(b)(6)

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

DATE: JUL 0 3 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker Pursuant to Section 203(b)(3)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(i)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as an IT consulting business. It seeks to permanently employ the beneficiary in the United States as a "Programmer Analyst." The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[1] The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The director's decision denying the petition concludes that the beneficiary does not meet the educational requirements of the labor certification.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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.[2]

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> 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

---

[1] Section 203(b)(3)(A)(i) of 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.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

> (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 significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. 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).[3] 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.
>
> . . .
>
> 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, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the 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 the DOL that stated the following:

---

[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) 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)(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).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i). The labor certification states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in "Computer Science."
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: "Mathematics, Engineering, Computer Applications, or related."
H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A. If Yes, specify the alternate level of education required: Other.
H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: "3 years bachelor's + master's or post-graduate diploma."
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "2."

H.9. Is a foreign educational equivalent acceptable? Yes.
H.10. Is experience in an alternate occupation acceptable? Yes.
H.10-A. If Yes, number of months experience in alternate occupation required: "24."
H.10-B. Identify the job title of the acceptable alternate occupation: "Software Engineer or related."
H.14. Specific skills or other requirements:

> 2 yrs simultaneous/concurrent experience with Actuate for reporting, Oracle databases, and Powerbuilder. Any suitable combination of experience, education or training is acceptable. The employer will accept a combination of degrees if deemed equivalent to a U.S. bachelor's degree by a credentials evaluator.

The labor certification states that the beneficiary possesses a Master's diploma in Programming and Computer Applications from India, completed in 1999. The record contains a copy of the beneficiary's Master's diploma in Programming and Computer Applications and transcripts from issued in October 1999. The record also contains a copy of the beneficiary's Bachelor of Science degree in Mathematics from the India, issued on December 27, 1999.[4]

The record also contains evaluations of the beneficiary's educational credentials prepared by the following individuals:

- By for dated April 8, 2012. Ms. attributes credits to each of the beneficiary's courses for a total of 206 credits. She concludes that the beneficiary's bachelor's degree from the is equivalent to a U.S. Bachelor of Science degree in Mathematics from a regionally accredited college or university in the United States.
- By Ph.D., for dated April 5, 2012. Dr. concludes that the beneficiary's bachelor's degree from the is equivalent to a "Bachelor of Science degree in Mathematics, representing 206 semester credit hours, from an institution of postsecondary education in the United States of America."
- By for the dated January 7, 2011. Mr. concludes that the beneficiary's bachelor's degree from the and his master's diploma from together constitute the equivalent of a "Bachelor's degree in Information Systems as granted by an accredited U.S. institution."

[4] The transcripts in the record indicate that the beneficiary completed the Bachelor of Science program on December 4, 1997, two years before the degree was issued. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The petitioner must resolve this discrepancy in any further filings.

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 (Commr. 1988). However, USCIS 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. USCIS may evaluate the content of the 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, 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 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011) (expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

In accordance with the evaluations in the record by Ms. and Dr. the petitioner relies on the beneficiary's three-year bachelor's degree as being equivalent to a U.S. bachelor's degree. A three-year bachelor's degree will generally not be considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). Ms. provides a course-by-course evaluation and attributes credits and grades to each of the beneficiary's courses, concluding that the beneficiary's bachelor's degree program constituted 206 credits. Dr. also concludes that the beneficiary earned 206 credits in his bachelor's degree program. Neither Ms. nor Dr. states how they determined what level of credits to equate to each of the beneficiary's courses.

This evaluation by Dr. also states the following on page six:

> . . . It is our case that the measurement of 1,800 clock hours constitutes the minimum requirement to earn a bachelor's degree in the United States.

Dr. states the following on page three:

> . . . Evidence indicates that in the overwhelming majority of cases, the number of contact hours in an Indian 3 yr bachelor's degree exceeds 1800. This is supported further by references below in which it is shown that collegiate instruction in India is markedly more intensive than comparable instruction in the U.S. On this basis, we can confidently say that an Indian three year bachelor's degree likely contains in excess of 1800 contact hours, just as we can say of a generic U.S. bachelor's degree that it likely contains the same. Our decision is therefore to adopt the figure of 1800 as representing a sensible minimum of contact hours absent evidence to the contrary.

This evaluation by Dr. appears to conclude that the majority of three-year Indian degrees exceed 1800 contact hours and therefore are the equivalent of a bachelor's degree from an accredited U.S. university. Dr. goes on at length about Carnegie Units and Indian degrees in general in his evaluation, concluding that the beneficiary's three-year degree is equivalent to a U.S. baccalaureate.

The Carnegie Unit was adopted by the Carnegie Foundation for the Advancement of Teaching in the early 1900s as a measure of the amount of classroom time that a high school student studied a subject.[5] For example, 120 hours of classroom time was determined to be equal to one "unit" of high school credit, and 14 "units" were deemed to constitute the minimum amount of classroom time equivalent to four years of high school.[6] This unit system was adopted at a time when high schools lacked uniformity in the courses they taught and the number of hours students spent in class. The Carnegie Unit does not apply to higher education.[7]

We have reviewed 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 around the world." *See* 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." *See* http://edge.aacrao.org/info.php. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.[8]

According to EDGE, a three-year Bachelor of Science degree from India is comparable to "three years of university study in the United States." Therefore, based on the conclusions of EDGE, and due to the discrepancies with the evaluations by Ms. and Dr. discussed above, the petitioner has not established that the beneficiary's three-year bachelor's degree meets the primary requirements of the labor certification as the foreign equivalent of a U.S. bachelor's degree. However, the labor certification allows for an alternate educational requirement of a three-year bachelor's degree and a master's degree or post-graduate diploma. At issue here is whether the

---

[5] The Carnegie Foundation for the Advancement of Teaching was founded in 1905 as an independent policy and research center whose motivation is "*improving teaching and learning.*" *See* http://www.carnegiefoundation.org/about-us/about-carnegie (accessed June 18, 2014).

[6] *See* http://www.carnegiefoundation.org/faqs (accessed June 18, 2014).

[7] *See* http://www.old.suny.edu/facultysenate/TheCarnegieUnit.pdf (accessed June 18, 2014).

[8] 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. v. USCIS*, 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.

beneficiary's Master's diploma in Programming and Computer Applications from Technocrates Computer Network represents a master's degree or a post-graduate diploma.

EDGE discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor's degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states that a postgraduate diploma following a three-year bachelor's degree represents attainment of a level of education comparable to a bachelor's degree in the United States. However, the "Advice to Author Notes" section states:

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

The evidence in the record on appeal does not establish that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor's degree is required for admission into the program of study. The petitioner indicates in response to our request for evidence (RFE), dated March 4, 2014, that the beneficiary's Master's diploma in Programming and Computer Applications from was not issued by an accredited institution in India. Counsel specifically states that is not currently an accredited program in India" and that it does not appear in the 1997 PIER World Education Series report on India either as an accredited or an unaccredited institution. Nevertheless, counsel states that regardless of whether is accredited by the AICTE, the beneficiary meets the requirements of the labor certification. However, the record does not contain any independent, objective information that is an actual institution of higher learning or that it has the capability of issuing post-graduate diplomas.

The evaluation by Mr. relies upon the beneficiary's three-year bachelor's degree and his two-year master's diploma to conclude that the beneficiary has the equivalent of a U.S. bachelor's degree. However, as stated above, nothing in the record demonstrates that the beneficiary's Master's diploma in Programming and Computer Applications from constitutes a master's degree or a post-graduate diploma, or that when combined with the beneficiary's three-year Bachelor of Science degree, it is the equivalent of a U.S. bachelor's degree.

Therefore, based on the conclusions of EDGE, the evidence in the record on appeal is not sufficient to establish that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree, a master's degree or a post-graduate diploma as required by the terms of the labor certification.

In addition, in our March 4, 2014 RFE, we requested that the petitioner provide evidence to establish that it intended to allow for an alternative to a U.S. bachelor's degree or a single foreign equivalent

degree. Specifically, we requested the recruitment report for the instant labor certification, including all advertisements, copies of the prevailing wage determination and all resumes received. The petitioner provided this evidence in response to our RFE. However, the advertisements state that the position requires a "BS in computer applications, computer sci., engineering or related/equiv." This language does not put potential U.S. workers on notice that they may qualify for the position with an alternative to a U.S. bachelor's degree. The North Carolina prevailing wage determination does not state that an alternative to a U.S. bachelor's degree is acceptable. Nothing in the petitioner's recruitment summary indicates its intent to accept a degree or post-graduate diploma from an unaccredited institution or any other combination of degrees. Therefore, the petitioner has not demonstrated that the beneficiary's educational credentials meet the terms of the labor certification and the requirements as advertised to potential U.S. workers.

The petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.