U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-USA, INC.

DATE: NOV. 20, 2015

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software consulting company, seeks to permanently employ the Beneficiary in the United States as a software engineer under classification as an advanced degree professional. *See* section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The Director, Texas Service Center, denied the immigrant visa petition. The matter is now before us on appeal. The appeal will be dismissed.

I. PROCEDURAL HISTORY

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is April 19, 2013.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's.
H.4-B. Major field of study: Computer-related, IT, Electronics & Communications, Electrical or Mechanical.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14 Must have one Relational Database Management System experience, such as Oracle 10g and above, SQL Server 2005 and above, Teradata or My SQL AND six software tools experience from the following: C, C++, Visual C++, Java/J2EE, HTML, O/R mapping tools such as Hibernate, Middleware tools such as MQ Series, Design Patterns (Singleton, Factory), XML,

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

> SOAP, Web Services, SOA, ASP.Net, C#, VB.NET, MOSS/Sharepoint, Security protocols and certificates SSL, HTTPS, Encryption, Web & Application Server Administration Weblogic, WebSphere, IIS, Apache, Tomcat; testing tools: TOAD, Mercury Tools, Rational Tools, Modeling: Design tools: UML and Visio. High mobility required.

The Director denied the visa petition after determining that the Beneficiary did not have a Master's degree as required by the labor certification. On appeal, the Petitioner states that the analysis provided by the Electronic Database for Global Education (EDGE) and cited to by the Director is outdated.

The Petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.[3] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4] We may deny a petition that does not comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision.[5]

II. LAW AND ANALYSIS

A. The Roles of the DOL and USCIS in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (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-
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> > (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
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> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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[3] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

It is significant that none of the above inquiries assigned to 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).[6] *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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> . . . .
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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 "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

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

> 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:

> [T]he 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 DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of a beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if that beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

B. Requirements for the Classification Sought

At issue in this case is whether the Beneficiary possesses the education required by the terms of the labor certification and qualifies for the requested preference classification.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. 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.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, a petition for an advanced degree professional must establish that a beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

C. Beneficiary Qualifications

Part J of the labor certification states that the Beneficiary in the present case holds a Master's degree in Computers from [redacted] (India), completed in July 2001. In support of this claim, the record contains a copy of the Beneficiary's two-year Master of Science in Computer Science degree issued in 2001 by [redacted] and a copy of his three-year Bachelor of Science degree from [redacted] (India), issued on an unknown date. Copies of the Beneficiary's academic transcripts accompany these degree certificates.[7]

The Director, however, did not find the Beneficiary's degrees to provide him with the foreign equivalent of the Master's degree, as required by the labor certification. Following a review of the

[7] The copy of the transcript for the Beneficiary's Master's degree is largely illegible; part of the transcript for his Bachelor's degree is also unreadable. The Petitioner should submit legible copies of these transcripts in any further filings.

evidence of record and the information provided by EDGE, the Director concluded that the Beneficiary's three-year Bachelor's degree coupled with his two-year Master's degree was the equivalent of a U.S. Bachelor's degree rather than the Master's degree (or foreign equivalent degree) required in Part H.4. of the labor certification. He denied the visa petition accordingly.

On appeal, the Petitioner contends that the information provided by EDGE on education in India is "out-of-date and incorrect" and that the Beneficiary's three-year Bachelor's degree plus his two-year Master's degree (a "3 + 2" academic program) are the equivalent of a U.S. Master's degree. As support for its claim, the Petitioner indicates that it is submitting an April 30, 2015, report, prepared by of , and notes that this same report indicates that EDGE finds 3+2 academic programs from other countries, including France, Switzerland, and Norway, to equate to U.S. Master's degrees. Although the record contains two evaluations, dated February 7, 2013, and February 5, 2015, we do not find it to include the April 30, 2015 report referenced by the Petitioner.

Nevertheless, we take note of the Petitioner's assertion on appeal that the Beneficiary's three-year Bachelor's degree and two-year Master's degree programs should be considered comparable to 3+2 academic programs in other countries that, it asserts, EDGE has found equivalent to Master's degree programs in the United States. This argument, however, fails to recognize that the academic evaluations available from EDGE are based on reviews of countries' specific educational systems and requirements, and that program length is only one of the factors considered in determining degree equivalencies. Proof that the length of a particular degree program is not dispositive in determining degree equivalencies is found in EDGE's report on education in the United Kingdom, where certain three-year baccalaureate degrees (those in the arts, science, nursing and engineering) are found to represent the attainment of a level of education equivalent to a U.S. bachelor's degree, when entry to the baccalaureate program requires an additional year of secondary-level education and at least two General Certificates of Education Advanced Level. Accordingly, the Petitioner's assertion that a 3+2 academic program in one country is comparable to a 3+2 program in another based solely on the fact that both involve five years of study is not persuasive. Inconsistencies must be resolved by the submission of "independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In evaluating the Beneficiary's Indian Bachelor's and Master's degrees, we have reviewed the two credentials evaluations submitted by the Petitioner, both of which were prepared by and which assert that the Beneficiary holds the foreign equivalent of the Master's in Computer Science required by the labor certification.

first evaluation is dated February 7, 2013, and focuses solely on the Beneficiary's 2001 Master's degree from Submitted by the Petitioner in response to the Director's May 20, 2014, request for evidence (RFE), report states that entrance to requires "graduation from [a] college or university and competitive entrance examinations," and concludes that the "course of studies undertaken, the number of credit units earned, the number of years of coursework, the grades earned for coursework and the final diploma" all indicate

that the Beneficiary has "satisfied requirements equivalent to those required for the attainment of a University degree from an accredited institution of higher education in the United States." concludes that "on the basis of the credibility of , and the hours of academic coursework," the Beneficiary's 2001 degree is the equivalent of a Master of Science in Computer Science from an accredited institution of higher learning in the United States.

second evaluation, provided in response to the Director's August 8, 2014, notice of intent to deny (NOID), addresses both the Beneficiary's Bachelor's and Master's degree programs, combining them to find the Beneficiary to hold the equivalent of a Master's degree in Computer Science from an accredited university in the United States. In this second report, finds the coursework completed by the Beneficiary at to "comprise the required curriculum for a candidate seeking a university degree from an accredited institution of higher education in the United States." His analysis of the Beneficiary's coursework at also finds the Beneficiary to have "satisfied requirements equivalent to those required for the attainment of a University degree from an accredited institution of higher education in the United States. concludes that "on the basis of the credibility of , and the hours of academic coursework," the Beneficiary has attained the equivalent of a U.S. Master of Science in Computer Science.

However, having reviewed and considered the above opinions, we do not find them to demonstrate that the Beneficiary holds the equivalent of a U.S. Master's degree or to support the Petitioner's claim on appeal that the Beneficiary's 3+2 academic program should be viewed as a four-year baccalaureate degree followed by a one-year Master's program.

In his February 7, 2013, evaluation, does not address the Beneficiary's undergraduate degree or the length of studies related to this degree. However, in his second review of the Beneficiary's academic credentials, , contrary to the Petitioner's assessment of the Beneficiary's education just noted, finds the coursework completed by the Beneficiary for his undergraduate degree from to "comprise the required curriculum for a candidate seeking a university degree from an accredited institution of higher education in the United States," which, when followed by his two-year Master's degree, provides him with the foreign equivalent of the advanced degree required by the labor certification.

, however, offers no explanation of the reasoning that led him to conclude that the Beneficiary's three-year Bachelor's degree from is comparable to a four-year baccalaureate degree awarded in the United States. Although he states that his evaluation has taken into consideration the hours of coursework completed by the Beneficiary at , he does not explain how the coursework in the Beneficiary's three-year program satisfies the coursework requirements of a four-year U.S. baccalaureate program. Neither does he indicate that the Beneficiary completed any advanced level studies in the field of computer science, summer coursework, or transfer credits that might explain his conclusions. In the absence of such information, opinion does not establish that the coursework completed by the Beneficiary in a three-year program satisfies the requirements of a four-year baccalaureate program in the United States in advance of the Beneficiary's two-year graduate studies. Accordingly, the

submitted evaluations do not demonstrate that the Beneficiary holds the Master's degree required by the labor certification. We use an evaluation of a Beneficiary's foreign education by a credentials evaluation organization as an advisory opinion only. Where an evaluation is not in accord with other evaluations or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988).

In addition to our review of the submitted credentials evaluations, we have also considered the information available from EDGE. The database in EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO)[8] and which serves as a "web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. (accessed October 23, 2015). We consider EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies. Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.[9] Here, EDGE reports that a three-year Indian Bachelor of Arts, Commerce, Science, and Computer Applications is comparable to three years of university study in the United States, and that when combined with a two-year Master of Science degree from India, represents the attainment of a level of education comparable to a Bachelor's degree in the United States.

For the reasons previously discussed, the submitted credentials evaluations do not establish that the Beneficiary holds the foreign equivalent of a U.S. Master's degree and the record offers no other evidence to establish the claimed U.S. equivalency of the Beneficiary's degrees. Therefore, following a review of all the evidence, we conclude that the Beneficiary's three-year Indian Bachelor of Science degree and two-year Master of Science degree, when combined, are the foreign equivalent of a Bachelor's degree in the United States, rather than the Master's degree required by the labor certification.

Although the Petitioner contends that our reliance on EDGE is misplaced, USCIS' use of the information available from EDGE has been found reasonable by the courts. In *Confluence International, Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that USCIS had provided a rational explanation for our reliance on information provided by AACRAO to support our decision. In *Sunshine Rehab Services, Inc. v. USCIS*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the beneficiary's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification required a degree and did not allow for a combination of education and experience. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010) (*Tisco*), the court found that USCIS

[8] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.*

[9] *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the beneficiary's three-year foreign "baccalaureate" and two-year foreign "Master's" degree were comparable to a U.S. Bachelor's degree.

In *Tisco*, the court considered a case where, as here, the petitioner sought to establish the beneficiary's three-year Indian undergraduate degree and two-year Master's degree as the foreign equivalent of a U.S. Master's degree. However, USCIS reviewed EDGE and cited to information that the Beneficiary's three-year Bachelor of Science degree and two-year Master of Science degree would be equivalent to a Bachelor's degree in the United States. In its decision, the court identified some of the specific shortcomings in the credentials evaluations that had been submitted to USCIS, including the absence of any explanation as to "how a three-year program . . . in India was the equivalent of attaining a bachelor's degree . . . in the U.S., or . . . how five years of study in India was the equivalent of six years of study in the U.S. (the typical number of years of study to attain a Master's)." It noted that the submitted evaluations "failed to define the number of credit hours associated with each class . . . . [and that] a total number of credit hours [that the beneficiary] completed are unknown." Such deficiencies, the court stated, were, in and of themselves, a "sufficient basis" for USCIS' denial of the visa petition. The court also found that these same deficiencies "call[ed] into question the validity of [the petitioner's] advisory reports." It further noted that in submitting evaluations that did not offer explanations for their conclusions, the petitioner had not met its burden of proof under the Act and had provided a basis for USCIS to accord them less evidentiary weight.

As previously discussed, the credentials evaluations prepared by like the evaluations submitted by the petitioner in *Tisco*, offer an insufficient explanation as to how he reached his finding that the Beneficiary's three-year Bachelor's degree was equivalent to a four-year baccalaureate degree issued in the United States and, therefore, how the Beneficiary's two subsequent years of graduate education combined with a three-year baccalaureate degree would be the foreign equivalent of a U.S. Master's degree. Accordingly, the evidence of record on appeal is not sufficient to establish that the Beneficiary possesses the foreign degree equivalent of a U.S. Master's degree, as required by the labor certification. Therefore, the beneficiary does not have the education required by the labor certification. Additionally, as previously indicated, the labor certification does not allow for an equivalency based on a combination of education and experience. As a result, the Petitioner has not established that the Beneficiary possesses at least a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, as required by the labor certification.

III. CONCLUSION

In summary, the Petitioner has not established that the Beneficiary possesses the Master's degree required by the terms of the labor certification, and, therefore, has not established that the Beneficiary is qualified for the position offered, or that he has the advanced degree for the requested preference classification. Therefore, the Beneficiary does not qualify for the position offered and is not eligible for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. The Director's decision denying the petition will be affirmed. The

appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

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: The appeal is dismissed.

Cite as *Matter of N-USA, Inc.*, ID# 14844 (AAO Nov. 20, 2015)