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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 19 2006  
WAC 04 110 53685

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The petitioner provides systems integration and software development services. It seeks to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, a Form ETA 750,<sup>1</sup> Application for Alien Employment Certification 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 or the requirements for possession of an advanced degree set forth in the regulation at 8 C.F.R. § 204.5(k)(3)(i). Specifically, the director determined that the beneficiary did not possess a foreign equivalent degree to a U.S. baccalaureate degree.

On appeal, in-house counsel submits a brief and additional exhibits. For the reasons discussed below, we uphold the director's conclusion that the beneficiary does not possess an advanced degree as defined in the regulation at 8 C.F.R. § 204.5(k)(3)(i). We note that this part of our decision is based on our interpretation of the statute that we are charged with enforcing and our own regulations. Thus, this conclusion may be reached without any interpretation of the petitioner's intent in crafting the alien employment certification. Moreover, even if we accepted the petitioner's assertion that the beneficiary's *combination* of education constitutes a foreign equivalent degree, the beneficiary could not have completed five years of experience after *completing* his equivalent education as of the priority date in this matter. Given this fact, we also conclude that the beneficiary did not meet the regulatory requirements for an advanced degree even if we accept the beneficiary's combined education as a foreign equivalent degree. Further, without five years of "post-baccalaureate" experience, the beneficiary also fails to meet the plain language job requirements set forth on the alien employment certification as of the priority date in this matter.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree *followed by* at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." (Emphasis added.) *Id.*

In December 1973, the beneficiary successfully completed three years of academic and outdoor training at the National Defence Academy, Khadakwasla in India, recognized as a graduate degree

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<sup>1</sup> After March 28, 2005, the correct form to apply for labor certification is the Form ETA 9089.

since 1974. In March 1999,<sup>2</sup> the petitioner received a "Post Graduate Diploma in Human Resource Management" from Indira Gandhi National Open University. Thus, the issues are whether either degree is a foreign degree equivalent to a U.S. baccalaureate degree or, if not, whether it is appropriate to consider the beneficiary's years of experience in addition to that degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification, which expressly requires five years of "post-baccalaureate experience" in lieu of a Master's degree.

The petitioner initially submitted an evaluation of the beneficiary's credentials from Education Evaluators International, Inc. The evaluation concluded that the beneficiary's "combined studies are equivalent in level and purpose to a Bachelor of Science in Military Science with a minor in Business Management awarded by regionally accredited colleges and universities in the United States." The evaluation also references additional studies at the Symbiosis Institute of Management Studies in Pune, India, but the record contains no evidence of this education and the beneficiary did not list it on the Form ETA 750B. In response to the director's notice of intent to deny, the petitioner submitted a new evaluation from [REDACTED], a professor at Seattle Pacific University. Dr. [REDACTED] asserts that the beneficiary's education at the Defence Academy was "equivalent to 3 years of accredited U.S. university level credit." Dr. [REDACTED] then concluded that the beneficiary's diploma from Indira Gandhi National Open University was equivalent to the one and a half years of general background in business education required for a U.S. baccalaureate in business. Finally, Dr. [REDACTED] considered education not documented in the record and concluded that the combination of all of the education discussed was "fully equivalent to the knowledge and skills contained in a U.S. Bachelor's degree in Business Administration."

Citizenship and Immigration Services (CIS) 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, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). In the present matter, however, neither evaluation concludes that the beneficiary's Defence Academy degree, the only degree in the record obtained more than five years before the priority date, is a foreign degree that is equivalent to a U.S. baccalaureate.

#### **Eligibility for the Classification Sought**

As noted above, the ETA 750 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

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<sup>2</sup> The beneficiary indicated on the Form ETA 750B that he obtained his diploma in January 1999. The diploma, however, is dated March 12, 1999. The two-month difference, however, does not impact whether the beneficiary could have completed five years of post-baccalaureate experience as of July 5, 2001, the priority date in this matter.

In general.-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.

According to 20 C.F.R. § 656.1(a), the purpose and scope of the regulations regarding labor certification are as follows:

Under § 212(a)(5)(A) of the Immigration and Nationality Act (INA) (8 U.S.C. 1182(a)(5)(A)) certain aliens may not obtain a visa for entrance into the United States in order to engage in permanent employment unless the Secretary of Labor has first certified to the Secretary of State and to the Attorney General that:

(1) There are not sufficient United States workers, who are able, willing, qualified and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work, and

(2) The employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

It is significant that none of the above inquiries assigned to 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, including the 9<sup>th</sup> Circuit that covers the jurisdiction for this matter.

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). *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.

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 "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).

Throughout the proceedings, counsel relies on letters from Mr. [REDACTED] Director of the Business and Trade Services Branch of CIS' Office of Adjudications. The letter discusses whether a "foreign equivalent degree" must be in the form of a single degree or whether the beneficiary may satisfy the requirement with multiple degrees. Office of Adjudications letters are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although such a letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000)(copy incorporated into the record of proceeding).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the Circuit Court of Appeals from whatever circuit that the action arose. See *N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74 (9<sup>th</sup> Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9<sup>th</sup> Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even CIS internal memoranda do not establish judicially enforceable rights. See *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5<sup>th</sup> Cir. 2000)(An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). The Joint Explanatory Statement of the Committee of Conference 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, 101<sup>st</sup> Cong., 2<sup>nd</sup> Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at \*6786 (October 26, 1990). At the time of enactment in 1990, it had been almost thirteen years since *Matter of Shah*. 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 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. *Lujan-Armendariz v.*

*INS*, 222 F.3d 728, 748 (9<sup>th</sup> Cir. 2000) *citing Lorillard v. Pons*, 434 U.S. 575, 580 (1978)(Congress is presumed to be aware of administrative and judicial interpretations).

On appeal, counsel asserts that while the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) relating to nonimmigrants provides guidance on determining the “equivalence to completion of a college degree,” the statute and the immigrant regulations relating to advanced degree professionals are “silent” on this issue. Counsel is not persuasive. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, legacy Immigration and Naturalization Service (the Service), 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 Service 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 (November 29, 1991)(emphasis added).

Thus, there is nothing in the statute or regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act 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 244. 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, as counsel asserts on appeal, rather than a “foreign equivalent degree.”

Thus, in order to have the 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. As noted in the federal register, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to bachelor’s degree will qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience.

Because the beneficiary does not have a “United States baccalaureate degree or a foreign equivalent degree,” the beneficiary does not qualify for preference visa classification under section 203(b)(2) of

the Act as he does not have the minimum level of education required for the equivalent of an advanced degree.

Moreover, the petitioner must demonstrate the beneficiary's eligibility as of the priority date in this matter. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The priority date in this matter is 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). Here, the Form ETA 750 was accepted for processing on July 5, 2001. Even if we accepted the petitioner's position that the beneficiary's combination of education constitutes a foreign equivalent degree, the beneficiary did not complete this education until March 1999, less than five years before the priority date. Thus, the petitioner cannot demonstrate that the beneficiary's alleged foreign equivalent degree is "followed by" five years of experience.

### **Qualifications for the Job Offered**

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 (9<sup>th</sup> 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)(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.

736 F. 2d 1305, 1309 (9<sup>th</sup> Cir. 1984).

In this matter, at least two circuits, including the Ninth Circuit overseeing the Oregon District Court, has held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

The key to determining the job qualifications is found on Form ETA-750 Part A. 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-750 be read as a whole. The instructions for the Form ETA 750A, item 14, provide:

***Minimum Education, Training, and Experience Required to Perform the Job Duties.*** Do not duplicate the time requirements. For example, time required in training should not also be listed in education or experience. Indicate whether months or years are required. Do not include restrictive requirements which are not actual business necessities for performance on the job and which would limit consideration of otherwise qualified U.S. workers.

Regarding the minimum level of education and experience required for the proffered position in this matter, Part A of the labor certification reflects the following requirements:

Block 14:

Education: 6\*

Experience: M.S. or equiv. degree

Block 15: \*In the alternative, we will accept a Bachelor of Science or equivalent degree in Engineering, Computer Science, Information Sciences, Physics, business Administration, Math or related field plus five years of progressive *post-baccalaureate* experience as a project engineer or in a related occupation (e.g. software engineer, programmer, programmer/analyst, systems analyst, [or] software consultant).

(Emphasis added.) Moreover, to determine whether a beneficiary is eligible for a preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS

will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Finally, where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by professional regulation, CIS must examine "the language of the labor certification job requirements" in order to determine what the petition beneficiary must demonstrate to be found qualified for the position. *Madany*, 696 F.2d at 1015. The only rational manner by which CIS 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." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). CIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification application form]." *Id.* at 834 (emphasis added). CIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

As stated above, even if we accept the petitioner's contention that the beneficiary's combined education is a foreign equivalent degree, the beneficiary did not complete that education until 1999, less than five years before the priority date in this matter. Thus, the beneficiary cannot be said to have five years of "post-baccalaureate" experience as required in Box 15 of the Form ETA 750A.

The beneficiary does not have a "United States baccalaureate degree or a foreign equivalent degree," and, thus, does not qualify for preference visa classification under section 203(b)(2) of the Act. In addition, the beneficiary did not meet the job requirements on the labor certification as of the priority date in this matter. For these reasons, 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. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.