

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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**

PUBLIC COPY



35

DATE: **SEP 12 2011** OFFICE: NEBRASKA SERVICE CENTER

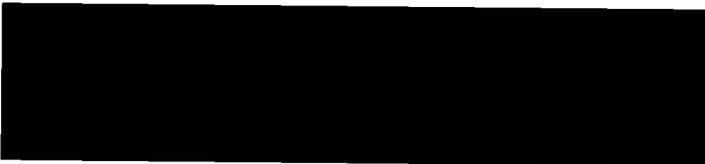


IN RE: Petitioner:
Beneficiary:



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:



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, Nebraska 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 an IT consulting business. It seeks to employ the beneficiary permanently in the United States as a software engineer of applications 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, approved by the U.S. Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not qualify for the second preference classification. Specifically, the director determined that the beneficiary did not possess a master's degree or a foreign equivalent degree. The director also determined that the petitioner had failed to submit a copy of its 2007 Internal Revenue Service (IRS) tax return or its 2007 W-2 Wage and Tax Statement for the beneficiary and, thus, that the petitioner had failed to demonstrate its ability to pay the beneficiary the proffered salary of \$63,211.20 from the priority date of June 19, 2006 onwards.

The AAO notes that the director sent the petitioner a Request for Evidence (RFE) on July 8, 2008. The RFE specifically asked the petitioner to submit its 2007 IRS tax return and the beneficiary's 2007 W-2 Wage and Tax Statement. The petitioner submitted its response to the RFE on September 23, 2008, but failed to include those two requested documents. The petitioner now submits both documents on appeal.

The purpose of the RFE is to elicit further information that clarifies whether the petitioner has established the beneficiary's eligibility for the benefit sought as of the filing date of the petition. See 8 C.F.R. §§ 103.2(b)(8) and (12). The petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where the director put the petitioner on notice of a deficiency in the evidence and gave the petitioner an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the director to consider the submitted evidence, it should have submitted the documents in response to the director's request for evidence. *Id.*

The petitioner's 2007 tax return and the beneficiary's 2007 IRS Form W-2 are relevant and necessary to evaluate the petitioner's ability to pay. Thus, the director was justified in requesting that material evidence. The petitioner should have had such documents available by the time that it submitted its response to the director's RFE on September 23, 2008. The petitioner also did not explain to the director or the AAO why it did not submit such requested documents at that time. Under the circumstances, the AAO need not, and does not, consider the sufficiency of the evidence submitted on appeal. Accordingly, the AAO upholds the director's conclusion that the petitioner has failed to demonstrate that it had the continuing ability to pay the beneficiary the proffered salary from the priority date onwards.

On appeal, counsel also submits a brief, two educational evaluations, and additional evidence regarding the beneficiary's education. The AAO will withdraw the director's adverse findings regarding the beneficiary's education.

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 diploma in computer engineering from VKR & VNB Polytechnic Gudiwada in 1995 and a three-year "B" Level Master of Computer Applications (MCA) diploma from the Government of India's Department of Electronics Accreditation for Computer Courses (DOEACC Society) in 2001. Thus, the issues are whether those diplomas 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 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. 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 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 (plus the requisite five years of progressive experience

in the specialty). More specifically, a three-year bachelor's degree will not be considered to be the "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).

Counsel has submitted evaluations from [REDACTED] of Silvergate Evaluations Inc. dated July 27, 2007, [REDACTED] of Ites Inc. dated July 31, 2007, and [REDACTED] of the DOEACC Society dated August 7, 2008. [REDACTED] conclude that the beneficiary possesses the equivalent to a master's degree in computer science. [REDACTED] concludes that the beneficiary possesses the equivalent to a Master of Computer Applications.

[REDACTED] states that both of the beneficiary's programs were accredited. [REDACTED] notes that the first program required the completion of secondary school and competitive entrance exams, consisted of general and specialized studies, and constituted the equivalent to a bachelor's degree in the United States. [REDACTED] states that the DOEACC Society three-year program required prior graduation from an Indian state board diploma program or its equivalent and the completion of competitive entrance exams and that it constituted the equivalent to a master's degree in the United States. [REDACTED] bases this analysis on the accreditation and credibility of both programs, the number of years of coursework, and the nature of the coursework. [REDACTED] lists the courses that the beneficiary completed for each diploma and finds that the beneficiary completed a total of 90 credits for both programs.

The AAO has consulted the Electronic Database for Global Education (EDGE) as a tool to help analyze the beneficiary's educational background. According to its website, the American Association of Collegiate Registrars and Admissions Officers (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 September 1, 2011). 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.

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.

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. [REDACTED] “AACRAO EDGE Login,” <http://aacraoedge.aacrao.org/> (accessed September 1, 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.

The beneficiary completed a three-year diploma in computer engineering from VKR & VNB Polytechnic Gudiwada in India in 1995. EDGE concludes that a bachelor’s degree is three years in duration and represents attainment of a level of education comparable to two to three years of university study in the United States. The AAO finds that the beneficiary’s three-year diploma is not less persuasive evidence than a three-year degree that he completed the equivalent to two to three years of university study in the United States.

The beneficiary also completed a three-year “B” Level MCA diploma from the Government of India’s DOEACC Society in 2001, a program which the All India Council for Technical Education (AICTE) developed. EDGE concludes that completion of an MCA represents attainment of a level of education comparable to a master’s degree in the United States. EDGE also states that an MCA requires three years of study as the beneficiary completed for this MCA program.

On appeal, counsel asserts that the beneficiary has completed six years of post-secondary study similar to the way that a master’s graduate in the United States would have.

Because the beneficiary has a U.S. advanced degree or foreign equivalent degree, he does 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.

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, U.S. Citizenship and Immigration Services (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 or applications is the minimum level of education required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary earned a foreign three-year diploma in computer engineering from VKR & VNB Polytechnic Gudiwada in 1995 and a three-year "B" Level MCA diploma from the DOEACC Society in 2001.

For the reasons stated above, the beneficiary does have the education required for the job as specified on the alien employment certification. The beneficiary does have a U.S. master's degree in computer science or applications or a foreign equivalent degree and, thus, does qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary does meet the job requirements on the alien employment certification.

Notwithstanding, the petitioner has failed to demonstrate that it had the continuing ability to pay the beneficiary the proffered salary from the priority date onwards. For this reason, 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.