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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: SEP 19 2011 OFFICE: NEBRASKA 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.

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 advanced computer consulting business. It seeks to employ the beneficiary permanently in the United States as a senior business systems analyst 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 750,¹ 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 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, counsel submits a brief and additional evidence. The AAO upholds the director's conclusion that the beneficiary did not possess the requisite education for the position.

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." *Id.*

The beneficiary earned a Bachelor of Commerce degree diploma in financial accounting and auditing from the University of Mumbai in India.² The beneficiary also earned a one-and-a-half year diploma in computer studies from the NCC National Centre for Information Technology, completed in September 1989 in India. Thus, the issues are whether those credentials qualify the beneficiary for the classification sought and meet the specified job requirements.

¹ After March 28, 2005, the correct form to apply for alien employment certification is the Form ETA 9089.

² The AAO notes that the beneficiary passed the final exam for the degree in April 1987, but that the university did not confer the degree to the beneficiary until December 1998. The beneficiary indicated on the alien employment certification that he instead completed this degree in 1987. *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 AAO further notes that the petitioner has failed to submit a copy of the beneficiary's transcript for this degree.

Eligibility for the Classification Sought

As noted above, the DOL certified the ETA 750 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).

A United States 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 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) (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 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, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."³ 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 (plus the requisite five years of progressive experience in the specialty). 8 C.F.R. § 204.5(k)(2).

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" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at

³ 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.

8 C.F.R. § 204.5(l)(3)(ii)(C) 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.” The AAO 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”). The record contains no evidence that the NCC National Centre for Information Technology in India is a college or university.

The AAO notes that the petitioner has failed to submit any evaluations regarding the equivalency of the beneficiary’s education in the United States. The petitioner has also only submitted evidence that the beneficiary completed a three-year Bachelor of Commerce degree from a college or university.

On appeal, counsel has submitted information regarding shortened bachelor’s level degrees in Canada as well as bachelor’s degree requirements for the University of Texas at San Antonio and for Dallas Baptist University. The AAO notes that the beneficiary has not participated in any of these programs. The AAO therefore does not find this evidence submitted to be persuasive with regard to the case at hand.

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.

The key to determining the job qualifications is found on Form ETA-750 Part A. This section of the application for alien employment certification, “Offer of Employment,” describes the terms and conditions of the job offered. It is important that the ETA-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

Minimum Education, Training, and Experience Required to Perform the Job Duties. Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

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.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the alien employment certification reflects the following requirements:

Block 14:

Education: Bachelor's degree in engineering, computer science, mathematics, or a related field

Experience: Five years in the job offered or in the related occupations of systems analyst, programmer analyst, or computer professional

Block 15: A master's degree in a relevant discipline and two years of experience are acceptable in the alternative

The petitioner has only demonstrated that the beneficiary possesses a three-year Bachelor of Commerce degree in financial accounting and auditing from a college or university. The beneficiary does not have a U.S. master's degree or a foreign equivalent degree. The beneficiary also does not 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 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. For these reasons, considered both in sum and as separate grounds for denial, 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.