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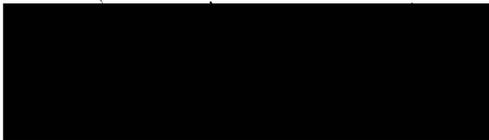


FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: FEB 14 2007
LIN 04 244 50512

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:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference 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 software development consulting firm. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because she did not have a four-year bachelor's degree, and that the petitioner could not combine education and training to arrive at the requisite four year baccalaureate degree or foreign equivalent. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 30, 2005 denial, the single issue in this case is whether the beneficiary is qualified to perform the duties of the proffered position.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

To be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm.

1977). 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). In this case, that date is October 24, 2004.

The AAO takes a *de novo* look at issues raised in the denial of this petition. See *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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal¹. On appeal, counsel submits a copy of an interoffice memorandum from ██████████ Citizenship and Immigration Services (CIS) Former Acting Associate Commissioner,² as well as letters written by ██████████ Director, CIS Business and Trade Services, on January and July 2003 to two attorneys of record, answering questions with regard to the employment-based EB-2 Professionals with Advanced Degree classification. Counsel also submits a copy of the beneficiary's diploma from Pace University, School of Computer Science and Information Systems. This document states that the beneficiary was awarded a Master of Science degree on September 1, 2004. Counsel also submits documentation from Pace University on the beneficiary's coursework during the spring and summer semesters of 2004.

On appeal counsel resubmits the educational equivalency report dated March 2, 1002 written by ██████████ Silberzweig, The Trustforte Corporation, New York, New York. In this document, Mr. ██████████ stated that based on the beneficiary's three years of university level education in India, her university studies at Pace University, the number of years of the beneficiary's coursework, and the nature of the coursework, the beneficiary had attained the equivalent of a bachelor of science degree in computer science from an accredited U.S. higher education institution.

The record also contains documentation on the coursework undertaken by the beneficiary at Pace University in 2000 to 2001, coursework undertaken by the beneficiary in her three-year program of studies at the University of Mumbai, with a major in life sciences, and copies of certificates for four courses in computer-related classes or training courses that the beneficiary attended in India. Finally the record contains two letters verifying the work experience of the beneficiary in India. One letter is from ██████████ Deputy General Manager, ██████████, dated June 21, 2004. In his letter Mr. ██████████ stated that the beneficiary had worked as a programmer analyst from February 9, 1998 to June 30, 1999. This letter also had a stamp on it that says "Attested (signature illegible) Head Mistress, S.V. P. M. Eng. School, Kalwa." The second letter was written by ██████████ Arizona, who stated that he was an employee of Sun Automation Services Limited in Mumbai, India, and that the beneficiary was also an employee from October 1999 to October 2000, in the field of computer programming.

On appeal, counsel asserts that the petition has been denied in error. Counsel refers to 8 C.F.R. § 204.5(j)(4)(1), and states that CIS laws, regulations and existing headquarters memos all allow for the combination of various degrees to establish the equivalency of a U.S. baccalaureate degree. Counsel states that by virtue of the beneficiary's bachelor of science degree and her computer diploma, she does have a

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² Memorandum from ██████████, Acting Associate Commissioner, Office of Programs, and ██████████ Deputy Executive Commissioner, Office of Operations, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants*, HQOPRD 70/6.2 AD00-08.

baccalaureate degree in computer science. Counsel reiterates that based on the educational equivalency document submitted to the record, the courses completed towards the master of computer science degree at Pace University, the computer diploma, and the beneficiary's bachelor of science degree from India, the beneficiary does have the equivalent of a bachelor of science degree from an accredited U.S. educational institution.

Counsel examines the regulations for establishing whether a beneficiary can be considered a professional holding an advanced degree, and cites to 8 C.F.R. 204.5(k)(3)(i), and 8 C.F.R. § 204.5(k)(12), and also refers to the correspondence from Efrén Hernández III, CIS Director of Business and Trade Services. Counsel states that this correspondence was written to clarify the implication of 8 C.F.R. 204.5(k)(2), and states, in pertinent part, that it is not the intent of the regulations that only a single foreign degree satisfies the equivalency requirement. Counsel also comments on two other letters written by Mr. [REDACTED] and to the previously-noted memorandum from [REDACTED], Former Acting Associate Commissioner that addressed educational equivalencies for the EB-2 program, namely professionals with advanced degrees.

Counsel states that while the memo and letters were written to clarify the EB-2 classification, they are equally applicable to the EB-3, professionals and skilled workers, classifications. Counsel states that as long as a petitioner writes "BS degree" in item 14 of the ETA 750 and the beneficiary has a U.S. bachelor's degree or its academic equivalent through a combination of degrees, the regulatory criteria are met.

On appeal, counsel submits copies of two letters dated January 7, 2003 and July 23, 2003, respectively, from Efrén Hernández III of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the July 2003 letter, Mr. [REDACTED] states that he believes that the combination of a post-graduate diploma and a three-year baccalaureate degree may be considered to be the equivalent of a U.S. bachelor's degree.

Counsel's assertions based on these letters as well as on the Cronin memo are not persuasive. At the outset, it is noted that 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). Furthermore policy memorandums such as the Cronin memo are equally not binding on the AAO in its deliberations.

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Additionally, although 8 C.F.R. § 204.5(k)(2), as referenced by counsel and in Mr. Hernández' correspondence, permits a certain combination of progressive work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute 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 under the third preference category. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, 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. *Matter of Shah*, at 245. Finally, unlike the temporary non-immigrant H-1B visa category for which promulgated

regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permit equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 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 software engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|---|
| 14. | Education | |
| | Grade School | X |
| | High School | X |
| | College | X |
| | College Degree Required | Bachelor's Degree |
| | Major Field of Study | Information Systems, Comp. Sci, CIS, Life Science |

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision, or two years of experience in the related occupation of programmer analyst or any exp. providing skills in described [sic]duties." Item 15 of Form ETA 750A states the following: "May travel to client sites within the United States."

The beneficiary set forth her credentials on Form ETA-750B and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary stated she had attended Pace University, New York, New York, studying Information Systems from January 2002, with an expected graduation in June 2004 with a Master in Information Systems degree. The beneficiary also stated that she attended University of Bombay, Marharashtra, India, studying life sciences, from September 1994 to July 1997, obtaining a bachelor's degree in science. The beneficiary also stated that she attended Boston Computer Institute, Bombay, India, studying integrated Java technology, from October 2000 to December 2000, obtaining a diploma in "Java Tech". The record contains a copy of the beneficiary's diploma for a three year integrated course in Life Sciences dated December 12, 1997, as well as the certificates the beneficiary received in India for courses such as web development, integrated Java Technology, "C" Programming & C++.

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 college, with a baccalaureate degree in information systems, computer science, computer information systems, or life science.

The petitioner did not clearly delineate the required number of years required for the bachelor's degree requirement on the Form ETA 750A. Thus, the intent of the petitioner in simply marking the box identified as "college" with an X is unknown. As previously stated, a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, 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. *Matter of Shah*, at 245. It is also noted that the petitioner presented no evidence that the beneficiary actually received four years of education during her three-year baccalaureate degree studies in life sciences.

Guidance on 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."

With regard to the credentials evaluation report submitted to the record, the evaluator examined the beneficiary's three-year academic degree, and her coursework while attending Pace University, in arriving at his conclusion that the beneficiary had the equivalent of a U.S. baccalaureate degree in science from an accredited U.S. institution. The AAO would note that the beneficiary's three year course of studies at the University of Mumbai was in life sciences, which is one of the majors listed as the ETA 750. However, the beneficiary's documented coursework contains no class in any realm of computer sciences, and her component unit within her major is listed on her transcript as "Horticulture and Gardening". Thus, the AAO would question the evaluator's statement that the beneficiary's university level studies in India in combination with one year coursework at Pace University in computer and information management would be the equivalent of four years of university level studies in computer science. Thus, the petitioner's educational equivalency report is only given limited evidentiary weight.

On appeal, counsel submits the beneficiary's diploma for a master's degree from the School of Computer Science and Information Systems, Pace University. However, as of the 2003 priority date, the beneficiary did not possess a master's degree in computer studies. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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 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. While the beneficiary's present possession of a master's degree in a stipulated field of expertise could be viewed as the equivalent of a U.S. baccalaureate degree, she did not possess this degree at the time the priority date was established. For purposes of these proceedings, the AAO will examine the beneficiary's educational credentials as they existed as of the October 24, 2003 priority date.

Furthermore although counsel on appeal refers to the regulatory criteria for establishing eligibility for visa petitions involving professionals with advanced degrees, neither counsel nor the petitioner has indicated that the

current petition was filed within this classification, commonly referred to as EB-2. Nor has counsel or the petitioner specifically stated that the visa petition is for a skilled worker.

It is noted that the petitioner's cover letter dated August 23, 2004 on page two, described the position as a professional position. In addition, the proffered position requires a bachelor's degree and two years of experience in the actual job or in a relation occupation. Because of those requirements, the proffered position is for a professional. DOL assigned the occupational code of 030-062-010, software engineer, on the ETA 750 to the proffered position. The DOL online occupational code is 15.1031.00. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT?s=030.162-014+&g+Go> (accessed February 13, 2007) and its extensive description of the position and requirements for the position most analogous to the petitioner's proffered position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a standard vocational preparation (SVP) range of 7-8 to the occupation, which means "[m]ost of these occupations require a four-year bachelor's degree, but some do not." See <http://online.onetcenter.org/link/summary/15-1031.00#JobZone> (accessed February 13, 2007). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

The proffered position may be properly analyzed as professional since the position requires a bachelor's degree and two years of experience, which is required by 8 C.F.R. § 204.5(l)(3)(ii)(C) and DOL's classification and assignment of educational and experiential requirements for the occupation. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements. Thus, the AAO will examine the beneficiary's qualifications for the proffered position under the professional employment-based classification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for "professionals," 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.

As previously stated, the record reflects that, as of the 2003 priority date, the beneficiary had a three-year degree from an Indian university in life sciences, with subsequent non-university level studies in computer science in India. She then subsequently attended Pace University beginning in 2000, and received credit for coursework in the Pace University School of Computer Science and Information Systems. Mr. ██████████ in his educational evaluation described the beneficiary's academic studies at the University of Bombay (Mumbai) as satisfying "substantially similar requirements to the completion of three years of academic studies leading to a bachelor of science degree from an accredited U.S. educational institution." Mr. ██████████ continued that the beneficiary's acceptance into the Pace University program, her completion of a year's coursework, together with the beneficiary's prior academic studies, indicated that she had the equivalent of a bachelor of science degree in computer science from a U.S. institution. However, as previously stated, the AAO does not consider the combination of the three year degree and additional coursework to equate to a U.S. baccalaureate degree in computer sciences or any other field stipulated on the Form ETA 750. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the position.

It is also noted that the Form ETA did not specify qualifying for the proffered position through a combination of degrees/diplomas or a variety of coursework, so that United States workers or legal permanent residents had no notice that they could possess less than a four year bachelor's degree to apply and qualify for the proffered position.

Beyond the decision of the director, the record is not clear that the beneficiary had the requisite two years of experience as a software engineer prior to the October 24, 2003 priority date. 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*, 299 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 letter of work verification submitted to the record by the petitioner for the beneficiary's claimed employment with ██████████ India, was written by the beneficiary's co-worker, Jaikrit Rawat. As such, it is not sufficient to establish her one year period of employment with the company. The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

Thus the letter from the beneficiary's co-worker is given no weight in these proceedings. Therefore, the petitioner has only established one year and four months of relevant work experience based on the letter submitted by Mr. ██████████ that stated the beneficiary worked for the company from February 9, 1998 to June 30, 1999. It is further noted that this second letter of work experience has an attestation stamp ostensibly by a headmistress of an Indian educational institution. This raises the question as to whether the work performed with ██████████ by the beneficiary was part of an academic program or was professional

work. Thus, the record is not clear as to whether the beneficiary has the requisite two years of experience in the proffered position prior to the 2003 priority date. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) states: "Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition."

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for 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.