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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: JUN 27 2013

OFFICE: NEBRASKA SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(ii)

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in cursive script, appearing to read "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center (Director). It is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a semiconductor manufacturer. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL).

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.

In denying the petition the Director found that [REDACTED], a U.S. institution, which awarded the beneficiary a Master's degree in Electrical Engineering on May 31, 2009, is not an accredited educational institution. Therefore, the beneficiary's degree from [REDACTED] did not meet the educational requirements on the ETA Form 9089 and did not entitle him to classification as a professional under section 203(b)(3) of the Act.

On appeal, counsel asserts that there is no requirement in either the Act or federal regulations that a degree be from an accredited institution to make the beneficiary eligible for employment-based classification as professional.

Factual and Procedural History

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). *See also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, U.S. Citizenship and Immigration Services (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 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 required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree in electrical and/or computer engineering, or science, or related science or engineering discipline.
- H.5. Training: None required.

- H.6. Experience in the job offered: None required.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: Education or experience in Graphics Library Knowledge (OpenGL, Direct3D), OS (Operating System) Internals, OS Kernel Development (Linux, Windows), Performance Analysis/Tuning/Optimization, Software Quality/Debug/Test/Validation and System on Chip Architecture.

Part J of the labor certification states that the beneficiary's highest level of education related to the offered position is a master's degree from [REDACTED] located in California, completed in May 2009.

The record of proceeding contains a copy of the beneficiary's master's diploma in electrical engineering and transcripts from [REDACTED]

The record also contains a copy of the beneficiary's bachelor's diploma in engineering and transcripts from [REDACTED] India. The record contains an evaluation by [REDACTED] Evaluator, [REDACTED] dated October 24, 2008. The evaluation concludes that the beneficiary has attained the equivalent of a Bachelor's Degree in Electrical Engineering from a regionally accredited college or university in the United States.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795. *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Commr. 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

The director issued a request for evidence (RFE) on October 19, 2012. In the RFE, the director requested evidence that [REDACTED] was an accredited institution. In response to the director's 2012 RFE, counsel stated in his brief that the petitioner defined the minimum education requirement for the position of software engineer as a master's degree and does not require that the master's degree be from an accredited institution and does not screen applicants based upon whether or not their degrees were issued from accredited institutions. Counsel further stated that the beneficiary meets the petitioner's minimum education requirement. Finally, counsel states that the Department of Labor (DOL) does not assess whether advanced degrees are from accredited institutions when it reviews

labor certifications.

The director denied the employment-based visa application on January 31, 2013. As noted in the director's decision, the [REDACTED] has not received accreditation by an organization recognized by the U.S. Department of Education. On appeal, counsel again asserts that accreditation is not required for a professional worker and that the petitioner does not require that the master's degree be from an accredited institution. Counsel further states that the petitioner has determined that the beneficiary is qualified for the offered position and meets the requirements for EB-3 status. In his brief on appeal, counsel states that "it remains within an employer's discretion to take more inclusive interpretation of an education requirement so long as it makes more American workers eligible for the position." Counsel adds that the beneficiary has also earned a bachelor's degree from [REDACTED] India, and that the degree was found to be equivalent to a U.S. bachelor's degree from a regionally accredited college or university.

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.

The issues on appeal are twofold:

- Whether the beneficiary's educational credential from [REDACTED] makes him eligible for classification as a professional under section 203(b)(3)(ii) of the Act.
- Whether the beneficiary's degree from [REDACTED] and/or degree from [REDACTED] meets the educational requirement set forth on the ETA Form 9089 (labor certification) to qualify him for the job of software engineer.

Eligibility for the Classification Sought

The ETA Form 9089 in this case was accepted for processing by the DOL on May 4, 2011, and certified by the DOL on July 8, 2011. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *See 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) of the Act, 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

The Immigration Act of 1990 Act added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that “[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor’s degree with at least five years progressive experience in the professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference (advanced degree professional) immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the INS specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(ii) of the Act as a professional with anything less than a full baccalaureate degree. More specifically, 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. Where the analysis of the beneficiary's credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree."¹

The degree must also be from a college or university. For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study."

While the regulatory language of 8 C.F.R. § 204.5(l)(2) does not specifically state that a degree must come from an accredited college or university to qualify as a professional, that requirement is implicit in the regulation. As stated by the U.S. Department of Education (DoEd) on its website:

The U.S. Department of Education does not accredit educational institutions and/or programs. However, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. An agency seeking national recognition . . . must meet the Secretary's procedures and criteria for the recognition of accrediting agencies, as published in the *Federal Register* The Secretary . . . makes the final determination regarding recognition.

The United States has no . . . centralized authority exercising . . . control over postsecondary educational institutions in this country. . . . [I]n general, institutions of higher education are permitted to operate with considerable independence and autonomy. As a consequence, American educational institutions can vary widely in the character and quality of their programs.

. . . [T]he practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs. Private educational associations of regional or national scope have adopted criteria reflecting

¹ Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality.

. . . Accreditation of an institution or program by a recognized accrediting agency provides a reasonable assurance of quality and acceptance by employers of diplomas and degrees.

www.ed.gov/print/admins/finaid/accred/accreditation.html (accessed June 17, 2013).

The DoEd's purpose in ascertaining the accreditation status of U.S. colleges and universities is to determine their eligibility for federal funding and student aid, and participation in other federal programs. Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

Presidents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions

CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.

Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort.

www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed June 17, 2013).

The DoEd and CHEA recognize six regional associations – covering the entire United States and its outlying possessions – that accredit U.S. colleges and universities. One of these is the Western Association of Schools and Colleges Accrediting Commission for Senior Colleges and Universities (WASC) – whose geographical scope encompasses California, the state in which  is located.²

² WASC also provides accreditation in Hawaii, the territories of Guam, American Samoa, Federated

The WASC website lists accredited and “candidate” higher educational institutions in its jurisdiction. According to the U.S. Department of Education website, [REDACTED] was accredited by the Accrediting Council for Independent Colleges and Schools, a national career-related accrediting organization recognized by CHEA and DoEd, on July 1, 2001 and the accreditation was terminated on December 31, 2004. [REDACTED] earned WASC pre-accreditation on June 24, 2011 and WASC accreditation on February 22, 2013. See <http://ope.ed.gov/accreditation> (accessed June 17, 2013). Although [REDACTED] is currently accredited by WASC, the institution was not accredited by WASC or the Accrediting Council for Independent Colleges and Schools when the beneficiary earned his degree in May 2009. Thus, [REDACTED] was never accredited by the applicable accrediting agency recognized by the DoEd and CHEA – WASC. The same is true for the other five regional associations.

Accreditation of a college or university by a regional accrediting body recognized by the DoEd and CHEA is a badge of quality. As stated on their respective websites, accreditation is intended “to assure academic quality and accountability” (CHEA) and to provide “a reasonable assurance of quality and acceptance by employers of degrees” awarded by the accredited institutions (DoEd). Moreover, the imprimatur of a regional accrediting agency guarantees that a school’s degrees will be recognized and honored nationwide. By comparison, there is no guarantee that degrees awarded by an unaccredited institution will be recognized and honored nationwide.

The Immigration and Nationality Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(l)(2) defining “professional” for the purposes of section 203(b)(3) of the Act – also have nationwide application. “Professional” is defined in 8 C.F.R. § 204.5(l)(2) as “a qualified alien who holds at least a **United States baccalaureate degree**” (or a foreign equivalent degree). (Emphasis added.) The repeated usage of the modifier “United States” to describe the different levels of (non-foreign) degrees makes clear the intention of the rulemakers that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. The only way to assure nationwide recognition for its degrees is for the educational institution to secure accreditation by a regional accrediting agency approved by the DoEd and CHEA.

For educational institutions in California, where [REDACTED] is located, the regional accrediting agency is WASC. As previously discussed, [REDACTED] was not accredited by WASC or any other organization recognized by DoEd or CHEA. Accordingly, the beneficiary’s Master’s degree in Electrical Engineering by [REDACTED] cannot be deemed to have nationwide recognition. Nor is there any evidence in the record that [REDACTED] is, or was, accredited in any foreign jurisdiction. Therefore, the beneficiary’s master’s degree from [REDACTED] does not meet the requirements of 8 C.F.R. § 204.5(l)(2).

States of Micronesia, Republic of Palau, Commonwealth of the Northern Marianas Islands, the Pacific Basin, and East Asia, and areas of the Pacific and East Asia where American/International schools or colleges may apply to it for service.

Based on the foregoing analysis, the AAO determines that the beneficiary is not eligible for preference visa classification as professional under section 203(b)(3)(A)(ii) of the Act and 8 C.F.R. § 204.5(l). Thus, the petition cannot be approved.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[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 [visa category] 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). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] 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.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification – "Job Opportunity Information" – describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)

(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In this case, Part H, lines 4, 4-B, 7, and 7A of the labor certification state that the minimum educational requirement to qualify for the proffered position of software engineer is a master's degree in electrical and/or computer engineering, or science, or related science or engineering discipline. Line 9 states that a "foreign educational equivalent" is acceptable. Lines 5, 6, and 10 state that no training or experience is required. Line 8 states that no alternate combination of education and experience is acceptable. Thus, the labor certification requires a U.S. master's degree or a foreign equivalent degree in electrical and/or computer engineering, or science, or related science or engineering discipline.

The beneficiary does not meet the above requirements. As previously discussed, the beneficiary's degree from [REDACTED] though called a Master's degree in Electrical Engineering does not qualify as a U.S. master's degree under the professional definition of 8 C.F.R. § 204.5(l)(2) because it was not awarded by an educational institution that has been accredited by a regional accrediting agency recognized by the DoEd and CHEA. Nor does the beneficiary have a foreign educational equivalent to a U.S. master's degree since there is no evidence that [REDACTED] was ever accredited in a foreign jurisdiction. Since he does not fulfill the educational requirements in Part H of the labor certification, the beneficiary does not qualify for the job offered. For this reason as well, the petition cannot be approved.

Conclusion

The beneficiary is not a professional within the meaning of 8 C.F.R. § 204.5(l)(2), and thus is not eligible for preference visa classification under section 203(b)(3)(A)(ii) of the Act. Nor does the beneficiary meet the educational requirements on the labor certification to qualify for the job offered.

For the reasons stated above, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.