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U.S. Citizenship
and Immigration
Services

B5



FILE: [REDACTED]
SRC 06 243 51681

Office: TEXAS SERVICE CENTER Date: JUL 27 2007

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.

Maura Deandck
Robert P. Wiemann, 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 provides consulting services. It seeks to employ the beneficiary permanently in the United States as a network system administrator 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 Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification *and* that the petitioner did not have the necessary education for the classification sought.

On appeal, counsel relies on a letter that is not a binding statement of policy and a federal district court decision that deals with a lesser classification. For the reasons discussed below, we find that decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the classification sought. In addition, courts have afforded us deference in interpreting our own regulations. Consistent with these legal authorities, we find that counsel has not overcome the director's finding that the petitioner does not qualify *for the classification sought*. We emphasize that we can reach this decision based solely on an interpretation of our own regulations and without any evaluation of the job requirements specified on the ETA Form 9089. Given this conclusion, we need not reach whether the alien meets the job requirements specified on the ETA Form 9089.

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). 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 United States doctorate or a foreign equivalent degree." *Id.*

The beneficiary possesses a foreign *two-year* "bachelor of commerce" degree and completed a two-year "computer diploma course." Thus, the issues are whether either degree is a foreign degree equivalent to a U.S. baccalaureate degree and, if not, whether it is appropriate to consider the beneficiary's years of experience in addition to that degree.

On appeal, counsel cites *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005) for the proposition that it is the responsibility of the employer to set the job requirements and that Citizenship and Immigration Services (CIS) may not "impose its definition of 'bachelor's degree.'" Counsel further asserts that DOL certified the ETA Form 9089 with full knowledge of the beneficiary's education.

Counsel's reliance on *Grace Korean* is misplaced. First, 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 cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* at 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

Regardless, *Grace Korean* deals with a different classification than the one before us. At issue in the matter before us is whether the alien is qualified for the classification sought pursuant to section 203(b)(2) of the Act. *Grace Korean*, on the other hand, dealt with an interpretation of "bachelor's or equivalent" (emphasis added) pursuant to section 203(b)(3) of the Act. Section 203(b)(3) of the Act includes the skilled worker classification, which requires no education; a fact found significant in the *Grace Korean* decision. *Grace Korean* also involved a certified Form ETA 750, since replaced by the ETA Form 9089. Under the old process, the employer would provide DOL with the alien's exact degree, name of the degree issuing institution and number of years of education on Form ETA 750B. The new process only requires the employer to indicate the beneficiary's highest level of education. In this matter, the petitioner indicated on Part J of the ETA Form 9089 that the beneficiary's highest level of education was a baccalaureate. Thus, contrary to counsel's assertion on appeal, DOL was *not* apprised of the specifics of the beneficiary's actual education: a two-year degree followed by a two-year computer course. Thus, we cannot conclude that DOL made any evaluation of that education.

In summary, at issue before us is whether the beneficiary qualifies for classification as an advanced degree professional pursuant to section 203(b)(2) of the Act. Thus, *Grace Korean* is not on point. Unlike the facts in *Grace Korean*, we can reach a decision on the beneficiary's eligibility for classification under section 203(b)(2) of the Act through an interpretation of our regulations alone, without reference to the Form ETA 9089.¹

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

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

¹ This distinction has been acknowledged in a subsequent decision issued by the same district as the court in *Grace Korean*. *SnapNames v. Chertoff*, CV 06-65-MO, 9 (D. Ore. November 30, 2006) (deferring to CIS' interpretation of its own regulations that classification as an advanced degree professional requires a single degree equivalent to a U.S. baccalaureate).

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.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

(a) Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), certain aliens may not obtain immigrant visas for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Secretary of Homeland Security that:

(1) There are not sufficient United States workers who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries 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. 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) [current section 212(a)(5)].² *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)[(5)] 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.

* * *

² As amended by Sec. 601, and as further amended by Sec. 172 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; however, the changes made by Sec. 162(e)(1) were repealed by Sec. 302(e)(6) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-323, 105 Stat. 1733, effective as though that paragraph had not been enacted.

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)[(5)]. 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)[(5)] 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 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 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)[(5)], 8 U.S.C. § 1182(a)[(5)]. 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).³

On appeal, counsel relies on a letter from Mr. Efren Hernandez III, Director of the Business and Trade Services Branch of CIS' Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. 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).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the Circuit Court of Appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

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). The Joint Explanatory Statement of the Committee of Conference 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 (October 26, 1990). At the time of enactment in 1990, it had been almost thirteen years since *Matter of Shah*. 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. We 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. *Lujan-Armendariz v.*

³ Significantly, the Seventh Circuit, in a decision reversing a CIS judgement of an alien's eligibility, merely distinguished *K.R.K. Irvine* and *Tongatapu* without questioning the holdings in those decisions. Rather, the court explicitly stated that the "Department of Homeland Security then determines whether the alien whom the employer wants to hire satisfies those requirements – that is, whether he *has* the training required for the job." *Hoosier Care, Inc. v. Chertoff*, No. 06-3562 (7th Cir. April 11, 2007).

INS, 222 F.3d 728, 748 (9th Cir. 2000) *citing Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

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. More specifically, as stated above, a three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 244. 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." 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.

Thus, 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.

The petitioner submitted two evaluations of the beneficiary's education credentials, both of which conclude that his bachelor of commerce degree is equivalent to *two years* of university-level credit at an accredited university in the United States. The evaluation from Universal Evaluations and Consulting, Inc. indicates that the beneficiary's diploma is equivalent to two years of "professional

training offered by [a] private institution in the United States.” Both evaluations conclude that the beneficiary has the equivalent of a U.S. baccalaureate only by considering his experience in addition to his academic credentials.

On appeal, counsel asserts that the beneficiary possesses a three-year degree. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The evaluations submitted do not support counsel’s assertions. Rather, both evaluations indicate that the beneficiary completed a two-year degree and a two-year computer course.

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. For this reason, 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.