U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 22 2008

LIN 07 142 51847

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

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 employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dental care office. It seeks to employ the beneficiary permanently in the United States as a management analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] 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 Master's degree or foreign equivalent degree.

On appeal, the petitioner submitted new evidence, including a new evaluation. On March 21, 2008, this office advised the petitioner of inconsistencies between the evaluations submitted and inconsistencies between those evaluations and published materials regarding the education system in India. The petitioner's response has now been received. The petitioner's response includes no new evidence. Rather, counsel simply asserts that the inconsistencies identified in our notice result from the use of different source materials by different evaluators. Counsel does not, however, identify those sources[2] or provide copies of any source material not already in the record. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). While we would have considered any source material supporting the evaluations in the record and resolving the inconsistencies, the petitioner has not submitted any evidence that would allow us to do so. Thus, the petitioner has not overcome our concerns. Moreover, as stated in our previous notice and reiterated below, the one piece of source material provided does not support the evaluation prepared by the individual who purports to rely on that material.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign three-year Bachelor of Business Administration degree from Gujarat University and a two-year Master of Business Administration from the same institution. At

[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.
[2] We do not consider other evaluations as source material. Rather, these evaluations simply represent other personal opinions allegedly based on source material that is not in the record.

issue is whether this education is sufficient to meet the job requirements of the proffered job as set forth on the alien employment certification.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

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

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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 DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] 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, revisited this issue, stating:

> 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)[(5)], 8 U.S.C. § 1182(a)[(5)]. **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).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

*Tongatapu,* 736 F. 2d at 1309.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

> ***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, Citizenship and Immigration Services (CIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien

employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On the Form ETA 750, Blocks 14 and 15, the petitioner indicated that a Master in Business Administration or Master's Degree in a related field "or equivalent" plus six months of experience is required for the job. The petitioner did not expressly indicate that an alternate combination of experience and education would be acceptable. Thus, regardless of whether the beneficiary qualifies as a member of the professions holding an advanced degree, the petitioner must demonstrate that the beneficiary has a Master's degree "or equivalent."

Initially, the petitioner submitted an evaluation from Morningside Evaluations and Consulting asserting that the beneficiary's education was "the equivalent of a Master of Business Administration degree from an accredited institution of higher education in the United States.

In response to the director's request for additional evidence, the petitioner submitted two new evaluations from [redacted][3] of Career Consulting International. In her first evaluation, Dr. [redacted] evaluates the beneficiary's three-year Bachelor of Business Administration degree as equivalent to a U.S. baccalaureate upon concluding that the beneficiary completed 153 "credits." In the second evaluation, [redacted] equates the beneficiary's two-year Master of Business Administration to a U.S. Master's degree. [redacted] list of course credits does not match the lecture hours listed on the beneficiary's transcript, the figures used by a subsequent evaluation. The petitioner also submitted similar evaluations from [redacted] of Marquess Educational Consultants, Ltd. and [redacted] President of the European-American University[6] in the Commonwealth of Dominica. In addition, the petitioner submitted a letter from [redacted], a former professor at the University of Mumbai, asserting that 15 "contact" hours in India equate to one U.S. credit hour. The use of credits rather than a year-for-year equivalency will be rebutted below. Finally, the petitioner submitted evidence of accelerated baccalaureate programs. Programs that allow students to work at an accelerated pace and, thus, complete four years of education in less than four years does not establish that the typical three-year degree in India is equivalent to a four-year baccalaureate in the United States or even an accelerated program in the United States.

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[3] [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, www.sorbon.fr/index1.html, [redacted] awards degrees based on past experience.

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

[5] [redacted] also indicates he has a canonical diploma of [redacted] Professor, equivalent to a Doctorate of Divinity.

[6] According to the university's website, www.thedegree.org, it is an unaccredited "self-validating" university of which [redacted] is the president.

On appeal, the petitioner submitted a new evaluation from World Education Services (WES). Significantly, while this evaluation does conclude that the beneficiary's two-year MBA is equivalent to a U.S. MBA, it also concludes that the beneficiary's three-year degree is equivalent to only three years of undergraduate study. More specifically, it concludes that the beneficiary completed 96 credits[7] during those three years. Thus, this evaluation is not consistent with the evaluations by Dr. [redacted], who concluded that the beneficiary earned 153 credits during this time and received the equivalent of a U.S. baccalaureate.

The petitioner also submits a new evaluation from [redacted], a retired director of admissions and registrar at [redacted] State College. [redacted] concludes that the beneficiary earned 128 credits, more than allowed in the WES evaluation but far less than [redacted] assign. While [redacted] calculation of credits derives from the lecture hours listed on the transcript, the record lacks evidence that Indian lecture hours doubled for the year are equivalent to U.S. credit hours. The beneficiary's transcript shows no coursework unrelated to the field of business administration.

[redacted] submits a page from the Project for International Education Research (PIER) publication: *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986). The chart on this page provides that an Indian Master of Business Administration "may be considered for graduate admission with no advanced standing." Thus, this publication does not support the conclusion of [redacted] or the other evaluators. Rather, by stating that an Indian MBA may be considered for *admission* to U.S. MBA or other graduate programs, it has the effective result of concluding that an Indian MBA is equivalent to a U.S. baccalaureate.

Also on appeal, the petitioner submitted evidence that the University of Bridgeport offers a separate "MBA pre-3" program for graduates of three-year baccalaureate programs. If a three-year baccalaureate were truly equivalent to a U.S. four-year baccalaureate, it is not clear why the University of Bridgeport would have to offer a separate program for these students. The petitioner also submitted evidence that some U.S. colleges, such as Western New England College, offer "accelerated" programs where high school graduates can obtain an MBA in five years. In these programs, students begin taking graduate coursework in their senior year. The existence of accelerated programs in the United States does not necessarily establish that all foreign five-year programs in business administration must be considered equivalent to a U.S. MBA.

The above inconsistent evidence is the evidence presented by the petitioner. In our March 21, 2008 notice, however, we advised the petitioner of both the above inconsistencies and the following

[7] While the WES evaluation lists 136 undergraduate credits in the summary, the breakdown of credits per course shows six credits for sixteen courses, or 96 credits total. The evaluation provides no explanation for the 136 credits listed in the summary. The 96 credits listed are consistent with the conclusion in this evaluation that the beneficiary's three-year baccalaureate is equivalent to only three years of undergraduate education in the United States.

information obtained by this office that further undermines the credibility of the evaluations in the record.

In determining whether a two-year Master's degree following a three-year Indian bachelor's degree is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, 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." AACRAO, http://www.aacrao.org/about/ (last accessed March 13, 2008) (copy incorporated into the record of proceeding and included with our March 21, 208 notice). 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." *Id.* According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. [redacted] Director of International Education Services, "AACRAO EDGE Login," http://aacraoedge.aacrao.org/index.php (last accessed March 13, 2008) (copy incorporated into the record of proceeding).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In the section related to the Indian educational system, EDGE provides that a two-year Master's degree following a three-year bachelor's degree "represents the attainment of a level of education comparable to a bachelor's degree in the United States." (Printout enclosed with our March 21, 2008 notice.) Unlike the individual opinions expressed in the record, EDGE represents a peer-reviewed evaluation that has been vetted by a council of experts.

Our March 21, 2008 notice also advised the petitioner of information in two of AACRAO's PIER publications: *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). We reiterated that while Mr. [redacted] purports to support his opinion with this publication, the publication actually contradicts his opinion. We note that the 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43. As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual.

One of the PIER publications also reveals that a year-for-year analysis is an accurate way to evaluate Indian post-secondary education. *A P.I.E.R. Workshop Report on South Asia* at I80 explicitly states that "transfer credits should be considered on a year-by-year basis starting with post-Grade 12 year." The chart that follows states that 12 years of primary and secondary education followed by a three-year baccalaureate "may be considered for undergraduate admission with possible advanced standing up to three years (0-90 semester credits) to be determined through a course to course analysis." This information seriously undermines the evaluations submitted in response to the director's request for additional evidence and on appeal that attempt to assign credits hours for the beneficiary's three-year baccalaureate that are equivalent to or beyond a U.S. four-year baccalaureate.

In response, counsel asserts that the petitioner submitted credential evaluations which all concluded that the beneficiary possesses the equivalent of a U.S. Master's degree. Counsel further asserts: "The evaluators have utilized different methods and relied on different resources to reach the conclusion that [the beneficiary] does possess the equivalent to an MBA degree. Utilizing different methods and resources should not be construed to be inconsistent, as indicated in your notice." Counsel then asserts that [redacted] evaluation was supported by [redacted]'s evaluation and that [redacted] evaluation was supported by the evaluation from WES. Counsel, however, provides no examples of published source material on the Indian education system supporting any of the above evaluations. As noted above, the only source material provided, the page from the PIER publication purportedly supporting [redacted] evaluation, actually contradicts his evaluation.

Finally, counsel acknowledges the information from EDGE, but asserts that CIS did not "provide a credentials evaluation from EDGE to prove that [the beneficiary] does not possess the equivalent to a U.S. Master of Business Administration Degree." The materials from EDGE were not cited as an evaluation of the beneficiary's education. Rather, we explained that EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO and noted that the information about specific degrees in India does not support the evaluations in this case. Moreover, we did not rely solely on EDGE. Rather, we also cited two PIER publications, one of which the petitioner submitted on appeal as support for Mr. [redacted] evaluation. Counsel does not explain why a page from this PIER publication was submitted if the publication is not worthy of consideration.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)). In this matter, the evaluations are not consistent with each other in how the beneficiary's credits should be considered (the evaluations reach three vastly different

conclusions on this issue: 96, 128 and 153) or the equivalency of his three-year baccalaureate. The evaluations are also not consistent with the PIER publication submitted by the petitioner on appeal.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* **The petitioner was advised of all of the above** inconsistencies and afforded an opportunity respond. Simply asserting that the inconsistencies are immaterial or result from utilizing difference sources which are not part of the record is insufficient.

Finally, the petitioner submits a copy of a non-precedent decision by this office. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

In light of the above, the petitioner has not established, through the submission of consistent and credible evidence, that the beneficiary has the necessary education for the job as certified by DOL

Moreover, as noted in our previous notice, the petitioner has not established that the beneficiary even qualifies for the classification sought. As the beneficiary's MBA is only equivalent to a U.S. baccalaureate, it then becomes necessary to determine whether he has the necessary five years post-baccalaureate experience.

The petitioner must establish that the beneficiary was eligible for the classification sought as of 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. *See* 8 C.F.R. § 204.5(d); 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Regl. Commr. 1971). The Form ETA 750 in this matter was accepted for processing on June 14, 2004.

The beneficiary received his Master's degree, which we have determined is equivalent to a U.S. baccalaureate, in December 2001. Thus, the beneficiary could not have accumulated five years of post-baccalaureate experience as of the priority date in this matter, June 14, 2004

The beneficiary does not meet the job requirements on the labor certification and is not eligible for the classification sought. For these reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

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.