

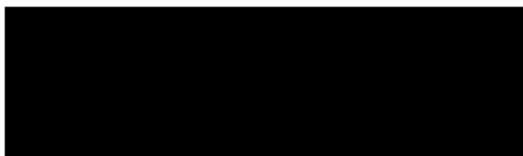
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

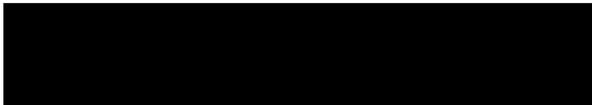
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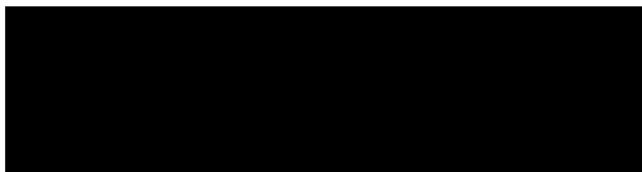
DATE: **SEP 15 2011** OFFICE: TEXAS SERVICE CENTER

FILE: 

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.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office



DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition on February 18, 2010. The petitioner submitted a motion to reconsider on March 19, 2010, which the director dismissed on March 31, 2010. The petitioner appealed the decision to the Administrative Appeals Office (AAO) on May 3, 2010. The appeal will be sustained. The petition will be approved.

The petitioner is an integrated software and processing solutions business. It seeks to employ the beneficiary permanently in the United States as a senior technical consultant 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 experience.

On appeal, counsel submits a letter and information regarding the beneficiary's employment experience. Counsel asserts that the beneficiary possessed the requisite experience for the position as of the priority date. The AAO will reverse the director's decision, finding that the beneficiary did obtain over five years of progressive post-baccalaureate experience in the specialty before the priority date.

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 four-year Bachelor of Engineering degree from the Computer Branch of the University of Pune in India in 1996. Thus, the issues are whether this credential and the beneficiary's subsequent experience 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. 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).

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).

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 U.S. Citizenship and Immigration Services (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).

The petitioner submitted an evaluation from [REDACTED] of the [REDACTED] [REDACTED] c. dated December 24, 2008. She concludes that the beneficiary possesses the equivalent to a bachelor’s degree in computer engineering in the United States. [REDACTED] states that she is a member of the American Association of Collegiate Registrars and Admissions Officers (AACRAO). Consistent with the evaluation submitted, the AAO finds that the beneficiary’s four-year Bachelor of Engineering degree is comparable to a U.S. baccalaureate.

As the beneficiary has a foreign equivalent degree to a U.S. baccalaureate, the AAO will review the record to determine whether the petitioner has documented that the beneficiary completed the necessary five years of post-baccalaureate progressive experience in the specialty before the priority date of January 2, 2009.

The petitioner submitted letters documenting that the beneficiary worked as an associate consultant for [REDACTED] from March 1997 to November 2006 and as a programmer analyst for [REDACTED] from July 2007 to January 2008.

The director found the evidence the petitioner submitted regarding the beneficiary's experience working for [REDACTED] to be sufficient. However, the director found the letters documenting the beneficiary's experience working for [REDACTED] to be insufficient because the beneficiary's former employing business had not written them. Rather, the beneficiary's project manager at that business had written a notarized letter documenting the beneficiary's experience there. A former co-worker also submitted a notarized letter similarly documenting the beneficiary's experience there.

The director also found that the letter that the petitioner submitted regarding the beneficiary's work for [REDACTED] was insufficient as the beneficiary had not listed [REDACTED] as an employer on the alien employment certification. The AAO notes that the beneficiary was working for [REDACTED] at the time and doing consulting work for [REDACTED] as part of his job duties. Thus, the beneficiary should not have also listed Verizon as a separate employer on the alien employment certification.

On appeal, counsel asserts that the beneficiary completed the requisite experience for the position as of the priority date.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as the DOL certified and as submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The AAO finds that the notarized letter from the beneficiary's supervisor with Tata Consultancy Services Limited to be sufficient evidence of his employment experience there for approximately nine and a half years. The AAO also finds the letter from Prudent Technologies & Consulting to be sufficient. Thus, the beneficiary did possess the requisite post-baccalaureate progressive work experience as of the priority date.

Because the beneficiary has a U.S. baccalaureate degree or foreign equivalent degree and five years of progressive experience in the specialty, he qualifies 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, 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 bachelor's degree in computer science or a related field is the minimum level of education required. Line 6 reflects that no experience in the proffered position is required. Line 10 reflects that five years of experience as an associate consultant, programmer analyst, software engineer, etc. are required instead. Line 8

reflects that a combination of education and experience is not acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary earned a foreign four-year Bachelor of Engineering degree from the Computer Branch of the University of [REDACTED] in 1996, which is equivalent to a bachelor's degree in the United States. The beneficiary also completed more than five years of post-baccalaureate progressive experience in the acceptable occupations before the priority date.

The beneficiary does not have a U.S. master's degree or a foreign equivalent degree. However, the beneficiary does have a U.S. baccalaureate degree or a foreign equivalent degree followed by five years of progressive experience in the specialty. Thus, the beneficiary 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. For these reasons, the petition may 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.