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U.S. Citizenship
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FILE: [Redacted]
LIN 07 004 50505

Office: NEBRASKA SERVICE CENTER

Date SEP 24 2008

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.

Mai Plussa

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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner is a storage software business. It seeks to employ the beneficiary permanently in the United States as a director of research and development 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 required for classification pursuant to section 203(b)(2) of the Act. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate.

On appeal, both initially and in response to an inquiry from this office, counsel has submitted additional evidence. We find that this evidence overcomes the director's concerns. The record, however, does not resolve whether the beneficiary has the necessary experience and whether the petitioner still exists or is the predecessor to a new company.

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 Israel. Thus, the issue is whether that degree is a foreign degree equivalent to a U.S. baccalaureate degree. For the reasons discussed below, we find that the petitioner has adequately demonstrated that admission to an Israeli baccalaureate degree program requires a year of study beyond high school. Thus, the degree in and of itself is a foreign equivalent degree to a U.S. four-year baccalaureate.

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).

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 Citizenship and Immigration Services (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.")

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).

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 (Nov. 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 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 or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."¹ 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. 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.

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

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.

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 beneficiary received a Bachelor of Science in Math and Computer Science from Ben-Gurion University in 1997. The petitioner initially submitted a transcript from Ben-Gurion University and an evaluation from World Education Services (WES) stating that the admission requirement for Ben-Gurion University was high school graduation and that the program was three years in length. Without further explanation, the WES evaluation then concludes that the beneficiary’s degree is equivalent to a U.S. baccalaureate. The petitioner resubmitted the same information in response to the director’s request for additional evidence.

On appeal, the petitioner submits an evaluation from [REDACTED] of the Trustforte Corporation. In his evaluation, [REDACTED] states that Israeli students “typically complete 13 years of study prior to entering university.” [REDACTED] continues: “Most Israeli universities recognize the thirteenth year, completed in high school programs, as satisfying the academic requirements of the first year of bachelor’s programs. As a result, Israeli universities generally require only three years of bachelor’s studies.”

On May 19, 2008, this office issued a request for additional evidence. In our request, we noted that CIS may evaluate the content of advisory opinions and even give less weight to opinions that are not corroborated. See *Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988); *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)). We further noted that Mr. Silberzweig did not include copies of relevant pages of the sources he lists as references for his evaluation and that the record lacked the beneficiary’s high school transcript. As such, we requested these documents.

In response, the petitioner submitted pages from Ann Fletcher, *Higher Education in Israel: A PIER World Education Series Special Report*, the American Association of Collegiate Registrars and Admissions Officers (AACRAO) (1993). This publication includes placement recommendations, which state that an Israeli three-year baccalaureate degree “may be considered for graduate admission.” More significantly, the publication also includes the following Israeli university admission requirements for overseas students:

- A level of education equivalent to the Israeli matriculation certificate; or
- One year of studies at an accredited college or university; or
- One year of preparatory studies at a university in Israel.

The materials continue: “In general, Israeli university admissions policies do not recognize a U.S. high school diploma as equivalent to the Israeli Teudat Bagrut [the one year of study culminating in an exam that Israeli students complete after high school and before entering university].”

Finally, the petitioner submitted the beneficiary’s high school transcript, showing 12 years of pre-university education, and a certificate verifying his completion of the Teudat Bagrut.

We are satisfied that the beneficiary’s post-secondary education does not simply represent two lesser “degrees,” the Teudat Bagrut and the Israeli baccalaureate. Rather, the petitioner has now established that Israeli universities issue baccalaureate degrees that by themselves are equivalent to U.S. baccalaureate degrees because they require for admission what U.S. universities might consider advanced placement or transfer credit in lieu of the first year of undergraduate study. Moreover, the petitioner has established this equivalency through an evaluation now supported by *relevant* published material representing a *peer-reviewed* report.

The beneficiary’s baccalaureate also serves to meet the educational requirements specified on the alien employment certification, which requires a Bachelor of Science in Computer Science or foreign educational equivalent.

The alien employment certification also indicates that five years of experience are required. Thus, the job requires a member of the professions holding an advanced degree, as defined at 8 C.F.R. § 204.5(k)(2). The record, however, does not establish that the beneficiary has the necessary experience. Specifically, the director should consider whether all of the evidence submitted to document the beneficiary’s experience complies with the requirements set forth at 8 C.F.R. § 204.5(g)(1).

The beneficiary indicated on the ETA Form 9089, Part K, that he worked as a Director and Section Manager for Comverse from August 1, 2001 through May 31, 2004; as a Vice President of Research and Development for BrowseUp from September 1, 1999 through July 31, 2001; and as a Team Leader for Radware from August 1, 1997 through June 30, 1999.

Initially, the petitioner established the beneficiary’s employment with Radware, but only “from 1997 to 1999.” As the letter does not verify the exact dates or even the months in which the beneficiary began and ceased employment, the petitioner has only established the beneficiary’s employment during 1998. The petitioner also submitted letters from [REDACTED], CEO of Linglines, Ltd., verifying the beneficiary’s employment with BrowseUp and from [REDACTED], a manager at Cisco Systems, purporting to verify the beneficiary’s employment with Comverse.

On March 2, 2007, the director advised that the letters from [REDACTED] were not letters from former employers, as required under 8 C.F.R. § 204.5(g)(2), and, thus, could not

establish the beneficiary's experience. In response, the petitioner submitted a new letter from Mr. [REDACTED] founder of BrowseUp, explaining that BrowseUp ceased operations in 2002 and confirming the beneficiary's 23 months of employment there from September 1, 1999 through July 31, 2001. The petitioner also submitted evidence supporting the beneficiary's employment there downloaded from the Internet. Thus, the petitioner has now established that the beneficiary has at least three years of experience at Radware and BrowseUp. The petitioner also submitted a letter purportedly from [REDACTED] at Comverse, but that letter is unsigned. Thus, the director must consider whether this new letter has any evidentiary value.

Finally, as stated above, on May 19, 2008, this office issued a request for additional evidence. The copy addressed to the petitioner was returned as undeliverable. A review of the petitioner's website reveals that the petitioner was purchased by NetApp in January 2008. Thus, the director must determine whether the petitioner still exists and, if there is now a successor-in-interest, whether a new petition is required.

Therefore, this matter will be remanded for further action in accordance with the above. 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 new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.