the record includes a list of U.S. workers who sought the position. Most of these workers were denied the position because they lacked bachelor’s degrees; several of the rejected applicants were “working on [a] Bachelor’s degree” at the time they applied. The petitioner offers no justification for this admission that three years of undergraduate education is sufficient for someone who studied in India, but not in the United States or any other country where a four-year degree is the standard.

With regard to the beneficiary’s major field of study, counsel states “one must take [a] sufficient number of computer courses in order to pursue a bachelor’s degree in Business Management.” Counsel offers no support for this claim. The record contains examination documents, listing every course that the beneficiary took at the University of Mysore:

Language (four classes)
Accounting (three classes)
PPM
English Grammar and Composition
Economic Theory
Business Communications & Office Management

Industrial Economy of India
Commercial Law
Business Mathematics
Business Legislations
Industrial Law
Banking and Trade
Business Statistics
Cost Accounting (two classes)
Commercial ----- [handwritten entry, only partly legible]
Marketing Management (four classes)
Managerial Economics
Project Report

None of the listed course titles has any clear relation to computer science, management information systems, or engineering. Thus, the record does not support, and appears to contradict, counsel's contention that the beneficiary's business management studies were computer-intensive.

Counsel observes that the beneficiary "has worked in the IT industry for ten years." The director did not dispute the beneficiary's employment experience. At the same time, the beneficiary's experience cannot compensate for other deficiencies in the record.

The director denied the petition because the beneficiary lacked the required equivalent degree, and because the beneficiary's major field of study is not among those required on the labor certification.

On appeal, counsel again requests a change of classification and repeats the argument that the petitioner does not consider a bachelor's degree plus five years of experience to be equivalent to an advanced degree. We have already addressed this argument. The fact remains that the regulations *do* indicate that five years of progressive post-baccalaureate experience is equivalent to an advanced degree, for purposes of the classification sought. The stated rationale for a change of classification is, therefore, not persuasive, even if it were possible to change classifications at the appellate stage (which it is not, barring gross adjudicative error by the director). Furthermore, even if the director were to readjudicate the petition under a different classification, it would still be the case that the beneficiary does not possess the minimum qualifications set forth on the labor certification.

Counsel's initial statement on appeal contains the following passage:

If the beneficiary's qualification is still a question based on those documents/information she has already provided to the Service, the beneficiary wishes to provide additional information of another period of full-time post graduate in-class training in Computer Applications. Due to the fact that the beneficiary lost the document of that period [of] education and it was very hard to get [a] duplicate copy from the Institute after leaving it for many years, the beneficiary did not provide information for that period [of] education in the first place. . . .

Now, since the Service decided that the beneficiary does not qualify [for] the I-140 petitioned position, it becomes extremely important for the beneficiary to receive and provide those documents to you. The Institute has also agreed to provide a duplicate copy to the beneficiary due to the important position of this document. Therefore, the Petitioner and the beneficiary needs [sic] additional 30 days to submit the above-mentioned documents.

Counsel did not identify “the Institute” in this initial statement. Subsequently, the petitioner has submitted an additional brief from counsel and a letter from the beneficiary, who states:

I would hereby like to submit additional records of my education, which is a Diploma in Computer Applications from Kanpur University, India, which I was not able to submit initially at the time of filing my Labor [certification] Application as I had lost the records at that time. I hence used my Bachelors Degree in Business Management in conjunction with work experience used to equate to a Bachelors Degree in the US.

I have been able to get copies of the same reissued from the University at this time. I would like to submit the same for the processing of my I140 and I485 [application to adjust status] cases.

Despite counsel’s assertion that “the Institute” had already agreed to provide the documentation; the passage of an additional thirty days; and the beneficiary’s assertion that she has “been able to get copies” of the documents, the record does not contain any documentation from Kanpur University. Counsel’s cover letter, submitted with the beneficiary’s letter, identifies five appellate exhibits. All of these are accounted for in the record. Therefore, we have no cause to conclude that any documents from Kanpur University were duly submitted but subsequently misplaced.

Counsel states “the Beneficiary was able to obtain the complete documents [from Kanpur University] and submit them to the evaluations agency, Park Evaluations and Translations.” [REDACTED], on behalf of Park Evaluations and Translations, offers the following assessment:

[The beneficiary] completed coursework in general studies and in her area of concentration, Business Management, which leads to a degree from the University [of Mysore]. . . .

Thereafter, [the beneficiary] enrolled in the Post-Graduate program in Kanpur University. [The beneficiary] completed coursework and examinations in 1995 and received a Diploma. Additionally, she completed studies in her area of concentration, Computer Application, including courses in Computer Organization, Computer Graphics, Data Base Management, Data Structure through ‘C’, Basic, Networking, and other related subjects. The diploma is evidence that [the beneficiary] completed the required coursework for candidates for the Diploma.

On the basis of the credibility of the University of Mysore, Kanpur University, the number of years of coursework, the nature of the coursework, the grades earned in the coursework, and

the hours of academic coursework, it is the judgment of Park Evaluations that [the beneficiary] has attained the equivalent of a Bachelor of Science degree in Computer Information Systems from an accredited institution of higher education in the United States.

This evaluation relies upon copies of the original documents provided by [the beneficiary] and represented by [the beneficiary] to be authentic and true copies of those documents.

We are not persuaded by this new claim of additional qualifying education. The Form ETA 750-B, Statement of Qualifications of Alien, which the beneficiary signed, lists the University of Mysore, Brilliant's Computer Centre, and even her secondary school (Mahajana Pre-University College), but not Kanpur University. As for the petitioner's claim that she originally did not mention Kanpur University because she had no documentation from that institution, the record contains no documentation from Mahajana Pre-University College, but this obviously did not prevent the beneficiary from mentioning it on a statement of qualifications that she signed under penalty of perjury.

The beneficiary's resume, submitted with the initial filing, lists the University of Mysore and Brilliant's Computer Centre under "Educational Qualifications," but there is no mention of Kanpur University. Before denying the petition, the director had put the petitioner on notice that the beneficiary's documented qualifications were insufficient; the petitioner's response to that notice contained no indication at all that the beneficiary possessed additional degrees or qualifications. We have, therefore, no primary evidence that the beneficiary holds a degree from Kanpur University. Given that the beneficiary claims to be in possession of this evidence, the petitioner's failure to submit the evidence is inexplicable. We cannot conclude that the petitioner has credibly established that the beneficiary holds a computer science-related degree from Kanpur University; a degree that neither the petitioner nor the beneficiary ever mentioned, despite multiple opportunities to do so, until the appellate stage.

Even if we presume the newly submitted evaluation to be based on credible, authentic documents, it does not establish the beneficiary's eligibility. The evaluation does not indicate that the beneficiary's purported degree from Kanpur University is, itself, equivalent to a baccalaureate; rather, the evaluation indicates that the beneficiary's two degrees from Mysore and Kanpur collectively constitute the equivalent of a baccalaureate.

Counsel submits a copy of a letter dated January 7, 2003, from [REDACTED] Director of the Business and Trade Services Branch of CIS's Office of Adjudications (Office of Adjudications letter). This letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees.

The Office of Adjudications letter was written in response to a letter from an attorney who inquired whether, for purposes of 8 C.F.R. § 204.5(k)(2), a "foreign equivalent degree" is limited to a "foreign degree" or whether "foreign education" may count, "when no formal degree is conferred or a 3 year foreign degree combined with a diploma that is determined to be equivalent to a United States degree." In response, Mr. Hernandez stated:

You ask whether the reference to “a foreign equivalent degree” in 8 C.F.R. 204.5(k)(2) means that the *foreign equivalent advanced degree* must be in the form of a single degree. Despite the use of the singular “degree,” 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 service finds that the foreign degree or degrees are the equivalent of the required US degree, then the requirement may be met.

(Emphasis added.) Considering the new credentials evaluation and the Office of Adjudications letter, counsel asserts that the beneficiary has a “foreign equivalent degree” to a United States baccalaureate degree.

Counsel’s assertions are not persuasive. First, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). According to India’s Department of Education, the nation’s educational degree structure provides for both three-year and four-year bachelor’s degree programs. After 12 years of primary and upper primary school, a bachelor’s degree in the arts, commerce, or the sciences may be earned after three years of higher education. A bachelor’s degree in a professional field of study, such as agriculture, dentistry, engineering, pharmacy, technology, and veterinary science, generally requires four years of education. *See generally* Government of India, Department of Education, *Higher Education in India, Academic Qualification Framework - Degree Structure*, (last updated October 1, 2001), available at <http://www.education.nic.in/htmlweb/higedu.htm> (printed copy incorporated into the record of proceeding). If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be deemed to be the “foreign equivalent degree” to a United States baccalaureate degree. However, in *Matter of Shah*, 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. Based on the same reasoning, the beneficiary’s three-year Bachelor of Business Management degree from the University of Mysore will not be considered the “foreign equivalent degree” to a United States baccalaureate degree for purposes of this preference visa petition.

Finally, the letter from the Office of Adjudications is not persuasive. The succinct response of [REDACTED] specifically refers to “the foreign equivalent advanced degree” as the point of concern, rather than the phrase “United States baccalaureate degree or a foreign equivalent degree.” Accordingly, the response appears to specifically address the phrase “foreign equivalent degree” as it relates to the definition of advanced degree at 8 C.F.R. § 204.5(k)(2): “‘Advanced degree’ means any United States academic or professional degree or a foreign equivalent degree above the baccalaureate level.” [REDACTED] response is reasonable when considered in the context of a “foreign equivalent degree” to a United States advanced degree; by definition, an advanced degree is a degree above the baccalaureate level, thereby requiring multiple degrees.

However, if applied to the phrase “United States baccalaureate degree or a foreign equivalent degree” contained at 8 C.F.R. § 204.5(k)(2), the letter’s reasoning would lead to results directly contrary to the regulations, statute, and the intent of Congress. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the

regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (November 29, 1991)(emphasis added). There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act with anything less than a full baccalaureate degree. Although the preamble to the publication of the final rule specifically dismissed the option of equating "experience alone" to the required bachelor's degree, the same reasoning applies to accepting an equivalence in the form of multiple lesser degrees, professional training, incomplete education without the award of a formal degree, or any other level of education deemed to be less than the "foreign equivalent degree" to a United States baccalaureate degree. Whether the equivalency of a bachelor's degree is based on work experience alone or on a combination of multiple lesser degrees, the analysis results in the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. In addition, a combination of degrees which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree does not meet the regulatory requirement of a foreign equivalent degree.

Furthermore, the Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS 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 CIS 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).

As previously noted, the ETA-750 labor certification specifically requires a Master's degree in "Computer Science/Management Information Systems/Engineering or related major," or a Bachelor's degree in one of those fields and five years of progressive experience. Based on the submitted evidence, the petitioner has not established that the beneficiary possesses a United States Master's degree or a foreign equivalent degree.

And as previously explained, the petitioner has not established that the beneficiary possesses the minimum alternate qualifications, a Bachelor of Science degree with five years of experience, as the beneficiary's three-year Bachelor of Business Management degree is not a "United States baccalaureate degree or a foreign equivalent degree," and there is no credible evidence that the studies leading to that degree involved significant training in computer science, business information systems, or engineering. We are not persuaded that the beneficiary attended Kanpur University at all, let alone that the beneficiary possesses a qualifying degree from that institution. 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)(2) of the Act as she does not have the minimum level of education required for the equivalent of an advanced degree.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.