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U.S. Citizenship
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Services

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FILE: [REDACTED]
LIN 03 257 52877

Office: NEBRASKA SERVICE CENTER

Date: DEC 21 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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, Director
Administrative Appeals Office

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

The petitioner is a computer consulting and software development company. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the petitioner failed to provide sufficient evidence that the beneficiary is qualified for the proffered position. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that the petitioner defines equivalent to be equivalent education to a four-year degree, not an equivalent four-year degree. Counsel submits further documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is June 24, 2002.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of programmer/analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education
 - Grade School
 - High School
 - College

College Degree Required
Major Field of Study

Bachelor's or equivalent
Computer Sc. or MIS or Engg. Or Bus. Admin or Electronics
or CIS

The petitioner also specified that any applicants have one year of experience in the job offered or one year of experience in the related occupation of "systems analysis &/or programming &/or S/W Engg &/or Computer Consulting. t/software implementation consultant." Under Item 15, the petitioner also set forth additional special requirements as follows: "Work expr with IBM m/f, CICS and COBOL. Employer is [software] consulting/development firm. Relocation to various client sites throughout the U.S. for periods of 6 [months] to [two] years required."

The job offered lists the following duties on Item 13: "Carry out the program analysis, program design, coding and testing of software application systems utilizing IBM mainframe, CICS and COBOL."

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he had attended Nagarjuna University, Guntur, India from April 1998¹ to September 1991, primarily studying mathematics, physics, and chemistry and receiving a bachelor of science. He also indicated that he attended Sri Krishnadevaraya University, Anantapur, India from June 1992 to June 1993, studying computer science applications and earning a post Bachelor of Science diploma. In relation to his studies, the beneficiary also stated that his studies had been evaluated to be equivalent in level, scope and purpose, to a bachelor's degree in computer information system from a regionally accredited institution in the United States. The beneficiary provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that he worked in multiple positions for multiple past employers as follows in reverse chronology:

1. The petitioner, programmer/analyst, June 2000 – Date of filing ETA 750;
2. Peers Technologies Software Training and Development, Hyderabad, India, programmer/analyst, March 1999 to January 2000;
3. IT World Professional Services, Singapore, software consultant, February 1998 to December 1998.

With the initial petition, the petitioner provided a copy of a credential evaluation from Josef Silny & Associates, Inc., that states the Nagarjuna University studies were equivalent to the completion of three years of undergraduate study at a regionally accredited U.S. college or university. The evaluator then stated that at Sri Krishnadebaraya University the beneficiary received a post bachelor of science diploma in computer science applications in June 1993. The evaluator then concluded that the beneficiary's studies at Nagarjuna University and at Sri Krishnadebaraya University were the equivalent of a U.S. bachelor of science degree in computer information systems. The petitioner also provided a copy of the beneficiary's diploma from Sri Krishnadebaraya University and Nagarjuna University, Faculty of Physical

¹ This date is a typographical error. The correct date as documented by the beneficiary's grades records is 1989.

Sciences, as well as Statement of Marks documents for his studies at Nagarjuna University and for the one-year course at Sri Krishnadevaraya University. In addition, the petitioner submitted a letter from IT World Professional Services in Singapore that stated the beneficiary worked for this business from February 16, 1998 to December 9, 1998 as a software consultant with the title of IBM Mainframe programmer. The petitioner also submitted a letter from Peers Technology in Hyderabad that stated the beneficiary worked for this company from March 22, 1999 to January 5, 2000, and held the position of programmer/analyst.

Because the evidence was insufficient, the director requested additional evidence on March 23, 2004, specifically stating that the Form ETA 750 indicated that the petitioner required the completion of four years of college education, a bachelor's or equivalent degree in computer science, management information systems, engineering, business administration, electronics or computer information systems, along with one year of experience in the job offered, or in a related occupation. The director stated that Form ETA 750 did not state that any other level of education would satisfy the petitioner's requirements, nor did it provide for a degree based on work experience, training, or a combination of lesser degrees. The director then stated that unless otherwise specifically stated, the equivalent of a bachelor's degree is interpreted to mean a foreign degree equivalent to a U.S. bachelor's degree.

The director finally stated that the beneficiary had the requisite work experience but the petitioner did not establish that the beneficiary complied with educational requirements outlined in the Form ETA 750. The director noted the beneficiary's two degrees and stated that the beneficiary did not appear to have a U.S. bachelor's degree or a foreign equivalent degree in one of the specific fields listed in the ETA 750. Although the director noted that the petitioner and the evaluator of the beneficiary's educational credentials contended that the combination of the beneficiary's two lesser degrees was satisfactory to meet the educational requirements stipulated by the Form ETA 750, the director reiterated that Form ETA 750 did not state that any other level of education would satisfy the petitioner's requirements, nor did it provide for a degree equivalent based on work experience, training, or a combination of lesser degrees as the minimum level of education. The director requested that the petitioner submit evidence to establish that the beneficiary completed four years of college level education and obtained the requisite bachelor's or equivalent degree in one of the specified fields of study before June 24, 2002, the priority date.

In response to the director's request for evidence, counsel stated that the beneficiary's academic credentials met the stated requirements on the ETA 750, and that the director added interpretations that were not valid. Counsel further stated that in order to meet the stated requirement of the labor certification, he or she must possess a bachelor's degree OR equivalent in any of the fields stated in the Form ETA 750. (Emphasis in original.) Counsel stated that the petitioner never stated the words "foreign equivalent" in the Form ETA 750. Counsel further stated that a word-by-word review of the petitioner's labor certification would show that a bachelor's degree or *equivalent* was the minimum education required for worker to perform the job duties described on the labor certification. (Emphasis in original.)

Counsel stated that if an American worker with the same credentials as the beneficiary applied for the posting due to the petitioner's advertising, he would be qualified for the job. Counsel asserted that the petitioner's academic requirements for the position was that a person must possess a bachelor's degree or equivalent in one of the stated fields and must possess one year of work experience in one of the related occupations utilizing IBM mainframe, CICS and COBOL. Counsel also contended that [REDACTED] a CIS adjudications official, has written advisory opinions stating that a combination of lesser degrees may be used to establish the equivalent of a foreign bachelor's

degree. Counsel stated that the beneficiary came from a country that issues three-year bachelor's degrees, and therefore, the beneficiary possessed a bachelor's degree. In addition, counsel stated the beneficiary also possessed a one-year postgraduate diploma in computer science applications. Counsel stated that the beneficiary held the equivalent of a four-year baccalaureate degree based on education only.

The director denied the petition on October 5, 2004, noting that the educational evaluation document submitted by the petitioner concluded that the beneficiary's three-year degree from Nagarjuna University and his one-year degree from Sri Krishnadevaraya University was the equivalent of a U.S. bachelor of science degree in computer information systems from an accredited U.S. educational institution. The director then stated that while CIS may use as advisory opinions statements submitted as expert testimony; where an opinion was not in accord with other information, CIS was not required to accept it and may give less weight to that evidence.

In the instant petition, the director stated the petitioner had not specifically stated that it was willing to accept such a combined degree equivalency. The director then stated that the petitioner now appeared to contend that the combination of degrees equated to a U.S. baccalaureate degree or to a foreign equivalent degree. The director stated that the Form ETA 750 did not state that any other level of education would satisfy the petitioner's requirements, nor did it provide for a degree equivalent as the necessary minimum level of education, regardless of whether the equivalency was based on work experience, training, or a combination of lesser degrees. Finally the director cited *Matter of Shah*, 17 I & N Dec. 244 (Reg. Com. 1977) and stated that a three-year bachelor degree would not be considered to be the foreign equivalent degree to a U.S. baccalaureate degree, and that a U.S. baccalaureate degree is generally found to require four years of education. The director then determined that the petitioner had not established that the beneficiary met the minimum requirement of Form ETA 750 at the time the 2004 priority date was established. The director further determined that the beneficiary could not be found to be qualified for the benefit sought, and the petition could not be approved.

On appeal, counsel asserts that the director's decision defines equivalent as equivalent four-year degree, while the petitioner defines equivalent as education equivalent to a four-year degree. Counsel resubmits the beneficiary's marks records and diplomas from the two universities that he attended, along with the educational equivalency report from Josef Silny & Associates. In addition, counsel submits copies of a 1997 AAO dismissal of an appeal that involved a position that required a bachelor of science in mechanical engineering technology or the equivalent, and five years of experience in the job. According to the decision, the beneficiary completed junior high school and received a certificate of completion of an apprentice program. In this decision, the director determined the petitioner listed the term equivalent on the ETA 750, but failed to define what was meant by the term equivalent and that the petitioner had not established that the beneficiary met the minimum requirement as set by the petitioner on the Form ETA 750.

Counsel also submits two letters sent to Mr. [REDACTED] Director, Business and Trade Services, Immigration & Naturalization Service, Office of Adjudications, Washington, D.C. One letter, dated December 27, 2002, and written by Aron A. Finkelstein asks for an interpretation of 8 C.F.R. 204.5(k)(1) and (2), a regulation that examines member of the profession holding advanced degrees. The letter writer also stated that legacy INS officers were interpreting a section of the Immigration and Naturalization Act (the Act), Section 203(b)(2), to mean that only a foreign degree can be considered equivalent to a U.S. baccalaureate degree for qualifying as a skilled worker or professional.

The second letter to Mr. [REDACTED] is written by Naomi Schoor, of BryanCave, L.L.P., New York, New York, and is dated June 30, 2003. The writer refers to Mr. [REDACTED] response to Mr. [REDACTED] with regard to questions on advanced degrees and whether the foreign equivalent to an advanced degree need not only require a single foreign degree to satisfy the equivalency requirements. Ms. Schoor then asks a question with regard to whether a three-year foreign bachelor's degree, coupled with a post-graduation diploma recognized by PONSI, (Program on Noncollegiate Sponsored Instruction) could be deemed to be the equivalent of a four-year U.S. bachelor's degree. If so, Mr. Schoor then asked whether the equivalent degree, combined with five years of progressive experience in the specialty, could be deemed an advanced degree, satisfying the requirements of INA § 203(b)(2)(A) and 8 C.F.R. § 204.5(k)(2). The record does not contain Mr. [REDACTED] response to either letter.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," states the following:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for "skilled workers," states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification" as clearly directed by the plain meaning of the regulatory provision. And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, the petitioner must show that the beneficiary meets the requirements of the Form ETA 750A, which includes four years of college, and a baccalaureate degree.

In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes four years of college, a bachelor's degree or equivalent in computer sciences, management information systems, engineering, business administration, electronics or computer information systems, with one year in the actual job or one year in the related occupation of systems

analysis, programming, software engineering or computer consulting. In addition, the petitioner required work experience with IBM mainframe, CICS and COBOL.

The petitioner has established that the beneficiary has the requisite one year of work experience in either the actual job or a related occupation. The only issue to be discussed in the remainder of this decision is whether or not the beneficiary has a bachelor's degree or its equivalent in computer sciences, management information systems, engineering, business administration, electronics or computer information systems.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). In the instant petition, the evaluator of the beneficiary's two university degrees combined them to conclude that the beneficiary had the equivalent of a U.S. baccalaureate degree in computer information systems. The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." See 8 C.F.R. § 204.5(I)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes. Therefore the educational evaluation document submitted by the petitioner is not accorded any evidentiary weight in these proceedings.

It is further noted that the beneficiary's studies during his three-year course of studies at Nagarjuna University are listed as English, Telugu, mathematics, physics, and chemistry. None of these fields of study are listed as the requisite major field of study. In fact, without further explanation, it appears that the beneficiary's only classes in computer studies or other related fields, one of the fields listed on the Form ETA 750, were during his one-year program at Sri Krishnadevaraya University. Without further clarification, the record indicates that the beneficiary has only one year of university level studies in one of the fields listed on the Form ETA 750. The one-year program in computer studies that the beneficiary attended would clearly not be the equivalent of a U.S. baccalaureate degree in any of the subjects listed on the ETA 750. This is another reason why the educational evaluation document is not viewed as probative evidence in the instant petition.

Although counsel in response to the director's request for further evidence, indicates that the petitioner never used the term "foreign equivalent" on the Form ETA 750, the labor certification does not indicate that the equivalent of a U.S. bachelor's degree can be a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. A "bachelor's or equivalent" listed under a question eliciting "College Degree Required," can lead to no alternate conclusion. Furthermore, as indicated by the petitioner on the Form ETA 750, the required college degree entailed four years of studies. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year bachelor of science degree from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional. Although *Shah* does use the term "usually" in the commentary on the length of a U.S. baccalaureate degree, the AAO views such a statement to mean that a college degree can be obtained in less than four years by taking extra classes, additional summer courses, so that the studies are completed in less than four years.

As stated in 8 C.F.R. § 204.5(I)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this

case, includes a bachelor's degree, or an equivalent degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent degree to a U.S. bachelor's degree. If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the beneficiary's formal education consists of less than a four-year curriculum.

On appeal, counsel submits a copy of a previous AAO decision, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Furthermore, counsel makes no comments with regard to the relevancy of the decision's findings to the instant petition.

Counsel also submits two letters written to Mr. [REDACTED] a CIS adjudications official. However, counsel provides no further commentary on these letters, nor any responses to these letters by Mr. [REDACTED]. The subject matter of the letter sent by Mr. [REDACTED] to Mr. [REDACTED] is clearly stated as the "interpretation of 204.5(k)(1) and (2) to allow foreign academic credentials as equivalent to a U.S. baccalaureate degree." The regulations at 8 C.F.R. § 204.5(k)(1) and (2) refer to professionals holding advanced degrees. Although both letters sent to Mr. Hernandez reference the issue of individuals with three year bachelor's degrees, they also both are primarily questioning regulations with regard to advanced degrees. As such, without further explanation, both letters are irrelevant to the present proceedings.

It is also noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. [REDACTED] correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree.

The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, either under a skilled worker or a professional under the third preference immigrant visa category, since it has not shown that the beneficiary holds a four-year baccalaureate degree or foreign equivalent.

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.