

AAO approves an EB2 I-140 involving a beneficiary holding a 3-year bachelor's degree and a 2-year master's degree from India

Commentary by Ron Wada*

AAO decision courtesy of Janet Cheetham**

On December 5, 2007, the AAO issued an unpublished decision approving an EB2 I-140 involving a beneficiary holding a 3 year bachelor's degree and a 2 year master's degree from India that had been denied by the USCIS Nebraska Service Center. The position was for a computer software engineer, and the degree requirement was for a master's degree in "Information Technology or related field (physics is a related field)." The AAO stated:

The director declined to consider the beneficiary's Master of Science degree because it followed a three-year baccalaureate. . . 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).

In this matter, however, the petitioner is not relying on a combination of multiple lesser degrees or education and experience to equate to a bachelor's degree. Rather, it is the petitioner's contention that the beneficiary's Master of Science degree . . . constitutes a foreign equivalent degree to a U.S. academic or professional degree above the baccalaureate level. . . The petitioner submits new evaluations and expert opinions all concluding that the beneficiary's Master of Science degree is equivalent to a Master of Science degree in Physics from an accredited U.S. university. . . The petitioner submitted the beneficiary's transcript for his Master's degree, which reflects two years of coursework. This transcript is consistent with the evaluations provided. Moreover, the petitioner has provided consistent and reasonable evaluations all finding that the beneficiary's Master's degree is a foreign equivalent degree to a U.S. Master's degree. Thus, we are persuaded that the beneficiary qualifies for the certified job.

Commentary

This unpublished AAO decision is significant because the USCIS Nebraska Service Center (NSC) has been generally applying an ad hoc "6 year rule" to determine whether a beneficiary's master's degree is a foreign equivalent degree to a U.S. master's degree. *See Wada, Ronald Y., AILA's Focus on EB2 & EB3 Degree Equivalency, American Immigration Lawyers Association, October 2007, at pp 23-28, available at <http://www.ailapubs.org/eb2andeb3.html>.* The NSC evaluates master's degree equivalency on a case by case basis, and may

require that the petitioner demonstrate through convincing documentation and analysis that the foreign master's degree is equivalent to a U.S. master's degree. The 6 year rule has created problems for beneficiaries holding a 5 year combined bachelor's and master's degree from Europe, Russia, and other countries where such programs are commonplace. It has also resulted in routine denials for beneficiaries holding a 3 year bachelor's degree followed by a 2 year master's degree from India, with no intermediary one year postgraduate diploma (the 3+2 combination), such as the case reported here.

The AAO decision in this case is perfectly consistent with the regulations – if a beneficiary's foreign master's degree, standing alone, can be shown to be “a foreign equivalent degree” to a U.S. master's degree, the beneficiary is not relying on a bachelor's degree for EB2 eligibility, so it should be irrelevant if the beneficiary's bachelor's degree was obtained through a three year program. However, the NSC and the AAO have in numerous cases extended *Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977) (an EB3 case involving bachelor's degree equivalency) beyond its facts by applying its reasoning to the evaluation of master's degree equivalency – i.e., if the underlying bachelor's degree is not equivalent to a U.S. bachelor's degree, the master's degree is considered not equivalent as well. *Matter of Shah* does not provide authority for this position; in addition, the EB2 degree equivalency regulation at 8 C.F.R. 204.5(k)(2) does not bar this type of equivalency. The sticking point has been what documentation USCIS and the AAO would consider sufficient to establish the equivalency of the foreign master's degree, standing alone, to a U.S. master's degree? In this case, the AAO says that multiple credible and consistent credential evaluations were sufficient.¹

CAUTION: Attorneys should not presume that either the USCIS or the AAO will now accept the 3+2 combination for EB2 in all cases, but should instead presume that the USCIS and AAO will continue to evaluate cases on a case-by-case basis. The AAO decision in this case may be persuasive in cases that have closely comparable facts, including submission of a two year transcript for the master's degree and “multiple credible and consistent credential evaluations.”

NOTE: The AAO decision in this case also devotes some attention to discussing the DOL's role in reviewing job requirements and various federal court decisions affirming the USCIS authority in this area. This discussion appears to be the AAO's response to recent federal court decisions in EB3 cases that conclude that the USCIS/AAO authority to interpret an employer's job requirements is limited (*see Wada, Ronald Y., AILA's Focus on EB2 & EB3 Degree Equivalency*, American Immigration Lawyers Association, October 2007, at pp 39-52,

¹ In subsequent communications with the attorney of record in the case, Janet Cheetham, Ms. Cheetham reported: “We sent in three evaluations- two from universities and one from education evaluator- all of them assessing only whether the Master's degree is equivalent to a US master's degree. The job required a Master's degree or foreign equivalent.”

available at <http://www.ailapubs.org/eb2andeb3.html>), and is not relevant to the specific issue at hand.

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** Ron Wada is a member of the Editorial Board of Bender's Immigration Bulletin and is Senior Counsel at the firm of Tafapolsky & Smith.*

**** Attached.**

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DEC 10 2007
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U.S. Citizenship
and Immigration
Services

DEC 05 2007

FILE: LIN 06 164 51652 Office: NEBRASKA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

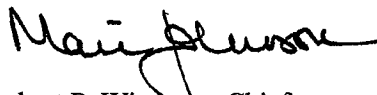
PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

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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.


2 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 sustained and the petition will be approved.

The petitioner provides banking and finance services. It seeks to employ the beneficiary permanently in the United States as a computer software engineer (Technical Specialist II) pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). 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. 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 Master's degree. The director's conclusion, however, is based on an analysis of the beneficiary's undergraduate degree, not his graduate degree.

On appeal, counsel asserts that the beneficiary has the foreign equivalent of a U.S. Master's degree. The record supports counsel's assertion.

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." *Id.* The petitioner, however, is not asserting that the beneficiary has a baccalaureate degree plus five years of experience. Rather, the petitioner is asserting that the beneficiary has an academic or professional degree or a foreign equivalent degree above the baccalaureate level.

The beneficiary possesses a foreign three-year bachelor's degree and a two-year Master of Science degree in Physics from Andhra University. Thus, the issue is whether this education can serve to qualify the beneficiary for the classification sought and the certified job requirements.

As noted above, the ETA Form 9089 in this matter is certified by DOL. Thus, at the outset, it is useful to discuss DOL's role in this process. Section 212(a)(5)(A)(i) of the Act provides:

In general.-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-

(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

(II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

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).

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:

The Department of Labor (“DOL”) must certify that insufficient domestic workers are available to perform the job and that the alien’s performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)[(5)], 8 U.S.C. § 1182(a)[(5)]. The INS then makes its own determination of the alien’s entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).

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

Tongatapu, 736 F. 2d at 1309.¹

The certified job, according to Part H, lines 4 through 7-A, requires a Master’s degree in “Information Technology or related field (physics is related field).”

The director declined to consider the beneficiary’s Master of Science degree because it followed a three-year baccalaureate. Contrary to counsel’s assertion on appeal, the director’s statement that baccalaureate degree generally requires four years of education is not without authority. 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). The director was bound by that decision. 8 C.F.R. § 103.4(c). Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”² In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2).

In this matter, however, the petitioner is not relying on a combination of multiple lesser degrees or education and experience to equate to a bachelor’s degree. Rather, it is the petitioner’s contention that the beneficiary’s Master of Science degree from the Andhra University constitutes a foreign equivalent degree to a U.S. academic or professional degree above the baccalaureate level. The petitioner initially submitted a credential’s evaluation from e-ValReports concluding that the beneficiary’s credentials “are equivalent to a combined bachelor’s and master’s degree in physics from an accredited university in the United States.”

On appeal, counsel notes that the ETA Form 9089 and the recruitment for the position both indicated that a foreign equivalent Master’s degree was acceptable. The petitioner submits new evaluations

¹ *But cf. Hoosier Care, Inc. v. Chertoff*, No. 06-3562 (7th Cir. April 11, 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.

² Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

and expert opinions all concluding that the beneficiary's Master of Science degree is equivalent to a Master of Science degree in Physics from an accredited U.S. university.

Citizenship and Immigration Services (CIS) uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an opinion is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *See Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Commr. 1988). The petitioner submitted the beneficiary's transcript for his Master's degree, which reflects two years of coursework. This transcript is consistent with the evaluations provided. Moreover, the petitioner has provided consistent and reasonable evaluations all finding that the beneficiary's Master's degree is a foreign equivalent degree to a U.S. Master's degree. Thus, we are persuaded that the beneficiary qualifies for the certified job.

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 met that burden.

ORDER: The appeal is sustained. The petition is approved.