

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

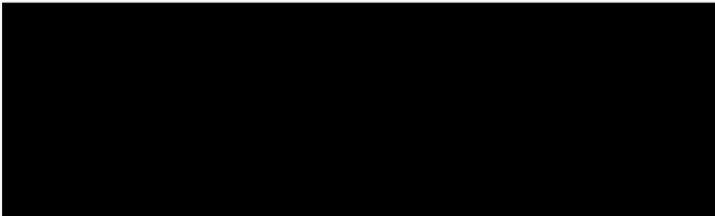
U.S. Department of Homeland Security  
20 Mass. Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

B5



FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAY 05 2008**

LIN 07 001 53840

IN RE:

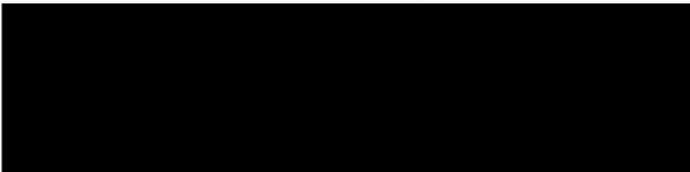
Petitioner:

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 is a data warehousing business. It seeks to employ the beneficiary permanently in the United States as a database 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. Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. Master's degree.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's ultimate decision that the beneficiary does not qualify for the certified position.

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 four-year bachelor's degree and a Postgraduate Diploma in Management from the Xavier Institute of Management. The beneficiary also has five years of post baccalaureate experience. Thus, the beneficiary qualifies as a member of the profession holding an advanced degree. The issue is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification and certified by DOL.

As noted above, the ETA Form 9089 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).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (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)(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 INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

On appeal, counsel relies on notes from meetings between the American Immigration Lawyers Association (AILA) and the service center and a "Clarifying Commentary" from the service center. The notes from an April 12, 2007 meeting between the service center and AILA indicate that the service center acknowledged that "it is possible" that a three-year baccalaureate plus a two-year Master's degree may be deemed equivalent to a U.S. baccalaureate. Thus, counsel asserts that CIS does not require a single source degree.

The comments made by service center employees during outreach meetings are not binding on the AAO. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center had approved an identical immigrant petition, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 at \*3 (E.D. La.), *aff'd*, 248 F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 534 U.S. 819 (2001).

Ultimately, 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, 75 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (5<sup>th</sup> Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

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 "CS, IT, EE, Computer Engineering or any related field of study" is the minimum level of education required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The petitioner submitted an evaluation from Educated Choices, LLC, concluding that the beneficiary's education is equivalent to a Bachelor's Degree in Electrical Engineering and a Master's Degree in Management from a regionally accredited college or university in the United States. While the evaluation noted that a high school diploma was required for admission to the beneficiary's baccalaureate program, the evaluation does not suggest that a four-year baccalaureate is required for admission to the postgraduate diploma in management program at the Xavier Institute of Management.

The director determined that a postgraduate diploma could not be considered a foreign equivalent degree to a U.S. Master's Degree because the Indian University Grants Commission does not recognize postgraduate diplomas. On appeal, counsel notes that the Xavier Institute of Management is recognized by the All India Council for Technical Education (AICTE). The petitioner submits evidence from the website [www.education.nic.in](http://www.education.nic.in) relating to Indian Institutes of Management (IIM). Significantly, those institutes include IIMs in Ahmedabad, Kolkata, Bangalore, Lucknow, Indore and

Kozhikode. The record contains no evidence that the Xavier Institute of Management is an IIM. We note that it is located in Bhubaneswar.

The petitioner also submits a September 17, 2002 letter from the Association of Indian Universities (AIU) to the Director of the Xavier Institute of Management advising that AIU had “reconsidered” and, in view of the institute’s facilities, now recommends the institute’s postgraduate diploma in management be recognized as equivalent to a Master of Business Administration (MBA) from an Indian University. The petitioner submits no evidence that an Indian MBA is equivalent to an MBA from a regionally accredited college or university in the United States. Moreover, the beneficiary received his postgraduate diploma in 1998, before this letter was issued.

Citizenship and Immigration Services (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)).

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).

Moreover, it is significant that both the statute and relevant regulations use the word “degree” in relation to professionals and members of the professions holding an advanced degree. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *See Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997); *Bailey v. U.S.*, 516 U.S. 137, 145 (1995). It can be presumed that Congress’ narrow requirement of a “degree” for members of the profession holding an advanced degree is deliberate. Significantly, in another context, Congress has broadly referenced “the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning.” Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). Thus, Congress’ exclusive use of the word “degree” in defining members of the profession holding an advanced degree reveals that the advanced degree

must be a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Consistent with this interpretation, an ETA Form 9089 that allows the foreign educational equivalent of a credential that is a “degree” in the United States must be interpreted as requiring a foreign degree from a college or university.<sup>1</sup>

While we acknowledge that the Xavier Institute of Management is an AICTE recognized institution, it is not a college or university and the record lacks evidence that it issues degrees.

In addition, while the beneficiary has a Bachelor of Engineering, the petitioner indicated on the ETA Form 9089 that the job requires a *Master’s Degree* in computer science, information technology, electrical engineering or any related field of study. The beneficiary’s postgraduate diploma, the degree allegedly equivalent to a U.S. Master’s Degree, is in management. The evaluation in the record equates the postgraduate diploma to a Master’s Degree in Management in the United States. Of the 42 courses taken, only five relate to computers. None of the coursework relates to engineering. The petitioner has not established that management is related to any of the areas of concentration listed on the ETA Form 9089.

The beneficiary does not meet the job requirements on the labor certification. 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.

---

<sup>1</sup> For example, we must presume that the foreign educational equivalent of a bachelor’s degree means a foreign equivalent degree to a U.S. baccalaureate. Otherwise, we would have to conclude that a job that requires a bachelor’s degree plus five years of post-baccalaureate experience does not require a member of the professions holding an advanced degree pursuant to 8 C.F.R. § 204.5(k)(4) simply because the employer indicated in Part H, line 9 that it would accept a foreign educational equivalent.