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FILE: LIN 06 123 53593 Office: NEBRASKA SERVICE CENTER Date: **JUN 16 2008**

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:

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 Director, Nebraska 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 hotel management services. It seeks to employ the beneficiary permanently in the United States as a manager of global asset management pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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. 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. Specifically, the director determined that the beneficiary did not possess a Master's degree.

On appeal, counsel asserts that the beneficiary has the foreign equivalent of a U.S. Master's degree and that it is not within the jurisdiction of Citizenship and Immigration Services (CIS) to consider whether the beneficiary is qualified for the job certified by DOL. On March 13, 2008, this office issued a notice of intent to dismiss the appeal, advising the petitioner of published material that contradicted the evaluations of the beneficiary's education. While we would have considered any published material supporting those evaluations had the petitioner submitted any in response to our notice, the petitioner did not respond.

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." *Id.*

### **The Beneficiary's Education**

The beneficiary possesses a foreign three-year bachelor's degree from the University of Calcutta and a postgraduate diploma for completion of a "two year (full-time) postgraduate programme in management" from the International Management Institute (IMI). A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Regl. Commr. 1977). Thus, at issue is the significance of the beneficiary's diploma from IMI.

The petitioner submitted evaluation from World Education Services (WES) asserting that the beneficiary's education in the aggregate is equivalent to a U.S. bachelor's degree and a U.S. Master's degrees.

CIS 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, CIS 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; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even 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 (Regl. Commr. 1972)). If CIS discovers published materials that contradict an expert's conclusion, it is reasonable to expect that the expert produce the published sources that support his conclusions, especially when the expert indicates in his opinion letter that he relied on published sources.

In our March 13, 2008 notice, we advised the petitioner that we had reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, [www.aacrao.org](http://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." Rather than representing the opinion of one individual, EDGE represents juried evaluations of various credentials that have been vetted by a team of experts.<sup>1</sup>

As stated in our previous notice, EDGE provides that a two-year postgraduate diploma following a three-year bachelor's degree "represents the attainment of a level of education comparable to a bachelor's degree in the United States." This juried opinion conflicts with the evaluation of the beneficiary's credentials in the record. We further advised that EDGE is consistent with AACRAO's Project for International Education Research (PIER) publication, *India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* 50 (1997). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not resolved the discrepancy between the evaluation and the materials from EDGE and

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<sup>1</sup> Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at [www.aacrao.org/publications/guide\\_to\\_creating\\_international\\_publications.pdf](http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf). 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.* at 11-12.

the PIER materials. Moreover, as will be discussed in more detail, nothing in the EDGE or PIER materials necessitates a finding that the beneficiary's education constitutes a degree from a college or university as required.

### **Eligibility for the Classification Sought**

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

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. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). None of the cases cited on appeal, which will be discussed in more detail below, purport to overrule the holdings of these federal circuit decisions.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability"). The record contains no evidence that IMI is a college or university

Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" from a college or university, 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. Even if we were to conclude that the beneficiary has a foreign equivalent degree to a U.S. baccalaureate, the petitioner only document the beneficiary's employment back to June 2001, less than five years before the priority date in this matter, October 28, 2005. *See* 8 C.F.R. § 204.5(d). The petitioner must establish that the beneficiary was eligible as of that date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14

I&N Dec. 45, 49 (Regl. Commr. 1971). As the petitioner has not documented that the beneficiary had five years of post-baccalaureate experience as of the priority date, the petitioner has not established that the beneficiary qualifies for the classification sought.

### **Qualifications for the Job Offered**

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 (9<sup>th</sup> 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)(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 9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1984).

Counsel cites *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), which finds that CIS “does not have the authority or expertise to impose its strained definition of ‘B.A. or equivalent’ on that term as set forth in the labor certification.” Subsequently, counsel relies on *Hoosier Care Inc. v. Chertoff*, 482 F. 3d 987 (7<sup>th</sup> Cir. 2007).

*Grace Korean* is a district court decision. 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. Specifically, we are not required to follow the decision of a United States district court in matters arising out of the same district, but are bound by the published decisions of the United States Circuit Courts of Appeals for matters arising out of the same circuit. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d at 74 (administrative agencies are not free to refuse to follow circuit precedent in cases originating within the circuit). Regardless, in this matter, we are not interpreting the phrase, “Bachelor’s or equivalent,” which the court in *Grace Korean* found to be open to interpretation. *Cf. SnapNames v. Chertoff*, CV 06-65-MO, 9 (D. Ore. November 30, 2006) holding “to the extent SnapNames argues the DOL certification precludes the AAO from considering whether [the alien] meets the educational requirements specified in the labor certification, *it is in error.*” (Emphasis added.) Acknowledging that the alien employment certification may be completed with the beneficiary in mind, the court continued: “However, CIS has an independent role in determining whether the alien meets the labor certification requirements, and where the plain language of those requirements does not support the petitioner’s asserted intent, the agency does not err in applying the requirements as written.”

The court in *Hoosier Care Inc. v. Chertoff*, 482 F. 3d at 987 is a circuit court decision. That decision, however, cites both *K.R.K. Irvine*, 688 F. 2d at 1006, and *Tongatapu*, 736 F. 2d at 1305, and does not challenge their holdings. *Hoosier*, 482 F. 3d at 990-91. Specifically, *Hoosier* involved facts where CIS questioned the alien’s eligibility for the job because while the alien had the required level of education, the education was wholly unrelated to the position. The court in *Hoosier* acknowledges that CIS has the responsibility to determine “if the alien is qualified for the job,” but finds that this inquiry is different “from whether the qualifications set by the employer are proper, which is the responsibility of the Department of Labor.” Most significantly, *Hoosier* involved a lesser classification and relied heavily on the regulation at 8 C.F.R. § 204.5(1)(4), which contains language on differentiating between skilled workers and professionals under section 203(b)(3) of the Act. No similar inquiry is required for the classification sought pursuant to section 203(b)(2) of the Act.

Ultimately, we are not usurping the responsibility of the Department of Labor in this matter. Specifically, we are not questioning the certified job requirements. Rather, we are upholding the director’s finding that the petitioner did not possess the required education as of the priority date in this matter.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which CIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree in management is the minimum level of education required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Significantly, Line 9 reflects that a foreign educational equivalent is acceptable.

As discussed above, we find that the beneficiary, at best, has the equivalent of a U.S. baccalaureate. The petitioner was provided an opportunity to address our finding on this matter and failed to do so. Moreover, none of counsel's assertions regarding our authority to consider the alien's eligibility for the job certified are persuasive.

In light of the above, we uphold the director's finding that the petitioner has not established that the beneficiary meets the job requirements of the job certified by DOL.

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.