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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 2 6 2010
LIN-07-128-52372

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:

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ATLANTA, GA 30342

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a systems analyst pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (Act), 8 U.S.C. §1153(b)(3)(A). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (Form ETA 750),[1] approved by the Department of Labor (DOL). Upon reviewing the evidence in the record, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a foreign degree equivalent to a U.S. bachelor's degree as required on the Form ETA 750. The director denied the petition accordingly.

The record shows that the appeal is properly and timely filed, 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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). On appeal, counsel asserts that the beneficiary possesses the equivalent to a U.S. bachelor's degree based on the combination of his three-year degree, training certificates and experience under 8 C.F.R. 214.2(h)(4)(iii)(D)(5). Counsel also submits additional evidence to respond the AAO's notice of derogatory information (NDI) dated July 13, 2010. The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[2] and in response to the NDI.

As set forth in the director's March 30, 2009 decision, the primary issue in the current petition is whether the beneficiary possessed the requisite bachelor's degree for the proffered position.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

To determine whether a beneficiary is eligible for an employment based immigrant visa, U.S. Citizenship and Immigration Services (USCIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose

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[1] After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

[2] 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).

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).

The petitioner must demonstrate the beneficiary's eligibility as of 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 C.F.R. § 204.5(d); 8 C.F.R. § 103.2(b)(12); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In this matter, the priority date is February 10, 2004.

Decisions by federal circuit courts, which are binding on this office, have upheld our authority to evaluate whether the beneficiary is qualified for the job offered.

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). *See also Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *Black Const. Corp. v. INS,* 746 F.2d 503, 504 (9th Cir. 1984); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984). The court in *K.R.K Irvine* relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *K.R.K. Irvine, Inc.*, 699 F.2d at 1009.

The key to determining the job qualifications is found on Form ETA 750A. It is important that the From ETA 750 be read as a whole. Regarding the minimum level of education required for the proffered position in this matter, Item 14 of the labor certification reflects that four-year college study and a bachelor's degree in computer science, engineering or math-related. The position also requires two (2) years of experience in the job offered. Item 15 describes as other special

requirement in pertinent part that the beneficiary "must have 2 years' experience in JAVA (JDBC, BEANS, RMI), COBRA, JAVA Script, HTML, ASP, CGI with Perl and Oracle."

The Form ETA 750 was filed and certified for the position of systems analyst (Dictionary of Occupational Titles (DOT) code 030.167-014). DOL assigned the occupational code of 15-1051.00, computer systems analyst, to the proffered position. *See* http://online.onetcenter.org/crosswalk/DOT?s=030.167-014&g=Go (accessed August 13, 2010). DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database and its extensive description of the position and requirements for the position most analogous to systems analyst position, the position falls within Job Zone Four requiring "considerable preparation" for the occupation type closest to systems analyst. According to DOL, a considerable amount of work-related skill, knowledge, or experience is needed for these occupations. 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/15-1051.00 (accessed August 13, 2010). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

> A considerable amount 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.

Therefore, a systems analyst position could be properly analyzed as a professional since the most of these occupations require a four-year bachelor's degree. In this case, although the petitioner checked box e in Part 2 of the I-140 form, which is for either a professional or a skilled worker, the petitioner did not request for consideration under the skilled worker category when the director reviewed and denied the petition under the professional category. Further, the Form ETA 750 does not indicate that the employer would accept any alternate combination of education and experience in lieu of the bachelor's degree requirement. Therefore, the AAO finds that the director properly analyzed this petition under the professional category.

For the professional category, 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.

The above regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language concerning the professional classification 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 record contains the beneficiary's bachelor of science degree and transcripts from Osmania University in India. The transcript for the beneficiary's bachelor's degree program shows that the beneficiary was awarded a bachelor of science degree from Osmania University upon completion of his three years of post-secondary school study. A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's three-year degree from Osmania University in India is not the foreign equivalent degree to a U.S. baccalaureate degree.

In determining whether the beneficiary possessed a single U.S. bachelor's degree or a foreign equivalent degree in computer science, we have also reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). AACRAO, according to its website, http://www.aacrao.org, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the registration page for EDGE, http://aacraoedge.aacrao.org/register, EDGE is "a web-based resource for the evaluation of foreign educational credentials." EDGE provides a great deal of information about the educational system in India. While it confirms that a bachelor of science degree is awarded upon completion of two or three years of tertiary study beyond the Higher Secondary Certificate (or equivalent) and represents attainment of a level of education comparable to two to three years of university study in the United States, it does not suggest that a three-year degree from India may be deemed a foreign equivalent degree to a U.S. baccalaureate.

EDGE also discusses both Post Secondary Diplomas, for which the entrance requirement is completion of secondary education, and Post Graduate Diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate. EDGE provides that a Post Secondary Diploma is comparable to one year of university study in the United States but does not suggest that, if combined with a three-year degree, may be deemed a foreign equivalent degree to a U.S. baccalaureate. EDGE further asserts that a Postgraduate Diploma following a three-year bachelor's degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." The "Advice to Author Notes," however, provides:

> Postgraduate Diplomas should be issued by an accredited university or institution approved by the All-India Council for Technical Education (AICTE). Some students

> complete PGDs over two years on a part-time basis. When examining the Postgraduate Diploma, note the entrance requirement and be careful not to confuse the PGD awarded after the Higher Secondary Certificate with the PGD awarded after the three-year bachelor's degree.

The petitioner submitted the beneficiary's course completion certificates from Tulec Computer Education, Indira Gandhi National Open University, CS Software Enterprise Limited, Peers Technologies, Orbit and Wilshire Software Technologies. However, there is no evidence in the record of proceeding that the entrance requirement to the courses for which the beneficiary was issued the certificates is a three-year bachelor's degree, and the courses provide college senior level education. Nor is there evidence showing that any certificate issuers is an accredited university or institution approved by AICTE. Therefore, the beneficiary's certificates from these training facilities cannot be considered as a postgraduate diploma from an accredited university or institution approved by AICTE. The record does not contain any evidence that any of the beneficiary's certificates submitted in the record is a postgraduate diploma from an accredited university or institution approved by AICTE. Therefore, the petitioner failed to demonstrate that the beneficiary possessed a single U.S. bachelor's degree or a foreign equivalent degree as required by the Form ETA 750 in the instant case.

The petitioner asserts that the beneficiary possessed the equivalent to a U.S. bachelor's degree in computer science according to a private credential evaluation from Foreign Credential Evaluations, Inc. (FCE). The evaluation report from FCE is based on the combination of the beneficiary's three-year bachelor's degree from Osmania University and certificates from non-AICTE approved training facilities. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

On appeal, counsel submitted six H-1B approval notices for the beneficiary in which USCIS made a determination on equivalent favorable to the beneficiary pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) as evidence that the beneficiary possesses a foreign equivalent to a U.S. bachelor's degree as requested on the Form ETA 750. However, while the equivalence applies to non-immigrant H-1B petitions, it does not apply to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States baccalaureate degree or a single foreign equivalent degree to be qualified as a professional for third preference visa category purposes. Because the beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree" in computer science, engineering or mathematics, the beneficiary does not qualify for preference visa classification under section 203(b)(3)(ii) of the Act. In addition, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), providing evidentiary requirements for "skilled workers," states the following:

> 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 art least two years of training or experience.

(Emphasis added).

Thus, for petitioners seeking to qualify a beneficiary for the third preference "skilled worker" category, the petitioner must produce evidence that the beneficiary meets the "educational, training or experience, and any other requirements of the individual labor certification." And for the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of the category sought, the beneficiary must have a four year bachelor's degree or its foreign equivalent in computer science, engineering or mathematics and two years of work experience in the job offered. As the beneficiary lacks the degree required by the petitioner on the labor certification, the beneficiary cannot qualify under wither the professional or the skilled worker category. Thus, the petitioner failed to demonstrate that the beneficiary is qualified for the proffered professional position, and counsel's assertions on appeal cannot overcome the grounds of denial in the director's March 30, 2009 decision. Therefore, the director's ground for denying the petition under the professional category must be affirmed.

Beyond the director's decision and counsel's assertions on appeal, the AAO has identified an additional ground of ineligibility and will discuss whether or not the petitioner has established that it had the continuing ability to pay the proffered wage beginning on the priority date until the beneficiary obtains lawful permanent residence. 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 regulation at 8 C.F.R. § 204.5(g)(2) states:

> *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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is February 10, 2004. The proffered wage as stated on the Form ETA 750 is $57,450 per year.

The petitioner claimed to have 110 employees on the petition. While 8 C.F.R. § 204.5(g)(2) allows the director accept a statement from a financial officer of the organization which establish the prospective employer's ability to pay the proffered wage in a case where the prospective United States employer employs 100 or more workers, the petitioner submitted a letter dated March 12, 2007 from Murali Suddala, the chief of executive officer of the petitioner, stating that the petitioner employs more than one hundred full time employees and has sufficient funds to pay the beneficiary the offered salary as stated in the form I-140 petition.

Given the record as a whole and the petitioner's history of filing petitions, we find that USCIS need not exercise its discretion to accept the letter from the CEO. USCIS records indicate that the petitioner has filed over 81 Form I-140 petitions with the service centers. In addition, the petitioner has also filed 228 Form I-129 nonimmigrant petitions. Consequently, USCIS must also take into account the petitioner's ability to pay the petitioner's wages in the context of its overall recruitment efforts. Presumably, the petitioner has filed and obtained approval of the labor certifications on the representation that it requires all of these workers and intends to employ them upon approval of the petitions. Therefore, it is incumbent upon the petitioner to demonstrate that it has the ability to pay the wages of all of the individuals it is seeking to employ. If we examine only the salary requirements relating to the 81 I-140 petitions, the petitioner would be need to establish that it has the ability to pay combined salaries of $4,653,450. Given that the number of immigrant and nonimmigrant petitions reflects more than two times of the petitioner's current workforce, we cannot rely on a letter from the CEO referencing the ability to pay a single unnamed beneficiary.

In addition, if the instant petition were the only petition filed by the petitioner, the petitioner would be required to produce evidence of its ability to pay the proffered wage to the single beneficiary of the instant petition. However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending or approved simultaneously, the petitioner must produce evidence that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions or approved petitions. Further, the petitioner would be obligated to pay each H-1B petition beneficiary the prevailing wage in accordance with DOL regulations, and the labor condition application certified with each H-1B petition. *See* 20 C.F.R. § 655.715.

In the instant case, the record does not contain any evidence showing that the petitioner paid the instant beneficiary and beneficiaries of those approved immigrant petitions the full proffered wages, or any regulatory-prescribed documentary evidence, such as annual reports, tax returns or audited financial statements from the year 2004 of priority date in this case to the present, to demonstrate ability to pay the proffered wages for the instant beneficiary and each beneficiary of the approved I-140 petitions from their own priority date until each of them obtains permanent residence.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wages during the year of the priority date and subsequent years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

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.