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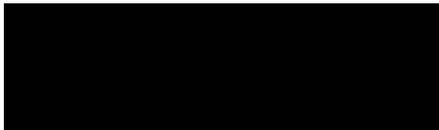
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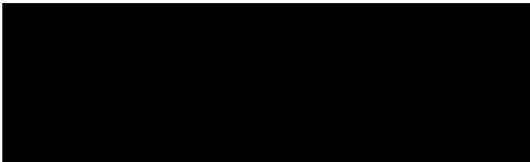
FILE: WAC 05 040 53500 Office: CALIFORNIA SERVICE CENTER Date: **OCT 11 2006**

IN RE: Petitioner:  
Beneficiary:



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, Chief  
Administrative Appeals Office

CC: OPENTV INC.  
ATTN: CORI EKMAN, DIRECTOR  
275 SACRAMENTO ST.  
SAN FRANCISCO CA 94111

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

The petitioner's business is software systems developer for the cable communications industry. It is a limited liability company.<sup>1</sup> It seeks to employ the beneficiary permanently in the United States as a senior software engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the work experience for which the Alien Employment Certification accompanying the petition specified and denied the position accordingly.

On appeal, the counsel submits a brief.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting 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.

The regulation at 8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* 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

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<sup>1</sup> On appeal counsel provided a news release dated September 7, 2005, that stated that the petitioner's assets has been acquired by OpenTV Corp. a NASDAQ listed corporation. Since the news release indicated the assets, rather than the stock, of the petitioner were acquired, and counsel has not explained the significance of this transaction relative to continuation of the petition and the continuing validity of the labor certification, it is assumed that the petitioner is still in existence and will employ the beneficiary should the petition be approved. In the event the petitioner will not do this, in order for a "successor in interest" determination to be made (assuming OpenTV Corp. qualifies), the following documentation should be submitted along with a new I-140 petition: a copy of the notice of approval for the initial Form I-140; a copy of the labor certification submitted with the initial Form I-140; documentation to establish the ability to pay the proffered wage - evidence of this ability must be either in the form of copies of annual reports, federal tax returns, or audited financial statements; a fully executed uncertified labor certification (Form ETA 750, Parts A & B) completed by the petitioner; documentation to show how the change of ownership occurred: buyout, merger, etc.; and documentation to show the petitioner will assume all rights, duties, obligations, and assets of the original employer. An successor in interest must establish that it has assumed all of the rights, duties, obligations, and assets of the original employer; continue to operate the same type of business as the original employer; and, establish that the new business has the ability to pay as of the priority date. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). None of these necessary requirements have been met to date.

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.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting 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)(2) states, in pertinent part:

“*Professional* means 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.”

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

*Professionals.* 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.

Here, the Form ETA 750 was accepted on October 4, 2001.<sup>2</sup> The proffered wage as stated on the Form ETA 750 is \$115,00.00 per year.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on October 4 2001. The petitioner selected in Part 2, check box “e” of the I-140 petition. That selection states, “A professional (at a minimum, possessing a bachelor’s degree or a foreign degree equivalent to a U.S. bachelor’s degree) or a skilled worker (requiring at least two years of specialized training or experience).”

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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).

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<sup>2</sup> It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., states “The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.”

In the instant case, Form ETA 750 A,<sup>3</sup> item 14 describes the requirements of the proffered position and occupation of senior software engineer as follows:

14.	Education (enter number of years) .....	
	Grade School	<u>8</u>
	High School	<u>4</u>
	College	<u>5</u>
	College Degree Required	<u>Master's or (equivalent) *<sup>4</sup></u>
	Major Field of Study	** <sup>5</sup>
	Training	Blank
	Experience .....	
	Job Offered .....	
	Number –Years / Mos.	<u>***3/0</u>
	Related Occupation .....	Software Developer
	Number –Years / Mos.	<u>***3/0<sup>6</sup></u>

The employer who is the petitioner has prepared the above ETA 750 A as an essential part of the labor certification process used to support a preference visa petition that is employment based. The employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria.

Along with Form ETA 750, Part A, set forth above; the employer also is required to submit Form ETA 750, Part B that is a “Statement of Qualifications of Alien.” Part B identifies the alien, specifies his current and prospective address in the United States, his education including trade and vocation training, and lists his work experience.

The Form ETA 750 Part B prepared by the beneficiary states the following education history:

<sup>3</sup> There are two “Corrections Approved” stamps bearing the dates January 15, 2004, by the U.S. Department of Labor across Sections 14 and 15 as noted above but no corresponding corrections on the face of the labor certification, nor was there in the record of proceeding any of the usual correspondence from USDOL relating to corrections requested on the Alien Employment Application as they are routinely processed by that department. Should this matter be pursued, this lack of necessary correspondence and the determination of the terms of the labor certification after the corrections must be remedied by probative evidence.

<sup>4</sup> Master’s degree or equivalent was noted by corresponding asterisk notation as “Bachelor’s degree in Computer Science, Information Systems, or Engineering (any field) or equivalent (such as a degree in another technical field with extensive computer science study) plus 5 years of progressive experience in the design and development of software, will substitute for the required Master’s degree and 3 years of experience.” [Underlining added]

<sup>5</sup> Major Field of Study was also specified as “Computer Science, Information Systems, or Engineering (any field) or equivalent (such as a degree in another technical field with extensive computer science study) plus 5 years of progressive experience in the design and development of software, will substitute for the required Master’s degree and 3 years of experience.” [Underlining added]

<sup>6</sup> Experience was also specified as “Design and development of software” [underlining added].

Block 11

Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

The Birla Institute of Technology & Science  
Pilani India

Field of Study	<u>Information Systems</u>
From ...[mo./yr]	<u>March 1995</u>
To ...[mo./yr.]	<u>September 1998</u>
Degrees or Certificates Received	<u>Bachelor of Science<sup>7</sup></u>

State Board of Technical Education and Training,  
Madras, India

Field of Study	<u>Computer Science &amp; Engineering</u>
From ...[mo./yr]	<u>April 1988</u>
To ...[mo./yr.]	<u>April 1990</u>
Degrees or Certificates Received	<u>Diploma</u>

Also, as indicated, the Form ETA 750 Part B prepared by the beneficiary stated the following employment history in software development that is summarized as follows:

- CAM Systems LLC, Saratoga California; Senior Software Engineer; February 2001 to present (i.e. August 17, 2001).
- Meena Systems Inc., West Windsor, New Jersey; Project Lead (in software development); February 2000 to February 2001.
- ProdEX Technologies, Chennai, India; Computer Software Development; May 1999 to January 2000.
- New Era Technology, Riyadh, Saudi Arabia; Project Lead (in software development); August 1998 to February 1999.

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<sup>7</sup> Beyond the decision of the director, there is no education equivalency certificate found in the record of proceeding. It has not been proven that the beneficiary has earned the foreign equivalent to a U.S. bachelor's degree that has been determined to be a four-year degree. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India (as is the case here) as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. We note that beneficiary has a three-year diploma, in addition to a two-year diploma from the State Board of Technical Education and Training, Madras, India. The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) uses a singular description of foreign equivalent degree. 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. 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. If this matter is pursued, a degree equivalency certificate evaluation should be submitted, and evidence submitted on the foregoing issues.

- SoftTeam Solutions, Chennai, India; Senior Software Engineer; September 1997 to August 1998.
- Global Magnum Tapes Pvt. Ltd., Madras, India; Senior Software Development Engineer; June 1994 to August 1997.
- GoldLine Information Systems Pvt. Ltd., Madras, India; Senior Software Engineer; July 1992 to May 1994.
- Argus Technologies, Madras, India; Senior Software Development Engineer; June 1990 to June 1992.

The director determined that the petitioner had not established that the beneficiary has the work experience after receipt of the bachelor's degree and by the priority date of the labor certification, required by the preference classification for which the Alien Employment Certification accompanying the petition specified, and denied the petition on December 11, 2004. *See Matter of Katigbak*, 14 I&N Dec. 45 (Reg. Comm. 1966).

On appeal, the counsel asserts that the director erred by finding that the beneficiary had to attain the required five years of work experience after attainment of a bachelor degree. Counsel cites the regulation at 8 CFR § 204.5(l)(3)(ii) stating that there is no such requirement found in the regulation.

Counsel on January 31, 2005, has submitted supplemental material that are question and answers from the American Immigration Lawyer Association concerning employment experience relative to EB2 immigration petitions. This matter concerns an EB3 petition.

The subject Form ETA 750 Part A requires, *inter alia*, a Master degree from a college and the completion of five years of 3 years of progressive experience in the design and development of software. Petitioner's clear intent is expressed in the certified Alien Employment Application. *See* 8 C.F.R. § 204.5 (l)(3)(ii)(B). The equivalent requirement elucidated in the ETA 750 A, Section 14 is a Bachelor's degree plus five years of progressive experience in the design and development of software. A plain reading of the equivalent requirement is that the five years of progressive experience must come after the attainment of the Bachelor degree since the Master Degree is a higher degree than the bachelor degree (i.e. the bachelor degree must be received first, then the master degree second). Therefore any equivalency to the initial requirement, a Master degree would have to be earned beyond or in addition to the Bachelor degree. Experience earned prior to the attainment of the bachelor degree would not qualify. Since the beneficiary's schooling ended September 1998, and the priority date of the labor certification is October 4, 2001, the beneficiary does not have the requisite five years of progressive work experience required by the terms of the labor certification.

Looking at this issue from a labor recruitment perspective, the petitioner advertised for qualified candidates in the American workforce whom, in the equivalent alternative requirement stated, had a bachelor's degree in the subjects stated in the Alien Employment Application plus 5 years of progressive experience in the design and development of software. Following counsel's logic, an applicant without formal education, but experience in the design and development of software, would qualify if he/she *later* attained the education necessary to design and develop software that he/she would have needed to attain the work experience in the first place. It is doubtful that the petitioner intended this interpretation of its labor certification requirements.

The petitioner failed to submit evidence to demonstrate that the beneficiary has the work experience for which the Alien Employment Certification accompanying the petition specified. The instant petition, submitted pursuant to 8 C.F.R. § 204.5(l), may not be approved.

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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.