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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 17 2008

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IN RE: Petitioner:
Beneficiary: [redacted]

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:

[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 employment-based immigrant visa petition was denied by Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical center. It seeks to employ the beneficiary as a medical center manager. As required by statute, the petition was accompanied by a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL). The director denied the petition because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel submits additional evidence and asserts that the beneficiary has the necessary educational credentials to meet the qualifications set forth in the approved labor certification.

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).

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *See* 8 C.F.R. 204.5(d); *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 30, 2001.

It is noted that CIS has authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. CIS may not ignore a term of the labor certification, nor may it imposer additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany v. Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary v. Coomey,* 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS,* 525 F. Supp. 254 (D. Colo. 1981).

It is further noted that Section 212(a)(5)(A)(i) of the Act and the scope of the regulation at 20 C.F.R. § 656.1(a) describe the role of the DOL in the labor certification process as follows:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
>
> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is left to CIS to determine whether the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by Federal Circuit Courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14). Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> * * *
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, at pp. 1012-1013.[1]

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[1] The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, has stated:

> 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)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). ***See*** *generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification Form ETA-750A, item 14 sets forth the minimum education, training, and experience that an applicant must have for the position of a medical center manager. In the instant case, item 14 states the following:

14.	Education	
	College	4
	College Degree Required	Bachelor's Degree
	Major Field of Study	**Liberal Arts**
	Experience	
	Job Offered	2 yrs., or
	Related Occupation	2 yrs.
	Related Occupation	Medical Coordinator

The proffered position of a medical center manager as set forth on the labor certification requires 4 years of college culminating in a Bachelor's degree in liberal arts and 2 experience in the job offered or in a related occupation as a medical coordinator. As reflected on the labor certification, DOL assigned the occupational code of 169.167-034, office manager, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL, the position falls within Job Zone Four requiring "considerable preparation" for the 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/11-3011.00.* (accessed July 16, 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.

If the proffered position is analyzed as a skilled worker rather than a professional position, a Bachelor's degree in Liberal Arts is still required, since the petitioner specified that requirement on the ETA 750. The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states in pertinent part:

> (B) *Skilled workers.* 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.

As proof of the beneficiary's formal education, the petitioner submitted a copy of a certificate from the "Board of Pre-University Education" issued by the Indian "Sree Siddagonga College of Arts, Science & Commerce," copies of grade transcripts from Bangalore University, India, as well as copies of various certificates of vocational training from the "Council for Accreditation in Occupational Hearing Conservation," the "U.S. Alcohol Testing of America, Inc.," the "American Lung Association," the "American Computer Corporation," a two-day course in spirometry from "Triton College Continuing Education Center," the "National Center for Competency Testing" certifying that the beneficiary fulfilled requirements in 2001 to be a phlebotomy technician, and a copy of a diploma from the "National Education Center," from the Byman Campus in Chicago, Illinois along with a grade transcript, confirming that the beneficiary completed a course in medical assisting in 1993.

The petitioner further provided a general evaluation report, dated August 28, 2002, from [redacted] of the Educational Credentials Evaluators, Inc. Mr. [redacted] determines that the beneficiary's academic studies at Bangalore University between 1977 and 1980 represent a U.S. equivalence of "the completion of undergraduate work representing a total of 70.00 semester hours of credit (two and one-third years of undergraduate study)."

The petitioner additionally supplied a second "expert letter," dated June 6, 2005, from [redacted]. Mr. [redacted] determines that the beneficiary completed the U.S. equivalent of two and a half years of undergraduate study at Bangalore University. He states that the beneficiary's course of medical assisting at the National Education Center represents one year of academic coursework from an accredited institution of higher education in the United States. Mr. [redacted] then discusses the beneficiary's professional experience and determines that using a formula of three years of work experience to equate to one year of college training, concludes that the combination of her employment experience, training and academic coursework represents the equivalence of a Bachelor of Science degree in Management with a concentration in Health Administration from an accredited institution of higher education in the United States.

The director denied the petition on July 21, 2005.[2] The director notes that the Wessel evaluation finds that the beneficiary acquired the U.S. equivalent of two and one-third years of undergraduate study and the Charnov evaluation determined that the beneficiary obtained the U.S. equivalent of two and one-half years of undergraduate study (prior to enrolling in the Medical Assisting Certificate Program). The director accepted that the beneficiary's academic studies at Bangalore University represented two and one-half years of undergraduate study. However, the director concluded that the evidence did not demonstrate that the beneficiary had obtained a U.S. Bachelor's degree as required by the ETA 750A, or a foreign degree equivalent to a U.S. Bachelor's degree.

On appeal, counsel submits copies of the documents previously provided to the underlying record and simply reiterates that the Charnov evaluation should be considered as determinative of the beneficiary's educational credentials.

Further, in response to the request for evidence issued by this office, counsel provided additional copies

[2] The director also observed in his denial that the petitioner had not provided an ETA 750B with the original signature of the alien, and noted that the Service seeks the original document before rendering a determination.

of the beneficiary's academic studies including a copy of a provisional degree certificate and a degree completion certificate, both dated November 12, 2007, from the Sree Siddaganga College of Arts, Science and Commerce, indicating that that the beneficiary completed the Bachelor of Science degree examinations held in April 1981. Counsel also provided two additional evaluations from the American Evaluation and Translation Service. Both are dated January 9, 2008. An educational evaluation report is authored by [redacted], the president of the organization. He concludes that the beneficiary's education in India is the equivalent of the completion of three years of undergraduate study in physics, chemistry, mathematics and related subjects at a regionally accredited college or university in the United States. The other evaluation identified as a "professional work experience evaluation report" from the American Evaluation and Translation Service is written by [redacted]. She states that based on a three years of experience for one year of education formula, that the beneficiary's combined education and progressively responsible work experience are equivalent to a U.S. degree of Bachelor of Science in Healthcare Management awarded by a regionally accredited college or university in the United States.

Additionally provided is a copy of a letter from the petitioner briefly summarizing the petitioner's internal posting of the certified position and newspaper advertisements.

As advised in its request for evidence issued to the petitioner, this office has also reviewed the credentials information in the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). ACCRAO, according to its website, www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/register/index/php, EDGE is "a web-based resource for the evaluation of foreign educational credentials."

In this matter, EDGE indicates that the beneficiary's Bachelor of Science degree from Bangalore University represents the attainment of a level of education comparable to 2 to 3 years of university study in the United States.

In summary, the Wessel evaluation concludes that the beneficiary's academic studies in India represent 2 1/3 years of undergraduate study in the United States. The Charnov evaluation states that her academic studies in India represent 2 ½ years of undergraduate study in the United States and then concludes that the equivalence of a Bachelor of Science degree in Management with a concentration in Health Administration from an accredited institution of higher education in the United States is achieved if the beneficiary's certificate in medical assisting is considered along with her professional work experience using a three to one formula as noted above. The Liken evaluation also uses this three to one formula combining academic study and employment experience to conclude that the beneficiary has the equivalent of a U.S. degree of Bachelor of Science in Healthcare management. Finally, [redacted] determines that the beneficiary's passage of the degree examinations for the Bachelor of Science degree in 1981 represents the equivalent of three years of undergraduate study in Physics, Chemistry, Mathematics and related subjects in the U.S.

While it may be noted that even if accepting the Bligh academic evaluation to credit the beneficiary with 3 years of undergraduate study in physics, chemistry, and mathematics, it is unclear how this fulfills the ETA 750's requirement of 4 years of college culminating in a Bachelor's degree in liberal arts. These

evaluations are not probative in determining whether the beneficiary's qualifications satisfy the terms of the labor certification. 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). It is noted that the Liken and Charnov evaluations employed a formula of equating three years of experience for one year of education, which may be used pursuant to the regulations governing non-immigrant petitions at 8 CFR § 214.2(h)(4)(iii)(D)(*5*), but is not provided for in the regulations governing immigrant petitions. Based on a review of the beneficiary's educational qualifications, it may not be concluded that she obtained 4 years of college culminating in a Bachelor's degree in liberal arts.

It is additionally noted that we are aware of the decision in *Snapnames.com, Inc. v. Michael Chertoff,* CV 06-65-MO (D. Ore. November 30, 2006). ." It is noted that decision arose in a different jurisdiction than the instant matter. 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 matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. In that case, the labor certification application specified an educational requirement of four years of college and a "B.S. or foreign equivalent." The district court determined that 'B.S. or foreign equivalent' relates solely to the alien's educational background, precluding consideration of the alien's combined education and work experience. *Snapnames.com, Inc.* at *11-13. Additionally, the court determined that the word 'equivalent' in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions (where there is no statutory educational requirement), deference must be given to the employer's intent. *Snapnames.com, Inc.* at *14. That court, however, did find that work experience is not properly considered in determining whether the alien has a "B.S. or foreign equivalent" and is supported by the plain meaning of **SnapNames's labor certification.** ***Snapnames.com, Inc.* at *14.** **Thus, in this matter, a combination of** education and experience as an acceptable substitute for a Bachelor's degree is not supported by the plain meaning of the labor certification in this case or by the *Snapnames* decision. *See also, Hong Video Technology,* 1998 INA 202 (BALCA 2001). It is further noted that the ETA 750 in this case did not specify or define any equivalency alternative to the requirement of a 4-year Bachelor's degree in liberal arts.

The approved labor certification requires an applicant for the position of medical center manager to have four years of college and a Bachelor's degree in liberal arts. Both the ETA 750 and the summary of the petitioner's recruitment efforts failed to indicate that a specified alternative equivalency to the qualifications set forth on the ETA 750 was acceptable.[3]

[3] DOL has also provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the ETA 750, Part A as well as throughout all phase of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. From Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree, " 2 (June 13, 1994). DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying

The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by DOL. Since that was not done, the director's decision to deny the petition is affirmed.

Based on the evidence submitted, the AAO concurs with the director that the petitioner has not established that the beneficiary possesses a Bachelor's degree in liberal arts as required by the terms of the labor certification. Therefore, the beneficiary is not eligible for the visa classification sought. She does not qualify for the preference visa classification under section 203(b)(3) of the Act. *See also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I& N Dec. 45, 49 (Reg. Comm. 1971).

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 sustained that burden.

ORDER: The appeal is dismissed.

Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992).