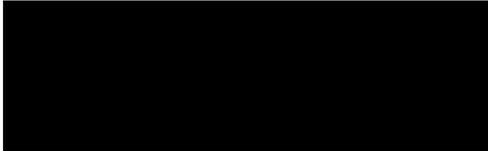


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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services



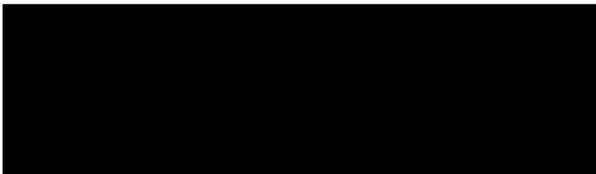
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DATE: **AUG 30 2012** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner: 
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:



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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a software development services business. It seeks to permanently employ the beneficiary in the United States as a "software engineer II" and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the *Immigration and Nationality Act (the Act)*, 8 U.S.C. § 1153(b)(2). Under this statutory provision immigrant classification may be granted to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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.

The regulation at 8 C.F.R. § 204.5(k)(4)(i) provides, in pertinent part, as follows:

Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor . . . The job offer portion of the individual labor certification . . . must demonstrate that the job requires a professional holding an advanced degree or the equivalent.

In this case, the immigrant visa petition (Form I-140) is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was certified by the United States Department of Labor (DOL).

In a decision dated August 27, 2008, the Director determined that the language of the labor certification, ETA Form 9089, does not demonstrate that a master's degree or a baccalaureate degree and five years of progressively responsible experience is required to qualify for the job. Therefore, the proffered position could not be classified as an advanced degree professional, and the petition could not be approved.

While reiterating that the petition must be denied for the above reason, the Director stated that the petition was also deniable on two other grounds. One ground was that the beneficiary did not have the equivalent of a U.S. master's degree, or the equivalent of a U.S. bachelor's degree and five years of post-baccalaureate work experience, as of January 29, 2007 – the priority date of the petition.¹ The other ground was that the petitioner had not established its continuing ability to pay the proffered wage – \$59,000 per year – from the priority date onward.

¹ The priority date of the petition is the date the underlying labor certification application was received for processing by the DOL.

The record shows that the appeal is properly filed and timely. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.

In his appeal brief counsel asserts that the labor certification clearly states the requirement for the proffered position to be a master's degree. According to counsel, therefore, the position qualifies for classification as an advanced degree professional. The plain language of the labor certification, however, does not support counsel's claim.

The minimum educational and experience requirements for the proffered position of "software engineer II" are specified in Part H of the ETA Form 9089.

- Lines 4, 4-B, 7, and 7-A specify that a **Master's Degree** in Business Administration or, alternatively, in Computer Science, Engineering, CIS, Mathematics, Electronics, or Management is required.
- Lines 8, 8-A, and 8-C specify that an alternative combination of education and experience is acceptable – in particular, a **Bachelor's Degree and 5 years of experience**.
- Line 9 specifies that a **foreign educational equivalent** is acceptable.
- Box 14 ("Specific skills and other requirements") provides the following additional guidance:

*** Employer defines a foreign educational equivalent in No. 9 to include: a combination of lesser degrees, diplomas and/or professional certificates recognized by a certified independent credentials evaluator as an academic equivalent to a Master's Degree.*

**** In lieu of a master's degree, employer is willing to accept the equivalent to a US Bachelor's Degree with five (5) years of prior progressive professional experience in the position offered or a related position; furthermore, employer is willing to accept any suitable combination of work experience, education and training that is equivalent to the actual minimum requirements of the position and shows demonstrable ability in the required skill sets.*

Thus, the labor certification provides that "a combination of lesser degrees, diplomas and/or professional certificates" could be recognized as "equivalent to a Master's Degree." This language does not square with the definition of "advanced degree" in 8 C.F.R. § 204.5(k)(2), which refers to degree in the singular ("United States academic or professional degree or a foreign equivalent degree above that of baccalaureate"), not as a combination of educational credentials.

Moreover, the labor certification goes even further, providing that "any suitable combination of work experience, education and training" could be deemed "equivalent to the actual minimum requirements of the position." Coupled with the "combination of lesser degrees, diplomas and/or professional certificates" provision, this language becomes almost totally open-ended in its scope. It

allows the employer to deem not only a combination of lesser educational credentials, but a combination of education, training and/or experience, or training/experience alone with no educational component, as equivalent to a master's degree or a bachelor's degree. Once again, this language does not square with the definition of "advanced degree" in 8 C.F.R. § 204.5(k)(2), which refers to degree in the singular ("United States academic or professional degree or a foreign equivalent degree above that of baccalaureate" or "United States baccalaureate degree or a foreign equivalent degree"). The regulatory definition of "advanced degree" requires a single degree, and a one-to-one equivalency of the foreign and U.S. degree. Under the regulation, equivalency to a U.S. master's degree or a U.S. bachelor's degree cannot be met with a combination of lesser educational credentials, or a combination of educational credentials, training and experience, or training/experience with no specific educational credential.

Thus, the labor certification does not restrict consideration to individuals holding a master's degree, or a bachelor's degree (and five years of experience), or a foreign equivalent degree to a U.S. master's or bachelor's degree. Since the educational requirements described in the ETA Form 9089 may be fulfilled with multiple educational credentials no one of which is equivalent to a U.S. degree, or a combination of lesser educational credentials, training and experience, they do not correlate with the educational requirements for an advanced degree professional – the classification sought by the petitioner on the Form I-140. Therefore, the petition cannot be approved.

Accordingly, the Director's decision will be affirmed, and the appeal dismissed.

The AAO will now address the other grounds for denial in the Director's decision. To be eligible for approval as an advanced degree professional, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). The petitioner must also establish its continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). In this case, the priority date (when the ETA Form 9089 was filed with the DOL) is January 29, 2007.

With regard to the petitioner's ability to pay the proffered wage to the beneficiary, whose employment with the petitioner began in November 2006, the evidence submitted with the appeal in October 2008 includes copies of the petitioner's federal income tax return (Form 1120S) for 2007, the Wage and Tax Statement (Form W-2) the petitioner issued to the beneficiary for the year 2007, and three pay statements the beneficiary received from the petitioner for the months of July, August, and September 2008. Based on this documentation,² the AAO concludes that the petitioner has established its ability to pay the proffered wage of \$59,000 per year from the priority date (January 29, 2007) onward. Accordingly, the petitioner has overcome this ground for denial. The Director's finding that the petition was deniable on this additional ground will be withdrawn.

With regard to the beneficiary's educational credentials from India, the documentation of record shows that they include the following:

² For the purposes of calculating the petitioner's ability to pay the proffered wage, the AAO notes that the petitioner's net income in 2007 was \$33,924, the total compensation paid to the beneficiary in 2007 was \$50,000, and the total compensation paid to the beneficiary for the first nine months of 2008 was \$48,500.01.

- A three-year Bachelor of Commerce degree from the University of Mumbai, conferred on December 27, 1999.
- A one-year Honours Diploma in Network-Centered Computing awarded by the National Institute of Information Technology (NIIT) in Mumbai on March 13, 1999.
- A two-year Master of Commerce degree from the University of Mumbai, conferred on December 18, 2004.

The record includes a series of academic equivalency evaluations of the beneficiary's education – two by [REDACTED] and one by [REDACTED]. The evaluations all assert that the three educational credentials listed above are equivalent to a U.S. Bachelor of Science in Computer Science and Business Administration and a U.S. Master of Business Administration (MBA). Based on these evaluations, the petitioner claims that the beneficiary's Master of Commerce degree from India is equivalent to a master's degree from a U.S. university.

U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is 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; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, not in accord with other information, or is questionable in any way. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

As an additional resource to ascertain the U.S. equivalency of foreign degrees, the AAO consults the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO 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.” <http://www.aacrao.org/About-AACRAO.aspx>. Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* EDGE is “a web-based resource for the evaluation of foreign educational credentials.” <http://edge.aacrao.org/info.php>. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.³ 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.* USCIS considers EDGE to be a

³ *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

reliable, peer-reviewed source of information about foreign credentials equivalencies.⁴

EDGE states that a Bachelor of Science degree in India is awarded upon completion two to three years of tertiary study beyond the Higher Secondary Certificate (comparable to a U.S. high school diploma), with the great majority being awarded after three years of tertiary study. The Indian degree is comparable to study at a U.S. college or university for the same number of years. According to EDGE, therefore, the beneficiary's three-year Bachelor of Commerce from the University of Mumbai would be comparable to three years of study at a U.S. college or university. EDGE also states that a Master of Commerce in India is awarded upon completion of two years of study beyond the three-year bachelor's degree, and is comparable to a bachelor's degree in the United States. According to EDGE, therefore, the beneficiary's Master of Commerce would be comparable to a U.S. bachelor's degree, not a master's degree as claimed by the petitioner.

There is no information about the NIIT (which issued the beneficiary's Honours Diploma) in EDGE. The AAO has accessed NIIT's website to determine what type of educational services it provides. See <http://www.niit.com/services/ITEducationforIndividuals/Pages/ComputerCourses.aspx> (accessed August 23, 2012). NIIT offers a career program (GNIIT); an engineering technology program (Edgeineers), which "helps engineering students and engineering graduates get acquainted with high-end technologies and meet requirements across their academic lifecycle;" networking and infrastructure management programs; basic computer programs; and short-term technology programs. *Id.* The website does not indicate that NIIT requires a college degree in order to admit a student to any of these programs. In this case, it is evident that the beneficiary's admission to NIIT was not predicated upon the completion of a bachelor's degree, since the beneficiary completed the one-year program at NIIT during her three-year bachelor's degree program at the University of Mumbai.

In accord with the Director's findings, the AAO concludes that the petitioner has not established that the beneficiary's educational credentials from India are equivalent to a U.S. master's degree. Also in accord with the Director's findings, the AAO concludes that the beneficiary's highest degree in India – the Master of Commerce from the University of Mumbai – is more likely than not comparable to a U.S. bachelor's degree. While this degree would be sufficient to constitute an "advanced degree" under 8 C.F.R. § 204.5(k)(2) with the requisite "five years of progressive experience in the specialty," the beneficiary could not have satisfied this criterion because less than five years passed between the completion of the master's degree program in April 2002 (when the final examinations

⁴ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the 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 only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination 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 labor certification itself required a degree and did not allow for the combination of education and experience.

were held) and the priority date of January 29, 2007, when the labor certification application was filed. The beneficiary's qualifying work experience had to be completed before the priority date. *See Matter of Wing's Tea House*. The AAO determines, therefore, that the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because, as of the priority date, he did not have either the foreign equivalent degree to a U.S. master's degree or a foreign equivalent degree to a U.S. bachelor's degree and five years of progressive experience in the specialty. *This ground of denial in the Director's decision will be affirmed.*

While the beneficiary's eligibility for classification as an advanced degree professional has not been established, the AAO notes that he might qualify for the proffered position under the terms of the labor certification. Since the petitioner specified on the ETA Form 9089 that various combinations of lesser educational degrees, or even a broad combination of education, training, and experience, could be deemed equivalent to a master's degree, the beneficiary's educational credentials and experience as documented in the record could be sufficient to meet the requirements of the labor certification. Since these credentials do not constitute an "advanced degree" as defined in 8 C.F.R. § 204.5(k)(2), however, they are of no avail to the beneficiary in this proceeding.

Beyond the decision of the Director, the record raises questions regarding the geographical location of the proffered position. The ETA Form 9089 specifies that the primary worksite of the job is at the petitioner's address in Tallmadge, Ohio. The Form W-2 issued to the beneficiary for 2007, however, identified his home as [REDACTED]. The beneficiary's pay statements in 2008 identified his home as Tampa, Florida. The petitioner has not explained how the beneficiary could be employed in Ohio while residing in California and Florida. There is no evidence in the record that the petitioner has any offices outside the state of Ohio, though it is also registered to do business in Illinois. A labor certification for a specific job offer is valid only for the particular job opportunity, the alien for whom the certification was granted, and the area of intended employment as stated on the labor certification. *See* 20 C.F.R. § 656.30(c)(2). The beneficiary's work history for the petitioner in 2007 and 2008 suggests that the petitioner may intend to employ the beneficiary outside of the area specified on the ETA Form 9089. If that is the case, the labor certification would be subject to invalidation. In any further proceedings involving the current labor certification, the petitioner should confirm the intended location of the employment.

Conclusion

The appeal will be dismissed on two grounds:

- The job requirements described in the labor certification may be fulfilled with credentials that do not correlate with an "advanced degree" as defined in 8 C.F.R. § 204.5(k)(2). Therefore, the proffered position cannot be classified as an advanced degree professional under section 203(b)(2) of the Act.
- The beneficiary is not eligible for classification as an advanced degree professional because he did not have either a foreign equivalent degree to a U.S. master's degree or a foreign equivalent degree to a U.S. bachelor's degree and five years of progressive experience in the specialty as of the priority date.

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For the reasons discussed above, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.