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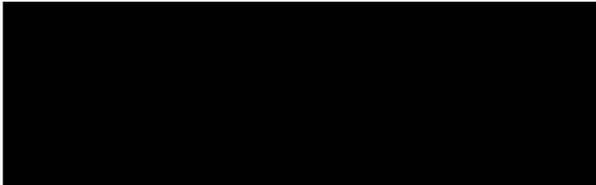
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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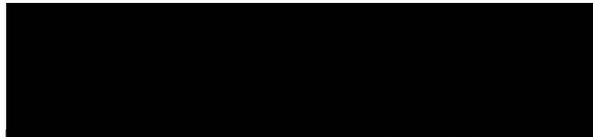
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FILE: LIN 06 159 52385 Office: NEBRASKA SERVICE CENTER Date: **MAY 12 2008**

IN RE: Petitioner:
Beneficiary:



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:



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.

Robert P. Wiemann, 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 provides software consulting and information technology staffing services. It seeks to employ the beneficiary permanently in the United States as a technical services manager 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, an ETA Form 9089 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 alien employment certification. Specifically, the director determined that the beneficiary did not possess a Bachelor of Science in Computer Science or Engineering or a foreign equivalent degree.

On appeal, counsel submitted a brief. On November 15, 2007, this office advised the petitioner and counsel of additional information that has been added to the record and requested additional evidence of the petitioner's ability to pay the proffered wage. In response to that notice, counsel submits a brief and additional evidence of the petitioner's ability to pay the proffered wage. For the reasons discussed below, while the petitioner has overcome our concerns regarding the lack of evidence of the petitioner's ability to pay the proffered wage, the petitioner has not demonstrated that the beneficiary meets the job requirements set forth on the alien employment certification certified by DOL.

Ability to Pay

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on February 28, 2006. The proffered wage as stated on the ETA Form 9089 is \$81,682 annually. On the ETA Form 9089, Part J, signed by the beneficiary, the beneficiary did not claim to have worked for the petitioner.

Initially, the petitioner submitted its 2005 Internal Revenue Service (IRS) Form 1065, U.S. Return of Partnership Income, showing \$14,428 in ordinary business income. Schedule L, from which we can determine net current assets, was blank. The director did not raise the issue of the petitioner's ability

to pay the proffered wage. In our November 15, 2007 notice, we requested the petitioner's 2006 tax return.

In response, the petitioner submitted the requested document reflecting ordinary business income of \$136,267. In determining an employer's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner has now demonstrated that its ordinary business income was sufficient to cover the proffered wage in 2006. Thus, the petitioner has overcome our concern on that issue.

Qualifications for the Job

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). The regulation further states: "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.*

Initially, the petitioner submitted the beneficiary's three-year Bachelor of Arts degree from Sri Venkateswara University.¹ The transcript for this degree reflects no computer related coursework. Rather, the beneficiary focused on economics, accountancy and statistics. The petitioner also submitted the beneficiary's MBA from the University of Madras. The transcript for this degree reflects only two computer related courses. Finally, the petitioner submitted the beneficiary's Post Graduate Diploma in Computer Applications from Universal Technologies Pvt. Ltd.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

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

¹ A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Regl. Commr. 1977).

is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

On appeal, counsel relied on a letter from Mr. Efrén Hernández III, Director of the Business and Trade Services Branch of CIS' Office of Adjudications. The 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. As stated in our November 15, 2007 notice, 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).

Rather, 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 CIS 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.")

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the Congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability").

The petitioner relies on the beneficiary's postgraduate diploma in addition to his three-year baccalaureate as equivalent to a U.S. baccalaureate. As discussed above, the regulations clearly distinguish between "college or university" and "school or other institution of learning." We interpret the terms "college" and "university" in the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) and the commentary at 56 Fed. Reg. at 30306 as including only those institutions that award at least a baccalaureate degree.² Postgraduate diplomas that are not degrees issued by a college or university cannot be considered as evidence that the beneficiary has a "foreign equivalent degree" to a United States baccalaureate, even in combination with a three-year baccalaureate. Four years of education is not presumptive evidence of education equivalent to a U.S. baccalaureate for purposes of this immigrant classification, especially when less than four years of that education was acquired at a college or university.

On appeal, counsel relies on *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. Nov. 3, 2005). As stated in our November 15, 2007 notice, the petition at issue in *Grace Korean* involved a lesser classification than the one sought in the matter before us and a far more general educational requirement than the very specific educational requirements listed on the ETA Form 9089 in this matter. Moreover, 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. Specifically, we are not required to follow the decision of a United States district court in matters arising out of the same district, but are bound by the published decisions of the United States Circuit Courts of Appeals for matters arising out of the same circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d at 74 (administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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.

² This interpretation is consistent with the most relevant definition for the term "college" in Webster's Ninth New Collegiate Dictionary 259 (1990), "an independent institution of higher learning offering a course of general studies leading to a bachelor's degree," and the term "university" in the same publication at 1291, an institution of higher learning authorized "to grant academic degrees; *specif.* one made up of an undergraduate division which confers bachelor's degrees and a graduate division which comprises a graduate school and professional schools each of which may confer master's degrees and doctorates."

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)[(5)] 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)[(5)], 8 U.S.C. § 1182(a)[(5)]. 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, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, “Job Opportunity Information,” describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, CIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. See *Madany*, 696 F.2d at 1015. CIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a alien employment certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. See *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS’s interpretation of the job’s requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. See *id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that

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

In this matter, Part H, line 4, of the alien employment certification reflects that a bachelor's degree in Computer Science or Engineering is the minimum level of education required. Lines 6 and 10 reflect that five years of experience in the job offered or a related occupation are required. Line 7 reflects that no alternative field of study is acceptable. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The petitioner submitted an evaluation from Foreign Credential Evaluations, Inc. concluding that the beneficiary's three-year degree from Sri Venkateswara University constitutes a "three-year program of study transferable toward the degree, Bachelor of Arts in Business Administration, from a regionally accredited university in the United States." The evaluation, prepared by [REDACTED] and [REDACTED], then asserts that the final year of the beneficiary's MBA "is equivalent to the one-year graduate degree, Master of Business Administration, from a regionally accredited university in the United States." Regarding the beneficiary's postgraduate diploma, the evaluation concludes that it "represents one year of study in Computer Science." Ultimately, the evaluation concludes that the beneficiary's academic history is "equivalent to the degrees, Bachelor of Arts in Business Administration with an additional concentration in Computer Science, and Master of Business Administration, from a regionally accredited university in the United States."

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS 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)).

[REDACTED] indicates that he has served on committees and projects for the American Association of Collegiate Registrars and Admissions Officer (AACRAO). [REDACTED] indicates that she is a member of AACRAO. Despite these affiliations, as stated in our previous notice, materials prepared by AACRAO do not support the evaluation.

On November 15, 2007, we advised the petitioner that we had reviewed the Electronic Database for Global Education (EDGE) created by AACRAO. AACRAO, according to its website, www.accrao.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/> EDGE is “a web-based resource for the evaluation of foreign educational credentials.” [REDACTED], Director of International Education Services, “AACRAO EDGE Login,” <http://aacraoedge.aacrao.org/index.php> (last accessed March 20, 2008) (copy incorporated into the record of proceeding).

Authors for EDGE are not merely expressing their personal opinions. Rather, 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 international publications.pdf](http://www.aacrao.org/publications/guide%20to%20creating%20international%20publications.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.

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.

According to the National Board of Accreditation’s List of Accredited Programmes in Technical Institutions, available for download at www.nba-aicte.ernet.in/nmna.htm, Universal Technologies Pvt. Ltd. is not accredited in the state of Andhra Pradesh where it is located (Secunderabad).

In light of this information, we requested evidence regarding the entrance requirements for Universal Technologies Pvt. Ltd. and whether it is accredited by AICTE or another authority. We also requested an evaluation that compares the beneficiary’s total credits in computer science with the total credits normally required for a baccalaureate in computer science from a regionally accredited institution in the United States.

In response, counsel asserts that Universal Technologies is a private institution which conducts different certification programs in software technologies. Counsel further asserts that the beneficiary’s diploma was a one-year program requiring the completion of two courses per semester

and involving a 180 day academic year. According to counsel, as Universal Technologies is not accredited by the government, an evaluator cannot compare the coursework there with the credits required for a baccalaureate in computer science in the United States. Counsel concludes, however, that Universal Technologies does require a three-year baccalaureate for admission and, thus, the evaluator was able to conclude that the beneficiary had an “additional concentration” in computer science.

The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record lacks evidence that Universal Technologies is a “college or university” as contemplated at 8 C.F.R. § 204.5(l)(3)(ii)(C) and 56 Fed. Reg. 30703, 30306 (July 5, 1991). Even if we accepted that Universal Technologies is a “college or university,” without a credible comparison of the beneficiary’s coursework with the credits required for a Bachelor of Science in Computer Science in the United States, we cannot conclude that the beneficiary meets the job requirements on the alien employment certification.

Being a member of the professions does not entitle the beneficiary to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah*, 17 I&N Dec. 244, 246-47 (Regl. Commr. 1977). Thus, the beneficiary’s possible eligibility for a different professional position than the one certified by DOL does not mandate the approval of this petition. As the beneficiary does not have at least a baccalaureate degree in Computer Science or Engineering, he does not qualify for the position certified by DOL.

The beneficiary does not meet the job requirements on the alien employment certification. Therefore, the petition may not be approved.

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.