U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

B5

[redacted]

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

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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.

Marie Johnson

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 developer. It seeks to employ the beneficiary permanently in the United States as a software engineer 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, an ETA Form 9089 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 foreign equivalent degree to a U.S. baccalaureate in a field related to the fields specified on the alien employment certification.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we uphold the director's decision.

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 degree from the University of Rajasthan and an "Honours Diploma" in Information and Systems Management from Aptech. Thus, the issues are whether either degree is a foreign degree equivalent to a U.S. baccalaureate degree. We must also consider whether the beneficiary meets the job requirements of the proffered job as set forth on the alien employment certification.

Eligibility for the Classification Sought

As noted above, the ETA Form 9089 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 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 (Regl. Commr. 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). *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 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."[1] 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.

The petitioner does not attempt to distinguish *Matter of Shah*, 17 I&N Dec. at 244. Rather, the petitioner advocates for a contrary finding in this matter. Initially, the petitioner submitted two evaluations, one from [redacted] at Career Consulting International (CCI) and one from Dr. [redacted] at Marquess Educational Consultants (MEC). Both evaluations conclude that the beneficiary's three-year degree from the University of Rajasthan is equivalent to a U.S. Bachelor of Science Degree. The evaluation from CCI lists 120 credits, although [redacted] does not explain how she determined the number of credits for each course other than referencing "contact" hours and

[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.

Carnegie Units. [redacted]g does not reference a single publication on evaluating academic degrees that concludes "contact" hours are a reliable and accepted method of determining equivalencies. We note that the beneficiary's transcript does not contain credit hour information.

Moreover, [redacted] states:

> Although programs, degree requirements and specializations differ in various respects, it is the judgment of Career Consulting International that [the beneficiary's] international course work is *comparable* to a Bachelor of Science in Computer Science from a Regionally Accredited Institution of Higher Education in the United States of America. Thus, for professional employment and for immigration purposes – *per 8 C.F.R. section 214.2(h)(4)(iii)(D)* – [the beneficiary] may be considered to have completed studies, which are comparable to a Bachelor of Science from a Regionally Accredited Institution of Higher Education in the United States of America.

(Emphasis added.) At issue is not whether the coursework may, in some respects, be "comparable." The issue is whether the beneficiary has a degree that is a foreign equivalent degree. Significantly, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D), relating to nonimmigrants, allows for evidence of "[e]quivalence to completion of a college degree." Subparagraph (*5*) of this provision allows for the combination of education and experience. The general language cited by Dr. Danzig does not appear in the regulation relevant to the immigrant classification sought, 8 C.F.R. § 204.5(k), which requires a foreign equivalent degree to a U.S. baccalaureate. We note that the beneficiary's transcript reflects only chemistry, botany, zoology, Hindi and English classes. Dr. Danzig does not explain how this limited subject matter compares to the general and broad education required for a four-year baccalaureate in the United States.

further asserts: "UNESCO clearly recommends that the 3 and 4 year Indian degree should be treated as equivalent to a bachelor's degree by all UNESCO members." She provides three website addresses in support of this assertion and subsequently quotes the following UNESCO recommendation:

> Member States should take all feasible stops within the framework of their national systems and in conformity with their constitutional, legal and regulatory provisions to encourage the competent authorities concerned to give recognition, as defined in paragraph 1(e), to qualifications in higher education that are awarded in the other Member States.

then lists British and U.S. universities that admit into graduate programs those with three-year Indian degrees. She notes that in the United States, some colleges issue baccalaureate degrees in less than four years where "the assessment of prior learning is taken into account."

also cites "accelerated" programs at the bachelor's level now offered by accredited schools in the United States and the UNESCO recommendation. concludes that if a

three-year baccalaureate is recognized as an appropriate admission to graduate school in India, it should be similarly recognized in the United States.

The petitioner also submitted the article "Does the Value of Degree Depend on the Color of Your Skin?" coauthored by [redacted] and [redacted]. The record contains no evidence that this article has actually been published in addition to being posted on a website. The article indicates that an Indian three-year degree "often" involves more than 1800 credit hours and that the Indian system "presupposes that general education (pre-major studies) occur at the Intermediate level." The article includes British colleges that accept three-year degrees for admission to graduate school but concedes that "a number of other universities" would not accept three-year degrees for admission to graduate school. Similarly, the article lists some U.S. universities that accept three-year degrees for admission to graduate school but acknowledges that others do not. In fact, the article concedes:

> None of the members of N.A.C.E.S. who were approached were willing to grant equivalency to a bachelor's degree from a regionally accredited institution in the United States, although we heard anecdotally that one, W.E.S. had been interested in doing so.
>
> In this process, we encountered a number of the objections to equivalency that have already been discussed.

[redacted] Ed.D., President of Educational Credential Evaluators, Inc., commented thus,

> "Contrary to your statement, a degree from a three-year "Bologna Process" bachelor's degree program in Europe will NOT be accepted as a degree by the majority of universities in the Untied States. Similarly, the majority do not accept a bachelor's degree from a three-year program in India or any other country except England. England is a unique situation because of the specialized nature of Form VI."
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> * * *
>
> International Education Consultants of Delaware, Inc., raise similar objections to those raised by ECE.,
>
> "The Indian educational system, along with that of Canada and some other countries, generally adopted the UK-pattern 3-year degree. But the UK retained the important preliminary A level examinations. These examinations are used for advanced standing credit in the UK; we follow their lead, and use those examinations to constitute the an [sic] additional year of undergraduate study. The combination of these two entities is equivalent to a 4-year US Bachelor's degree.
>
> The Indian educational system dropped that advanced standing year. You enter a 3-year Indian degree program directly from Year 12 of your education. In the US, there

> are no degree programs entered from a stage lower than Year 12, and there are no 3-year degree programs. Without the additional advanced standing year, there's no equivalency.

Finally, these materials do not examine whether those few U.S. institutions that may accept a three-year degree for graduate admission do so on the condition that the holder of a three-year degree complete extra credits.

The petitioner also submitted 138 pages of UNESCO materials, only two of which are relevant. The recommendation provided relates to "recognition" of qualifications awarded in higher education. Paragraph 1(e) defines recognition as follows:

> 'Recognition" of a foreign qualification in higher education means its acceptance by the competent authorities of the State concerned (whether they be governmental or nongovernmental) as entitling its holder to be considered under the same conditions as those holding a comparable qualification awarded in that State an deemed comparable, for the purposes of access to or further pursuit of higher education studies, participation in research, the practice of a profession, if this does not require the passing of examinations or further special preparation, or all the foregoing, according to the scope of the recognition.

The UNESCO recommendation relates to admission to graduate school and training programs and eligibility to practice in a profession. Nowhere does it suggest that a three-year degree must be deemed equivalent to a four-year degree for purposes of qualifying for a class of individuals defined by statute and regulation as eligible for immigration benefits. More significantly, the recommendation does not define "comparable qualification." At the heart of this matter is whether the beneficiary's degree is, in fact, the foreign equivalent of a U.S. baccalaureate. The UNESCO recommendation does not address this issue.

Significantly, the petitioner filed a previous petition in behalf of the beneficiary, receipt number LIN-06-098-52014. In support of that petition, the petitioner submitted an evaluation of the petitioner's education from the Trustforte Corporation. Consistent with *Matter of Shah*, 17 I&N Dec. at 244, the Trustforte evaluation addresses the petitioner's Bachelor of Science as follows: "the Nature of the courses and the credit hours involved indicate that he completed the equivalent of three years of acdemic studies toward a Bachelor of Science Degree at an accredited US college or university."

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 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)).

In this matter, the opinions of [redacted] and [redacted] are not consistent with the previous evaluation of the petitioner's degree or, indeed, the materials submitted in support of their evaluations. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.*

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.

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 that the legacy Immigration and Naturalization Service (now CIS) 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.[2]

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 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.

In this matter, Part H, line 4, of the labor certification reflects that a Masters degree is the minimum level of education required. Line 4-B reflects that the required major field of study is Computer Science. Line 7-A reflects that a degree in Engineering, Math, Physics or a "related field" is also acceptable. Line 8 reflects that a different combination of education and experience is acceptable in the alternative. Specifically, Lines 8-A and 8-C reflect that a baccalaureate plus five years of experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The beneficiary's diploma does not reflect the field of concentration. The beneficiary's transcript reflects that in addition to Hindi and English, the beneficiary took an equal number of Chemistry, Botany and Zoology courses. It is counsel's position that the beneficiary has a degree in Chemistry and that Chemistry is a related field to Computer Science, Engineering Math and Physics. On appeal, the petitioner submits materials from a university career development website listing "Computer Software Engineer" as a "Sample Occupation" for those graduating with a degree from the school's chemistry department. We note that some of the other occupations include geologist, editor, optometrist and public relations specialist. The Department of Labor's Occupational Outlook Handbook at page 288 (2006-2007 ed.) provides that Optometrists in the United States must be licensed and applicants for a license must have a Doctor of Optometry degree. Thus, clearly the list of "sample occupations" is not limited to those occupations that require no additional education. The petitioner also submitted evidence from the Occupational Outlook Handbook reflecting that

[2] *But cf. Hoosier Care, Inc. v. Chertoff,* 482 F. 3d 987 (7th Cir. 2007) relating to a lesser classification than the one involved in this matter and relying on the regulation at 8 C.F.R. § 204.5(l)(4), a provision that does not relate to the classification sought here.

undergraduate chemistry majors "usually study biological sciences; mathematics; physics; and increasingly, computer science." While this fact may be true, it reflects more on the necessity of having a computer background in pursuing chemistry research than relating chemistry to computer science. Moreover, it remains that the beneficiary in this matter did not take any computer science courses.

We are not persuaded that the petitioner has overcome the director's conclusion that Chemistry is unrelated to the major fields listed on the alien employment certification.

In light of the above, 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.