



U.S. Citizenship  
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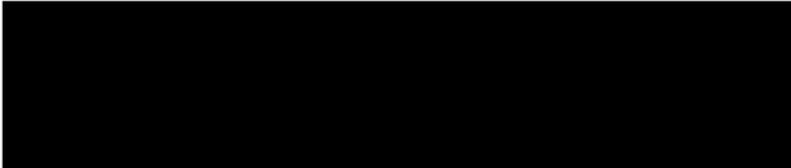
Office: NEBRASKA SERVICE CENTER

Date: JUL 10 2007

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

PETITION: 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 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 software development business. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst.<sup>1</sup> As required by statute, a Form ETA-750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. As set forth in the director's July 6, 2005 decision denying the petition, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position and denied the petition accordingly.

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

It is noted that the record also contains a denial, dated March 27, 2006, of another I-140 petition filed by the petitioner on behalf of the beneficiary on August 9, 2005, which is subsequent to the filing date of the instant appeal. As the record contains no evidence that the petitioner appealed the director's March 27, 2006 denial, the I-140 petition filed on August 9, 2005 will not be discussed further in this proceeding.

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<sup>1</sup> The petitioner titled the proffered position programmer/analyst. The proffered position requires a bachelor's degree and four years of experience. Because of those requirements, the proffered position is for a professional. The Department of Labor (DOL) assigned the occupational code of 15-1031.00, software applications engineers, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g+Go> (accessed February 22, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed February 22, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

*See id.*

The proffered position may be properly analyzed as professional since the position requires a bachelor's degree and four years of experience, which is required by 8 C.F.R. § 204.5(I)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements. Also noted is the December 30, 2005 letter from the petitioner's president in which he states that the proffered position is a professional position because it requires a bachelor's degree.

The issue is whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA-750 as of the petition's priority date. In a decision dated July 6, 2005, the director determined that the beneficiary does not hold a U.S. bachelor's degree or foreign equivalent in computer science, electrical/electronic engineering, mathematics, or a related field of study. The director found further that the Form ETA-750 filed by the petitioner on behalf of the beneficiary does not allow for a combination of work experience and/or educational programs to substitute for a U.S. bachelor's degree or equivalent foreign degree. The director therefore denied the petition.

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 the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA-750, Application for Alien Employment Certification, as certified by the U.S. Department of Labor and submitted with the instant petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). The priority date in the instant petition is April 29, 2003.

The AAO reviews appeals on a *de novo* basis. *See Dor v. I.N.S.* 891 F.2d 997, 1002, n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including any new evidence properly submitted on appeal. 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). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). On appeal, counsel submits copies of the following previously submitted documentation: a credentials evaluation from Education Evaluators International, Inc.; the beneficiary's foreign Bachelor of Science degree and Statement of Marks documents; and the beneficiary's post-graduate diploma and associated transcripts for successful completion of the course "Application Software Development" conducted from 08/26/91 – 06/02/92. As additional evidence, counsel submits copies of the following: Form I-797A, Notice of Action, addressed to the petitioner, granting the beneficiary an extension of his H-1B status from 06/06/05 – 06/05/06; a letter from Efren Hernandez III of INS Office of Adjudications about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2); and employment experience letters.

On appeal, counsel asserts that the beneficiary has completed the U.S. equivalent of a bachelor's degree, as demonstrated by the credentials evaluation, and that the clarification from Efren Hernandez indicates that it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement.

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. 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 Application for Alien Employment Certification, Form ETA-750A, blocks 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of software engineer. On the ETA-750A submitted with the instant petition, block 14 describes the requirements of the offered position as follows:

- 14. Education (number of years)
  - Grade School C
  - High School C
  - College 4
  - College Degree Required Bachelors or foreign equivalent
  - Major Field of Study Computer Science, Electrical/Electronic Eng., Mathematics, or related field

The applicant must also have four years of experience in the job offered or in a related occupation, the duties of which are delineated at block 13 of the Form ETA-750A and as this is a public record, will not be recited in this decision. Item 15 of Form ETA-750A does not set forth any special requirements.

The beneficiary states his or her qualifications on Form ETA-750B. On the ETA-750B submitted with the instant petition, in block 11, for information on the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), the beneficiary states the following:

Schools, Colleges and Universities, etc.	Field of Study	From	To	Degrees or Certificates Received
Mangalore University Mangalore, India	Physics, Math, & Statistics	06/1988	04/1991	B. Sc.
Academy of General Education Manipal, India	Application Software Development	08/1991	06/1992	Diploma

Counsel also submits a copy of a letter, dated January 7, 2003, from [REDACTED] of the INS Office of Adjudications to counsel in another case, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2).

At the outset, it is 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 for the equivalency of only 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. Hernandez's 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 under the third preference category. 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, in part, four years of college and a bachelor's degree or foreign equivalent in computer science, electrical/electronic engineering, mathematics, or a related field.

The record indicates that the beneficiary holds a Bachelor of Science degree from Mangalore University in Mangalore, India. The record contains a copy of an academic evaluation, dated March 20, 2002, by Education Evaluators International, Inc. for the beneficiary. After referencing the "three year full time program," the evaluator concludes, in part, that the beneficiary "has completed all of the theoretical and practical application of specialized knowledge required for the functional equivalent of a major in Mathematical Sciences for a Bachelor of Science degree awarded by regionally accredited colleges and universities in the United States." It is noted that in this case, the petitioner specified four years as the required number of years for the bachelor's degree requirement on the Form ETA-750A. 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 the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

Here, the record reflects that the beneficiary's formal education consists of less than a four-year curriculum. Additionally, the petitioner has not indicated that a combination of educational achievements can be accepted as meeting the minimum educational requirements stated on the labor certification. Thus, the combination of educational achievements may not be accepted in lieu of one baccalaureate degree. The beneficiary was required to have a bachelor's degree on the Form ETA-750.

The record indicates that the beneficiary does not hold a U.S. bachelor's degree or a foreign equivalent degree and that beneficiary does not have the required number of years of college education. In view of the foregoing, the beneficiary's degree from Mangalore University in Mangalore, India cannot be considered a foreign equivalent degree. Moreover, the ETA 750 specifically requires four years of college education. The beneficiary's three years of undergraduate studies fall short of the four-year requirement. 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).

The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA-750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed. Thus, the AAO affirms the director's decision finding that the beneficiary's three-year degree is not sufficient to meet the requirements of the proffered position.

The record also contains the following inconsistencies: the proffered wage is reflected as \$458.00 per week on the petition at Item 9 of Part 6, which amounts to \$75,816.00 annually. This amount conflicts with the proffered annual wage reflected on the ETA-750 Part A, Item 12: \$73,784.00. Further, information from the president's July 14, 2005 letter and the ETA-750B indicates that the beneficiary has worked for the petitioner from October 2000 to the present. This information conflicts with information from a letter, dated July 29, 2005, from the petitioner's manager, who states that the beneficiary worked for the petitioner from October 2000 to April 16, 2002, and then rejoined the petitioner on June 26, 2002. The record contains no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice

unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

Beyond the decision of the director, the evidence fails to establish that the petitioner had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and continuing until the beneficiary obtains lawful permanent residence.<sup>2</sup> The record contains an independent contractor agreement, dated 10/26/2000, between the petitioner and "enherent Corp." The record, however, does not contain a work order and comprehensive description of the beneficiary's proposed duties from an authorized representative of "enherent Corp." Without such evidence, the petitioner has not demonstrated that the petitioner would that the petitioner will remain the actual employer and is offering permanent, full-time employment to the beneficiary.<sup>3</sup> Further, a review of CIS records reflects that the petitioner has multiple sponsorships, having filed more than 2,537 I-129 nonimmigrant petitions and 259 I-140 immigrant petitions since 1995, 35 of which have priority dates of 2001, 2002, 2003, and 2004. The petitioner, however, has not provided evidence that it has met its past contractual obligations to place its information technology employees at client companies. The petitioner must show that it had sufficient income to pay all the wages at the priority date. For these additional reasons, the petition may not be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.

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<sup>2</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis.)

<sup>3</sup> *See* 20 C.F.R. § 656.3; *Matter of Smith*, 12 I&N Dec. 772 (Dist. Dir. 1968); *Matter of Ord*, 18 I&N Dec. 285 (Reg. Comm. 1992); *Matter of Artee*, 18 I&N Dec. 366 (Comm. 1982).