

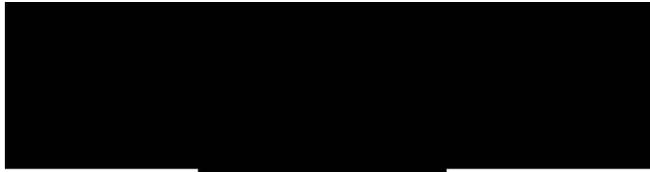


U.S. Citizenship
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FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: NOV 02 2009
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IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The decision of the director will be withdrawn and the case will be remanded for further consideration and action.

The petitioner provides software development and consulting services. It seeks to permanently employ the beneficiary in the United States as a senior software engineer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).¹ As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).²

As set forth in the director's March 26, 2007 denial, the primary issue in this case is whether the job offered requires an advanced degree professional. The AAO will also consider whether the beneficiary was qualified for the requested employment-based preference category on the priority date.³

The record shows that the appeal is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO maintains plenary power to review each appeal on a *de novo* basis. See *Janka v. U.S. Dept. of Transp.*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. See e.g. *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.⁴

¹There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

²This petition involves the substitution of a beneficiary on the labor certification. The substitution of beneficiaries was formerly permitted by the DOL. On May 17, 2007, the DOL issued a final rule prohibiting the substitution of beneficiaries on labor certifications effective July 16, 2007. See 72 Fed. Reg. 27904 (to be codified at 20 C.F.R. § 656). As the filing of the instant petition predates the final rule, the requested substitution will be permitted.

³An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director 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).

⁴The submission of additional evidence on appeal is allowed by the instructions to Form I-290B,

On the petition, the petitioner claimed to have been established in 2004, to have a gross annual income of \$4.5 million, and to employ 42 workers. The proffered wage stated on the labor certification is \$45.00 per hour (\$93,600.00 per year). The priority date of the petition is November 1, 2005, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

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. In order to classify the beneficiary in this employment-based preference category, the petitioner must establish that: the labor certification requires an advanced degree professional;⁵ the beneficiary is an advanced degree professional;⁶ and the beneficiary meets the requirements of the job offered as set forth in the labor certification.⁷ The petitioner must also establish that it has the continuing ability to pay the proffered wage from the priority date until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).

It is important to note that the DOL's role in the employment-based immigrant visa process is limited to determining whether there are sufficient U.S. workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of similarly employed U.S. workers. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a). It is significant that none of the responsibilities assigned to the DOL, nor the remaining regulations implementing these duties at 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or the job offered. Instead, the authority to make this determination rests solely with U.S. Citizenship and Immigration Services (USCIS). *See Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983).

The minimum education, training, experience and skills required to perform the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

H.4. Education: Bachelor's degree in "Any Discipline"

which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

⁵8 C.F.R. § 204.5(k)(4).

⁶8 C.F.R. § 204.5(k)(3).

⁷8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

- H.5. Training: None
- H.6. Experience: Five years
- H.7. Alternate field of study: None
- H.8. Alternate combination of education and experience: Master's degree
- H.9. Foreign educational equivalent: Accepted
- H.10. Experience in an alternate occupation: Five years of experience as a Senior Programmer Analyst
- H.14. Specific skills or other requirements: None

The job offer portion of the labor certification "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4). Accordingly, if the offered position does not require a member of the professions, the petition must be denied.

The regulation at 8 C.F.R. § 204.5(k)(2), defines "profession" as:

[O]ne of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Section 101(a)(32) of the Act states that the term "profession" "shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The offered position is not one of the occupations listed at Section 101(a)(32) of the Act. Therefore, the analysis of whether the offered position requires a member of the professions is based on whether a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

The director acknowledged these definitions, but then relied on *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966) and *Matter of Palanky*, 12 I&N Dec. 66 (Reg'l. Comm'r. 1966), for the proposition that the degree must be related to the field. We note that in *Matter of Shin*, 11 I&N Dec. at 688, the District Director did state that a degree in and of itself was insufficient; rather, the "knowledge acquired must also be of [a] nature that is a realistic prerequisite to entry into the particular field of endeavor." The following discussion, however, was limited to the level of education required, not the major field of study. Moreover, *Matter of Palanky*, 12 I&N Dec. at 68, addressed an occupation that did not require a full baccalaureate. Further, these cases predate the regulation at 8 C.F.R. § 204.5(k)(2). Therefore, the definition of "profession" in that regulation, which states only that a profession must require a baccalaureate for entry into the occupation, takes precedence over the two cases cited in the director's decision.

Although the definition of "profession" at 8 C.F.R. § 204.5(k)(2) does not state that the labor certification must require a field of study that relates to the occupation, the regulation does provide that a profession is an occupation for which a United States baccalaureate degree or its foreign equivalent is the *minimum* requirement for *entry* into the occupation. Thus, some professions may require *more* than a baccalaureate in an unspecified field for entry into that particular profession. In

such cases, USCIS is justified in considering whether the labor certification that does not specify one or more fields of study can truly be considered to require a member of the professions. We note that being a member of the professions does not entitle the alien to classification as a professional if he does not seek to continue working in that profession. *See Matter of Shah*, 17 I&N Dec. 244, 246-47 (Reg'l. Comm'r. 1977).

On the labor certification, the DOL categorized the offered position under SOC code 15-1031, Computer Software Engineers, Applications. The O*NET online database⁸ states that the occupation of Computer Software Engineers, Applications falls within Job Zone Four,⁹ and that 85% of Computer Software Engineers, Applications hold a baccalaureate degree or higher.¹⁰

The corresponding entry in the Occupational Outlook Handbook (OOH) for SOC code 15-1031 is Computer Software Engineers.¹¹ The required education for this occupation is summarized as follows:¹²

Most employers prefer applicants who have at least a bachelor's degree and broad knowledge of, and experience with, a variety of computer systems and technologies. The *usual* college major for applications software engineers is computer science or software engineering.

(Emphasis added). In summary, O*NET and the OOH confirm that the offered position requires at least a bachelor's degree. In addition, the OOH states that the usual bachelor's degree for this occupation is computer science or software engineering, but is not required for entry into the profession. Therefore, it is concluded that the offered position does not require an individual to possess a degree in one or more specific fields of study.¹³

⁸O*NET, located at <http://online.onetcenter.org>, is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations" (accessed September 26, 2009).

⁹According to O*NET, most of occupations in Job Zone Four require a four-year bachelor's degree. <http://online.onetcenter.org/help/online/zones> (accessed September 26, 2009).

¹⁰Details Report for 15-1031.00 at <http://online.onetcenter.org/link/details/15-1031.00> (accessed September 26, 2009).

¹¹The OOH, located at <http://www.bls.gov/OCO>, is a nationally recognized source of career information published by the DOL's Bureau of Labor Statistics.

¹²<http://www.bls.gov/oco/ocos267.htm> (accessed September 26, 2009).

¹³It is noted that the director did not reference a source of information suggesting that a minimum of a baccalaureate in any field of study was not a normal requirement for the occupation.

Further, it is noted that the beneficiary's university transcripts indicate the completion of courses in computer systems and applications. The record also contains a letter from one of the beneficiary's prior employers, which documents over five years of progressively responsible experience as a computer professional. Specifically, the letter states that the beneficiary was employed as a senior web designer and team leader with Webodrome Arise Technologies Pvt. Ltd. from August 1999 to February 2005. The labor certification, signed by the beneficiary under penalty of perjury on August 1, 2006, states that the beneficiary was employed as a Senior Programmer Analyst by SoftwareArt Corporation from February 2005 to November 2005. The beneficiary's education and experience consistent with the requirements of the offered position as stated in the OOH.

In light of the above, the petitioner has established that the position certified by the DOL is a profession. Thus, the director's decision that the offered position does not require a member of the professions is withdrawn.

However, the evidence in the record does not establish that the beneficiary was qualified for the requested employment-based preference category on the priority date, and the appeal cannot be sustained for that reason.

On the petition, the petitioner requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Act. 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.

The regulation at 8 C.F.R. § 204.5(k)(2), defines "advanced degree" as follows:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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.

The record contains a copy of the beneficiary's master of commerce degree from University of Mumbai, issued in 2002, and a copy of the beneficiary's three-year bachelor of commerce degree from University of Mumbai, issued in 1999. The record does not contain an evaluation of the beneficiary's foreign credentials. Accordingly, the AAO has reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). EDGE is a source considered by the AAO in the evaluation of foreign credential equivalencies. AACRAO, according to its website at 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 its registration page, EDGE is "a web-based resource for the evaluation of foreign educational credentials."¹⁴

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.¹⁵ 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.

EDGE provides that a bachelor of commerce degree awarded in India represents the attainment of a level of education comparable to two or three years of university study in the United States.¹⁶ EDGE also states that a master of commerce degree awarded in India represents the attainment of a level of education comparable to a bachelor's degree in the United States.¹⁷

Therefore, since the beneficiary does not possess a master's degree, in order to qualify as a member of the professions holding an advanced degree, the beneficiary must possess the foreign equivalent of a U.S. bachelor's degree *followed by* five years of progressive experience in the specialty. 8 C.F.R. § 204.5(k)(2). In addition, the beneficiary must have possessed the bachelor's degree and five years of experience by the November 1, 2005 priority date. 8 C.F.R. § 103.2(b)(1), (2). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

Given that the beneficiary's master of commerce degree was conferred by the University of Mumbai on December 20, 2002, he could not have possessed five years of progressive experience in the specialty following the issuance of his degree by the November 1, 2005 priority date. Therefore, the petitioner has not established that the beneficiary possessed the equivalent of an advanced degree, as defined at 8 C.F.R. § 204.5(k)(2), by the priority date. It does not appear that the petition may be approved for this reason.

¹⁴<http://aacraoedge.aacrao.org/register/index/php> (accessed October 8, 2009).

¹⁵*See An Author's Guide to Creating AACRAO International Publications*, 5-6 (First ed. 2005), at www.aacrao.org/publications/guide_to_creating_international_publications.pdf (accessed October 8, 2009).

¹⁶<http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=128> (accessed October 8, 2009, and incorporated into the record of proceeding).

¹⁷<http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=140> (accessed October 8, 2009, and incorporated into the record of proceeding).

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.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for consideration of the issues stated above. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director's decision is withdrawn; however, the petition is currently not approvable 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 decision.