U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-S-, INC.

DATE: FEB. 4, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

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

The instant petition, Form I-140, was filed on April 24, 2015. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the. Department of Labor (DOL) on September 25, 2014, and certified by the DOL (labor certification) on February 19, 2015. To be eligible for the job offered and the requested visa classification, the Beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date.[1] *See Matter of Wing's Tea House*, 16 I&N 158, 160 (Act. Reg'l Comm'r 1977). The priority date of the instant petition is September 25, 2014.

Part H of the labor certification sets forth the following minimum requirements for the job offered:

4.	Education: Minimum level required:	Master's degree
4-B.	Major Field of Study:	Electrical Engineering
5.	Training:	None required
6.	Experience in the Job Offered:	None required
7.	Alternate Field of Study:	Acceptable
7-A.	What field(s) of study?	Computer Information Systems Applied Mathematics

[1] The priority date of an immigrant petition is the date the underlying labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

8.	Alternate Combination of Education and Experience:	Not acceptable
9.	Foreign Educational Equivalent	Acceptable
10.	Experience in an Alternate Occupation	Not acceptable

Thus, the labor certification requires a master's degree in electrical engineering, computer information systems or applied mathematics, or a foreign educational equivalent. No training or experience is required.

As evidence of the Beneficiary's educational credentials the Petitioner submitted the following documentation with the Form I-140:

- Copies of a diploma and transcript from [redacted] in [redacted] India, showing that the beneficiary received a "Bachelor of Engineering in Electronics & Communication Engineering" on November 21, 2007, following the completion of a four-year, eight-semester academic program; and
- A diploma and transcript from [redacted] in [redacted] California, showing that the beneficiary received a "Master of Science with a major in Electrical Engineering" on August 31, 2010, upon completion of an academic program lasting from the summer of 2008 to the summer of 2010.

On June 23, 2015, the Director denied the petition on the ground that the Beneficiary does not hold a master's degree in electrical engineering, computer information systems, or applied mathematics from an accredited institution of higher education. The Director found that the Beneficiary's master's degree from [redacted] was conferred at a time when the university was not accredited by any regional accrediting association. Since the "Master of Science" degree was not issued by an accredited university, the Director determined that the Beneficiary did not meet the terms of the labor certification (specifically, the minimum educational requirement) and was not eligible for classification as an advanced degree professional.

The Petitioner filed an appeal, Form I-290B, along with a brief from counsel. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

I. LAW AND ANALYSIS

A. The Roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the Immigrant Visa Process

At the outset, it is important to discuss the respective roles of the DOL and USCIS in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides as follows:

> 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.

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

> There is no doubt that the authority to make preference classification decisions rests with INS.[2] 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).[3] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "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:

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[2] The legacy INS (Immigration and Naturalization Service) was replaced in part by USCIS (originally the Bureau of Citizenship and Immigration Services) when the Homeland Security Act of 2002 entered into force on March 1, 2003.

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

> [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 [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> [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).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

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

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

B. Eligibility for the Classification Sought

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 terms "advanced degree" and "profession" are defined in 8 C.F.R. § 204.5(k)(2). The regulatory language reads as follows:

> *Advanced degree* means any 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.
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> *Profession* means 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 in 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 the 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. Furthermore, an "advanced degree" is either (1) a U.S. academic or professional degree or a foreign equivalent degree above a baccalaureate, or (2) a U.S. baccalaureate or a foreign equivalent degree followed by at least five years of progressive experience in the specialty.

As previously discussed, the Beneficiary has a four-year Bachelor of Engineering in Electronics and Communication Engineering from [redacted] in India. According to the Electronic Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), a four-year bachelor of engineering degree in India is comparable to a bachelor's degree in the United States. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign degree equivalencies.[4] Accordingly, we find that the Beneficiary's Bachelor of Engineering from [redacted] is equivalent to a U.S. bachelor's degree. The Beneficiary does not disagree with this equivalency determination.

The labor certification specifies, however, that a master's degree is the minimum educational requirement for the job offered. The labor certification specifies that an alternate combination of education and experience is not acceptable. Under the terms of the labor certification, therefore, the Beneficiary's Bachelor of Engineering from [redacted] – a foreign equivalent degree to a U.S. baccalaureate – could not be combined with five years of qualifying experience in the specialty to meet the requirements of an advanced degree as defined in 8 C.F.R. § 204.5(k)(2). Furthermore, the evidence of record does not show that the Beneficiary had five years of qualifying experience in the specialty which could be combined with his bachelor's degree to comprise a master's degree equivalent under 8 C.F.R. § 204.5(k)(2), even if the labor certification allowed for such.

The Beneficiary's other degree is the aforementioned "Master of Science with a major in Electrical Engineering" from [redacted] California. [redacted] however, was not accredited by a recognized accrediting agency at the time the Beneficiary studied there and received his degree. For the reasons set forth below, a degree from an unaccredited institution will not be considered an advanced degree under 8 C.F.R. § 204.5(k)(2).

In the United States institutions of higher education are not authorized or accredited by the federal government.[5] Instead, the authority to operate and issue degrees is granted at the state level. State approval to operate, however, is not the same as accreditation by a recognized accrediting agency. Accrediting agencies are private educational associations that develop evaluation criteria reflecting the qualities of a sound educational program, and conduct evaluations to assess whether institutions

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[4] USCIS utilizes EDGE as a primary resource for determining the U.S. equivalency of foreign degrees. AACRAO, according to its website, www.accrao.org, is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent approximately 2,600 institutions in over 40 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* EDGE, as stated on its registration page, is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. 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.

[5] *See* http://ope.ed.gov/accreditation.

meet those criteria.[6] Institutions that meet an accrediting agency's criteria are then "accredited" by that agency.[7]

The U.S. Department of Education (DOE) and the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, are the two entities responsible for the recognition of accrediting agencies in the United States.

While the DOE does not accredit institutions, it is required by law to publish a list of recognized accrediting agencies that are deemed reliable authorities as to the quality of education provided by the institutions they accredit.[8] According to the DOE, "[t]he goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality."[9] Accreditation ensures the nationwide recognition of a school's degrees by employers and other institutions, and also provides institutions and their students with access to federal funding.

The CHEA plays a similar oversight role. The presidents of American universities and colleges established CHEA in 1996 "to strengthen higher education through strengthened accreditation of higher education institutions."[10] Like the DOE, CHEA recognizes accrediting organizations. "Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and accountability expectations that CHEA has established."[11] According to CHEA, accrediting institutions of higher education "involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort."[12]

The DOE and CHEA recognize the Western Association of Schools and Colleges (WASC), Accrediting Commission for Senior Colleges and Universities, as the accrediting association with jurisdiction over California, where [redacted] is located.[13] WASC's website lists all accredited institutions and candidates for accreditation within its jurisdiction. [redacted] is currently listed as an accredited institution. *See* http://www.wascsenior.org/institutions (accessed December 9, 2015). The entry for [redacted] further reveals that the institution was granted candidate status in 2011 and was first accredited by WASC in 2012. *See* http://www.wascsenior.org/institutions/international-technological-university (accessed December 9, 2015). This information accords with a previously submitted letter from [redacted] interim registrar, dated May 27, 2015, which stated that [redacted] received accreditation from WASC in December 2012 and confirmed that [redacted] was

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] http://www2.ed.gov/print/admins/finaid/accred/accreditation.html.
[10] www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf.
[11] *Id.*
[12] *Id.*
[13] *See* http://www.chea.org/Directories/regional.asp.

not accredited during the Beneficiary's enrollment at the institution in the years 2008-2010. Thus, was not an accredited university at the time the Beneficiary studied there and was granted his degree.

On appeal the Petitioner cites a previously submitted evaluation of the Beneficiary's educational credentials by of who stated that had received "state approval" from California's Bureau for Private Postsecondary Education (BPPE) to award Master of Science degrees with a major in Electrical Engineering. According to counsel in her appeal brief, California's "alternative regulatory framework for postsecondary degree-granting [was] established in order to ensure consumer protection and to prevent the operation of diploma mills in the state." While counsel touts the state's "rigorous standards" (Appeal Brief at 2), California's Education Code states that approval to operate in California is granted after the BPPE has verified that the institution "has the capacity to satisfy the minimum operating standards." Cal. Ed. Code section 94887. That standard is clearly lower than accreditation by a DOE- and CHEA-recognized accrediting organization, like WASC, which has region-wide jurisdiction and is national in scope.[14]

Accreditation by WASC provides assurance of a basic level of educational quality from the institution as well as the nationwide acceptance of its degrees. A degree from a state-approved institution that is unaccredited does not provide a sufficient assurance of quality or the nationwide acceptance of its degrees. Since the Beneficiary's "Master of Science" from was not earned at an accredited institution of higher education, we find that it does not qualify as an advanced degree within the meaning of 8 C.F.R. § 204.5(k)(2).

The Petitioner asserts that USCIS should accept the Beneficiary's Master of Science from as an advanced degree because the Department of Homeland Security (through its component, U.S. Immigration and Customs Enforcement, or ICE) had already authorized on the basis of its standing with the BPPE in California, to enroll international graduate students in its advanced degree program through the Student Exchange and Visitor Program (SEVP). The approval by ICE of an institution to enroll foreign students in F or M nonimmigrant visa status under 8 C.F.R. § 214.3, however, is unrelated to the requirements for immigrant classification as an advanced degree professional. A broad range of educational institutions are eligible for attendance by foreign students, including community colleges, junior colleges, seminaries, conservatories, high schools, elementary schools, and institutions which provide language training, instruction in the liberal arts or fine arts, and/or instruction in the professions. *Id.* The fact that an institution is authorized to enroll nonimmigrant foreign students does not mean that its degrees meet the requirements of an advanced degree under 8 C.F.R. § 204.5(k)(2) for the purposes of immigrant visa classification.

[14] The State of California acknowledges that "accreditation is an indication of the quality of education offered," and that institutions "must be accredited by an agency recognized by the [DOE] in order for it or its students to receive federal funds." http://www.cpec.ca.gov/x_collegeguide_old/accreditation.asp.

The Petitioner contends that the Beneficiary's Master of Science from qualifies as an advanced degree because there is no requirement in 8 C.F.R. § 204.5(k)(2), or elsewhere in the regulations, that the institution conferring the degree must be accredited. We are not persuaded. An educational credential from an institution that was not accredited by a DOE- and/or CHEA-recognized accrediting association lacks academic weight. While the Beneficiary's credential from is titled a Master of Science with a major in Electrical Engineering, we are not convinced that it demanded a comparable level of academic rigor, or that its academic content was as solid, as a master of science in that discipline from an accredited university. There is no documentary evidence, for example, of the admission requirements for the master of science program at the time of the Beneficiary's enrollment at in 2008, which makes it unclear whether a full bachelor's degree was the minimum requirement or whether admission could be gained by applicants with less than a bachelor's degree.

Finally, the Petitioner refers once again to the previously submitted credentials evaluation report of on the letterhead of which asserted that the Beneficiary's degree from "is a U.S. Master of Science degree in Electrical Engineering *from a Regionally Accredited College or University* in the United States of America." (Emphasis added.) Ms. ignored the crucial fact, however, that lacked accreditation at the time the Beneficiary studied there and was awarded his degree. Lacking an analysis of this issue, the evaluation has little evidentiary weight.

For all of the reasons discussed above, we conclude that the Petitioner has not established the beneficiary's eligibility for classification as an advanced degree professional under section 203(b)(2) of the Act based on his "Master of Science" from in California. Accordingly, the petition cannot be approved.

C. Qualifications for the Job Offered

To be eligible for approval under the immigrant visa petition, the beneficiary must have all the education, training, and experience specified on the underlying labor certification as of the petition's priority date, which is the date the labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg'l. Comm'r. 1977).[15] In this case, the priority date is September 25, 2014.

The key to determining the job qualifications is found in Part H of the ETA Form 9089, which describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

[15] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

Regarding the minimum level of education, training, and experience required for the proffered position of lead software engineer, the ETA Form 9089 states the following:

- The minimum educational requirement is a master's degree in electrical engineering, computer information systems or applied mathematics, or a foreign educational equivalent (Part H, lines 4, 4-B, 7, 7-A, and 9).
- There is no minimum training requirement (Part H, line 5).
- There is no minimum experience requirement (Part H, lines 6 and 10).

The Beneficiary does not meet the minimum educational requirement. As previously discussed, the Beneficiary's degree from [redacted] in [redacted] California, though called a Master of Science with a major in Electrical Engineering," does not qualify as a U.S. master's degree under the "advanced degree" definition of 8 C.F.R. § 204.5(k)(2) because it was not awarded by an educational institution that was accredited at the time by a regional accrediting agency recognized by the DOE and CHEA. Nor does the Beneficiary have a foreign educational equivalent to a U.S. master's degree. Since he does not fulfill the educational requirement in Part H of the labor certification, the Beneficiary does not qualify for the job offered. For this reason as well, the petition cannot be approved.

II. CONCLUSION

Based on the foregoing analysis, we find that the petition is deniable on the following grounds:

- The Beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because he does not have a U.S. master's degree in electrical engineering, computer information systems or applied mathematics, or a foreign equivalent degree.
- The Beneficiary does does not qualify for the proffered position under the terms of the labor certification, which requires a U.S. master's degree in electrical engineering, computer information systems or applied mathematics, or a foreign educational equivalent.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

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

ORDER: The appeal is dismissed

Cite as *Matter of E-S-, Inc.*, ID# 15614 (AAO Feb. 4, 2016)