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U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN-06-184-51965

Office: NEBRASKA SERVICE CENTER

Date: **SEP 29 2008**

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.

A handwritten signature in black ink, appearing to read "R. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a transportation and logistics company. It seeks to employ the beneficiary permanently in the United States as a computer systems analyst (programmer analyst). As required by statute, a Form ETA 750,² 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 bachelor's degree as required on the Form ETA 750. The director denied the petition accordingly.

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.

As set forth in the director's September 14, 2006 decision, the primary issue in the current petition is whether the beneficiary possessed the requisite bachelor's degree for the proffered position.

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 also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

On appeal counsel asserts that the beneficiary's three-year bachelor's degree from Nagarjuna University in India alone is equivalent to a four-year U.S. bachelor's degree according to the evaluation from Career Consulting International, Inc., that the petitioner intended to consider candidates with a combination of education by the term "foreign equivalent," and therefore, the beneficiary met the minimum educational requirement of a bachelor's degree or foreign equivalent in computer science, engineering or math as set forth on the Form ETA 750.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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.

¹ While the instant appeal is pending with the AAO, the petitioner filed another I-140 immigrant petition (SRC-07-084-53428) on behalf of the instant beneficiary based on a separate certified labor certification with the Texas Service Center on January 16, 2007. The petition was approved by the Texas Service Center on June 28, 2007. The beneficiary's I-485 application for adjustment of status filed upon the approval of the petition (SRC-07-084-53428) is currently pending.

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

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, 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 | 8 [years] |
| | High School | 4 [years] |
| | College | 4 [years] |
| | College Degree Required | B.S. or foreign equivalent |
| | Major Field of Study | Computer Science / Engineering (any branch) / Math |

The applicant must also have two years of experience in the job offered or in related occupation of systems analyst or software engineer. The duties of the proffered position are delineated at Item 13 of the Form ETA 750A and need not be recited in this decision. Item 15 of Form ETA 750A does not reflect any other special requirements.

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 evidence in the record, including new evidence properly submitted upon appeal.³ On appeal, counsel submitted a brief, evaluations dated October 10, 2006 from [REDACTED] of Career Consulting International (CCI) and [REDACTED] Educational Consultants (MEC). Other relevant evidence in the record includes the beneficiary's bachelor of science degree and transcripts from Faculty of Physical Science, Nagarjuna University, Professional Diploma in Network Centered Computing and transcripts from the National Institute of Information Technology (NIIT) and an evaluation dated May 24, 2006 from Worldwide Education Evaluators, Inc. (WEE May 24, 2006 evaluation). The record does not contain any further evidence concerning the beneficiary's educational qualifications. Because the record does not contain any evidence that the beneficiary obtained a single four-year bachelor's degree or foreign equivalent degree in computer science, engineering or mathematics prior to the priority date, the AAO issued a request for evidence (RFE) on January 29, 2008 granting 12 weeks to respond. However, to date, more than seven months, no response from the petitioner has been received. This office will adjudicate the appeal based on evidence in the record.

The original Form ETA 750 was accepted on November 13, 2003 and certified on April 13, 2006. The ETA 750 in the instant case was filed and certified for the position of programmer analyst. DOL assigned the occupational code of 030.162-014, programmer analyst, 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 September 5, 2008) and its

³ 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).

extensive description of the position and requirements for the position most analogous to programmer analyst position, the position falls within Job Zone Four requiring “considerable preparation” for the occupation type closest to programmer analyst 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/15-1051.00#JobZone> (accessed May 30, 2008). 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.

Therefore, a programmer analyst position could be properly analyzed as a professional or as a skilled worker since the normal occupational requirements do not always require a bachelor’s degree but a minimum of two to four years of work-related experience.⁴ In this case, the petitioner checked box e in Part 2 of the I-140 form, which is for either a professional or a skilled worker, but the director analyzed and denied the petition under the professional category. On appeal, the petitioner did not specifically request classification under the skilled worker category. Further, the Form ETA 750 does not indicate that the employer would accept any alternate requirements in lieu of the bachelor’s degree requirement. Therefore, the AAO finds that the director properly analyzed this petition under the professional category.

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.

The beneficiary possesses a three-year bachelor of science degree in physics, mathematics, and computer science from Nagarjuna University in India. In determining whether the beneficiary possessed a single U.S.

⁴ 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 programmer analyst positions are not included in this section.

bachelor's degree or a foreign equivalent degree in computer science, engineering or math, as mentioned in our RFE, 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>, 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 India. While it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's three-year bachelor of science degree in physics, mathematics, and computer science from Nagarjuna University in India cannot be considered a foreign equivalent degree.

EDGE also discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provide:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The beneficiary also holds a professional diploma from NIIT in India. The AAO accessed NIIT's website to determine what type of educational services it provides. NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. The AAO also accessed the AICTE's website, which does not list NIIT as an institute accredited by AICTE. Therefore, the beneficiary's diploma from NIIT cannot be considered as a post-graduate diploma or senior year level of undergraduate diploma from an accredited institute following a three-year bachelor's degree, and thus, the beneficiary's three-year bachelor's degree plus his diploma are not equivalent to a U.S. baccalaureate.

The petitioner asserts that the beneficiary possessed the equivalent to a U.S. bachelor's degree according to private credential evaluations from WEE, CCI and MEC. The WEE May 24, 2006 evaluation evaluated the beneficiary's bachelor of science degree from Nagarjuna University as equivalent to the completion of three

years of study toward a four-year Bachelor's degree and the diploma in network-centered computing from NIIT as equivalent to the completion of three-four semesters of study in computer Science from a regionally accredited university in the United States, and therefore, concludes that the beneficiary obtained the equivalent of the completion of a Bachelor of science degree in computer science from a regionally accredited technical college in the United States.

However, the WEE May 24, 2006 evaluation does not provide any supporting evidence showing that the beneficiary holds a single bachelor's degree or a foreign equivalent degree. As indicated in our RFE, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). While EDGE confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

The AAO accessed NIIT's website to determine what type of educational services it provides.⁵ NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student; however, in the instant case, it did clarify that the diploma it issued was pursuant to completion of post-graduate studies. There is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program. The WEE May 24, 2006 evaluation does not provide any evidence supporting its conclusion that the beneficiary's diploma in network-centered computing from NIIT is a postgraduate diploma from an accredited university or institution approved by All-India Council for Technical Education (AICTE). Instead, the record shows that the beneficiary was awarded the diploma from NIIT in 1984 before his bachelor of science degree from Nagarjuna University in 1985.

The petitioner also submitted evaluations from [REDACTED] of Career Consulting International and Dr. [REDACTED] Educational Consultants. Both [REDACTED] conclude that the beneficiary completed 120 credits. [REDACTED] reaches this conclusion by assigning 4.62 credits to each course the beneficiary took. While she explains that her "process" includes using "unit credits" or "clock hours of instruction" from academic records to determine the number of credits, the beneficiary's transcript in the record does not include either figure. Both [REDACTED] conclude that, despite the far greater number of courses in Physics and Mathematics, the beneficiary has a Bachelor of Science with a concentration in Computer Science.

In his evaluation concluding that the beneficiary's three-year degree following 12 years of primary and secondary education is equivalent to 120 credits and a four-year degree in the United States, [REDACTED] relies on *Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005 (D. Or. 2006). The judge in that case, however,

⁵ See <http://www.niit.com>.

⁶ [REDACTED] indicates that she has a Master's degree from the Institute of Transpersonal Psychology and a doctorate from [REDACTED] but does not indicate the field in which she obtained her doctorate. According to its website, [REDACTED] awards degrees based on past experience.

⁷ [REDACTED] indicates he has a "canonical diploma of [REDACTED] from St. [REDACTED] Oecumenical Institute of Divinity, which he equates to a Doctorate of Divinity.

found that CIS is entitled to deference in interpreting its own regulatory definition of advanced degree. *Id.* at *11. More specifically, the judge found that CIS was entitled to interpret “a degree” in the context of a professional and advanced degree professional to exclude an individual with an Indian three-year degree followed by membership in the Institute of Chartered Accountants of India. *Id.* at *10-11. In the matter before us, the beneficiary only has a three-year degree. Thus, the beneficiary in this matter has less education than the beneficiary in *Snapnames.com, Inc.*

Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge’s decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

The evaluations provide that the beneficiary’s Indian education would include “120 contact hours” and that these would be equivalent to 120 U.S. credit hours, which would be the normal course requirement for a U.S. Bachelor’s degree. From the information provided, it is not clear that a “contact hour” would be the same or directly equivalent to a U.S. “credit hour.” In the Indian system, students spend more time in the classroom providing more “contact hours,” whereas the U.S. system calculates time spent studying outside the classroom into the credit hour determination.⁸ The measures are based on two separate calculations and therefore cannot be considered as equivalent, or interchangeable.

However, as previously discussed, a three-year degree from India may not be deemed a foreign equivalent degree to a U.S. baccalaureate since a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

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” in computer science, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act. In addition, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), providing evidentiary requirements for “skilled workers,” states the following:

⁸ U.S. students “are assumed to spend two hours of outside preparation for every 1 hour of lecture.” [REDACTED] The University of Texas at Austin, “Assigning Undergraduate Transfer Credit: It’s Only an Arithmetical Exercise,” from <http://www.handouts.acrao.org/am07/finished/F034p> [REDACTED] (accessed February 19, 2008). As the Indian system is not based on credits, but is exam based, transfer credits are based on a calculation of the number of exams taken multiplied to reach “a base line of 30” for credit conversion as the systems do not readily equate. *Id.*

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.

(Emphasis added).

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.” 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 the category sought, the beneficiary must have a four-year bachelor’s degree or its foreign equivalent in computer science, engineering or math and two years of work experience in the job offered or in the related occupation of systems analyst or software engineer. As the beneficiary lacks the degree required by the petitioner on the labor certification, the beneficiary cannot qualify under either the professional or the skilled worker category. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and counsel’s assertions on appeal cannot overcome the grounds of denial in the director’s September 14, 2006 decision. Therefore, the director’s ground for denying the petition under the professional category must be affirmed.

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.