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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: NOV 07 2011 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: Beneficiary: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas 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 software development business. It seeks to employ the beneficiary permanently in the United States as a software engineer 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, an ETA Form 9089, Application for Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements or qualify for the classification sought. Specifically, the director determined that the beneficiary did not possess the requisite education for the position.

On appeal, counsel submits a brief, three educational evaluations, and additional evidence and asserts that the beneficiary meets the academic requirements of the alien employment certification. On August 9, 2011, the AAO advised the petitioner of information that contradicted the evaluations of the beneficiary's education. The petitioner submitted a response on September 22, 2011. The AAO will uphold the director's decision and conclude that the beneficiary does not possess the requisite education for the position.

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 U.S. 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 U.S. doctorate or a foreign equivalent degree." *Id.*

The beneficiary earned a foreign three-year Bachelor of Science degree diploma in computer science completed in April of 2000 from Bharathidasan University in India and a two-year Master of Science degree diploma in computer science completed in April of 2003 from Bharathiar University in India. Thus, the issues are whether those credentials qualify the beneficiary for the classification sought and meet the specified job requirements.

Eligibility for the Classification Sought

As noted above, DOL certified the ETA Form 9089 in this matter. DOL determines 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 Congress 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. Rather, U.S. Citizenship and Immigration Services (USCIS) determines whether the alien is qualified under the alien employment certification requirements. *Matter of Wing's Tea House*, 16 I&N Dec. 160 (Acting Reg'l Comm'r 1977). Federal courts have recognized this division of authority. *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 U.S. baccalaureate degree generally requires four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. The AAO must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). In fact, the Senate Conference Report for the Act presumes that a baccalaureate is a "4-year course of undergraduate study." S. Rep. No. 101-55 at 20 (1989). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 appeared in the Federal Register, the Immigration and Naturalization Service (the Service) (now USCIS), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of

1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus the requisite five years of progressive experience in the specialty). More specifically, USCIS will not consider a three-year bachelor's degree as a "foreign equivalent degree" to a U.S. baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."[1] In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single four-year degree that is the "foreign equivalent degree" to a U.S. baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2). *See also Regal International, Inc. v. Napolitano*, No. 10 C 5347 (N.D. Ill. E. D. Sept. 29, 2011).

The petitioner submitted evaluations from [redacted] of [redacted] dated September 19, 2008, from [redacted] of [redacted] dated September 25, 2008, and from [redacted] of [redacted]. dated September 10, 2004.

[redacted] focuses on the beneficiary's Master of Science degree and concludes that the beneficiary possesses the equivalent of a Master's degree in computer science in the United States. He notes that Bharathiar University is accredited and that the beneficiary's program there required the prior completion of a bachelor's degree and competitive entrance examinations. [redacted] states that he

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[1] *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

bases his analysis on the credibility of Bharathiar University, the number of years of the beneficiary's coursework, and the nature of the beneficiary's coursework.

similarly focuses on the beneficiary's Master of Science degree within his evaluation. He indicates that he is a member of the American Association of Collegiate Registrars and Admissions Officers (AACRAO). similarly notes that Bharathiar University is accredited and that the beneficiary's program there required the prior completion of a bachelor's degree and competitive entrance examinations. He states that he bases his analysis on the beneficiary's course of studies, number of credits earned, number of years of coursework, grades earned, hours of coursework, and final diploma as well as the subject matter of the beneficiary's courses and the overall credibility of Bharathiar University. concludes that the beneficiary possesses the equivalent of a Master of Science degree in computer science in the United States

instead evaluates both the beneficiary's Bachelor of Science and Master of Science degrees. He notes that Bharathidasan University is accredited and that it requires the completion of secondary school prior to entry. states that the beneficiary's Bachelor of Science program was three years or six semesters long with comprehensive examinations. He notes that the beneficiary's graduate program at Bharathiar University consisted of two years of study, examinations, and a research project. The AAO notes that appears to contradict himself within his evaluation. He concludes that the beneficiary's three-year Bachelor of Science degree program, when taken with the beneficiary's two-year Master of Science degree program, "is equivalent to the completion of a four-year Bachelor's degree in Computer Science from a regionally accredited university in the United States." However, also states that the beneficiary possesses the equivalent to a Bachelor of Science in computer science and a Master of Science in computer science. has not accounted for this discrepancy in the educational equivalency of the beneficiary's degrees.

The AAO notes that all three evaluators have not provided any peer reviewed source to support their opinions. They also come to varying conclusions regarding the equivalency of the beneficiary's educational background. USCIS 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, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r 1988).

On August 9, 2011, the AAO advised the petitioner that, based upon the above inconsistencies, the AAO had consulted the Electronic Database for Global Education (EDGE) as a tool to help analyze the beneficiary's educational background. According to its website, AACRAO, which created EDGE is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world.." *See* http://www.aacrao.org/About-AACRAO.aspx (accessed August 1, 2011 and incorporated into the record of proceeding). 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.* In *Confluence Intern., Inc. v. Holder*, 2009 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

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. , Director of International Education Services, "AACRAO EDGE Login," http://aacraoedge.aacrao.org/ (accessed August 1, 2011 and incorporated into the record of proceeding). In *Tisco Group, Inc. v. Napolitano*, 2010 (E.D.Mich. August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.*, 2010 (E.D.Mich. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the alien employment certification itself required a degree and did not allow for the combination of education and experience.

In the section related to the Indian educational system, EDGE provides that a Bachelor of Science degree is three years in duration and represents attainment of a level of education comparable to only two to three years of university study in the United States. EDGE also provides that a Master of Science degree is two years in duration and represents attainment of a level of education comparable to a bachelor's degree in the United States. This information listed within EDGE is inconsistent with all three credentials evaluations, which conclude that the beneficiary possesses the equivalent to a Master of Science degree in the United States.

The AAO also reviewed AACRAO's Project for International Education Research (PIER) publications: 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). The 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. *Id.* 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."

Based on the juried opinion in EDGE, the AAO concluded that the beneficiary's Bachelor of Science degree and Master of Science degree in this matter are only equivalent to a bachelor's degree from a

regionally accredited institution in the United States. As the beneficiary earned her master's degree in 2003, she did not possess five years of progressive post-baccalaureate experience as of the priority date in 2006, the date at which the petitioner must establish her eligibility. 8 C.F.R. §§ 103.2(b)(1); (12). A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

On appeal and in response to the AAO's August 9, 2011 notice, counsel asserts that the beneficiary possesses the requisite education for the position as the beneficiary's foreign master's degree is equivalent to an advanced degree in the United States. Counsel also states that it is the prerogative of the petitioner to define the requirements for the position. The petitioner, however, does not set the requirements for the classification. In the alternative, counsel asserts that USCIS should classify the position under the EB-3 category as a skilled worker. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to United States Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

On appeal, the petitioner also submitted a prior AAO decision, which found a beneficiary's three-year bachelor's degree and two-year master's degree to be the equivalent to a master's degree in the United States. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Because the beneficiary does not have a U.S. advanced degree or foreign equivalent degree, she does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

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 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. *See also Matter of Wing's Tea House*, 16 I&N Dec. at 160.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS 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 USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment 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). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, line 4, of the alien employment certification reflects that a master's degree in computer science, technology, engineering, or applications is the minimum level of education required. Lines 6 and 10 reflect that six months of experience in the proffered position or in the alternate occupations of programmer analyst, systems analyst, programmer, or a similar position are required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The petitioner has demonstrated that the beneficiary possessed at least six months of experience before the priority date of December 8, 2006. The beneficiary, however, earned a foreign three-year Bachelor of Science degree diploma in computer science completed in April of 2000 from Bharathidasan University in India and a two-year Master of Science degree diploma in computer

science completed in April of 2003 from Bharathiar University in India. As discussed above, this education is a foreign equivalent degree to a U.S. bachelor's degree only.

The beneficiary does not have a U.S. master's degree or a foreign equivalent degree. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the alien employment certification. 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.