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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: SEP 19 2014 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on a motion to reconsider. The motion will be granted, our previous decision will be affirmed, and the petition will remain denied.

The petitioner describes itself as an IT consulting business. It seeks to permanently employ the beneficiary in the United States as a "Programmer Analyst." The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).[1] The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The director's decision denying the petition concludes that the beneficiary does not meet the educational requirements of the labor certification. We affirmed the director's decision on appeal.

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

On motion to reconsider, the petitioner through counsel claims that we made a legal error by improperly applying education equivalency rules applicable when the petitioner is requesting a minimum of a bachelor's degree equivalency; counsel states that the equivalency rules do not apply to the current petition, as the petitioner is seeking a worker in the skilled worker category without a bachelor's degree equivalent. Further, counsel states that our decision is in direct conflict with existing regulations and case law in that we relied exclusively on the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), instead of the education evaluations provided in the record. Counsel asserts that our conclusion that the beneficiary's education is not the foreign equivalent of a U.S. bachelor's degree too narrowly defines the requirements of the labor certification application. The petitioner states that the labor certification does not require the "foreign equivalent" of a U.S. bachelor's degree. Counsel asserts that the labor certification, as written, would not support an EB-3 professional petition, because the minimum educational requirements are something less than "a foreign equivalent degree" as that term is interpreted by United States Citizenship & Immigration Services (USCIS). Counsel cites to the following in support of her argument. *Mandany v. Smith,* 696 F.2d. 1008 (D.C. Cir. 1983) at 1015; an unpublished decision; *Matter of General Eclectic Co. (GE Healthcare)*, 2011-PER-02696 (Jan. 22, 2013); *AILA Liason Committee Meeting at NSC,* dated January 22, 2013; *Memorandum from Anna C. Hall,* Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994); *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; *Matter*

[1] 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.

of Silver Dragon Chinese Restaurant, 19 I&N Dec. 401 (Comm'r 1986); and *Grace Korean United Methodist Church v. Chertoff,* 437 F. Supp. 2d 1174 (D. Or. 2005).

The petitioner claims, through counsel, that we substituted our own judgment for the petitioner's in interpreting the language of the labor certification application. We disagree. As noted in our decision dated July 3, 2014, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[2] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . .
>
> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be

[2] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the 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 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 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.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the duties of the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

The record contains evidence of the petitioner's recruitment in connection with its application for labor certification. In these documents, the petitioner stated that three positions were available at the time of hiring and advertised for such:

Programmer Analyst

Position 0401:	BS in computer applications, computer sci., engineering or related/equiv. + 2 yrs. exp. + 2 yrs. Simultaneous/concurrent exp-. w/ Actuate for reporting, Oracle Databases & PowerBuilder.
Position 0402:	BS in computer applications, computer sci., engineering or related/equiv. +1 yrs. exp. +1 yrs. Simultaneous/concurrent exp-. w/ Actuate for reporting & Oracle Databases.
Position 0403:	BS in computer applications, computer sci., engineering or related/equiv. +2 yrs. exp. + knowledge of Actuate report development, actuate server administration & actuate report migration.

The job advertisements each indicated to a prospective U.S. worker that the minimum requirement for the job opportunity was a bachelor of science degree in computer applications, computer science, engineering or a related degree [or] equivalent plus the required experience listed in each advertisement. The notice that the petitioner posted at its place of business used identical language to the cited advertisement for position 0401 listed above. Therefore, when the petitioner recruited for the position, the petitioner did not require less than a Bachelor of Science degree. The advertisement does not state that the petitioner would accept a combination of lesser degrees and/or work experience in lieu of education. As noted in our July 3, 2014 decision, the ETA Form 9089 requires a Bachelor of Science or equivalent plus two years' experience as a programmer analyst, software engineer or related as the minimum educational requirement for the job opportunity. *See Maramjaya v. USCIS,* Civ. Act No. 06-2158 (RCL) (D.C. Cir. March 26, 2008), which upholds an interpretation that a "bachelor's or equivalent" requirement necessitated a single four-year degree.

Box 14 of the ETA Form 9089 lists the specific skills or other requirements for the labor certification application:

> 2 years simultaneous/concurrent experience with Actuate for reporting, Oracle databases, and Powerbuilder.
>
> Any suitable combination of experience, education or training is acceptable.
>
> The employer will accept a combination of degrees if deemed equivalent to a U.S. bachelor's degree by a credentials evaluator.

Counsel states that the petitioner would accept a combination of lesser degrees if a credentials evaluator deems such degrees equivalent to a U.S. bachelor's degree. We do not agree that the petitioner advised potential workers in its advertisements that it would accept a combination of lesser degrees such as those possessed by the beneficiary. The language of the advertisements does not put

potential U.S. workers on notice that they might qualify for the position with an alternative to a U.S. bachelor's degree. Similarly, the prevailing wage request form submitted to the Employment Security Commission of North Carolina indicated that the petitioner sought a four-year bachelor's degree in computer applications or related or the equivalent. Nothing in the petitioner's recruitment summary indicates its intent to accept a degree or post-graduate diploma from an unaccredited institution or any other combination of degrees. The petitioner directed its recruitment efforts to the narrower pool of workers that have at least a bachelor's degree or a foreign equivalent degree. The petitioner cannot now before USCIS claim that under the ETA Form 9089 it could have accepted a lesser degree. Therefore, the petitioner has not demonstrated that the beneficiary's educational credentials meet the terms of the labor certification as advertised to potential U.S. workers.

Counsel asserts that we improperly applied bachelor's degree equivalency rules relevant to the professional category, which requires a minimum of a bachelor's degree or a foreign equivalent degree, in our adjudication of a skilled worker petition. Counsel asserts that because the labor certification does not require the "foreign equivalent" of a U.S. bachelor's degree, our assessment of the beneficiary's credentials utilizing the EDGE database in determining the beneficiary's educational equivalency is erroneous. We disagree. While lesser credentials than a bachelor's degree might qualify a beneficiary under the skilled worker category[3] in order to qualify for any category that requires a labor certification,[4] the petitioner must first establish that the beneficiary meets the requirements of the Form ETA 9089 labor certification application. As discussed above, the labor certification in support of the petition requires that the beneficiary have a foreign degree equivalent.to a United States bachelor's degree. Because the record does not establish this equivalency, the petition is not eligible for preference classification for a skilled worker. The record contains evaluations of the beneficiary's educational credentials prepared by the following individuals:

- for dated April 8, 2012. Ms. attributes credits to each of the beneficiary's courses for a total of 206 credits. She concludes that the beneficiary's bachelor's degree from the is equivalent to a U.S. Bachelor of Science degree in Mathematics from a regionally accredited college or university in the United States.

- Ph.D., for dated April 5, 2012. Dr. concludes that the beneficiary's bachelor's degree from the is equivalent to a "Bachelor of Science degree in Mathematics, representing 206 semester credit hours, from an institution of postsecondary education in the United States of America."

- for the dated January 7, 2011. Mr. concludes that the beneficiary's bachelor's degree from the and his master's diploma from

[3] Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides that an immigrant visa may be issued to a worker who is capable of performing skilled labor, e.g., that requires at least two years training or experience,

[4] Skilled worker petitions must be accompanied by a labor certification application. Section 203(b)(3)(C) of the Act, 8 U.S.C. § 1153(b)(3)(C).

together constitute the equivalent of a "Bachelor's degree in Information Systems as granted by an accredited U.S. institution."

In our appeal decision, we discussed specific deficiencies of the three education evaluations. These deficiencies have not been addressed on motion. We thus relied upon the findings in EDGE to reach our decision that the beneficiary's credentials did not equate to a United States bachelor's degree or a foreign degree equivalent. According to EDGE, a three-year Bachelor of Science degree from India is comparable to "three years of university study in the United States."

Contrary to counsel's argument above, in *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that we provided a rational explanation for our reliance on information provided by AACRAO to support our decision in that case. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. *See Maramjaya v. USCIS,* where the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. 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).

Also at issue on motion is whether the beneficiary's Master's Diploma represents a master's degree or a post-graduate diploma. The petitioner did not establish that the beneficiary's three-year bachelor's degree met the primary requirements of the labor certification as the foreign equivalent of a U.S. bachelor's degree. The labor certification allows for an alternate educational requirement of a three-year bachelor's degree and a master's degree or post-graduate diploma.

The beneficiary possesses a Certificate in Master's Diploma in Programming and Computer Applications from [redacted] in India, which has not been accredited by an official accrediting agency. Neither the [redacted] nor the [redacted] evaluations consider this credential in arriving at the conclusion that the beneficiary has the equivalent of a bachelor's degree in the United States. Only the [redacted] evaluation considers the beneficiary's instruction from this institution. The evidence in the record on appeal did not establish that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a two- or

three-year bachelor's degree is required for admission into the program of study.

As we noted in our previous decision, EDGE discusses postgraduate diplomas, for which the entrance requirement is completion of a two- or three-year baccalaureate degree. EDGE states that a postgraduate diploma following a two-year bachelor's degree represents attainment of a level of education comparable to one year of university study in the United States. EDGE also states 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. However, the "Advice to Author Notes" section states:

> 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 evidence in the record on appeal does not establish that the beneficiary's postgraduate diploma was issued by an accredited university or institution approved by AICTE, or that a two- or three-year bachelor's degree is required for admission into the program of study. The petitioner stated in response to our request for evidence (RFE), dated March 4, 2014, that the beneficiary's Master's diploma in Programming and Computer Applications from was not issued by an accredited institution in India. Counsel specifically stated that " is not currently an accredited program in India" and that it did not appear in the 1997 PIER World Education Series report on India either as an accredited or an unaccredited institution. Nevertheless, counsel states that regardless of whether is accredited by the AICTE, the beneficiary meets the requirements of the labor certification. However, the record does not contain any independent, objective information that is an actual institution of higher learning or that it has the capability of issuing post-graduate diplomas.

The evaluation by Mr. relies upon the beneficiary's three-year bachelor's degree and his two-year master's diploma to conclude that the beneficiary has the equivalent of a U.S. bachelor's degree. However, as stated above, nothing in the record demonstrates that the beneficiary's Master's diploma in Programming and Computer Applications from constitutes a master's degree or a post-graduate diploma, or that when combined with the beneficiary's three-year Bachelor of Science degree, it is the equivalent of a U.S. bachelor's degree.

Therefore, upon review of the record at hand and in considering the motion to reconsider, we find that the petitioner failed to establish that the beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. Therefore, the beneficiary does not qualify for classification as a skilled worker under section 203(b)(3)(A)(i) of the Act.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: Upon consideration of the motion, we affirm our decision dated July 3, 2014. The petition remains denied.