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U.S. Citizenship
and Immigration
Services

[redacted]

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FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 12 2005
LIN 03 131 55045

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a university engaged in education and research. It seeks to employ the beneficiary as a senior application developer. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL).[1] The director denied the petition because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel asserts that the beneficiary has the necessary educational credentials to meet the qualifications set forth in the approved labor certification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *See* 8 C.F.R. 204.5(d); *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 11, 2002.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification Form ETA-750A, items 14 and 15 set forth the minimum education, training, and experience that an applicant must have for the position of programmer/analyst. In the instant case, item 14 shows the required number of years and type of educational background and experience an applicant for the position must possess. It states the following:

14.	Education	
	College	4
	College Degree Required	BS or equivalent
	Major Field of Study	Computer science, physics, math information system or Related area
	Experience	
	Job Offered	7 years
	Related Occupation	7 yrs. Programmer or analyst or consultant

As evidence of the beneficiary's formal education, the petitioner submitted a copy of the beneficiary's 1992 Bachelor of Science (honors) diploma from the Algarh Muslim University, Algarh, India. It reflects that his major was physics. Copies of the beneficiary's grade transcripts indicate that this was a three-year course of study. The petitioner also provided a copy of the beneficiary's 1993 "Post-Graduate Diploma in Computer

[1] The original labor certification was submitted to the file in conjunction with the filing of an earlier preference petition under Lin 0302753247, which was denied on March 30, 2003.

Applications" from the Shia College Computer Centre (SCCC) in Lucknow, India. The diploma reflects that it represents a one-year course of study. The petitioner also provided a copy of a November 2001 performance award from the University of Michigan.

The petitioner additionally submitted an academic evaluation report from "U.S. Evaluations," dated February 19, 2003. It is signed by s evaluation is based upon his review of the beneficiary's degree from the Algarh Muslim University and his diploma from the SCCC. He determines that the beneficiary's baccalaureate degree from Algarh Muslim University represents three years of undergraduate studies at an accredited U.S. college or university and that the beneficiary's coursework at the SCCC equates to one year of academic study. maintains that by combining the beneficiary's studies at both institutions, it can be concluded that the beneficiary has completed the U.S. equivalent of a Bachelor of Science degree with a dual major in physics and computer science.

The director denied the petition on March 25, 2004. The director found that the evidence submitted did not meet the requirements of the approved labor certification because the beneficiary does not possess a U.S. bachelor's degree in the specified major or in a related major listed on the ETA 750. The director noted that the labor certification failed to sufficiently describe the term "equivalent" and that neither of beneficiary's two diplomas contained in the record represents the equivalent of a U.S. baccalaureate degree.

On appeal, counsel cites three AAO decisions from 1986, 1991, and 1994, as well as a partial copy of an American Immigration Lawyers Association (AILA) summary of a conference call with the Nebraska Service Center held on August 13, 2003, in maintaining that the beneficiary's coursework at the Algarh Muslim University and the SCCC together represent a foreign equivalent degree to a U.S. bachelor's degree required to satisfy the terms of the ETA 750. The AILA summary of the conference call references a January 7, 2003, letter from III of the former Immigration and Naturalization Service (INS) Office of Adjudications that was written in response to an inquiry from an attorney. expresses his opinion that about the possible means to satisfy the requirement of a foreign equivalent to a U.S. advanced degree for purposes of 8 C.F.R. § 204.5(k)(2). He states that he believes that a single foreign degree is not required to satisfy this equivalency.

Counsel's reliance on this partial AILA summary of a conference call and three prior AAO decisions is misplaced. While 8 C.F.R. § 103.3(c) provides that precedent decisions of Citizenship and Immigration Services (CIS), formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, 2003 letter involved the interpretation of a different regulatory provision than that guiding the present case, i.e., an equivalent of a U.S. advanced degree, not a baccalaureate degree. Private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi,* 22 I&N 169, 196-197 (Comm. 1968); *see also,* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

CIS is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(ii) of the Act. CIS jurisdiction includes the authority to examine an alien's qualifications for preference status and to investigate

the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary v. Coomey,* 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS,* 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh,* 719 F. Supp. 532 (N.D. Tex. 1989). CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree, even where a classification may not require a bachelor's degree. In this case, the ETA 750 explicitly states that the proffered position requires a bachelor's degree, not a combination of certificates or degrees, which could be considered the equivalent of a U.S. bachelor's degree. Even if viewed as a petition for a skilled worker, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the evidence must show that the alien has the education, training or experience, and any other requirements of the individual labor certification. This labor certification does not define any equivalency less than a bachelor's degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Dragon Restaurant,* 19 I&N Dec. 401, 406 (Comm. 1986).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) also provides in pertinent part:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for an entry into the occupation.

We find that "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration or study" is applicable to what constitutes evidence of a degree. Because neither the Act nor the regulations indicate that a bachelor's degree must be a United States bachelor's degree, CIS will recognize a foreign equivalent bachelor's degree to a United States baccalaureate. The above regulation uses the singular description of a foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The labor certification and regulation cited above clearly require an applicant for the position of software engineer to have a U.S. bachelor's or a foreign equivalent degree.

Although the preamble to the publication of the final rule at 8 C.F.R. § 204.5 in 1991 specifically dismissed the option of equating "experience alone" to the required bachelor's degree for a second preference classification as an advanced degree professional or as a professional under the third classification, similar reasoning would also prohibit the acceptance of an equivalence in the form of combined lesser degrees, professional training, or any other level of education deemed to be less than a "foreign equivalent degree" to a United States baccalaureate degree. *See* 56 Fed. Reg. 60897 (Nov. 29,

1991).

In view of the above, and as noted by the director, evaluation combining the beneficiary's studies at the Muslim University of Algarh and his SCCC diploma cannot be considered to persuasively establish that the beneficiary's credentials meet the terms of the labor certification. CIS 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Beyond the decision of the director, it is noted that the 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from employers or trainers giving the name, address, and title of the employer or trainer, and a description of the training received or the experience of the alien. In this case, while the petitioner submitted copies of seven letters from previous employers, only two specified that he had worked as a full-time employee. One of the letters, from Syntel Software Pvt. Ltd., of Bombay, India, failed to completely identify the position held by the beneficiary. As such, it cannot be concluded that the petitioner clearly established that the beneficiary had accrued seven full years of relevant work experience by the visa priority date as required by Item 14 of the ETA 750A. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States,* 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above-stated reasons, with each considered as an independent and alternative basis of denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.