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U.S. Citizenship  
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FILE:



LIN-04-159-52333

Office: NEBRASKA SERVICE CENTER

Date:

**MAY 12**

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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition<sup>1</sup> was denied by the Acting Director (Director), Nebraska Service Center, and now is before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineered plastic injection molding company. It seeks to employ the beneficiary permanently in the United States as a project engineer. As required by statute, a Form ETA 750,<sup>2</sup> 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 stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a four-year bachelor's degree as required on the Form ETA 750. Accordingly, the director denied the petition on December 20, 2005.

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.

On appeal counsel asserts that using the word "equivalent" and by hiring the beneficiary, the petitioner provided conclusive proof that it would accept an equivalent to a bachelor's degree consisting of a combination of education and experience. However, the record does not contain any evidence showing that the beneficiary holds an equivalent to a U.S. bachelor's degree, or that the petitioner specified on the Form ETA 750 that the minimum academic requirements of a bachelor's degree in mathematics, electrical or manufacturing engineering might be met through a combination of lesser degrees and/or quantifiable amount of work experience. The labor certification application, as certified, does not demonstrate that the petitioner would accept a combination of degrees that are individually all less than a four-year U.S. bachelor's degree or its foreign equivalent and/or quantifiable amount of work experience when it oversaw the petitioner's labor market test. In order to determine whether the instant petition could be considered under the skilled worker category, and whether the petitioner specified on the certified Form ETA 750 that the minimum academic requirements of a bachelor's degree or equivalent might be met through a combination of lesser degrees and/or quantifiable amount of work experience, the AAO issued a request for evidence (RFE) on November 8, 2007, granting the petitioner 12 weeks to submit additional evidence to support its assertions on appeal. To date, more than 24 weeks later, no response has been received.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent

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<sup>1</sup> The petitioner filed another I-140 immigrant petition (SRC-07-800-12083) based on an ETA Form 9089. The petition was approved by the Texas Service Center on May 14, 2007 and the beneficiary's application for adjustment of status based on the approved immigrant petition is currently pending.

<sup>2</sup> After March 28, 2005, the correct form to apply for labor certification is the ETA Form 9089.

evidence in the record, including new evidence properly submitted upon appeal and in response to the AAO's RFE.

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 original Form ETA 750 was accepted on November 13, 2001 and certified on October 17, 2003. The certified ETA 750 in the instant case requires four years of college studies, a Bachelor's Degree or equivalent in mathematics, electrical or manufacturing engineering and three years of experience in the job offered. Special requirements include: "Knowledge or experience with the following: GDT (Geometric Dimensioning and Tolerancing); SPC (Statistical Process Control); APQPO (Advanced Product Quality Planning); DOE (Design of Experiments); Design and processing FMEA (Failure Modes and Effects Analysis); 8D Problem Solving (8 Discipline Approach to Problem Solving); and process flow charts and control plans." DOL assigned the occupational code of 019.167-014, project manager, the same type of occupation as 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=019.167-014+&g+Go> (accessed April 2, 2008) and its extensive description of the position and requirements for the position most analogous to project engineer position, the position falls within Job Zone Five requiring "extensive preparation" for the occupation type of project engineer. According to DOL, a bachelor's degree is the minimum formal education required for this occupation. However, many also require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree). DOL assigns a standard vocational preparation (SVP) range of 8.0 and above to the occupation, which means "[t]hese occupations often involve coordinating, training, supervising, or managing the activities of others to accomplish goals. Very advanced communication and organizational skills are required. Examples include librarians, lawyers, aerospace engineers, physicists, school psychologists, and surgeons." See <http://online.onetcenter.org/link/summary/11-9041.00#JobZone> (accessed April 2, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

Extensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience. For example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job.

Employees may need some on-the-job training, but most of these occupations assume that the person will already have the required skills, knowledge, work-related experience, and/or training.

Therefore, a project engineer position is properly analyzed as a professional since a bachelor's degree is the minimum formal educational requirement.<sup>3</sup> In addition, the petitioner requested the professional category in its cover letter submitted with the I-140 petition. Therefore, the AAO will examine the petition under the professional category and determine whether the beneficiary meets the specific education, training, and experience terms of the job offer on the alien labor certification application. 8 C.F.R. § 204.5(l)(3)(ii)(B).

For the professional category, 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 above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is November 13, 2001. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The certified labor certification in the instant case requires four year college studies, a bachelor's degree or equivalent in mathematics, electrical or manufacturing engineering plus three years of experience in the job offered and other special requirements detailed on the Form ETA 750 at Item 15.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended Matthew Boulton Technical College from 1979 to 1983; he attended City and Guilds of London Institute in the field of "Mechanical Engineering" from May 1980 to June 1980, culminating in the receipt of a "Part 1 Certificate in Basic Engineering Craft Studies;" he attended Lucas Industries in the field of "Engineering" from May 1982 to June 1982, culminating in the receipt of a "Part 2 Certificate in Mechanical Engineering Craft Studies;" he attended Lucas Industries in the field of "Engineering" from September 1979 to June 1983, culminating in the receipt of a "Certificate of Apprenticeship;" and he attended Lucas Industries, certified by The Engineering Industry Training Board in the field of "Mechanical Engineering" from 1979 to 1980, culminating in the receipt of a "1<sup>st</sup> year training

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<sup>3</sup> A professional occupation is statutorily defined at Section 101(a)(32) of the Act as including but not limited to "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." It is noted that engineer positions are included in this section.

certificate.” He provides no further information concerning his educational background on this form, which is signed by the beneficiary under penalty of perjury that the information was true and correct.

In corroboration of the beneficiary’s educational background, the petitioner provided a copy of the beneficiary’s Part One Certificate in Basic Engineering Craft Studies in 1980, Examination Result in 1981 and Part Three Certificate in Mechanical Engineering Craft Studies in 1982 by City and Guilds of London Institute, first year training certificate in 1980 and Certificate of Engineering Craftsmanship in 1983 by The Engineering Industry Training Board, Certificate of Apprenticeship for completing engineering craft apprenticeship from September 3, 1979 to June 16, 1983 with the company of Lucas Industries, a certificate of completion of Fundamental Geometric Dimensioning and Colerancing on September 10, 1996 issued by Ford Motor Company, and an evaluation report from Foundation for International Services, Inc.

In determining whether the beneficiary possessed a single U.S. bachelor’s degree or a foreign equivalent degree in mathematics, electrical or manufacturing engineering, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, <http://www.aacrao.org>, is “a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries.” Its mission “is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services.” According to the registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” EDGE provides a great deal of information about the educational system in the United Kingdom. However, none of the certificates provided by the petitioner shows that the beneficiary was awarded a bachelor’s degree or a foreign equivalent degree to a U.S. baccalaureate.

The petitioner asserts that the beneficiary’s combination of education and experience is equivalent to a U.S. bachelor’s degree according to a private credential evaluation from Foundation for International Services, Inc., which evaluates the beneficiary’s education and experience as the equivalent of a bachelor’s degree in manufacturing engineering from an accredited institution of higher education in the United States. However, a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). In addition, the evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H-1B petitions, not to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Therefore, the beneficiary’s education and experience cannot be considered a foreign equivalent degree. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section

203(b)(3)(ii) of the Act as he does not have the minimum level of education required for the equivalent of a bachelor's degree. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and the director's ground for denying the petition under professional category must be affirmed.

On appeal counsel cites *Grace Korean United Methodist Church v. Michael Chertoff*, 437 F. Supp.2d 1174 (D. Ore. November 3, 2005) to support her assertions. *Grace Korean United Methodist Church v. Michael Chertoff* finds that 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, even in matters which arise in the same 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 1179 (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).

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 (9<sup>th</sup> 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).

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 regarding the professional category at 8 C.F.R. § 204.5(l)(2). The instant case deals with the professional category.

Counsel's assertions on appeal cannot overcome the grounds of denial in the director's December 20, 2005 decision that the petitioner failed to demonstrate that the beneficiary possessed an U.S. bachelor's degree or a foreign equivalent degree as required by the Form ETA 750.

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.