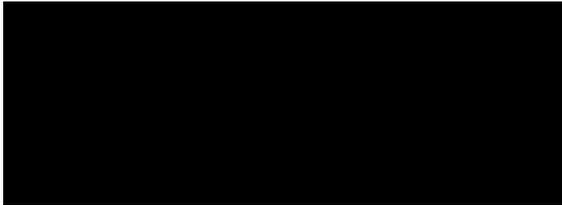




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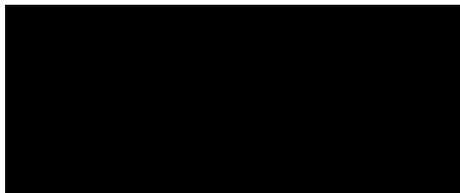
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 06 2005
WAC 03 254 54159

IN RE: Petitioner: [REDACTED]
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:



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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software consulting company. It seeks to employ the beneficiary permanently in the United States as a market research analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition was accompanied by certification from the Department of Labor. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a degree equivalent to a United States baccalaureate degree.

On appeal, counsel asserts that the beneficiary possesses a foreign degree equivalent to a United States baccalaureate degree. In support of the appeal, counsel submits a new evaluation of the beneficiary's foreign degree and a copy of a letter from Citizenship and Immigration Services' (CIS) Office of Adjudications.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). Regarding the "equivalent" of an advanced degree, the regulations state: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.* (We shall discuss this issue further, later in the decision.) The regulations thus allow post-baccalaureate experience to serve in lieu of an actual master's degree; but for the underlying bachelor's degree, there is no comparable provision to allow experience to serve in lieu of actual course credit at an actual degree-granting institution. The minimum educational requirement is a United States baccalaureate degree, or a foreign degree that is equivalent to such a degree.

As the beneficiary possesses a foreign three-year bachelor's degree, the sole issue in this proceeding is whether that degree may be considered a "foreign equivalent degree" to a United States baccalaureate degree so that the beneficiary would have the equivalent of an advanced degree.

The record contains an approved Department of Labor Form ETA-750, Application for Alien Labor Certification (labor certification). Regarding the minimum level of education and experience required for the proffered position, Part A of the labor certification reflects that the petitioner requires a "Master's or Equivalent" in "Economics, Computer Science, Business Administration, Business Management, or a related field." Under "number of years" of "College," the petitioner entered "All." The petitioner also stated: "By equivalent, we will also accept a Bachelor's degree and five years of experience in lieu of a Master's degree. Will accept experience gained before or after completion of degree or college studies."

The beneficiary received a Bachelor of Arts degree in Economics after three years of study at the University of Delhi, from 1988 to 1991. The original petition was accompanied by a credentials evaluation from [REDACTED] of Multinational Education & Information Services. In evaluating the beneficiary's Bachelor of

Arts degree, the evaluator stated: "This is equivalent to a three-year program of academic studies in Economics and transferable to an accredited university in the United States."

After considering the beneficiary's university studies, the evaluator evaluated the beneficiary's additional training that was received after his bachelor's degree. In 1996 and 1997, respectively, the beneficiary completed one-year courses and received "Post Graduate Diplomas" in Marketing Management and Operations Management from Indira Gandhi National Open University. The evaluator indicated that each of these courses "is equivalent to a one-year program of academic studies . . . transferable to an accredited University in the United States." The evaluator also discussed several training certificates that the beneficiary earned from the National Centre for Information Technology and Software Technology Groups International, and concluded that the beneficiary's "educational background is equivalent to an individual with a **Bachelor degree in Economics with a specialization in Computer Science** from an accredited University in the United States" (emphasis in original).

The director denied the petition, stating that the beneficiary's three-year degree "is less than a baccalaureate degree. . . . As such, the beneficiary is ineligible for classification as a member of the professions holding an advanced degree." On appeal, counsel asserts that the first evaluator mistakenly "cited certain computer training courses completed by" the beneficiary, and therefore the evaluation was inadequate to establish the beneficiary's eligibility. (The director had never indicated that the problem lay with the beneficiary's computer training courses.) The petitioner submits a new "education-only evaluation" from [REDACTED] of the Trustforte Corporation. This new evaluation, like the previous one, equates the beneficiary's studies at the University of Delhi with "three years of academic studies toward a Bachelor's Degree in Economics at an accredited US college or university," and that the beneficiary's subsequent studies at Indira Gandhi National Open University, considered in conjunction with the beneficiary's three-year degree, are "the equivalent of a Bachelor of Science Degree, with a dual major in Economics and Business Management, from an accredited college or university in the United States."

Counsel asserts that CIS should consider the beneficiary's multiple degrees in evaluating whether the beneficiary has a "foreign equivalent degree." Counsel submits a copy of a letter dated January 7, 2003, from [REDACTED] Director of the Business and Trade Services Branch of CIS's Office of Adjudications (Office of Adjudications letter). This letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or can take the form of multiple degrees.

The Office of Adjudications letter was written in response to a letter from an attorney who inquired whether, for purposes of 8 C.F.R. § 204.5(k)(2), a "foreign equivalent degree" is limited to a "foreign degree" or whether "foreign education" may count, "when no formal degree is conferred or a 3 year foreign degree combined with a diploma that is determined to be equivalent to a United States degree." In response, [REDACTED] stated:

You ask whether the reference to "a foreign equivalent degree" in 8 C.F.R. 204.5(k)(2) means that the *foreign equivalent advanced degree* must be in the form of a single degree. Despite the use of the singular "degree," it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement. Provided that the proper credential

evaluations service finds that the foreign degree or degrees are the equivalent of the required US degree, then the requirement may be met.

(Emphasis added.) Considering the new credentials evaluation and the Office of Adjudications letter, counsel asserts that the beneficiary has a “foreign equivalent degree” to a United States baccalaureate degree.

Counsel’s assertions are not persuasive. First, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). According to India’s Department of Education, the nation’s educational degree structure provides for both three-year and four-year bachelor’s degree programs. After 12 years of primary and upper primary school, a bachelor’s degree in the arts, commerce, or the sciences may be earned after three years of higher education. A bachelor’s degree in a professional field of study, such as agriculture, dentistry, engineering, pharmacy, technology, and veterinary science, generally requires four years of education. *See generally* Government of India, Department of Education, *Higher Education in India, Academic Qualification Framework - Degree Structure*, (last updated October 1, 2001), available at <http://www.education.nic.in/htmlweb/higedu.htm> (printed copy incorporated into the record of proceeding). If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be deemed to be the “foreign equivalent degree” to a United States baccalaureate degree. However, in *Matter of Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah* at 245. Based on the same reasoning, the beneficiary’s three-year Bachelor of Arts degree from the University of Delhi will not be considered the “foreign equivalent degree” to a United States baccalaureate degree for purposes of this preference visa petition. Both evaluations provided by the petitioner pronounce the beneficiary’s three-year Bachelor of Arts degree to be the equivalent not of a bachelor’s degree, but of three years of study toward such a degree at an accredited United States college or university.

Finally, the letter from the Office of Adjudications is not persuasive. The succinct response of [REDACTED] specifically refers to “the foreign equivalent advanced degree” as the point of concern, rather than the phrase “United States baccalaureate degree or a foreign equivalent degree.” Accordingly, the response appears to specifically address the phrase “foreign equivalent degree” as it relates to the definition of advanced degree at 8 C.F.R. § 204.5(k)(2): “‘Advanced degree’ means any United States academic or professional degree or a foreign equivalent degree above the baccalaureate level.” [REDACTED] response is reasonable when considered in the context of a “foreign equivalent degree” to a United States advanced degree; by definition, an advanced degree is a degree above the baccalaureate level, thereby requiring multiple degrees.

However, if applied to the phrase “United States baccalaureate degree or a foreign equivalent degree” contained at 8 C.F.R. § 204.5(k)(2), the letter’s reasoning would lead to results directly contrary to the regulations, statute, and the intent of Congress. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), 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 (November 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 with anything less than a full baccalaureate degree. Although the preamble to the publication of the final rule specifically dismissed the option of equating "experience alone" to the required bachelor's degree, the same reasoning applies to accepting an equivalence in the form of multiple lesser degrees, professional training, incomplete education without the award of a formal degree, or any other level of education deemed to be less than the "foreign equivalent degree" to a United States baccalaureate degree. Whether the equivalency of a bachelor's degree is based on work experience alone or on a combination of multiple lesser degrees, the analysis results in the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." 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 degree that is the "foreign equivalent degree" to a United States baccalaureate degree. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to bachelor's degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. In addition, a combination of degrees which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree does not meet the regulatory requirement of a foreign equivalent degree.

Furthermore, the Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000)(copy incorporated into the record of proceeding).

As previously noted, the ETA-750 labor certification specifically requires a master's degree, or a bachelor's degree and five years of experience. Based on the submitted evidence, the petitioner has not established that the beneficiary possesses a United States Master's degree or a foreign equivalent degree. And as previously explained, the petitioner has not established that the beneficiary possesses the minimum alternate qualifications, a Bachelor of Science degree with five years of experience, as the beneficiary's three-year Bachelor of Arts degree is not a "United States baccalaureate degree or a foreign equivalent degree." Because

the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Beyond the decision of the director, we note that the minimum requirements for the position do not conform to the regulations pertaining to the classification sought. 8 C.F.R. § 204.5(k)(4)(i) requires that the job offer portion of the individual labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. The regulation at 8 C.F.R. § 204.5(k)(2) defines the equivalent of an advanced degree: “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” (emphasis added). Similarly, pursuant to 8 C.F.R. § 204.5(k)(3)(i)(B), a petitioner who seeks to establish that the beneficiary holds the equivalent of an advanced degree must submit “evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive *post-baccalaureate* experience in the specialty” (emphasis added).

As noted above, the labor certification in the record indicates that the petitioner will “accept a Bachelor’s degree and five years of experience in lieu of a Master’s degree. Will accept experience gained *before or after* completion of degree or college studies” (emphasis added). Thus, the petitioner does not require five years of *post-baccalaureate* experience, and therefore the petitioner’s minimum requirements do not conform to the regulatory requirements pertaining to classification as a member of the professions holding an advanced degree or its equivalent. No petition based on a labor certification showing those minimum requirements can properly be approved under section 203(b)(2) of the Act, regardless of the beneficiary’s actual qualifications.

We stress that this discussion concerns the labor certification itself, without any consideration for the individual alien’s actual qualifications. Therefore, the director’s failure to note this fatal deficiency in the labor certification does not in any way undermine the director’s other findings relating specifically to the beneficiary’s qualifications.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a de novo basis).

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely 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.