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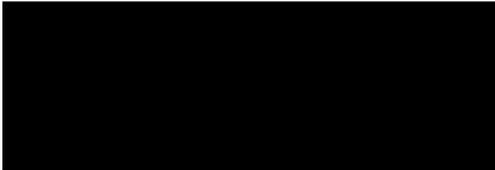
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date: AUG 26 2010

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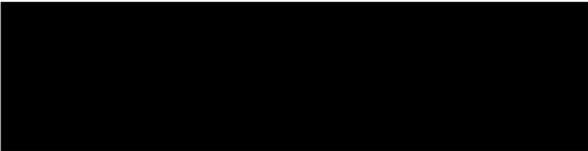
Petitioner:



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:

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 Director, Texas Service Center, denied the employment-based immigrant visa petition,¹ which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a medical clinic. It seeks to employ the beneficiary permanently in the United States as a market research analyst pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3). As required by statute, an ETA Form 9089 Application for Permanent Employment Certification (ETA Form 9089) approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, 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 U.S. Master's degree or foreign equivalent degree in the field required by the certified ETA Form 9089.

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). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal, counsel asserts that the petitioner established the beneficiary's educational qualifications with the evaluations stating that the beneficiary attained the equivalent of U.S. Master of Business Administration degree based the beneficiary's three years of studies at Osmania University and two year master of business administration degree from Indira Gandhi National Open University (IGNOU) in India.

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

¹ The petitioner filed an I-140 immigrant petition (LIN-07-119-52816) on behalf of the beneficiary for classification as a member of the professions holding an advanced degree based on a certified ETA Form 9089 (C-07019-01959) with the Nebraska Service Center on March 16, 2007. The petition was denied by the Nebraska Service Center on April 3, 2008 and the subsequent appeal from the denial was dismissed by the Administrative Appeals Office (AAO) on July 13, 2010. While the appeal from the denial of the petition (LIN-07-119-52816) was pending with the AAO, the petitioner filed the instant immigrant petition on behalf of the beneficiary for classification as a professional based on the same labor certification with the Texas Service Center on July 9, 2008.

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).

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 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 ETA Form 9089 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 November 8, 2006.

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 ETA Form 9089 Part H. This section of the application for alien labor certification, "Offer of Employment," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole. Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects that a bachelor's degree in business, marketing or related, or a foreign equivalent degree and 48 months (four years) of experience in the job offered are required.

The ETA Form 9089 was filed and certified for the position of market research analyst. DOL assigned the occupational code of 19-3021.00, market research analysts, 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/find/quick?s=19-3021.00> (accessed August 16, 2010) and its extensive description of the position and requirements for the same position, the position falls within Job Zone Four requiring "considerable preparation" for market research analysts. 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/19-3021.00> (accessed August 16, 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 market research 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 ETA Form 9089 clearly requires a master's degree for the proffered position and does not indicate that the employer would accept any degrees less than a bachelor's degree or alternate combination of any lesser education and experience in lieu of the 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. degree in order to be qualified as a professional for third preference visa category purposes.

The record contains the beneficiary's certificate for his bachelor program and transcripts for the three years of studies from Osmania University, and master of business administration degree and transcripts for the two years of studies from IGNOU in India in July 2005. The underlying ETA Form 9089 requires a master's degree in business administration or equivalent. Thus, the issues are whether each degree is on its own a single source foreign equivalent to a U.S. master's degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

A three-year bachelor's degree will not be considered to be the "foreign equivalent degree" to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. In the instant case, the three-year degree from Osmania University is not the foreign equivalent degree to a U.S. baccalaureate degree.

We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). AACRAO, according to its website, 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>.

accrao.org/register/index/php, EDGE is “a web-based resource for the evaluation of foreign educational credentials.”

EDGE confirms that while a master of arts, commerce, science awarded upon completion of two years of study beyond the two- or three-year bachelor’s degree in India is not the foreign equivalent degree to a U.S. master’s degree, it represents attainment of a level of education comparable to a bachelor’s degree in the United States. In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). Here the beneficiary’s master of business administration degree from IGNOU represents attainment of a level of education comparable to a bachelor’s degree in the United States, but not a master of business administration degree.

On appeal, counsel submitted an evaluation report from Morningside Evaluations and Consulting which evaluates the beneficiary’s two-year master of business administration degree from IGNOU as the equivalent degree to a U.S. MBA degree. 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).

Counsel also refers to and submits a decision issued by the AAO concerning two-year master’s degree from India equivalent to a U.S. master’s degree, but does not provide its published citation. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Therefore, the record does not contain any evidence that the beneficiary holds a single United States master’s 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 master’s degree or a foreign equivalent degree in business administration, 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 at 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 master degree or a foreign equivalent degree as set forth on the ETA Form 9089. Thus, regardless of the category sought, the beneficiary must have a master’s degree or its foreign equivalent in business administration and one year of work experience in the job offered or software engineer. As the beneficiary lacks the degree required by the petitioner on the labor certification, the beneficiary cannot qualify under either 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 April 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 additional grounds of ineligibility. 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).

As previously discussed, the underlying ETA Form 9089 requires 12 months (one year) of experience in the job offered or in an alternate occupation of software engineer in addition to the degree requirement. The beneficiary must establish that he has at least one year of experience in the job offered or as software engineer prior to the priority date in this matter.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien’s experience or training will be considered.

The record contains a letter dated May 26, 2006 from [REDACTED] as evidence provided by the beneficiary’s former employer pertinent to his experience in the specialty. This letter does not include a description of the duties the beneficiary performed as the regulation requires. Without such a specific description of the duties performed by the beneficiary, the AAO cannot determine whether the experience the beneficiary obtained from the employment with this employer enables him to perform the duties set forth on the ETA Form 9089 and further qualifies him for the proffered position. This letter does not verify whether the beneficiary worked on part-time or full-time basis during the period and if it was a part-time job, the letter fails to demonstrate that the beneficiary had at least one year of experience as requires. Therefore, the AAO cannot accept and consider this letter as primary evidence to establish

the beneficiary's requisite experience and the petitioner failed to establish that the beneficiary possessed the qualifying experience for the proffered position.

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 January 19, 2007. The proffered wage as stated on the ETA Form 9089 is \$38,626 per year.

The record does not contain any evidence showing that the petitioner paid the instant beneficiary any compensation during the period from the priority date to the present. The record contains the sole proprietor's Form 1140 U.S. Individual Income Tax Return for 2005 and 2006. However, these two years tax returns are actually not necessarily dispositive because the priority date falls in 2007. The record before this office closed on May 29, 2009 with the receipt of the appeal and additional evidence in sport to the appeal. As of that date the sole proprietor's federal tax returns for 2007 and 2008 should have been available. However, the petitioner did not submit the sole proprietor's tax returns, annual reports or audited financial statements for these two years. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

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 to the present.

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.



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ORDER: The appeal is dismissed.