

(b)(6)

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

DATE: **FEB 05 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg

Acting Chief, Administrative Appeals Office

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). A motion to reopen and reconsider was dismissed by the Director. The case is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a software services company. It seeks to permanently employ the beneficiary in the United States as a speech language pathologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

*Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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.

#### **Case history**

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on November 15, 2010. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed at the Department of Labor (DOL) on January 15, 2010, and certified by the DOL on May 19, 2010. The ETA Form 9089 specifies (in Part H, boxes 4, 4-B, 7, 7-A, and 9) that the minimum education required for the proffered position is a master's degree in hearing language and speech or a related field (such as communication disorder), or a foreign educational equivalent. Another requirement specified in Part H (box 14) is that the beneficiary have a professional license from the State of California as a speech language pathologist.

As evidence of the beneficiary's educational credentials the petitioner submitted photocopies of his academic records from the [REDACTED] in India, showing that he was awarded the following degrees:

- A Bachelor of Science (Audiology and Speech Rehabilitation) on December 2, 1998, following completion of a three-year degree program.
- A Master of Science (Audiology and Speech Rehabilitation) on December 27, 2001, following completion of a two-year degree program.

Also submitted with the petition was an evaluation of the beneficiary's Indian education by the [REDACTED] a foreign credential evaluation service in [REDACTED]

California, dated January 25, 2008. According to the [REDACTED] the beneficiary's Indian credentials are equivalent to a Master of Science in Audiology and Speech Language Pathology from a regionally accredited university in the United States.

In addition, the petitioner submitted a photocopy of the beneficiary's Speech-Language Pathologist "Renewal License" from the State of California, valid until September 30, 2010.

In response to a Request for Evidence issued on April 12, 2011, the petitioner submitted another academic evaluation of the beneficiary's Indian degrees, this time from Prof. [REDACTED] of [REDACTED], dated May 13, 2011. Like the [REDACTED] evaluation, Prof. [REDACTED] concluded that the beneficiary's credentials are equivalent to a Master of Science in Speech and Language Pathology and Audiology from an accredited U.S. university.

On August 20, 2011, the Director denied the petition on the ground that the beneficiary did not have the requisite education as specified in the ETA Form 9089 (labor certification). The decision relied primarily on the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which indicated that the beneficiary's combined degrees in India were comparable to a bachelor's degree in the United States. The Director referred to the evaluation from Prof. [REDACTED] but determined that it was outweighed by the information in EDGE. The Director also noted that the beneficiary may possess the equivalent of a U.S. bachelor's degree in audiology and speech rehabilitation plus five years of progressive post-baccalaureate experience in the field, which would constitute an advanced degree as defined in 8 C.F.R. § 204.5(k)(2), but determined that the beneficiary would still not qualify for the proffered position because the labor certification specified that a master's degree was required, with no provision for the alternate combination of a bachelor's degree and five years of experience.

The petitioner submitted a motion to reopen and reconsider on September 19, 2011, which was dismissed by the Director on November 21, 2011, on the grounds that the motion was not supported by new evidence, or precedent decisions, or a showing that the decision was legally or factually incorrect.

The petitioner filed a timely appeal, accompanied by a brief from counsel and supporting documentation. Included with these materials is a copy of the brief submitted by prior counsel with the motion to reopen and reconsider, which current counsel asserts was not properly considered by the Director. According to counsel, the Director erred by relying "exclusively" on AACRAO and "ignoring" the opinion of Prof. [REDACTED]. Counsel also contends that the Director should have found the beneficiary eligible for classification as an advanced degree professional based on a bachelor's degree and five years of post-baccalaureate experience. The AAO conducts appellate review on a *de novo* basis. See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The issues before the AAO are the following:



(b)(6)

- Does the beneficiary have the requisite credentials to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act?
- Does the beneficiary have the requisite credentials to qualify for the job of speech language pathologist under the terms of the labor certification?

**Is the Beneficiary Eligible for the Classification Sought?**

As previously discussed, the ETA Form 9089 in this case is certified by the DOL. The 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. See 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 the 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).

A United States baccalaureate degree is generally found to require four years of education. See *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977).<sup>1</sup> This decision involved a petition filed under 8 U.S.C. §1153(a)(3) of the Act, 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 Immigration Act of 1990 Act added section 203(b)(2)(A) to 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

---

<sup>1</sup> In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.



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).

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 (advanced degree professional) 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 INS 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 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 United States baccalaureate degree. See *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.”<sup>2</sup> In order to have experience and education equating to an

---

<sup>2</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

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 five years of progressive experience in the specialty). See 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. 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 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. See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3<sup>rd</sup> Cir. 1995) per *APWU v. Potter*, 343 F.3d 619, 626 (2<sup>nd</sup> Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). 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).<sup>3</sup>

As previously discussed, the documentation of record shows that the beneficiary earned two educational degrees at the [REDACTED]: (1) a Bachelor of Science (Audiology and Speech Rehabilitation) on December 2, 1998, after completing a three-year degree program; and (2) a Master of Science (Audiology and Speech Rehabilitation) on December 27, 2001, after completing a two-year degree program. In the appeal brief, which reflects the earlier brief submitted with the motion to reopen and reconsider, counsel reiterates the petitioner's contention that the beneficiary's Indian education is equivalent to a U.S. master's degree. In counsel's view, the AAO arbitrarily relied on the EDGE resource of AACRAO instead of the educational evaluation of Prof. [REDACTED] in finding that this education was only equivalent to a U.S. bachelor's degree. Counsel characterizes AACRAO as a commercial service in competition with other foreign credential evaluation services. The motion brief resubmitted on appeal highlights a quote from a U.S. Department of Education website stating that the U.S. government does not recommend or endorse any one service over another. It also points out that AACRAO provides its own credential evaluations for a fee, which renders it "neither independent nor unbiased." Motion, page 6.

---

specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

<sup>3</sup> Cf. 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").



As explained on its website, AACRAO 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.” <http://www.aacrao.org/About-AACRAO.aspx>. Its mission “is to serve and advance higher education by providing leadership in academic and enrollment services.” *Id.* EDGE is “a web-based resource for the evaluation of foreign educational credentials.” <http://edge.aacrao.org/info.php>. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials.<sup>4</sup> If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* U.S. Citizenship and Immigration Services (USCIS) considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the 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 only comparable to a U.S. bachelor’s degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination 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 labor certification itself required a degree and did not allow for the combination of education and experience.

EDGE states that a Bachelor of Science degree in India is awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate (comparable to a U.S. high school diploma), with the great majority being awarded after three years of tertiary study. The Indian degree is comparable to study at a U.S. college or university for the same number of years. According to EDGE, therefore, the beneficiary’s three-year bachelor’s degree from the [REDACTED] is most likely comparable to three years of study at a U.S. college or university. EDGE also states that a Master of Science degree in India is awarded upon completion of two years of study beyond the three-year bachelor’s degree, and is comparable to a bachelor’s degree in the United States. Therefore, the beneficiary’s two-year master’s degree from the [REDACTED] is most likely comparable to a bachelor’s degree from a U.S. college or university, not a master’s degree as claimed by the petitioner.

While the petitioner challenges the AAO’s utilization of AACRAO’s EDGE as a resource,

---

<sup>4</sup> See *An Author’s Guide to Creating AACRAO International Publications* available at [http://www.aacrao.org/publications/guide\\_to\\_creating\\_international\\_publications.pdf](http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf).



characterizing it as an inappropriate preferential endorsement of its education evaluation service over other credential evaluation services, the AAO does not agree. In reviewing this petition, the AAO has not relied on an evaluation by AACRAO of the beneficiary's specific educational credentials that was paid for with a fee to AACRAO. Rather, the AAO has utilized information from AACRAO's database – EDGE – that has been vetted by a panel of experts and has general applicability to all bachelor of science and master of science degrees in India. The evaluations submitted by the petitioner from the IIC and Prof. Appel, on the other hand, focus exclusively on the beneficiary's degrees. Thus, they are not comparable to the independent, broadly applicable credentials analysis offered by EDGE. In short, the AAO considers the AACRAO database a reliable resource for information about the U.S. equivalency of foreign degrees.

That being said, the AAO also considers educational evaluations from private services that are specific to the beneficiary. In this case the petitioner has submitted two. One is from the previously discussed [REDACTED]. In its evaluation the [REDACTED] set forth the entire course list of the beneficiary's two degrees, assigned 5 credits to each course and 10 credits for each "clinical practical" completed, and determined that the beneficiary earned a total of 215 credits in his five years of study. The basis of these credit numbers, however, is totally unclear. They do not appear on the beneficiary's official transcripts, and the [REDACTED] does not explain what they represent. The evaluation states that the beneficiary's Indian studies are equivalent to a U.S. master's degree, but provides no rationale in support of this equivalency. It simply states its conclusion without analysis. In view of these substantive deficiencies, the AAO views the evaluation's closing paragraph as particularly apt:

The [REDACTED] evaluation . . . is advisory and in no way limits an agency or institution in making its own determination of the level of education and allocation of credits to be allowed for these studies . . .

Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only: Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For the reasons discussed above, the AAO determines that the [REDACTED] evaluation has little or no probative value. It is not persuasive evidence that the beneficiary's five years of tertiary study in India are equivalent to a U.S. master's degree.

The other educational evaluation in the record – from Prof. [REDACTED] – asserts, based on a course-by-course analysis of the beneficiary's degree programs at the [REDACTED] that the beneficiary's bachelor's and master's degree programs comprised the equivalent of 162 credits in the United States, which surpassed the normal minimum of 150 credits required to complete a bachelor's degree and a master's degree in speech and language pathology and audiology at a U.S. university. Like the [REDACTED] evaluation, however, Prof. [REDACTED] does not explain how he calculated the "U.S. credit equivalent" he assigns to each course. On the beneficiary's transcripts the credit hours totaled 108 for his bachelor's degree courses and 35 for his master's degree courses – which adds up to 143 credit hours for the two programs combined. Since that total is under the 150

(b)(6)

credits cited by Prof. [REDACTED] as the normal minimum for a U.S. master's degree in the field, his failure to explain how he arrived at the figure of 162 as the "U.S. credit equivalent" is a glaring omission.

Prof. [REDACTED] notes that the beneficiary's master's degree program appears to have included two calendar years of continuous studies, clinical rotations, and research, rather than two academic years of eight months each. This assessment derives from notations on the beneficiary's transcripts that Part I of his coursework was completed in the time period of September 1998 to August 1999, Part II of his coursework was completed in the time period of September 1999 to August 2000, and his clinical practice was performed from September 1998 to October 2000. Prof. [REDACTED] concludes that the master's degree program comprised the equivalent of three academic years. The problem with this claim is that the semester credit hours for the beneficiary's entire master's program totaled 35, which is closer to a typical three-semester total than it is to a three-year total. The AAO is not persuaded that the master's degree should be regarded as more than a two-year program, regardless of how the studies, clinical time, and research may have been organized and scheduled between September 1998 and October 2000.

According to Prof. [REDACTED] the Master of Science (Audiology and Speech Rehabilitation) is unlike a generic master of science degree in India, which is a two-year program that can be entered with a three-year bachelor's degree in any field of science. In contrast, the Master of Science (Audiology and Speech Rehabilitation) program requires a bachelor's degree in the same specific field of study. The resulting master's degree, Prof. [REDACTED] asserts, is a professional degree analogous to other Indian professional degrees such as Master of Science (Nursing), Master of Science (Pharmacy), Master of Science (Agriculture), and Master of Science (Engineering). There is a crucial difference, however, between each of these degree programs and the one at issue in this proceeding. According to EDGE, the entry requirement for Indian master of science programs in nursing, pharmacy, agriculture, and engineering is a four-year bachelor's degree in the same field of study. In contrast, the master of science program in audiology and speech rehabilitation requires only a three-year bachelor's degree in that field of study. As previously discussed, U.S. baccalaureate degrees are generally four-year programs. See *Matter of Shah* at 244. Prof. [REDACTED] does not claim that the beneficiary's Bachelor of Science (Audiology and Speech Rehabilitation) is equivalent to a U.S. bachelor's degree. In accord with EDGE, he acknowledges that the three-year degree from the [REDACTED] is comparable to three years of study at a U.S. college or university. The beneficiary's lack of a U.S. equivalent bachelor's degree eliminates the essential building block of his claim to have a U.S. equivalent master's degree, as required to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

As further evidence of the U.S. equivalency of the beneficiary's master's degree, Prof. [REDACTED] cites the beneficiary's licensure by the [REDACTED] which was predicated on his fulfillment of state requirements that include possession of "at least a master's degree in speech-language pathology or audiology from an educational institution approved by the board or qualifications deemed equivalent by the board." California's Business and Professions Code, Section 2532.2(a). The regulatory language quoted above, however, indicates that a master's degree is not an absolute requirement for licensure by the



The California state regulations provide that "qualifications deemed equivalent by the board" could also suffice, without further specification. It seems entirely possible that educational coursework amounting to less than a master's degree in combination with working experience in speech language pathology or audiology could be "deemed equivalent" by the [REDACTED] to a master's degree in the field. In this case, the record indicates that the beneficiary had several years of post-education experience as a speech therapist, at least some of which was gained before he was licensed by the [REDACTED]. Accordingly, the AAO does not agree with Prof. [REDACTED] claim that the beneficiary's licensure in the State of California necessarily means that the [REDACTED] accepted his master's degree from India, standing alone, as equivalent to a U.S. master's degree.

Even if the AAO did agree with Prof. [REDACTED] claim, it would not be dispositive in this proceeding because a ruling by a state entity is not binding on the AAO in its interpretation of a federal statute or regulation. The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9<sup>th</sup> Cir. 1987) (administrative 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). Even internal memoranda of USCIS do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") Therefore, the beneficiary's licensure by the State of California has no bearing on the AAO's determination, in the context of this immigrant visa petition, as to whether the beneficiary's foreign education is equivalent to a U.S. master's degree.

Prof. [REDACTED] asserts that some U.S. colleges and universities have initiated three-year bachelor's degree programs, and that some U.S. universities recognize certain three-year bachelor's degrees from India as a sufficient qualification for entry into a U.S. master's degree program. While assorted documentation submitted by the petitioner corroborates these claims generally, the information therein is too vague and anecdotal to draw any firm conclusions that favor the petitioner in this proceeding. For example, the requirements a student must fulfill for admission into a three-year bachelor's degree program in the United States (such as advanced courses in high school and grade point average) may vary among U.S. colleges and universities. Similarly, U.S. universities considering three-year bachelor's degree holders for admission into advanced degree programs may require such applicants to have a higher grade point average, class standing, and/or advanced course content in their undergraduate studies. It is not clear from the beneficiary's academic record in India that he would satisfy such criteria. In any event, the fact remains that the standard length of a bachelor's degree program in the United States is four academic years.

For all of the reasons discussed above, the AAO determines that the evaluation of Prof. [REDACTED] has limited evidentiary weight. It is not persuasive evidence that the beneficiary's five years of tertiary study in India are equivalent to a U.S. master's 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. See *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner cites the beneficiary's certification on June 19, 2007 by the [REDACTED]

[REDACTED], as having "met all of the requirements of section 212(a)(5)(C) of the Immigration and Nationality Act, as specified in Title 8, Code of Federal Regulations section 212.15(f) for the Profession of: Speech-Language Pathologist." The statutory provision cited above provides that a health-care worker seeking to enter the United States must present a certificate from the [REDACTED] verifying, among other things, that his or her education "meet[s] all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application." Section 212(a)(5)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(5)(C)(i)(I). The regulatory provision cited above provides that an organization authorized to issue health care certificates must verify, among other things, that the alien's education "meet[s] all applicable statutory and regulatory requirements for admission into the United States. **This verification is not binding on the DHS.**" (Emphasis added.) 8 C.F.R. § 212.15(f).

As the limitation in the regulation makes clear, the AAO, as part of the Department of Homeland Security, is not bound by any verification by the [REDACTED] regarding an alien's educational credentials. Thus, even if the [REDACTED] certificate stated that the beneficiary's Indian master's degree was equivalent to a U.S. master's degree, it would have no legal consequence for the AAO in its adjudication of the instant petition. In fact, the certificate does not indicate that the [REDACTED] viewed the beneficiary's master's degree from the [REDACTED] as comparable to a U.S. master's degree. Compliance with the statutory and regulatory provisions cited in the certificate does not require an alien to have a master's degree (U.S. or foreign equivalent), since classification as an "advanced degree professional" can be met with a bachelor's degree (U.S. or foreign equivalent) and five years of progressive experience in the specialty. While this combination of education and experience is considered equivalent to a master's degree under the regulatory definition of "advanced degree professional" in 8 C.F.R. § 204.5(k)(2), it does not comport with the labor certification in this case, which requires a master's degree without any experience component.

For all of the reasons discussed in this decision, the AAO determines that the petitioner has failed to establish that the beneficiary has a foreign educational equivalent to a U.S. master's degree in hearing language and speech or a related field, as required by the labor certification. In accord with EDGE, the AAO concludes that the beneficiary's education is more likely than not comparable to a U.S. bachelor's degree in that field.

As an alternative basis for relief, counsel asserts that the beneficiary is eligible for classification as an advanced degree professional based on the foreign equivalent of a U.S. bachelor's degree plus five years of progressive experience in the specialty, which meets the definition of "advanced degree" in 8 C.F.R. § 204.5(k)(2). The beneficiary is not eligible for classification on this basis, however, because the labor certification co-signed by him and the petitioner's director specifically

requires a master's degree or a foreign educational equivalent (Part H, lines 4 and 9, of ETA Form 9089), and does not allow for any alternate combination of education and experience (Part H, line 8, of ETA Form 9089). To be eligible for a given classification, the beneficiary must meet all the requirements set forth on the labor certification as of the petition's priority date.<sup>5</sup> See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Furthermore, even if the labor certification allowed for this alternate combination of education and experience, the record does not establish that the beneficiary meets both criteria. The AAO agrees that the beneficiary likely has the foreign educational equivalent of a U.S. bachelor's degree. However, the record does not show that the beneficiary had five years of progressive experience by the priority date of January 15, 2010. While the petitioner has submitted letters from three school officials who claim that the beneficiary was employed as a speech therapist/language specialist during the school years of 2006-07, 2007-08, and 2008-09, the total time of this employment falls well short of the five-year requirement in the above regulation. Therefore, the beneficiary is not eligible for classification as an advanced degree professional on the basis of a foreign educational equivalent to a U.S. bachelor's degree and five years of progressive experience in the specialty.

Based on the foregoing analysis, the AAO concludes that the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because he lacks the requisite educational degree. Accordingly, the petition cannot be approved.

## **2. Is the Beneficiary Qualified for the Job Offered?**

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. 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 [visa category] 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 (9<sup>th</sup> Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

---

<sup>5</sup> The priority date of the petition is the date the underlying labor certification application (ETA Form 9089) was received for processing by the DOL. See 8 C.F.R. § 204.5(d). 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.

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 in ETA Form 9089, Part H. This part of the application describes the terms and conditions of the job offered. It is important that the application be read as a whole.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 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 a labor 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 labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The petitioner specified the following educational, training, and experience requirements for the speech language pathologist:

- The minimum educational requirement is a master's degree or a foreign educational equivalent in hearing language and speech or a related field, such as communication disorder. (Part H, line 4, 4-B, 7, and 9.)
- No training or experience in the job offered is required. (Part H, lines 5 and 6.)
- No alternate combination of education and experience is acceptable. (Part H, line 8.)
- A license in speech language pathology is required. (Part H, box 14.)



While the beneficiary has the requisite license from the State of California, he does not have the requisite educational degree because his master's degree from India is not equivalent to a U.S. master's degree in the field. Therefore, the beneficiary does not satisfy the minimum educational requirement of the labor certification to qualify for the proffered position. For this reason as well, the petition cannot be approved.

**Conclusion**

The petition is deniable on two grounds:

1. The beneficiary does not have the requisite educational degree – specifically, a U.S. master's degree or a foreign equivalent degree – to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.
2. The beneficiary does not qualify for the proffered position of speech language pathologist under the terms of the labor certification because he does not have the requisite educational degree – specifically, a U.S. master's degree or a foreign educational equivalent.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.