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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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File:



LIN-04-025-51474

Office: NEBRASKA SERVICE CENTER

Date: JAN 26 2007

In re:

Petitioner:

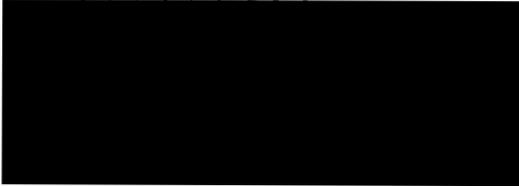
Beneficiary:



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

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

The petitioner is an information systems consulting business, and seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). As set forth in the director's March 24, 2005 denial, the petition was denied for failure to document that the beneficiary met the position requirements of the certified labor certification.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional. The regulation at 8 C.F.R. § 204.5(1)(2) provides that a third preference category professional is 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 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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on October 24, 2002.² The proffered wage as stated on Form ETA 750 is \$85,000 per year, 40 hours per week. The labor certification was approved on September 4, 2003, and the petitioner filed the I-140 on the beneficiary's behalf on November 3, 2003. On the I-140 petition, the petitioner listed the following information related to the petitioning entity: established January 31, 1992; gross annual income: not listed; net annual income: not listed; and employees: not listed.

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² [REDACTED] filed the ETA 750 as the petitioner. In May 2003, the petitioner changed its corporate name to [REDACTED].



On March 24, 2005, the director denied the petition on the basis that the petitioner failed to demonstrate that the beneficiary had a bachelor’s degree as required by the certified ETA 750, and, therefore, did not meet the requirements of the labor certification. The petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary’s qualifications, Citizenship and Immigration Services (“CIS”) must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition’s priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

On the Form ETA 750A, the “job offer” position description for a software engineer provides:

Research, design and develop computer software systems, in conjunction with hardware product development. Consult with hardware engineers and other engineering staff to evaluate interface between hardware and software, and operational and performance requirements of overall system. Provide technical guidance on client projects. Will use C, C++, Visual Basic, Visual Interdev, HTML, ASP, JSP, VxWorks, Shell Scripts, J2EE, JDBC, JavaBeans, Servlets, EJB, XML, Jbuilder, WebLogic, Vitria, ClearCase, Oracle, Sybase, SQL Server, Informix, Cognos, Purify, TOAD, SQL Navigator, Crystal Reports, UNIX, Windows NT/2000, Lotus Notes, WinRunner, LoadRunner, TestDirector, ClearQuest, MS Office 2000, etc.

Further, the job offered listed that the position required:

- Education: College degree: Bachelor
- Major Field Study: **Computer Science, Engineering, Math, or MIS.**
- Experience: 5 years in the job offered, Software Engineer, or 5 years as a Programmer Analyst, or Systems Analyst.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed prior education as: (1) Osmania University, Andhra Pradesh, India; Field of Study: Computer Science; from July 1990 to April 1994, for which he received a Bachelor of Science degree; and (2) BICT, Secunderabad, India; Field of Study: Computer Science; from May 1994 to January 1996, for which he received a “PG Higher Diploma Comp Applications.”

The regulations define professional under the third preference category 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(1)(2). The regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for professional classification that:

(C) *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 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

The petitioner submitted an evaluation of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

- Evaluation: [REDACTED] New York, New York.
- The evaluation provided that the beneficiary completed a Bachelor of Science degree at Osmania University in India where his coursework was specialized in a combination of Mathematics, Physics, and Computer Science.
- The beneficiary then completed postgraduate work at the Bureau of Integrated and Computer Techniques (BICT) in India related to computer science, computer applications, computer programming, and related subjects. We note that the evaluation does not provide that enrollment at BICT is contingent upon completion of a bachelor's degree. The petitioner further did not provide that enrollment is contingent upon completion of a bachelor's degree.
- The evaluation determined that the two programs together would be the equivalent of a Bachelor of Science degree in Computer Science.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree.³

³ We are aware of the recent decision in *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that Citizenship and Immigration Services (CIS) "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." We note that the AAO is not bound to follow the published decision of a United States district court in matters, which arise in another 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. The court in *Grace Korean* makes no attempt to distinguish its holding from other Circuit Court decisions discussed below. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at *8 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

The evaluation that the petitioner provided, which combines the beneficiary's educational studies to equal one degree is insufficient to document that the beneficiary has a U.S. Bachelor's degree or its foreign equivalent. The labor certification was not drafted to consider a Bachelor's degree or equivalent in "education, training, or experience." The petitioner did not set forth any alternative requirements or definition of equivalent to include

At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the 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.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) 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, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

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)(14), 8 U.S.C. § 1182(a)(14). 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). See also *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C.Cir.1977), "there is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

While we do not lightly reject the reasoning of a District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(1)(2).

a combination of educational programs, and/or education and experience. Therefore, the evaluation is deficient, and the petitioner cannot demonstrate that the beneficiary met the position requirements based on this evaluation.

On appeal, counsel cites to the January 7, 2003 letter from Mr. [REDACTED] Director of the Business and Trade Services Branch of CIS' Office of Adjudications (Office of Adjudications letter) in support of the petitioner's argument that programs of study can be combined to equal a degree.

The [REDACTED] letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the educational requirement by combining multiple degrees. First, we note that the January 7 [REDACTED] letter deals with a different classification – second preference, advanced degree professionals, and is not applicable to the petition before us where the petitioner has applied under the third preference professional category. Further, the AAO is not bound to follow the letter from the Office of Adjudications. Office of Adjudications letters do not constitute official CIS policy. Instead, such letters may serve to aid in interpreting the law. Such letters 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). The letter does not supercede the statute, regulations and precedent decisions, such as *Matter of Shah*, 17 I&N Dec. at 245.

Further, counsel has attached a second letter from Mr. [REDACTED] dated July 23, 2003, which similarly responds to questions regarding satisfying the foreign equivalent requirement for a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2). The Hernandez letter does state that completion of a three year degree followed by a PONSI recognized post-graduate diploma program may be deemed equivalent to a four-year U.S. Bachelor's degree. The [REDACTED] letter provides that it would, however, we note that the Hernandez letter further provides: "while it is my personal opinion that this should be the case, this is not currently contemplated in the regulations and I cannot that a case should currently be treated this way." Here, again, the letter contemplates a different classification, second preference, advanced degree professionals, and not the third preference category raised in the instant petition. Additionally, we note again that the AAO is not bound to follow the Office of Adjudications' letter, and that such letters do not constitute official CIS policy.

The labor certification was written only to accept a Bachelor's degree. The petitioner did not list that an equivalent in combined education programs, or education and work experience less than a bachelor's degree would be accepted. As the ETA 750 is written and certified, the beneficiary does not meet the educational qualifications. We cannot read the ETA 750 otherwise to the benefit of the beneficiary to include a Bachelor's or equivalent accepting combined educational studies. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

The petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750 and the petition was properly denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.