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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
and Immigration
Services

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FILE:

SRC 07 155 51733

Office: TEXAS SERVICE CENTER

Date: SEP 14 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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 claims to provide computer consulting and software development services. It seeks to employ the beneficiary permanently in the United States as a marketing research analyst. The petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the Department of Labor (DOL).

As set forth in the director's July 30, 2007 denial, the primary issue in this case is whether the beneficiary possesses the minimum educational requirements of the offered position as set forth in the labor certification.

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. 5 U.S.C. § 557(b); *see also 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 at 1002 n. 9. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The evidence in the record of proceeding includes the following:

- Transcript and postgraduate diploma in marketing management from Indira Gandhi National Open University, India.
- Statement of marks and bachelor of science diploma from the University of Delhi, India.
- Transcript and master of science diploma in environmental biology from Maharshi Dayanand University, India.
- Software technology & systems management curriculum transcript from NIIT, India.
- Academic equivalency evaluation by [REDACTED] of International Credentials Evaluation Services, dated February 24, 2000.
- Academic equivalency evaluation by [REDACTED] of The Trustforte Corporation, dated January 23, 2007.
- Employment experience letter by [REDACTED] of SVAM International, Inc., dated June 9, 2004, stating that the beneficiary was employed as an Account Manager – Market

¹The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

Research Analyst from December 2002 to June 2004.

- Employment experience letter by [REDACTED] of Interactive Communications & Systems (USA) Inc., dated January 3, 2003, stating that the beneficiary was employed as an Account Manager – Market Research Analyst from August 2000 to December 2002.
- Employment experience letter by [REDACTED] of North Shore Technologies Pvt. Ltd., dated July 30, 2000, stating that the beneficiary was employed as an Account Manager – Recruitment & Sales from November 1999 to July 2000.
- Employment experience letter by [REDACTED] of Labindia Instruments Pvt. Ltd., dated June 5, 2007, stating that the beneficiary was employed as a Sales Engineer and Product Manager from March 3, 1994 to October 5, 1999.
- Forms 1120S, U.S. Income Tax Return for an S Corporation, for 2005 and 2006.
- 2005 Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary.
- 2006 Form W-2, Wage and Tax Statement, issued to the beneficiary by an employer other than the petitioner.

On the petition, the petitioner claimed to have been established in 1997, to have a gross annual income of \$19 million, and to employ 181 workers.

The priority date of instant petition is February 22, 2005, the date the labor certification was filed with the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage stated on the labor certification is \$58,000.00 per year. The labor certification states that the offered position of marketing research analyst requires a master's degree in marketing, business, management, business administration, marketing management "or its foreign educational equivalent," and two years of experience in the job offered or in "other occupations in the marketing industry."

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2) provides immigrant classification to members of the professions holding advanced degrees. In order to obtain classification in this employment-based preference category, the labor certification must require a member of the professions holding an advanced degree,² and the petitioner must demonstrate that the beneficiary is a member of the professions holding an advanced degree³ who meets the requirements of the job offered as set forth in the labor certification.⁴

"Advanced degree" is defined as either a "United States academic or professional degree or a foreign equivalent degree above that of baccalaureate." 8 C.F.R. § 204.5(k)(2). The regulation at 8 C.F.R. § 204.5(k)(2) further states that 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

²8 C.F.R. § 204.5(k)(4).

³8 C.F.R. § 204.5(k)(3).

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

equivalent of a master's degree."

The same regulation defines "profession" as "one 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." *Id.* Section 101(a)(32) of the Act states that the term "profession" includes, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The director's denial states that the petitioner failed to establish that the beneficiary possessed the foreign educational equivalent of a master's degree in one of the acceptable fields of study set forth on the labor certification. Accordingly, on appeal, the petitioner must establish that, as of the priority date, the beneficiary had the qualifications stated on the labor certification. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (USCIS) must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986); *see also Madany*, 696 F.2d at 1015.

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. *See* 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 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 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).

Part A of the labor certification describes the minimum education, training, experience and skills required to perform the duties of the job offered. In the instant case, the labor certification states that the marketing research analyst position has the following requirements:

EDUCATION

Grade School: 8 years

High School: 4 years

College: 5 years

College Degree Required: "Master"

Major Field of Study: "Marketing, Business, Management, Business Administration, Marketing Management or its foreign educational equivalent"

TRAINING: None

EXPERIENCE: Two (2) years in the job offered or in "other occupations in the marketing industry"

OTHER SPECIAL REQUIREMENTS: "Travel and/or relocation required"

The evidence in the record includes the beneficiary's transcript and postgraduate diploma in marketing management from Indira Gandhi National Open University, India; statement of marks and bachelor of science diploma from the University of Delhi, India; transcript and master of science diploma in environmental biology from Maharshi Dayanand University, India; and software technology & systems management curriculum transcript from NIIT, India.

The record also includes an academic equivalency evaluation by [REDACTED] of International Credentials Evaluation Services (ICES evaluation), dated February 24, 2000. The ICES evaluation states that the beneficiary's bachelor of science degree from the University of Delhi is the equivalent "to the completion of three years of academic study towards a Baccalaureate Degree from an accredited institution of tertiary education in the United States." In addition, the ICES evaluation states that, "considered together with his prior studies at The University of Delhi," the beneficiary's postgraduate diploma in marketing management from Indira Gandhi National Open University is equivalent "to the completion of a Bachelor of Science Degree in Marketing from an accredited institution of tertiary education in the United States."

In addition, the record includes an academic equivalency evaluation by [REDACTED] of The Trustforte Corporation (Trustforte evaluation), dated January 23, 2007, stating that the beneficiary's master of science degree in environmental biology is equivalent to a master of science degree "from an accredited college or university from the United States."

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, USCIS 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. USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *Id.* Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Even if the AAO accepts the conclusions of the submitted evaluations,⁵ the petitioner has not

⁵Mr. Silberzweig claims to be a member of American Association of Collegiate Registrars and Admissions Officers (AACRAO) and to have used an AACRAO publication to evaluate the beneficiary's credentials. The AAO has consulted AACRAO's Electronic Database for Global Education (EDGE). According to its registration page at <http://aacraoedge.aacrao.org/register/index/php>, EDGE is "a web-based resource for the evaluation of foreign educational credentials." Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison, and their opinions are subject to final review and approval by AACRAO's National Council on the Evaluation of Foreign Educational Credentials. According to EDGE, a master of science degree from India is "comparable to a bachelor's degree in the United States." <http://aacraoedge.aacrao.org/credentialsAdvice.php?countryId=99&credentialID=140> (accessed

demonstrated that the beneficiary possessed the educational requirements of the job offered as set forth in the labor certification. The petitioner has not submitted any diploma, transcript or credentials evaluation stating that the beneficiary has a *master's degree* in marketing, business, management, business administration, marketing management or its foreign educational equivalent. The ICES evaluation states that the beneficiary has the multiple degrees which, taken together, are equivalent to a U.S. bachelor's degree in marketing. The Trustforte evaluation states that the beneficiary has the equivalent of a master of science degree, but it does not specify a field of study.

There is nothing in the record of proceeding that establishes that the beneficiary possesses a master's degree in one of the required fields of study set forth in the labor certification.

Therefore, the petitioner has not established that the beneficiary met the educational requirements set forth in the labor certification as of the priority date.

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.

August 20, 2009). However, even if EDGE confirmed the conclusion of the Trustforte evaluation, the appeal would still be dismissed for the reasons set forth below. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.