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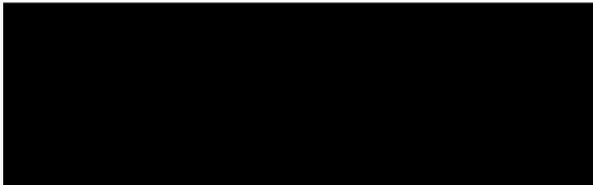
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **MAY 20 2008**
SRC 07 104 53014

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:

SELF-REPRESENTED

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, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for issuance of a notice of derogatory evidence and a new decision consistent with the following discussion.

The petitioner is a software and development consulting firm. It seeks to employ the beneficiary permanently in the United States as a senior system analyst 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 have the necessary experience for the classification sought.

On appeal, the petitioner overcomes the director's concerns as stated in the denial. We are aware, however, of adverse information that reveals that the beneficiary does not have the necessary education for the classification sought. That information, discussed below, has now been added to the record. Based on this information, we will remand the matter to the director for the purpose of issuing a notice of derogatory information and a new decision that takes into account the concerns addressed below.

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.*

The beneficiary possesses a foreign three-year bachelor's degree from Osmania University and a "Certificate" from HANSA Computers and Graphics Institute of Software Training confirming the beneficiary's completion of "a course titled Post Graduate Diploma in Computer Applications." In response to the director's request for additional evidence, the petitioner submitted an evaluation from Multinational Education and Information Services, Inc. concluding that the beneficiary's three-year degree is equivalent to three years of post-secondary education in the United States. While acknowledging the beneficiary's postgraduate diploma certificate, the evaluation then concludes that the beneficiary's education *in combination with his nine years of training and experience* are equivalent to a U.S. baccalaureate.

Thus, the issues are whether the beneficiary's education is a foreign degree equivalent to a U.S. baccalaureate degree and, if so, whether the beneficiary has the five years of progressive post-baccalaureate experience required for equivalency to an advanced degree under 8 C.F.R. § 204.5(k)(2). We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

The director did not contest that the beneficiary has a foreign equivalent degree. Rather, the director concluded that the beneficiary's post-baccalaureate experience was not sufficiently progressive. On appeal, counsel submits the memorandum from Michael D. Cronin, Acting Associate Commissioner, Office of Programs, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants* AD00-08 (March 20, 2000). The memorandum includes a section defining "progressive experience" as "employment experience that reveals progress, moves forward and advances toward increasingly complex or responsible duties." The memorandum further states that it is "reasonable to infer that highly technical positions are progressive in nature due to the constant state of change in their respective industries" although the memorandum notes that five years of post-baccalaureate experience in a highly technical position does not "automatically translate" into an advanced degree in every case.

On appeal, the petitioner explains in detail how the beneficiary's job responsibilities have progressed despite the similar job titles he has held. This explanation is consistent with the letters from the beneficiary's employers and the reasonable inference that the beneficiary's highly technical positions have been progressive in nature. Thus, we withdraw the director's sole basis of denial.

That said, we also withdraw the director's apparent finding that the beneficiary's education amounts to a foreign equivalent degree to a U.S. baccalaureate. Therefore, we remand the matter to the director for the purpose of advising the petitioner of the following information.

Eligibility for the Classification Sought

Authority to consider beneficiary's eligibility for the classification sought

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 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).

A baccalaureate degree generally requires four years of education

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). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

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 as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone, a combination of multiple lesser degrees or a degree plus experience, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”¹ In order to have the necessary 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. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor’s degree may 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. 56 Fed. Reg. at 60900.

¹ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

A baccalaureate must be from a college or university

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.” Members of the professions holding an advanced degree must be held to a similar requirement. *See* 56 Fed. Reg. 30703, 30306 (July 5, 1991).

The record contains no evidence that HANSA is a college or university. Education at an institution that is not a college or university cannot be counted towards the necessary education for a professional as defined at 8 C.F.R. § 204.5(l)(3)(ii)(C). *See also* 56 Fed. Reg. at 30306 (relating to members of the professions holding an advanced degree).

Adverse information revealing that the beneficiary’s education is not equivalent to a U.S. baccalaureate

Moreover, in determining whether a postgraduate diploma following a three-year Indian bachelor’s degree is a foreign equivalent degree, we have 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, 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.” AACRAO, <http://www.aacrao.org/about/> (last accessed March 25, 2008) (copy incorporated into the record of proceeding). 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.” *Id.* According to the login page, EDGE is “a web-based resource for the evaluation of foreign educational credentials” that is continually updated and revised by staff and members of AACRAO. Dale E. Gough, Director of International Education Services, “AACRAO EDGE Login,” <http://aacraoedge.aacrao.org/index.php> (last accessed March 25, 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. 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.

In the section related to the Indian educational system, EDGE provides that an Indian Bachelor of Science is generally awarded after two (for older degrees) or three years of university study and are “comparable to two to three years of university study in the United States.” (Printout enclosed.) Certain postgraduate diplomas following a three-year degree “represents attainment of a level of education comparable to a bachelor’s degree in the United States.” EDGE makes clear, however, that only those postgraduate diplomas issued by an accredited university or an institution approved by the All-India Council for Technical Education (AICTE) are comparable to a U.S. baccalaureate. EDGE warns that some postgraduate diploma programs only require a higher secondary diploma for admission and that these diplomas are not comparable to a U.S. baccalaureate.

EDGE includes a link to <http://www.nba-aicte.ernet.in/nmna.htm>, which allows a user to download a list of AICTE approved institutions by province. The certificate in the record reveals that HANSA is located in Hyderabad in Andhra Pradesh. A review of the list of accredited programs in Andhra Pradesh (accessed March 27, 2008 and added to the record), reveals that HANSA is not included. We were also unable to locate any information on HANSA through a “Google” Internet search.

Upon consideration of all of the above information, we must conclude that the beneficiary’s education in this matter is not equivalent to a bachelor’s degree from a regionally accredited institution in the United States. Our conclusion is supported by the peer-reviewed opinion in EDGE and also by two of AACRAO’s Project for International Education Research (PIER) publication publications: *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. Copies of relevant pages of these publications have been added to the record. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual.

Our analysis of the statute, binding precedent (*Matter of Shah*, 17 I&N Dec. at 244) leads us to conclude that the beneficiary does not have the necessary education for the classification sought. This conclusion is supported by the peer-reviewed opinions in EDGE and the PIER materials.

Thus, the matter will be remanded to the director for the purpose of issuing a notice of derogatory information that allows the petitioner an opportunity to respond to the information set forth above.

Qualifications for the Job Offered

The director is also justified in considering whether the beneficiary meets the job requirements set forth on the alien employment certification. *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008-09 (9th Cir. 1983). The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating that the legacy Immigration and Naturalization Service (now CIS) 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 labor 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 labor 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 labor 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 labor 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 labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree is the minimum level of education required. Line 6 reflects that one year of experience is required. Line 8 reflects that a combination of education or experience is acceptable in the alternative. Lines 8-A and 8-B reflect that the alternative combination of education and experience consists of a bachelor's degree and five years of experience. Line 9 reflects that a foreign educational equivalent is acceptable.

As stated above, the record does not reflect that the beneficiary has a foreign educational equivalent to a U.S. baccalaureate.

Therefore, this matter will be remanded. The director must issue a notice of derogatory information that includes copies of the above adverse information that is now in the record and a new denial notice, containing specific findings that will afford the petitioner the opportunity to present a meaningful appeal. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a notice of derogatory information and ultimately a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.