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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:

[REDACTED]
LIN 06 236 52026

Office: NEBRASKA SERVICE CENTER

Date:

MAY 19 2009

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:

[REDACTED]
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.

John F. Grissom
Acting 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 AAO will withdraw the director's decision; however, because the petition is not approvable, it is remanded for further action and consideration.

The petitioner purports to be a gas station and convenience store developer. 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). 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.

On appeal, counsel asserts that the beneficiary has the foreign equivalent of a U.S. baccalaureate degree plus five years of experience. The record supports counsel's assertion that the beneficiary's highest degree is a foreign equivalent degree to a U.S. baccalaureate. Nevertheless, the petition is not currently approvable. Specifically, the record is inconsistent regarding the beneficiary's past employment. Thus, we will remand the matter to the director for further inquiry into that issue.

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 possesses a foreign three-year bachelor's degree and a one-year Master of Science degree. The issue is whether that education can serve to qualify the beneficiary for the classification sought.

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 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

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). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, 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 of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. 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. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)(Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

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 (Nov. 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 as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. 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."¹ 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. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may 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. 56 Fed. Reg. at 60900.

In this matter, the petitioner is not relying on a combination of multiple lesser degrees or education and experience to equate to a bachelor's degree. Rather, it is the petitioner's contention that the beneficiary's one-year Master of Marketing Management degree from Kurukshetra University constitutes a foreign equivalent degree to a U.S. academic or professional degree above the baccalaureate level. The petitioner initially submitted two credentials evaluations from Global Education Group. The first evaluation concludes that the petitioner's education in India, including his three-year Bachelor of Commerce and one-year Master of Marketing Management, is equivalent to a Bachelor of Business Administration in Marketing awarded by a regionally accredited university in the United States. The second evaluation indicates that the petitioner's education plus five years of experience is equivalent to a U.S. Master of Business Administration.

The director concluded that it was not appropriate to consider the beneficiary's education in the aggregate and that, since the beneficiary's underlying baccalaureate degree was a three-year degree, he could not establish that his education equated to a U.S. baccalaureate.

U.S. Citizenship and Immigration Services (USCIS) uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an opinion is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *See Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm'r. 1988). The petitioner submitted the beneficiary's transcript for his Master's degree, which reflects one year of coursework. We are

¹ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

persuaded that the Master's program at Kurukshetra University required an Indian baccalaureate for admission. The facts before us do not suggest that the petitioner is attempting to have us consider in the aggregate multiple degrees that are each less than a U.S. baccalaureate. Rather, the Master of Marketing Management appears to be the next benchmark in higher education after the three-year baccalaureate. As the one-year Master's degree builds upon the three-year baccalaureate (entry into the Master's program requires a three-year baccalaureate), it essentially incorporates the three-year degree. We emphasize that our conclusion does not deviate from *Matter of Shah*, 17 I&N Dec. at 245, which found that a three-year course of study was not equivalent to a U.S. baccalaureate. Moreover, we further emphasize that the mere completion of four years or more of course credits in the pursuit of multiple lesser degrees or post-graduate diplomas, even if those degrees and diplomas are obtained, cannot be considered a foreign degree equivalent to a U.S. baccalaureate. There must be a final degree that, in and of itself, is equivalent to a U.S. baccalaureate. In this case, the Master's degree is a higher benchmark of accredited university education *and* essentially incorporates the three-year degree by requiring that degree for admission. Thus, the evaluation equating this higher benchmark, which can only be obtained after completing an Indian baccalaureate, to a U.S. *baccalaureate* is credible.² Thus, the beneficiary's baccalaureate may be considered in combination with five years of progressive post-baccalaureate experience to equate to an advanced degree as defined at 8 C.F.R. § 204.5(k)(2).

Nevertheless, the petition is not currently approvable. We must also consider whether the beneficiary is qualified for the job certified by the Department of Labor. *Tongatapu*, 736 F.2d at 1309; *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Madany*, 696 F.2d at 1008.

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.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree in Marketing is the minimum level of education required. Line 6 reflects that no experience in the job offered is required. Line 8, however, indicates that a combination of education or experience is acceptable in the alternative. Specifically, lines 8-A and 8-C reflect that a Bachelor's degree plus five years of experience are acceptable in lieu of a Master's degree. Significantly, line 10 reflects that experience

² While the evaluations are not supported by relevant pages from published resources, the evaluations are consistent with the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO), "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." See <http://www.aacrao.org/about/> (accessed May 14, 2009) (copy incorporated into the record of proceeding). With regard to education in India, EDGE provides that a Master's degree following a three-year baccalaureate is comparable to a U.S. baccalaureate. See www.aacraoedge.aacrao.org/index.php for information about EDGE specifically. (Information on Indian Master's degrees provided on EDGE, accessed May 14, 2009, incorporated into the record of proceeding.) See also *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) (also concluding that an Indian Master's degree following a three-year baccalaureate is comparable to a U.S. baccalaureate), incorporated into the record of proceeding.

in an alternate occupation is not acceptable. Thus, all five years of experience must be in the job offered, a Marketing Research Analyst. The priority date in this matter is July 12, 2006, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must establish that the beneficiary had the necessary experience as of that date. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). Thus, the beneficiary must have begun working as a Marketing Research Analyst as of July 12, 2001 to have acquired five years of experience in that position as of the priority date.

The record contains a letter from [REDACTED]. We note that the company's address is the same as the petitioner's. [REDACTED] asserts that the beneficiary worked for [REDACTED] as a Market Research Analyst from March 2001 through the date of the letter, April 3, 2006. We have obtained, however, the nonimmigrant visa petition filed in behalf of the beneficiary by [REDACTED] Receipt Number WAC-06-166-50579, and incorporated into this A-file record of proceeding. The nonimmigrant petition contains a letter from the [REDACTED] asserting the following:

In March 2001 to October 2003, [the beneficiary] began his employment with [REDACTED] Joint Venture, as a General Manager. . . .

Because of our company's expansion into new markets, we offered [the beneficiary] a Market Research Analyst position in November 2003 to the present time.

Based on the petitioner's prior representations to obtain approval of the nonimmigrant petition, the beneficiary had only been working as Marketing Research Analyst for three years prior to the filing the instant petition. 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).

Therefore, we remand the matter to the director for the purpose of further inquiry relating to the beneficiary's past employment.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.