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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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[Redacted]

RICHMOND, VA 23258

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date:

AUG 23 2010

IN RE:

Petitioner:

[Redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching your decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

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 appeal will be dismissed.

The petitioner is a financial and banking institution. It seeks to employ the beneficiary permanently in the United States as a Unix 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, a Form ETA 750,<sup>1</sup> 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 necessary for the visa classification as a member of the professions holding an advanced degree and denied the petition, accordingly.

On appeal, the petitioner submits additional evidence and asserts that the beneficiary satisfied the terms of the labor certification.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The record shows that the appeal is properly filed and 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.

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."<sup>2</sup> *Id.*

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750, Application for Alien Employment Certification, as certified by the DOL and

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089. *See* 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004).

<sup>2</sup>Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as a "degree of expertise significantly above that ordinarily encountered." In this case, the petitioner has not asserted that the beneficiary falls within this category.

submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on February 4, 2003.<sup>3</sup> On the ETA Form 750 B, signed by the beneficiary on January 29, 2002, the beneficiary claims to have worked for the petitioner since September 2001. The Form ETA-750A, item(s) 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of a Unix Administrator. They reflect the following:

14. Education (Enter number of years)

Grade School	6
High School	6
College	5-6
College Degree Required (Specify)	Master's degree or equivalent
Major Field of Study	Electrical Engineering or Computer Science
Experience	
Job Offered (Yrs.)	6 Mos.
Related Occupation	none stated

15. Other Special Requirements Knowledge and experience in HP-UX MC Service Guard Clustering software, HP-UX LVM disk management, EMC symmetrix High Availability Disk configuration, TCOP/IP, NFS internet protocols (SMTP, HTTP, NNTP, DNS), Unix Security and Unix Shell.

On Part B of the ETA 750 listing the beneficiary's educational and other qualifications and skills, it is claimed that he attended the "GOVT Polytechnic, India," from August 1986 to February 1990, majoring in computer engineering and received a bachelor's degree. It also states that the beneficiary has a "Master's equivalent" from the Institute of Electronics and Telecommunications Engineers following a program of study from June 1990 to June 1995, majoring in electrical engineering and telecommunications.

The record contains copies of the beneficiary's credentials as follows:

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<sup>3</sup> If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

- 1) A copy of a Provisional Certificate Cum Consolidated Marks from the Government Polytechnic, State Board of Technical Educational and Training of Hyderabad, India, indicating that the beneficiary completed a three-year diploma course in computers engineering and received the diploma on February 28, 1990. This diploma is accompanied by copies of his memorandum of marks.
- 2) A copy of the beneficiary's examination marks card from The Institution of Electronics and Telecommunication Engineers (IETE) indicating that he had passed Section(s) A and B examinations by June 1994.
- 3) A copy of a certificate from the IETE reflecting that the beneficiary became an associate member of the IETE on November 6, 1995 by virtue of his successful passage of the AMIETE Examination in June 1995.

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).

The petitioner initially submitted two credentials evaluations from the Washington Evaluation Service authored by [REDACTED]. The earliest evaluation is dated May 31, 2001. [REDACTED] states that his report is based on a review of the beneficiary's diploma in computer engineering, his associate membership in the IETE, transcripts, and a resume detailing over 10 years of professional work experience. It is noted that the underlying record does not contain a copy of the beneficiary's resume. [REDACTED] determines in this report that the beneficiary's combined academic studies are academically equivalent to a U.S. Bachelor of Science in Electronics and Communication Engineering and that when combined with the beneficiary's over ten years of work experience in communication engineering would be the U.S. equivalent to a Master of Science in Electronic and Communication Engineering.

A second evaluation, dated December 29, 2006, from [REDACTED] indicates that he has reviewed the beneficiary's diploma in computer engineering, his associate membership in the IETE, relevant marks and transcripts, as well as letters from employers and the beneficiary's resume detailing over nine years of work experience. In this evaluation, [REDACTED] states that the beneficiary's three-year diploma in computer engineering combined with his studies at the IETE are the U.S. equivalent to a four-year Bachelor of Science in Electronics and Communications Engineering with a second major in Computer Engineering. He states that the beneficiary's studies at the IETE are the U.S. equivalent of one year of studies at the university level. Therefore, when combined with his three-

year diploma, the beneficiary has the U.S. equivalent of a four-year bachelor's degree.<sup>4</sup> further states that when combined with over 9 years of professional work experience, the beneficiary reached "the equivalence to a master's degree in 2002" (1996 plus 5 years professional computer work experience).

On appeal, counsel asserts that the beneficiary satisfied the bachelor's degree requirement by attainment of the Certificate of Associate Membership after passing the AMIETE Examination in 1995. Together with an additional five years of progressive work experience, counsel contends that the beneficiary has obtained the equivalent of a master's degree.

Counsel also submits copies of two letters from the Virginia Commonwealth University indicating that the beneficiary was awarded a Master's degree in Information Systems on May 19, 2007,<sup>5</sup> and that his admission to the graduate program, was based, in part, on his passage of the AMIETE Examination. Counsel also provides a copy of a letter, dated January 7, 2003, from Hernandez III, Director of the Business and Trade Services Branch of U.S. Citizenship and Immigration Services' (USCIS) Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. The AAO does not find that the graduate admissions criteria used by Virginia Commonwealth to be probative of whether the beneficiary is eligible for visa classification as an advanced degree professional as the regulatory requirements are specific as to what qualifies as an advanced degree. Similarly, it is additionally noted that the Office of Adjudications letter is not binding on the AAO. Letters written by the Office of Adjudications do not constitute official USCIS policy and will not be considered as such in the adjudication of petitions or applications. Although such letters may be useful as an aid in interpreting the law, the letters are not binding on any USCIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (Dec. 7, 2000) (copy incorporated into the record of proceeding).

Rather, 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. Askkenazy Property Management Corp.* 817 F. 2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative

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<sup>4</sup>The record contains the beneficiary's secondary school certificate, which EDGE states is comparable to less than completion of senior high school in the United States and that placement might be in Grade 11. Nothing in the record shows that the beneficiary has a Higher Secondary Certificate, which EDGE states is equivalent to senior high school in the U.S. Therefore, without further verification of the beneficiary's Higher Secondary Certificate, this part of the evaluation is in question. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

<sup>5</sup>This degree is not under consideration in this case as it was received after the priority date of February 4, 2003.

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).

Two additional credential evaluations are submitted on appeal. They include a third evaluation, dated May 28, 2008, from [REDACTED] of the Washington Evaluation Service and an evaluation of the beneficiary's academics and work experience, dated April 23, 2008, from [REDACTED] an associate professor in the department of decision and information technologies at the University of Maryland. [REDACTED] retracts his earlier determination that the beneficiary's IETE studies were equivalent to one-year of U.S. university studies and now states that they were equivalent to a four-year Bachelor of Science in Electronics and Communications Engineering with his three-year diploma in computer engineering equivalent to a second major in computer engineering. An additional five years of progressive work experience is deemed to be the equivalent of a U.S. Master of Science in Computer Science. [REDACTED] evaluation reaches the same conclusion. Both evaluators rely on the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO),<sup>6</sup> which advises admissions officers that an associate membership in the IETE represents attainment of a level of education comparable to a bachelor's degree in the United States. EDGE further explains that:

Associate Membership in 1) The Institution of Engineers, India (IEI), 2) Institution of Electronics and Telecommunications Engineers (IETE, formerly AMIETE), or 3) the Institution of Mechanical Engineers, India (IMEI) Part A and B is awarded upon completion of Section "A" examination basic commonalities and Section B examination consisting of compulsory, advanced commonality, discipline commonalities and specialization options courses in various Engineering Divisions (Aerospace, Agricultural, Architectural, Chemical, Civil, Computer, Electrical, Electronics and Telecommunications, Environmental, Marine, Mechanical, Metallurgical and Materials, Mining, Production and Textile Engineering) following

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<sup>6</sup>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." In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the American Association of Collegiate Registrar and Admissions Officers to support its decision.

the higher secondary certificate and engaged in engineering or industrial profession at least for a period of five years.<sup>7</sup>

The AAO has also consulted AACRAO publications such as *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R. World Education Series India: A Special Report on the Higher Education System and Guide to the Placement of Students in Educational Institutions in the United States* (1997). The 1986 *P.I.E.R. Workshop Report on South Asia* indicates that an associate membership in the Institution of Electronics and Telecommunications Engineers (IETE) is based upon sequential examinations, preparatory courses and employment experience. An associate membership is awarded to students who have passed Section A and B of the Graduateship Examination and who have the requisite employment experience. *Id.* at p. 55. The P.I.E.R. World Education Series also indicates that an associate membership in the IETE while not designated as a bachelor's degree would be conditionally considered for U.S. graduate admission in a closely related field if the specialized nature of the program followed is appropriate preparation for graduate admission. *Id.* at p.47. It further indicates that for the associate membership, an applicant must have at least "2 years of practical training /experience in the field of Electronics and Telecommunication Engineering of the standard of the second year of a recognized B.E./B.Tech degree program expected before appearing for Section A of this examination; an additional 2 years of the standard of the final year of such a degree program expected before appearing for Section B." *Id.* at p.112.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 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, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at \*6786 (Oct. 26, 1990).

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<sup>7</sup> Accessed 08/02/10.

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 (now USCIS), 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 recognized 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 (November 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. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree *Matter of Shah*, 17 I&N Dec. at 245.

Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, certificates, diplomas, or professional credentials, as is the case here, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree,” notwithstanding Professor Chen’s observation that he terms the associate membership in IETE as a “foreign equivalent degree.” USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information

or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). This is not inconsistent with the EDGE determination, which concludes that the associate membership is “comparable” to a bachelor’s degree but is not specifically a foreign equivalent baccalaureate degree within the context of the second preference visa category as the credential is based on examinations plus experience. 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.

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*.” (Emphasis added.) For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C)<sup>8</sup> 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). Compare 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”).

While the IETE may offer courses and examinations, there is no evidence that the IETE is a college or university or that an associate membership, which is based on a combination of practical experience and examinations, is a “baccalaureate degree,” which would allow the beneficiary to qualify as an advanced degree professional.<sup>9</sup>

<sup>8</sup> 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.

<sup>9</sup> Additionally, the clear terms of the labor certification require the candidate to have a master’s degree. 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). Even if we accepted the beneficiary’s IETE credential as a single-source bachelor’s degree, which we do not, the beneficiary would not meet the terms of the labor

It may not be concluded that the petitioner has established that this beneficiary possesses the advanced degree in the requisite field of study as required by the ETA 750 or qualifies for visa classification as an advanced degree professional under section 203(b)(2) of the Act. 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.

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certification, which clearly state that the applicant must have attended college for five to six years and possess a Master's degree or equivalent in Electrical Engineering or Computer Science.