U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 27 2006

WAC 05 196 52174

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 of the Texas Service Center certified a decision to the Administrative Appeals Office (AAO). While the director in his decision indicated the petition would be denied, the text of the decision appears to approve the three major issues identified by the director. Upon review of the decision, the AAO affirms the director's decision. The immigrant visa petition is approved.

The petitioner is a supplier of programmable logic solutions. It seeks to permanently employ the beneficiary in the United States as a senior information systems analyst. The petitioner submitted a request dated June 8, 2005 to substitute the present beneficiary for the ETA 750 initially submitted and subsequently approved for [redacted] The petitioner further requested to withdraw the I-140 petition filed on behalf of its former employee [redacted] The petitioner submitted Form ETA 750, Part B, executed by the substituted beneficiary, along with a resume, education and experience documentation of the instant beneficiary. The petitioner indicated on the I-140 that it wished to classify the beneficiary as a professional or skilled worker. The director in his decision certified to the AAO denied the petition[1] and addressed three issues to be examined in the proceedings.[2] The director then certified the decision to the AAO for review.

Counsel in response to the certification of the Service Center decision to the AAO corresponded with the AAO in a letter dated August 29, 2006. Counsel stated that on August 3, 2006, her office received notification of the certified decision dated July 28, 2006. Counsel then stated that she had received an I-797, Approval Notice, for the instant petition dated July 29, 2006. Counsel stated that it was unclear if any action needed to be taken in the matter, and that if the matter was still before the AAO, the petitioner supported the Texas Service Center's recommendation that the petition be approved, based on the factors cited in the Notice of Certification. Counsel also requested that the petition be approved in the original requested classification, skilled worker or professional, which was the requested classification of the I-140 petition. Counsel submits copies of the Service Center's notice of certification, the notice of approval, and a fax sent to the Texas Service Center requesting the classification change.

The director in his decision quotes extensively from a legacy INS memo that he identifies as "HQ Memo 27(MM6E03)." This memo is written by Luis G. Crocetti, Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, March 7, 1996, HQ 204.25-P. It can be seen at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

In the certified decision, the director identified three issues to be addressed in the decision, namely that the petitioner filed on behalf of the beneficiary under an ineligible preferred classification; that the petitioner requested substitution of the original beneficiary on the labor certification for the instant beneficiary; and that the petitioner also requested that CIS, under current labor certification substitution policy, procure the original labor certification.

With regard to the beneficiary's classification as a professional, the director noted that the labor certification did not require the minimum of a bachelor's degree for entry into the position, but rather the minimum of a master's

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[1] As stated previously, the director's decision is confused as he initially stated the petition would be denied, then identified three issues to be examined in the proceedings, and finally with regard to at least one issue clearly determined that the petition should be approved. The denial of the instant petition only appears on page two wherein the director states "upon review, it is determined that the petition be denied." The possibility of a typographical error exists based on the contents of the certified decision.

[2] These three issues will be discussed more fully further in these proceedings.

degree. In a footnote, the director noted that the petitioner placed a special requirement on the labor certification that the employer would accept a bachelor of science degree and two years of experience in lieu of a master's degree with no experience, but that the record demonstrated that the beneficiary held a master's degree in computer science and did not present evidence of the beneficiary's experience in computer science via letters from current or former employers in accordance with 8 C.F.R. 204.5(1)(3)(ii)(a). The director concluded that the record as a whole did not support the finding that the job opportunity is for a professional under section 203(b)(3)(A)(ii).

Next, the director examined the substitution of the beneficiary on the original labor certification for the instant beneficiary. The director stated that such substitutions are allowed based on the Crocetti memo; however, CIS must determine if the petitioner is attempting to use the labor certification more than once. The director then noted that CIS records indicated that the original beneficiary of the labor certification was admitted as a lawful permanent resident pursuant to section 201(b)(2)(ii), and that it was clear that the original beneficiary did not fill the job opportunity on the labor certification based on this admission. The director then noted that it was not clear whether the request for substitution of the beneficiary on the labor certification is the first request or a successive request. The director noted that the original visa petition was sent to the United States consulate in Taipei, Taiwan and was not available for review. Therefore the director determined that CIS could not determine whether the petitioner had attempted to use the labor certification more than once.

A third factor discussed by the director was the requisite review of the original labor certification, and the CIS inability to obtain the original labor certification. The director noted that the petitioner filed the original visa petition with legacy INS on October 20, 1999, and legacy INS approved the visa petition on October 13, 2000 and subsequently forwarded the visa petition to the National Visa Center (NVC). The director stated that the petitioner had requested the original visa petition be sent to the NVC for consular processing, and thus CIS was obligated to recall the visa petition from the NVC. The director then stated that the NVC informed CIS that the visa petition had already been sent to post in Taipei, Taiwan, and that some United States Consulates and embassies, such as Taipei, do not return visa petitions to NVC for revocation under section 205. Such consulates simply terminate registration under Department of State (DOS) guidelines and destroy the visa generally after five years if the alien beneficiary fails to appear for consular processing. The director noted that legacy INS policy and federal regulations stood in conflict of each other and required reconciliation of authority, since 8 C.F.R. § 103.2(b)(4) and 204.5(g)(1) required the original labor certification and did not allow for photocopies or exception to this rule. The director stated that the central question with regard to the original labor certification hinged on the discretionary authority of CIS to approve a visa petition supported by a photocopy of the labor certification in cases where the original labor certification no longer exists.

The director also noted that CIS may request a duplicate labor certification from the Department of Labor (DOL) in cases where the original labor certification has been lost; however, the DOL only retains records of labor certifications for five years after which the records are destroyed. Therefore, the director noted that CIS may not request a duplicate of the original labor certification.

The director then determined that the approval of the instant visa petition predicated on a photocopy of the original labor certification was a matter of discretion in cases where CIS cannot obtain the original labor certification. The director stated that the petitioner had correctly followed all possible policy procedures for requesting the substitution of the beneficiary on the labor certification. The director also noted the petitioner could not deter DOS from destroying visa petitions under the rules and regulations of the Secretary of State, and the petitioner could not request a duplicate of the labor certifications by rules and regulations of the Secretary of the Department of Labor. The director concluded that the instant visa petition cannot be supported by the original labor certification because of its destruction. The director stated that CIS may approve the visa petition without

the original labor certification as a matter of discretion based on the intent of the Crocetti memo. The director stated that the language in question from the memo is to be construed in harmony with the thrust of related provisions and with the statute as a while. The director cited *KMart Corp. V. Cartier, Inc.*, 486 U.S. 281,291(1988); *COIT Independence Joint Venture v. Federal Sav. And Loans Ins. Corp.*, 489 U.S. 561 (1989); and *Matter of W-F-*, 21 I& N Dec. 503 (BIA 1996).

Upon review of the record, the director's decision does appear to follow the intent of the Crocetti memo with regard to the greater goal of facilitating the substitution of beneficiaries on approved labor certifications. With regard to the various procedures for obtaining the original labor certifications either from the petitioner, the NVC, or CIS, the petitioner's circumstances involving a petition filed over five years ago that technically could be destroyed by either the Taipei consulate office or DOL are not addressed in the Crocetti memo The procurement of the original labor certification in part is to satisfy regulatory criteria at 8 C.F.R. § 204.5(k)(4) but also to ensure that the petitioner is not using the same labor certification more than once. The Crocetti memo states:

> The service center should ensure that the petitioner is not using the same labor certification more than once. The adjudicator, using the Central Index System, must determine whether the original labor certification beneficiary has immigrated or applied for adjustment of status based on the labor certification and I-140 petition filed by the employer. The adjudicator must also look up the status of any previous petition in [CIS systems].

The Crocetti memo continues:

> If the original I-140 petition with the labor certification has been forwarded to the National Visa Center (NVC), the service center should issue a notice of automatic revocation and update [CIS systems] accordingly. The service center may either request the NVC to return the original I-140 petition to the service center or send a VISAS 90 cable to the NVC or United states consulate. Once this has been completed, the service center may adjudicate the new I-140 petition filed on behalf of the substituted alien.

If the center follows this guidance with regard to checking if the previous beneficiary had adjusted his status by using the original labor certification, which the record of proceedings establish that it has, the service center has complied with all policy guidance. The AAO notes that the director's decision states that the Service Center contacted the NVC and was notified that the Taipei consulate destroyed pending visa petitions after five years. Thus, the AAO affirms the director's decision to approve the instant petition even though the original labor certification was not submitted by the petitioner or obtained by the service center from either the U.S. consulate in Taipei or a substitute labor certification was obtained from DOL.

Furthermore, the second issue of whether the petitioner has used the original labor certification more than once appears to have been satisfied by the fact that the original beneficiary was admitted as a lawful permanent resident pursuant to section 201(b)(2)(ii) and did not fill the job opportunity on the labor certification based on this admission. As previously stated, the Service Center also determined that when the initial I-140 petition was approved the original beneficiary entered the United States under CR6 status. The Service Center also determined that since the visa petition was no longer available for review, the director could not determine if the petitioner had attempted to use the labor certification more than once. Since the director has allowed the matter to proceed without the original labor certification, and appears to have fulfilled the prerequisite systems enquiry and search for multiple beneficiaries without finding derogatory information on the petitioner's use of I-140 petitions and labor certifications, the second issue raised by the director can be resolved favorably for the petitioner. Furthermore, the record also indicates that the Service Center did find at least 840 petitions filed by the petitioner

either under H-1B nonimmigrant, I-140 employment based immigrant petitions, and other classifications. Upon examination of a cross section of these petitions, the Service Center concluded that the petitions were filed for individuals who later adjusted their status, utilizing the same labor certifications. Thus, the AAO will withdraw this part of the director's decision, if this was the basis of a proposed denial of the petition.

The AAO does not agree with the director's determination with regard to the first issue raised by the director, namely the classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability, rather than a professional or skilled worker. The AAO will examine the issue of the beneficiary's qualifications more fully in these proceedings.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

"*Professional* means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions."

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in pertinent part:

> *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

If the petition is for a professional pursuant to 8 C.F.R.§204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on February 24, 1998. The Form ETA 750 states that the proffered position requires six years of college and a Master's degree in computer science. The petitioner also noted under the section, college degree required, that it "will accept B.S. in CS plus 2 years of experience in lieu of an M.S. in CS with no experience." Thus the minimal level of education required is a baccalaureate degree, provided the beneficiary can demonstrate two years of experience.

With the petition, the petitioner submitted an educational equivalency document submitted by [redacted] Evaluator, Foundation of International Studies (FIS), Bothell, Washington dated December 6, 2000. [redacted] stated that the beneficiary has the equivalent of three years of university level studies based on his studies in India at Madurai Kamaraz University, Faculty of Science in Palkalainagar, India which is equivalent to three years of university level credit from an accredited U.S. college or university. [redacted] then stated the beneficiary's master's degree from Bharathidasan University, Faculty of Science in Tiruchirappalli, India is

equivalent to a master's degree in compute science from a U.S. college or university. [redacted] concludes by stating the beneficiary has the equivalent of a master's degree in computer science from an accredited U.S. institution. The beneficiary's transcripts for these two Indian institutions were also submitted to the record, as well as a letter of employment verification from [redacted] Director, Braghasutham Software Technologies Pvt. Ltd. This letter stated that the beneficiary had worked as a systems executive in the business' software division from December 5, 1994 to November 30, 1996. Another letter of work verification is found in the record from CBSI, Limited, Chennai, India. This letter, written by [redacted] General Manager, Human Resources, stated that the beneficiary worked for the company as a senior application developer from December 2, 1996 to July 31, 1998.

The director in the decision certified to the AAO states that the petitioner did not establish that the minimum of a baccalaureate degree is required for entry into the occupation. As stated previously the director noted the petitioner's special requirement on the labor certification that it would accept a bachelor of science degree and two years of experience in computer science in lieu of a master's degree with no experience. But the director stated that the beneficiary holds a master's degree in computer science and does not present evidence of experience in computer science.[3] Thus the director stated that the petition classification should be a member of the professions holding an advanced degree or an alien of exceptional ability who is not seeking a National Interest Waiver. Therefore, the minimum requirements of a baccalaureate degree and two years of work experience, as stipulated by the ETA 750 do not fit the advanced degree requirements, which require a master's degree or a baccalaureate degree with five years of progressive experience. The beneficiary's qualifications are not determinative as to what visa category the labor certification would support. CIS cannot add to or subtract from the requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

The AAO will now discuss whether or not the beneficiary meets the requirements of the ETA 750. The record reflects that the beneficiary's bachelor's degree from Madurai Kamaraz University is in the requisite field of computer science; however, it is a three-year degree, adjudged to be the equivalent of 3 years of study at a regionally accredited institution in the United States.

A foreign three-year bachelor's degree is not a "foreign equivalent degree" to a United States bachelor's degree. A United States bachelor's degree generally requires four years of education. *Matter of Shah*, 17, I&N Dec. 244 (Reg. Comm. 1977). If supported by a proper credentials evaluation, a four-year bachelor's degree from India might reasonably be deemed to be the "foreign equivalent degree" to a United States bachelor's degree. However, in *Matter of Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States bachelor's degree because the degree did not require four years of study. *Matter of Shah* at 245. Based on the same reasoning, the beneficiary's three-year degree from University will not be considered the "foreign equivalent degree" to a United States bachelor's degree for purposes of this preference visa petition.

The basis for distinguishing between a single degree and a combination of degrees in this context is that the Form ETA 750 requires a U.S. Bachelor's Degree or an equivalent foreign degree, and that the regulations governing the instant visa category do not permit the substitution of degrees and experience, or degrees and additional education, or a combination of degrees, for the requirements stated on the Form ETA 750.

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[3] It is not clear why the director stated the beneficiary had no work experience in computer sciences. Based on the previously described letters from Raghasutham Software Technologies Pvt. Ltd., and CBSI, Limited, the beneficiary had four years of years of relevant work experience prior to the 1998 priority date year.

CIS must ascertain whether the alien is, in fact, qualified for the certified job. In evaluating the beneficiary's qualifications CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. CIS may not ignore a term of the labor certification, nor may it impose additional requirements. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner is obliged, therefore, to demonstrate that the beneficiary has a U.S. bachelor's degree in Computer Science with two years of relevant work experience or a Master's degree in computer science with no experience. Because the record does not indicate that the beneficiary has a U.S. degree, the remaining issue is whether the beneficiary has a foreign degree that is equivalent.

As stated previously, the beneficiary has a three-year degree in computer science that is not found to be equivalent to a U.S. baccalaureate degree from an accredited U.S. institution. In this case, the record also demonstrates that the beneficiary holds a master's degree in the field of computer science from St. Joseph's College, Trichy, India and that the beneficiary attended this program from June 1992 to November 1994, or for two years and five months. The AAO finds this degree to meet the requirements of the regulations. It is a single degree in the specified field of study; and the degree represents a total of five years and five months of study. Based on the documentation in the record, the beneficiary has completed five years and five months of college education. Since the petitioner stipulated that it would accept the minimum educational qualifications of a bachelor's degree, which usually consists of four years of study,[4] the beneficiary's master's degree that constituted five years and five months of studies would qualify. In addition, as previously stated, the record reflects that the beneficiary has four years of work experience prior to the 1998 priority date year. Thus, with regard to the instant petition, the visa petition for the beneficiary can be classified as professional or skilled worker, based on the beneficiary's five and a half months of university studies and his master's degree in computer studies. Therefore the part of the director's decision pertaining to the changed classification is withdrawn.

Thus, all three issues examined by the director do not appear to prevent the approval of the instant petition. The petitioner has met its burden of proof. The petition is approved.

Order: The petition is approved.

[4] *See Shah.*