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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **SEP 20 2005**
LIN-03-064-51467

IN RE: Petitioner: [REDACTED]
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:

REPRESENTED BY IN-HOUSE COUNSEL

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 Director, Nebraska Service Center, denied the third preference employment-based immigrant visa petition and a subsequent motion to reconsider. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer software consultant. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition and a subsequent motion to reconsider because he determined that the beneficiary did not present evidence that he had the foreign equivalent of a United States bachelor's degree. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that the beneficiary's credentials are sufficient to meet the requirements of the labor certification and submits additional evidence.

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

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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 a member of the professions, the petitioner must submit evidence that the minimum of a baccalaureate degree is required for entry into the occupation.

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. 8 C.F.R. § 204.5(d). See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, that date is March 13, 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 systems analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|--------------|---|
| 14. | Education | |
| | Grade School | Y |
| | High School | Y |
| | College | 4 |

College Degree Required
Major Field of Study

Bachelor's or equivalent
Major or minor/concentration in Computer Science or related,
Physical Science, Math, or Engineering

The applicant must also have one year of experience in the job offered or in software development. Additionally, Item 15 modifies the related occupation experience with the "Other Special Requirements" as follows: "Experience in related occupation must include some experience with SQL Server, Visual Basic, VB Script, and ASP."

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended the Mumbai University in Mumbai, India, studying Chemistry from June 1986 through May 1989 which culminated in his receipt of a Bachelor of Science degree in Chemistry. Additionally, the beneficiary indicated that he attended NIIT Systems Management in Bombay (Mumbai), India, studying Computer Science from June 1989 through July 1991, culminating in a Diploma in Computer Science. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

In corroboration of the Form ETA-750B, the petitioner provided copies of the beneficiary's Bachelor of Science degree in Chemistry conferred by the University of Bombay (Mumbai) in 1989; Honours Diploma in Systems Management from the National Institute of Information Technology (NIIT) in 1991; a transcript showing completion of high school; experience letters conforming to the regulatory requirements set forth at 8 C.F.R. § 204.5(l)(3) and confirming that the beneficiary has met the special requirements of the proffered position; and a credential evaluation from Foreign Credential Evaluators, Inc (FCI), dated December 2001. Considering both the beneficiary's three-year degree from University of Mumbai and the one and a half year diploma from NIIT, the FCI credential evaluation stated the following, in pertinent part: "In summary, it is the judgment of [FCI] that [the beneficiary] has the equivalent to the degree, Bachelor of Science in Chemistry with an additional concentration in Computer Science, from a regionally accredited university in the United States."

The director denied the petition on June 23, 2003 finding that the beneficiary was not qualified for the proffered position because the evidence did not indicate that he held a foreign equivalent degree to a baccalaureate degree. The director, referencing the FCI evaluation that considered the beneficiary's three-year degree from the University of Mumbai and the one and a half year diploma from NIIT, stated that the relevant regulatory authority does not have a provision that permits a petitioner to establish equivalency through "work experience or a combination of educational certifications and memberships."

On motion to reconsider, counsel asserted that CIS inconsistently applies a standard for analyzing foreign degree equivalencies. Counsel referenced a letter written by [redacted] on December 27, 2002 and, although conceding that [redacted] was writing in the context of second preference employment-based immigrant visa petitions for advanced degree professionals, asserted that the phrase "a foreign equivalent degree" found in 8 C.F.R. § 204.5(k)(2) should be expansively interpreted to include multiple degrees. Counsel included a copy of Mr. Hernandez's letter. Counsel also stated that the petitioner filed many other similar petitions for beneficiary with qualifications similar to the beneficiary in the instant petition that were approved.

In a decision dated February 11, 2004, the director affirmed his prior decision explaining that the legislative history to the Act's amendment in 1990 confirmed the intent of Congress that the third preference petition for professionals requires aliens seeking eligibility for benefits under that provision to have at least a baccalaureate degree. The director stated that [REDACTED] letter only applied in the context of "Members of the Professions with Advanced Degrees," noting the plurality of degrees in that preference category's description, and also stated that CIS is not bound by a letter that does not constitute official CIS policy. With respect to counsel's assertion that other petitions similar to the instant one were approved in the past, the director stated that CIS is not obligated to follow erroneous decisions. Finally, the director also stated that the Government of India's Department of Education indicates that it offers three or four year degrees for higher educational programs and cited to *Matter of Shah*, 17 I&N 244 (Reg. Comm. 1977) for the premise that CIS will not consider a three-year degree to be a "foreign equivalent degree" to a United States baccalaureate degree. The director noted that a portion of FCI's credential evaluation determined that the beneficiary's three-year degree from the University of Mumbai would permit him to "transfer" into a regionally accredited university in the United States.

On appeal, counsel asserts that the beneficiary's credentials are sufficient to meet the requirements of the labor certification. Counsel asserts that Shah's facts are distinguishable from the instant case because the Board of Immigration Appeals (BIA), which was adjudicating third preference immigrant visa appeals at that time, considered many other factors, including the failure of the petitioner to submit any evidence at all to support the beneficiary's credentials, than just a three-year degree. Additionally, counsel asserts that the legislative history actually supports her interpretation of "foreign equivalent degree," and although providing an incorrect citation to the Federal Register, quotes from what the AAO determined was found on 56 FR 60900 (November 29, 1991) the following: "Because neither the Act nor its legislative indicates that bachelor's or advanced degrees must be US degrees, [CIS] will recognize foreign equivalent degrees." Counsel states the director erred in relying upon that preambulatory language to the amended Act because it was in the context of combining academic credentials and employment experience, not multiple academic credentials. Finally, counsel submits additional correspondence from [REDACTED] and claims that CIS' own legal counsel provides guidance that "foreign equivalent degree" could include multiple academic degrees.

At the outset, the preambulatory language to amending the Act found at 56 FR 60900 states the following, in pertinent part:

The final rule will not change with regard to academic requirements for either professionals holding advanced degrees or professionals in the third classification. 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 discussed above 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, [CIS] 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.** Therefore, [CIS] believes that, to carry out Congress' intent, it must require a bachelor's degree in both contexts, and cannot permit an

alien to meet this minimum requirement through experience alone. [CIS] also maintains that the equivalent of an advanced degree--a baccalaureate plus five years of progressive experience in the professions-- equates to no more than a master's degree. Persons formerly qualifying for third preference by virtue of education and experience equating to a bachelor's degree will qualify for the third employment category as skilled workers with more than two years of training and experience. These individuals as well as holders of baccalaureate degree will fall into the same preference category.

(Emphasis added). Counsel is correct that the preamble evincing Congressional intent behind the Act's amendment is in the context of combining education and experience when adjudicating third preference petitions in which an alien tries to qualify through the combination of education and experience. However, counsel's quote is not dispositive evidence of Congressional intent that CIS is to accept multiple academic degrees, which when combined are deemed equivalent to one baccalaureate degree issued from an accredited university in the United States, for aliens seeking eligibility as professionals under the third preference category. Counsel's quote from the block of text cited above from the preamble, which is highlighted, merely states that CIS will recognize foreign equivalent degrees. CIS does recognize foreign equivalent degrees, and if those degrees support a petition's eligibility and all other substantive and procedural elements are met, then a petition is approved. The sentence following counsel's quote, however, which is also highlighted and was quoted by the director, uses a singular description of a baccalaureate degree in the context of the third preference category. The AAO does not find the perambulatory language dispositive of the issue because it does not clearly state whether or not a combination of academic degrees could be accepted as a "foreign equivalent degree" as envisioned for an alien seeking classification as a professional under the third preference category.

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 Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany 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 of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree or equivalent (four years in college) with a major or minor/concentration in Computer Science or related, Physical Science, Math or Engineering.

Guiding the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight."

FCI is not a member of NACES, the National Association of Credential Evaluation Services. The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector. Thus, the credential evaluation provided by FCI carries little evidentiary weight in these proceedings.

Even if the AAO were to consider FCI's credential evaluation, however, the petitioner has not established that the beneficiary is qualified for the proffered position. In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be a foreign equivalent degree, a 4-year degree that is not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. The petitioner clearly requires a 4-year degree, as the number "4" marked in Item 14 under the "MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in Item 13 above" under "College" reflects (Emphasis in original).

Additionally, as properly noted by the director, a U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree in Chemistry from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies to the instant petition since the Regional Commissioner made specific findings concerning a three-year degree from India in the context of third preference petitions. Counsel states that the holding *Shah* is distinguishable from the facts of the instant petition because the beneficiary in *Shah* failed to provide a credential evaluation. However, the Regional Commissioner did consider an evaluation issued by the U.S. agency overseeing the Department of Education at that time, which concluded that *Shah's* three-year degree was the equivalent of a U.S. bachelor's degree. The Regional Commissioner chose not to defer to that equivalency determination and decided that the three-year degree was not the equivalent of a U.S. four-year baccalaureate degree because *Shah's* transcripts showed only three years of attendance at the Indian university and his degree was annotated "special," for which no explanation was provided.

While the beneficiary's bachelor degree from Mumbai University is not annotated with "special," the only credential evaluation contained in the record of proceeding indicates that the completion of that 3-year program enabled the beneficiary to transfer into university in the United States. FCI's evaluation requires the combination of the 3-year program and NIIT's diploma in order to deem the beneficiary's credentials equivalent to a 4-year baccalaureate degree awarded by an accredited U.S. educational institution.

The AAO accessed NIIT's website to determine what type of educational services it provides. NIIT collaborates with India's government educational system from kindergarten through post-graduate levels. No admission requirements are posted on the website but it does reflect that it provides online courses to colleges and develops college graduates' technical skills to prime them for better employment positions. Thus, it appears that NIIT does not require a college degree in order to admit a student; however, in the instant case, it did clarify that the diploma it issued was pursuant to completion of post-graduate studies¹. Nevertheless, the AAO notes that the beneficiary was issued a diploma. NIIT did not, and does not, award academic degrees. Finally, there is no evidence that the beneficiary's admission to NIIT was predicated upon the completion of a bachelor's degree program.

The regulations define a third preference category "professional" as a "qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(1)(2). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the

¹ The AAO assumes that "post graduate" means after the completion of a baccalaureate degree program and not secondary school.

regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The AAO concurs with the director's decision concerning [REDACTED] letter, as well as the correspondence submitted on appeal, being exclusively within the context of advanced degree professionals in the second preference category. [REDACTED] guidance is limited to the second preference category and not the third preference category. As the director noted, the second preference category is described with plural degrees in the Act, but the same is not true of the third preference category. They are distinguishable categories with separate eligibility requirements and no analogy may be made absent clear guidance from Congress, the statute, the regulations, case law, or CIS binding policy.

The director was correct in noting that letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree². Here, the record reflects that the beneficiary's formal education, as evidenced by his highest academic degree, consists of less than a four-year curriculum. The evaluations submitted with the evidence in this proceeding suggesting that the beneficiary's certificates from various schools should be considered as the equivalent of a baccalaureate degree is not accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United State's bachelor's degree because it includes multiple academic credentials in the evaluation.

Additionally, the petitioner has not indicated that a combination of educational achievements (e.g., a 3-year bachelor's degree plus an additional 1 and ½ year "diploma") can be accepted as meeting the minimum educational requirements stated on the labor certification. Thus, the combination of educational achievements may not be accepted in lieu of one baccalaureate degree. The beneficiary was required to have a bachelor's degree on the Form ETA 750. 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.

Based on the evidence submitted, we concur with the director that the petitioner has not established that the beneficiary possesses a bachelor's degree as required by the terms of the labor certification.

² The AAO acknowledges the director's print-out from the Indian Government's Department of Education's website contained in the record of proceeding. The print-out includes a list of bachelor's degrees and the years of studies required in order to complete the degree. The list reflects that the bachelor degrees offered in India range from 2 to 5 years. Thus, 4 year programs are available.

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.

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prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



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136

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 20 2005**
WAC-03-008-54824

IN RE: Petitioner: [REDACTED]
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:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director.

The petitioner is an exporter of recycled products. It seeks to employ the beneficiary permanently in the United States as an importer-exporter agent. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that the petitioner committed fraud for submitting a business license never issued by the city listed on it, San Gabriel, California, and denied the petition accordingly.

On appeal, the petitioner, through former counsel, asserts that the petitioner's business is real and was authorized by the City of San Gabriel, California, and that denial of the petition would adversely impact the petitioner's operations since it needs the beneficiary's expertise and DOL determined there are no qualified US workers for the proffered position. The petitioner is considered self-represented in these proceedings since former counsel is no longer in active status as a licensed attorney in the state of California and no other attorney has submitted a properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative into the record of proceeding.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 23, 1999. The proffered wage as stated on the Form ETA 750 is \$30.38 per hour, which amounts to \$63,190.40 annually. On the visa petition, filed in October 2002, the petitioner claimed to be established in 1996 and to employ six employees. The petitioner also claimed to have gross annual income of \$240,750 with net annual income of \$114,036.

The petitioner is structured as a sole proprietorship. With the petition, the petitioner submitted its sole proprietor's Forms 1040, U.S. Individual Income Tax Returns, with accompanying Schedules C, Profit or Loss from Business statements, for 1999, 2000, and 2001. The petitioner also submitted a Business Tax Registration Certificate issued by the City of San Gabriel paid for on October 15, 2001; a letter pertaining to the beneficiary's qualifications; the beneficiary's individual income tax returns and W-2 forms issued to the beneficiary from the petitioner reflecting wages paid in the amount of \$24,000 each year; documentation