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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: -DEC 07 2011 OFFICE: TEXAS SERVICE CENTER



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:

SELF REPRESENTED

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 our 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 \$630. 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, 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 is a computer software development and consultancy business. It seeks to employ the beneficiary permanently in the United States as an assistant project manager 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 Permanent Employment Certification, which the U.S. Department of Labor (DOL) approved, accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the specified job requirements or qualify for the classification sought. Specifically, the director determined that the beneficiary did not possess the requisite education.

On appeal, the petitioner submitted a letter, two educational evaluations, and additional evidence and asserted that the beneficiary meets the academic requirements of the alien employment certification. On September 8, 2011, the AAO advised the petitioner of information that contradicted the evaluations of the beneficiary's education. The petitioner submitted a response on October 20, 2011. For the reasons discussed below, the AAO concurs with the director's ultimate conclusion that the petitioner has not established that the beneficiary possesses a U.S. bachelor's degree or foreign equivalent degree plus five years of post-baccalaureate experience. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 U.S. 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 U.S. doctorate or a foreign equivalent degree." *Id.*

The beneficiary earned a foreign three-year Bachelor of Science degree diploma in physics in 1991 from the University of Mumbai (formerly the University of Bombay) in India and a foreign one-year post-graduate diploma (PGD) certificate/transcript in computer programming and systems analysis in 1993 from the University of Mumbai's Garware Institute of Career Education and Development in India. Thus, the issues are whether those credentials qualify the beneficiary for the classification sought and meet the specified job requirements.

Eligibility for the Classification Sought

As noted above, DOL certified the ETA Form 9089 in this matter. DOL determines 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 Congress 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. Rather, U.S. Citizenship and Immigration Services (USCIS) determines whether the alien is qualified under the alien employment certification requirements. *Matter of Wing's Tea House*, 16 I&N Dec. 160 (Acting Reg'l Comm'r 1977). Federal courts have recognized this division of authority. *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 U.S. baccalaureate degree generally requires 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, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 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. The AAO 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). In fact, the Senate Conference Report for the Act presumes that a baccalaureate is a “4-year course of undergraduate study.” S. Rep. No. 101-55 at 20 (1989). *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 appeared in the Federal Register, the Immigration and Naturalization Service (the 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 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 (plus the requisite five years of progressive experience in the specialty). More specifically, USCIS will not consider a three-year bachelor’s degree as a “foreign equivalent degree” to a U.S. 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, 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 U.S. baccalaureate degree (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

On appeal, the petitioner submitted two evaluations from [REDACTED] of the Trustforte Corporation dated February 4, 2008 and October 15, 2008 respectively and an evaluation from

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.

dated October 15, 2008. In response to the AAO's September 8, 2011 notice, the petitioner submitted an additional evaluation from dated October 5, 2011 and an evaluation from dated September 26, 2011.

first concludes that the beneficiary possesses the equivalent to a Bachelor of Science degree in computer science and physics based upon his Bachelor of Science degree and his PGD. states that the University of Mumbai is accredited and that he bases his analysis on the reputation of the university, the number of years of the beneficiary's studies, the nature of the coursework, and the grades attained. The AAO notes that claims to be a member of the American Association of Collegiate Registrars and Admissions Officers (AACRAO).

In second evaluation, he instead concludes that the beneficiary possesses the equivalent to a Bachelor of Science degree in computer science only. He states that he bases his analysis of the beneficiary's bachelor's degree on the reputation of the university, the nature of the coursework, and the credit hours completed. states that he bases his analysis of the beneficiary's PGD on the reputation of the university, the duration of study, the nature of the coursework, the hours completed, and the grades attained. He further asserts that transfer students of U.S. universities often complete less than four years of study there before obtaining a degree. The AAO notes that the beneficiary was never a student in the United States, nor did he transfer in the middle of one program to another within his academic career. In third evaluation, he again concludes that the beneficiary possesses the equivalent to a Bachelor of Science degree in computer science only.

Similar to second evaluation, concludes that the beneficiary possesses the equivalent to a four-year Bachelor of Science degree in computer science only. He states that the beneficiary completed approximately 132 credits for both programs (approximately 96 credits for his Bachelor of Science program) and that U.S. universities typically only require 120 credits for graduation with a bachelor's degree. does not go into detail as to how he estimated the number of credits the beneficiary completed. In third evaluation, he instead concludes that the beneficiary completed approximately 126 credits for both programs (approximately 90 credits for his Bachelor of Science program). In evaluation, he concludes that the beneficiary possesses the equivalent to a Bachelor of Science degree in computer science only. He makes the same findings as regarding the total number of credits that the beneficiary has completed. and rely on the Electronic Database for Global Education (EDGE). also relies on EDGE in his third evaluation.

Given membership in AACRAO and his, and reliance on EDGE, the AAO consulted EDGE as a tool to help analyze the beneficiary's educational background. According to its website, AACRAO, which created EDGE, is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in

over 40 countries around the world.” See <http://www.aacrao.org/About-AACRAO.aspx> (accessed August 11, 2011 and incorporated into the record of proceeding). 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.” *Id.* In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision.

According to the login page, EDGE is “a web-based resource for the evaluation of foreign educational credentials” that is continually updated and revised by staff and members of AACRAO. Dale E. Gough, Director of International Education Services, “AACRAO EDGE Login,” <http://aacraoedge.aacrao.org/> (accessed August 11, 2011 and incorporated into the record of proceeding). In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), a federal district court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien’s three-year foreign “baccalaureate” and foreign “master’s” degree were comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), a federal district court upheld a USCIS conclusion that the alien’s three-year bachelor’s degree was not a foreign equivalent degree to a U.S. bachelor’s degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the alien employment certification itself required a degree and did not allow for the combination of education and experience.

In the section related to the Indian educational system, EDGE provides that a Bachelor of Science degree is three years in duration and represents attainment of a level of education comparable to only two to three years of university study in the United States.

EDGE also discusses both post-secondary diplomas, for which the entrance requirement is completion of secondary education, and PGDs, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a post-secondary diploma is comparable to one year of university study in the United States but does *not* suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a PGD following a three-year bachelor’s degree “represents attainment of a level of education comparable to a bachelor’s degree in the United States.” The “Advice to Author Notes,” however, provides:

Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor’s degree.

The AAO notes that, in response to the AAO's notice, the petitioner submitted a letter from the beneficiary's PGD program, which states that admission into the program requires prior graduation from a recognized university as well as a written examination and an interview.

Based on the juried opinion in EDGE, the AAO concludes that the beneficiary's baccalaureate in this matter is only equivalent to two to three years of undergraduate education from a regionally accredited institution in the United States. Due to the evidence that the University of Mumbai's Garware Institute of Career Education and Development program requires a three-year baccalaureate for entry, the AAO concludes that the beneficiary's PGD from that institution in addition to his prior university-level studies are equivalent to a U.S. baccalaureate. The AAO notes that the beneficiary does not possess two unrelated lesser degrees, but a PGD that builds on the prior degree required for entry into the PGD program in a related field.

Nevertheless, the record does not contain consistent evidence establishing the beneficiary's five years of post-baccalaureate experience. The petitioner stated on the Form I-140 petition that the beneficiary last entered the United States in March of 2006. However, on the alien employment certification, the beneficiary listed that he did not start working in the United States for the petitioner until April of 2007. The beneficiary additionally stated on the ETA Form 9089 that he worked for [REDACTED] from May of 1998 to March of 2003. However, in a letter dated July 10, 2007, [REDACTED] stated that the beneficiary worked there from January of 1998 to March of 2007. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

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.

The record of proceeding does not resolve the above inconsistencies. Thus, the petitioner has not credibly established that the beneficiary has five years of progressive post-baccalaureate experience.

Because the beneficiary has neither (1) a U.S. advanced degree or foreign equivalent degree, nor (2) a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

Qualifications for the Job Offered

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 (9th 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. *See also Matter of Wing's Tea House*, 16 I&N Dec. at 160.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien employment 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, USCIS may not ignore a term of the alien employment certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS 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 USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in an alien employment 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). USCIS's interpretation of the job's requirements, as stated on the alien employment certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the alien employment certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the alien employment certification.

In this matter, Part H, line 4, of the alien employment certification reflects that a master's degree in computer science, engineering, mathematics, science, or business is required for the job. Line 6 and

line 10 reflect that one year of experience in the proffered position of assistant project manager or as a computer/engineering professional are required. In the alternative, line 8 reflects that a bachelor's degree in computer science, engineering, mathematics, science, or business and five years of experience may be acceptable. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary earned a foreign three-year Bachelor of Science degree diploma in physics in 1991 from the University of Mumbai (formerly the University of Bombay) in India and a foreign one-year PGD certificate/transcript in computer programming and systems analysis in 1993 from the University of Mumbai's Garware Institute of Career Education and Development. As discussed above, this education is a foreign equivalent degree to a U.S. bachelor's degree. However, the petitioner has failed to document effectively the beneficiary's completion of more than five years of progressive post-baccalaureate experience in the specialty before the priority date in 2008. The petitioner has submitted contradictory information regarding the beneficiary's dates of alleged employment.

The petitioner has not credibly established that the beneficiary has five years of progressive post-baccalaureate experience in the specialty. Thus, the beneficiary does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does not meet the job requirements on the alien employment certification.

Because the beneficiary has neither (1) a U.S. advanced degree or foreign equivalent degree, nor (2) a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act. Thus, 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.