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U.S. Citizenship  
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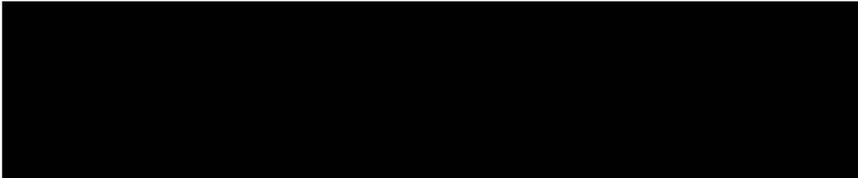
Date **OCT 28 2008**

IN RE: Petitioner:  
Beneficiary:



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 is sustained. The petition will be approved.

The petitioner is a provider of patient monitoring systems and products. It seeks to employ the beneficiary permanently in the United States as a software engineer III. 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 he possessed a three-year degree in Physics, Math and Electronics from Bangalore University, and the director determined that this degree is not a foreign equivalent of a U.S. baccalaureate degree in computer science as stipulated in the ETA Form 9089. 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 January 29, 2007 denial, the single issue in the current petition is whether the beneficiary is qualified to perform the duties of the proffered position.

In the instant petition, the petitioner submitted the I-140 petition identifying the beneficiary's classification as a professional. 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. Section 203(b)(3)(A)(i) of 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.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

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. Evident 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation

The regulation at 8 C.F.R. § 204.5(l)(3) also 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.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 Application for Permanent Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 9089 was accepted on November 15, 2006.

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 appeal<sup>1</sup>. On appeal, counsel submits a brief and resubmits documentation submitted in the petitioner's response to the director's request for further evidence, along with a copy of page 12 of the certified ETA Form 9089.

The record also contains a copy of the beneficiary's diploma from Bangalore University, India dated April 1994 that states the beneficiary earned a bachelor of science in physics, mathematics and electronics. The record also contains three statement of marks for the beneficiary's three years of university-level studies. The record also contains an academic equivalency report written by [REDACTED], Chief Evaluator, Foreign Consultants, Inc. Northbrook, Illinois. In her evaluation, [REDACTED] referenced the beneficiary's diploma from Bangalore University and a certificate issued to the beneficiary by the authority of the CMC Limited, Bangalore upon his completion of a post-graduate study program from January 2, 1995 to July 19, 1995 majoring in computer applications.<sup>2</sup> Ms. [REDACTED] examined the beneficiary's coursework at Bangalore University and his coursework at CMC, Limited, Bangalore, and determined he had 130 credit hours of university level studies. She then indicated the beneficiary had the equivalent of a U.S. Bachelor of Science degree in computer science granted by a regionally accredited academic college or university.

In response to the director's request for further evidence dated January 5, 2007, the petitioner submitted its recruitment materials for the proffered job, including job announcement on the petitioner's website, print advertisements, job search website and state job bank postings as well as the posting notice and prevailing wage statement. The record also contains a printed screen from the petitioner's website that described its work.

On appeal, counsel states that the director in his decision did not consider the certified ETA Form 9089 in its entirety. Counsel states that the beneficiary clearly meets the minimum requirement for the third preference employment-based skilled worker petition. Counsel further notes that the director did not read the petitioner's ETA Form 9089 correctly, or the points raised by counsel in response to the director's RFE. Counsel states

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<sup>1</sup> 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).

<sup>2</sup> The record does not contain this certificate or any transcript of courses utilized by [REDACTED] in her evaluation.

that Box H-14 on the ETA Form 9089 supplements Boxes 4 and 4-B of the form and states that the requisite degree requirement was “B.S. (3 or 4 year program, US or foreign degree) in computer science or related technical field.”

Counsel states that neither the PERM regulations nor the Permanent Online System User Guide, published by the U.S. Department of Labor on April 26, 2005, offers specific guidance or instructions on precisely what should be placed into each box for this online system of eliciting information with respect to the recruitment which has been conducted. Counsel also states that there has not been a BALCA opinion or further implementing regulations that provide guidance about what information needs to appear in precisely which box. Counsel asserts that DOL offers some assistance through its “frequently asked questions” but nothing has been provided with respect to how the information is to be conveyed on the form.

Counsel states that Citizenship and Immigration Services (CIS) must examine the petitioner’s Form ETA 9089 as a whole and that in Box 4, the applicant is only given a box to check, and that in the instant matter checking “bachelor’s degree” would be the appropriate box, since the petitioner clearly required a bachelor’s degree of three or four years, U.S. or foreign. Box 4B only asks for the major field of study, and in this instant, computer science is clearly the major field of study. Counsel further states that the only box on this online form that allows for development of the education and skill requirements is Box 14 entitled “specific skills or other requirements” and this is where the petitioner put “B.S. (3 or 4 years, U.S. or foreign degree ) in computer science or related technical field.” Counsel states that the beneficiary possesses a three-year bachelor’s degree in physics, mathematics and electronics that the CIS in its denial says are clearly related fields. Counsel then states that the director’s assertion that the ETA Form 9089 stipulates that the degree must be in computer science is incorrect. Counsel states that when all the terms of the labor certificate are considered, the petitioner’s Form ETA 9089 “clearly allows for a 3 OR 4 year bachelor’s degree U.S. OR foreign degree, in computer Science OR a related field”(Emphasis in original).

Counsel notes that the I-140 petition was filed for a third preference employment-based position, and that the beneficiary qualifies as a skilled worker. Counsel states that the petitioner did not require an individual possessing a U.S. degree or foreign degree equivalent to a U.S. bachelor’s degree, but rather a three or four-year degree program, U.S. or foreign, together with four years of specialized experience. Counsel states that the beneficiary clearly qualifies as a skilled worker.

Counsel also notes that a bona fide recruitment was held and that all requirements for the proffered position were clear and transparent to all U.S. applicants. Counsel notes that the prevailing wage request and all recruitment information demonstrate that all workers applying for this position clearly understood that a person holding a three or four-year bachelor’s degree in computer science or a related field could apply for the position. Counsel states that the petitioner did substantial advertising of the position, including two advertisements in the *Seattle Times*; web site postings both in the *Seattle Times* and on the employer’s websites; physical postings in the petitioner’s offices, and posting in the Washington State Job Bank. Counsel notes that all the advertising specified a three or four-year bachelor’s degree, U.S. or foreign in computer science or related field.

Counsel notes that the director noted in his denial that the recruitment information has no bearing on the adjudication of the petition. Counsel states that U.S. workers were fairly apprised of the job opportunity and CIS interests were met in that the beneficiary clearly qualifies as a skilled worker under the third preference employment-based category. Counsel states that to deny the petitioner because CIS thinks that the petitioner should have stated its specific degree requirements in Boxes 4 and 4-B instead of in Box 14 serves no legitimate public interest.

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, 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 of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The beneficiary set forth his credentials on Form ETA-9089 and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part J-12,13, and 14, the beneficiary indicates his major field of study was physics, mathematics and electronics, and that he completed his relevant education at Bangalore University in 1994.

In the instant case, the applicant must also have four years of experience in the job offered, the duties of which are delineated on an addendum for Item H-11 of the Form ETA 9089, and include the following:

Define, design, implement and test software and specifications for innovative employer products, utilizing expertise in system design and architecture. Working on all phases of the development lifecycle, utilizing software tools including Rational Rose, version control systems, and Microsoft Visual Studio. Design and implement databases. Lead software project management and technical review of project software deliverables and work to optimize stability, reliability and robustness of system software. Must be willing to travel up to 25 % of time.

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree is the minimum level of education required. Line 4-B indicates that the major field of study is computer science. ETA Form 9089, line 4-B does not indicate the minimum academic requirement is a baccalaureate degree or the equivalent. Line H-6 reflects that the proffered position requires forty eight months of experience in the proffered job, Line H-8 indicates that there is no alternative combination of education and experience that is acceptable, and Line H-9 indicates that a foreign educational equivalent degree is acceptable. In Section H-11, job duties, the petitioner indicated "See Attachment" and in an attachment described the beneficiary's job duties. In Section H-14, specific skills or other requirements, the petitioner states:

B.S. (3 or 4 year program, US or foreign degree) in computer science or related technical field; and Four years of software development experience including 3 years of experience with system design and architecture using OOAD and UML and Design Patterns, software programming experience using C/C++, COM, DCOM and Win32APIs for Multi-threaded system, and Microsoft Visual Studio. Requires 2 years experience working with optimizing stability, reliability and robustness of system software using Bounds Checker, Performance Monitor, and source code profiler. Experience must include design and implementation of databases using SQL Server, Visual Basic, and Windows ADO objects. Experience may be gained concurrently.

The AAO finds that the petitioner in the attachment for H-14 provided special requirements and additional information with regard to the requisite bachelor's degree identified in Part H, Line 4, and that such information must be taken into consideration when evaluating the petitioner's actual minimum educational requirements for the proffered position and whether the beneficiary has the requisite minimum educational and training

requirements. The AAO notes that while Section H-14 appears to be for such job related requirements as shorthand and typing speeds, the expansion of the petitioner's stated required academic requirements in an attachment to Line 14 clearly present alternatives to a four-year U.S. bachelor's degree. On the attachment for Line 14, the petitioner clearly delineated three years to four years as the required number of years required for the bachelor's degree requirement on the Form ETA 9089.

It is 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. Nevertheless, the Form ETA 750 in the instant petition clearly states three years to four years as the required number of years for the stipulated baccalaureate degree. The actual credentials held by the beneficiary were analyzed by credential evaluators and their evaluations were 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 educational equivalency documents submitted to the record, the one evaluation submitted to the record and used ostensibly for the petitioner's H1-B petition, combined the beneficiary's three years of university level studies with further studies at CMC Systems, Inc., to determine that the beneficiary has the equivalent of a U.S. baccalaureate degree in computer science. However, the evaluator is combining two degrees in arriving at her conclusion with regard to the beneficiary's academic equivalency. As stated previously, the record contains no copy of any post graduate certificate from CMS Systems, Inc. and no further explanation or documentation as to the beneficiary's coursework at CMS Systems, Inc. Therefore the AAO only gives ██████████'s academic equivalent report limited weight. The AAO does find that the beneficiary has a three-year degree in a field related to computer science.

In response to the director's request for further evidence, counsel stated that the petition is for a skilled worker. Therefore the AAO will comment on the requisites of both the professional and skilled worker categories in these proceedings.

The proffered position requires a three or four-year bachelor's degree and four years of experience. DOL assigned the occupational code of 15-1032.00 software applications engineers, to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/link/summary/15-1032.00> (accessed October 2, 2008) 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." 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.

Therefore the proffered position can be either a professional or skilled worker classification. 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(l)(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. Therefore since the beneficiary does not have a four-year bachelor's degree in computer science or a related field, the position and the beneficiary can not be viewed as a professional.

The petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application. In the instant petition, the Form ETA 9089 also stipulates four years of relevant work experience, including three years of experience with system design and architecture using OOAD and UML and Design Patterns, software programming experience using C/C++, COM, DCOM and Win32APIs for Multi-threaded system, and Microsoft Visual Studio; and requires two years experience working with optimizing stability, reliability and robustness of system software using Bounds Checker, Performance Monitor, and source code profiler. The ETA Form 9089 also states that experience must include design and implementation of databases using SQL Server, Visual Basic, and Windows ADO objects, and experience may be gained concurrently.

With the initial petition, and on the ETA Form 9089, the beneficiary represented that he had worked for Dolphin Medical Inc, as a Software Engineer II/III, from October 25, 2004 to the date he signed the ETA Form 9089, namely December 27, 2006, and that he performed the following duties:

Define, design, implement and test software and specifications for innovative employer products, utilizing expertise in system design and architecture. Working on all phases of the development lifecycle, utilizing software tools including Rational Rose, version control systems, and Microsoft Visual Studio. Design and implement databases. Lead software project management and technical review of project software deliverables and work to optimize stability, reliability and robustness of system software.

He also represented that he worked for SpaceLabs Medical, Inc., the parent company of Dolphin Medical, from November 3, 2000 to October 24, 2004, and performed the following duties:

Design multi-tiered software system and architecture for medical devices using system design and architecture using OOAD, COM, and UML. Design, develop, implement and test software for a real-time data transferring system, using C++, COM, DCOM and SQL Server, OPC, Multi-Thread programming using Win 32 API for Windows CE and NT. Optimize overall system software stability, reliability and robustness, using performance measurement tools, including Bounds Checker, Performance Monitor, and source code profiler under Windows CE and NT.

The beneficiary also represented that he had worked for LG Soft India Private Ltd, Bangalore, India<sup>3</sup> from September 5, 1997 to November 2, 2000 as a systems analyst, and in an attachment describes the following job duties:

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<sup>3</sup> The petitioner in this attachment also states that the beneficiary worked for LG Soft India Private Ltd. in

Responsible for system design and architecture using OOAD and UML and Design Patterns and conducting software programming with C/C++, DCOM and WIN 32 APIs for Multi-threaded system, and utilization of software tools including Rational Rose, version control systems and Microsoft Visual Studies. Over two years experience working with optimizing stability, reliability and robustness of system software using Bounds Checker, Performance Monitor, and source code profiler. One year experience with design and implementation of databases using SQL Service, Visual Basic, and Windows ADO objects.

Finally the beneficiary represented that he had worked for WishBone Systems Pvt. Ltd, Bangalore, India, from July 5, 1996 to August 28, 1997 as a software engineer, as member of a development team, utilizing SQL Server among other programs

The record contains letters of work verification for LG Soft India, Inc. and for Wishbone Private, Inc. The petitioner states in the cover letter that the beneficiary is currently employed by the petitioner pursuant to H-1B authorization. There is no further clarification of when the beneficiary began working for Dolphin Medical or for SpaceLabs, the petitioner's parent company. Nevertheless the beneficiary's work experience with LG Soft India, Inc. and with Wishbone Systems, Pvt. Inc, in India constitute four years of work experience relevant to the proffered position.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-9089 which, in this case, includes a three-year bachelor's degree with four years of relevant work experience. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirements on the Form ETA-9089 of an equivalent three-year foreign degree to a U.S. bachelor's degree.<sup>4</sup>

The beneficiary was required to have a three or four year bachelor's degree in computer science or a related technical field as stipulated on the petitioner's ETA Form 9089, and throughout the recruitment materials submitted to the record in response to the director's RFE. Contrary to the director's statement, the recruitment materials are material as they establish and corroborate the petitioner's information with regard to the petitioner's actual intent with regard to the minimum academic and training requirements for the proffered position. Based on the beneficiary's educational documentation, namely, his diploma from Bangalore University, he possesses a three-year bachelor degree in physics, mathematics and electronics, fields that are related to the field of computer science. Based on the letters of work verification from LG Soft India, Inc., and for Wishbone Systems, Pvt., Inc., the petitioner has established that the beneficiary has the requisite training. Thus, the petitioner has met its burden. The director's decision dated August 15, 2003 will be withdrawn. The appeal is sustained.

**ORDER:** The appeal is sustained. The petition is approved.

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San Jose, California from 1999 to 2000 pursuant to his H-1B authorization.

<sup>4</sup> Under the skilled worker classification, the petitioner would also have to establish that the beneficiary had four years of relevant experience. The record, based on various letters of work verification, establishes the beneficiary's requisite four years of work experience.

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