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U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 20 2008

LIN 06 229 50927

IN RE: Petitioner: [redacted]
Beneficiary:

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:

[redacted]

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, Nebraska 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 is a software development and consulting firm. It seeks to employ the beneficiary permanently in the United States as a finance manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, a Form ETA 750,[1] 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. Specifically, the director determined that the beneficiary did not possess a "Master's or Equivalent," defined as a bachelor's degree plus five years of progressively responsible experience, in Accounting, Business Administration, Information Systems or Auditing.

On appeal, counsel submits a brief and a new evaluation of the beneficiary's credentials. For the reasons discussed below, counsel has not overcome the director's concerns.

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." *Id.*

The beneficiary possesses a foreign three-year Bachelor of Science in Chemistry, a foreign Bachelor of Laws and passed the final examination for the Institute of Chartered Accountants of India (ICAI). Thus, the first issue is whether any of these credentials is a foreign degree equivalent to a U.S. baccalaureate degree such that the beneficiary can be classified as a professional. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. 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. 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 DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien

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

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).

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, 75 (9th 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 (9th 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 (5th 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). 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 . . . .

The Act added section 203(b)(2)(A) of 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 (October 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 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).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the 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 (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)(2) of the Act as a member of the professions holding an advanced degree 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."[2] 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). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor's degree may 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. 56 Fed. Reg. at 60900.

As stated above, the beneficiary earned a three-year Bachelor of Science in Chemistry from the University of Bombay in 1973 and a Bachelor of Laws from the same institution in 1976. He then passed the final examination for the ICAI in 1979. The petitioner initially submitted an evaluation of these credentials from Educational Credentials Evaluators, Inc. (ECE). The ECE evaluation

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[2] *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.

concludes that the beneficiary's three years of education in Chemistry are equivalent to three years of undergraduate work. The ECE evaluation further concludes that the beneficiary's Bachelor of Laws is equivalent to a Juris Doctor in the United States, but with respect to Indian law. In addition, the ECE evaluation concludes that the beneficiary's passage of the ICAI exams is equivalent to a bachelor's degree in Business Administration, with a major in accounting. Finally, in the aggregate, the ECE evaluation concludes that the beneficiary "has the equivalent of a Juris Doctor (J.D. Degree, but in Indian Law in the United States, plus a Bachelor's degree in Business Administration with a major in Accounting, plus completion of additional undergraduate work."

On appeal, the petitioner submits a new evaluation from of Morningside Evaluations and Consulting. Dr asserts that a bachelor's degree is required for entrance into the Bachelor of Laws program, but does not provide the specific source for this assertion.[3] Without discussing the beneficiary's Bachelor of Science degree in Chemistry, states that the beneficiary "completed coursework in general studies, including coursework in English, the social sciences, mathematics and the sciences" and concludes that the beneficiary has "attained the equivalent of a Bachelor of Laws degree from an accredited institution of higher education in the United States." The record does not support statement regarding the coursework completed by the beneficiary. The transcripts in the record reflect only law courses as part of the beneficiary's legal studies and only chemistry courses as part of his Bachelor of Science program. While the ECE evaluation lists additional coursework in English, Hindi, Physics and Biology, no math or social science courses are listed.

Citizenship and Immigration Services (CIS) 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, CIS 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; CIS may evaluate the content of

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[3] This assertion is contradicted by Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officer (AACRAO). We note that Dr. Itzkowitz indicates that he is a member of AACRAO. EDGE states that completion of a higher secondary certificate or equivalent is the admissions requirement for a Bachelor of Laws. AACRAO, according to its website, 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." AACRAO, http://www.aacrao.org/about/ (last accessed August 20, 2008). According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. [redacted], Director of International Education Services, "AACRAO EDGE Login," http://aacraoedge.aacrao.org/index.php (last accessed August 20, 2008).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

those letters as to whether they support the alien's eligibility. *See id.* at 795. CIS may even 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 (Regl. Commr. 1972)). Moreover, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The record does not resolve the inconsistencies regarding the coursework undertaken by the beneficiary at the University of Bombay.

The beneficiary's three-year Bachelor of Science degree has not been evaluated as equivalent to a U.S. baccalaureate and, as stated above, a baccalaureate is generally a four-year degree. *Matter of Shah*, 17 I&N Dec. at 245. Moreover, an alien who meets the definition of professional in one field will not qualify for classification as a professional unless he seeks to continue working in that field. *Id.* at 246-47.

The beneficiary's Bachelor of Laws has been evaluated as equivalent to a U.S. Juris Doctor, but in Indian law. The petitioner has not established, however, that any accredited institution in the United States offers Juris Doctor degrees in Indian law. Thus, it is not clear that the beneficiary's degree is truly a foreign equivalent degree to a U.S. Juris Doctor. Moreover, while sometimes termed a "LLB" or "Bachelor of Laws," a Juris Doctor is not an undergraduate baccalaureate. The beneficiary's "Bachelor of Laws" was a three-year degree. As stated above, a baccalaureate generally requires four years. *Id.* at 245. Thus, this degree does not qualify the beneficiary as a professional. Even if we did conclude that the beneficiary qualifes as a professional in Indian law, he does not seek to enter the United States to work as a legal professional. As stated above, the beneficiary must seek to enter the United States to pursue the profession of which he is a member if he is to qualify for classification as a professional. *Id.* at 246-47

The beneficiary's passage of the final ICAI examination has been evaluated as equivalent to a U.S. baccalaureate in business administration with a concentration in accounting. For the classification sought, however, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." 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." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).

Moreover, it is significant that both the statute and relevant regulations use the word "degree" in relation to professionals and members of the professions holding an advanced degree. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d. 1289, 1295 (5th Cir. 1987). It can be presumed that Congress' narrow requirement of a "degree" for members of the profession holding an advanced degree is deliberate. Significantly, in another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) (relating to aliens of exceptional ability). Thus, Congress' exclusive use of the word "degree" in defining members of the profession holding an advanced degree reveals that the advanced degree must be a *degree* and that a diploma or certificate from an institution of learning other than a college or university is a potentially similar but distinct type of credential. Consistent with this interpretation, an ETA Form 9089 that allows the foreign educational equivalent of a credential that is a "degree" in the United States must be interpreted as requiring a foreign degree from a college or university.[4] *See also Snapnames.com, Inc. v. Chertoff*, 2006 WL 3491005, *10-11 (Dist. Or. Nov. 30, 2006) (upholding a finding that ICAI membership based on passage of the final examination is not a single degree qualifying an alien for classification as an advanced degree professional).

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.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. 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 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.

[4] For example, we must presume that the foreign educational equivalent of a bachelor's degree means a foreign equivalent degree to a U.S. baccalaureate. Otherwise, we would have to conclude that a job that requires a bachelor's degree plus five years of post-baccalaureate experience does not require a member of the professions holding an advanced degree pursuant to 8 C.F.R. § 204.5(k)(4) simply because the employer indicated in Part H, line 9 that it would accept a foreign educational equivalent.

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 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)[(5)], 8 U.S.C. § 1182(a)[(5)]. 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, 736 F. 2d at 1309.

When determining whether a beneficiary is eligible for a preference immigrant visa, CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. CIS 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 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. *See 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 alien employment certification application form. *See id.* at 834. 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.

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:	Master's or Equivalent
Major Field of Study: or Auditing.	Accounting, Business Administration, Information Systems
Block 15:	Will also accept a Bachelor's degree and 5 years of progressively responsible experience in lieu of a Master's and 3 years experience.

While the petitioner indicated it would accept a "Master's or Equivalent," it did not indicate that it would accept any equivalency for a bachelor's degree.

On appeal, counsel asserts that the bachelor's degree need not be in any particular field as long as the post-baccalaureate experience is in the requisite field. The petitioner, however, seeks to classify the beneficiary as a member of the professions holding an advanced degree. That classification normally requires an advanced degree, defined as an academic or professional degree beyond a bachelor's degree. The legislative history, reflected in the regulations, does reflect an intent that a bachelor's degree plus five years of post-baccalaureate experience be considered equivalent to an advanced degree, but stresses that the alien must have a baccalaureate. *See* 56 Fed. Reg. at 60900. To hold that the bachelor's degree need not be in the requisite field, however, would have the untenable result of allowing aliens with no education in the requisite field to qualify for an occupation that requires a Master's degree in a specific field. We note that there is a classification for occupations that require only experience in a field. *See* section 203(b)(3)(i) of the Act. The petitioner did not seek to classify the petitioner under that section, although we note that the labor certification indicates that the occupation is one that requires more than experience. We note that DOL's Occupational Outlook Handbook, available at http://www.bls.gov/oco/ocos010.htm#training (accessed August 20, 2008), provides: "A bachelor's degree in finance, accounting, economics, or business administration is the minimum academic preparation for financial managers." This

statement supports the job requirements certified by DOL and refutes counsel's assertion that only the experience need be in a specific field.

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 does not meet the job requirements on the labor certification. 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.