

**U.S. DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
ADMINISTRATIVE APPEALS OFFICE
WASHINGTON D.C.**

_____)	
In the matter of:)	
)	
T_____ , Petitioner)	A-----
T_____ , Beneficiary)	LIN16----- (I-290B)
)	(LIN16-----)
)	
Form I-140 Immigrant Petition)	
Advanced Degree Professional)	
INA § 203(b)(2)(A))	
_____)	

**BRIEF OF AMICUS CURIAE AMERICAN IMMIGRATION COUNCIL
FROM A DECISION OF THE NEBRASKA SERVICE CENTER**

I. Introduction

In the decision on appeal in this case the Nebraska Service Center (NSC) erroneously elevates form over substance and ignores the plain meaning of the “advanced degree professionals” statute and the implementing regulations to find that the beneficiary did not have the equivalent of an advanced degree. At issue is the employment-based second preference (EB-2) category for “members of the professions holding advanced degrees or their equivalent” INA § 203(b)(2)(A). The regulatory definition of “advanced degree” includes the master’s degree equivalency of a bachelor’s degree plus five years of “progressive experience in the specialty.” *See* 8 C.F.R. § 204.5(k)(2). The denial disregards the plain meaning of “holding advanced degrees or their equivalent” in the statute, congressional intent as expressed in the legislative history, and the agency’s own implementing regulations—both with respect to the definition of an advanced degree or equivalent and the initial evidence satisfactory to show that the foreign national has a degree.

The NSC erred when it determined that the date a bachelor’s degree was awarded to the beneficiary was the date on the beneficiary’s diploma. This determination left the beneficiary 65 days short of the five years of post-degree progressive experience in the field required for an advanced degree equivalent. The NSC has impermissibly restricted “holding advanced degrees” to the receipt of a diploma at a formal ceremony. As detailed below, a Provisional Degree Certificate satisfies the plain meaning of “degree”: the date all degree requirements were met, the degree awarded as of that date, the field of study and an official acknowledgement. Alternatively, a Provisional Degree Certificate, like a U.S. transcript with degree statement, is an official academic record evidencing that the foreign national holds a degree. In India, where the beneficiary received her degree, a formal ceremony may occur months or years later. This formal

ceremony is not when the degree is awarded, any more than a student attending a convocation at a U.S. university is awarded a degree because he or she walked across a stage. A person has a degree when he or she has met the requirements and official academic records other than a diploma are sufficient to prove this.

II. Interests of the Amicus Curiae

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts and administrative tribunals on issues relating to the interpretation of the Immigration and Nationality Act and related regulations.

III. Legal Background

As part of the Immigration Act of 1990 (IMMACT90), Congress enacted the employment-based preference categories currently in effect. INA § 203(b). This appeal concerns the employment-based second preference (EB-2) category for "advanced degree professionals." Specifically, the employer petitioned for the foreign national in this category based on the foreign national having a bachelor's degree plus five years of progressive experience, frequently referred to as a "bachelor's plus 5" equivalent to a master's degree.

The relevant portion of the statute provides:

(A) *In general.*—Visas shall be made available ... to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

INA § 203(b)(2)(A). The House and Senate managers of the Conference Committee for IMMACT90 provided the following explanation as to what constitutes an advanced degree equivalent:

The conferees intend that the equivalent of an advanced degree be defined to mean a bachelor's degree plus at least five years' experience in the particular profession. In considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions.

Joint Explanatory Statement of the Committee of Conference accompanying H.R. Conf. Rep. No. 101-955, 136 Cong. Rec. H13203-01 (Oct. 26, 1990) (available at 1990 WL 290409) and reprinted in 1990 U.S.C.A.A.N. 6784, 6786 (available at 1990 WL 201613).¹

The agency definition of the equivalent of an advanced degree incorporates this expression of Congressional intent:

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.**

8 C.F.R. § 204.5(k)(2) (emphasis added). In the preamble to the final regulation, effective November 29, 1991, legacy INS explicitly acknowledged that the conference managers' explanatory statement is the source for its definition:

The statute indicates that members of the professions holding advanced degrees or their equivalent may qualify for this classification. The Joint Explanatory Statement of the Committee of Conference on this point says that the equivalent of an advanced degree shall be "a bachelor's degree with at least five years progressive experience in the professions." **In the proposed rule, the Service followed this guidance** and required the alien to have a United States advanced degree or a foreign equivalent advanced degree. **To qualify for the exception, the petitioner must demonstrate that the alien has at least a bachelor's degree, or a foreign equivalent degree, plus five years of progressive experience in the profession.** The Service interpreted this combination to equate with a master's degree

56 Fed. Reg. 60897, 60899-90 (Nov. 29, 1991) (emphasis added).

¹ The conference managers represented a wide spectrum on immigration, including former Representative (now Senator) Charles Schumer (D.-N.Y.) and Representative Lamar Smith (R.-Tex.) and former Senators Edward M. Kennedy (D.-Mass.) and Strom Thurmond (R.-S.C.). A complete list of the conference managers from the Federal Register notice is provided at Ex. A.

As to evidence of the “bachelor’s plus 5” equivalent, legacy INS provided:

(3) Initial evidence. The petition must be accompanied by documentation . . .

(i) To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

(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.

8 C.F.R. § 204.5(k)(3)(i)(B).

IV. Evidence of the Degree is not limited to the Date an Individual Received a Diploma

The AAO should reject an interpretation of the “advanced degree” requirement that limits it to the date on which the individual received the diploma. The wording of the statute, the legislative history and the regulatory interpretation do not support this construction, which elevates form over substance. When considering the reasonableness of an agency’s interpretation, a court first considers “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If it has, that is “the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43 (footnote omitted). In determining Congressional intent, consideration should be given to the context in which the word or phrase appears, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000), and undefined words are to be given their ordinary meaning, *see CSX Transp., Inc. v. Ala. Dep’t. of Revenue*, 562 U.S. 277, 283-84 (2011).

A. A Provisional Degree Certificate is a “Degree” within the Plain Meaning of INA § 203(b)(2)(A).

In ordinary usage, a university confers a degree when an individual has met all of the degree requirements. For example, Merriam Webster defines “degree” as “a title conferred on students by a college, university, or professional school on completion of a program of study.” Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/degree>. Similarly, the American Heritage Dictionary of the English Language (5th ed. 2011) defines it as “[a]n academic title given by a college or university to a student who has completed a course of study,” <http://www.thefreedictionary.com/degree>. “Most colleges and universities award academic degrees upon completion of particular programs of study,” Learn.org, *What are academic degrees?* http://learn.org/articles/What_are_Academic_Degrees.html. (All accessed Feb. 23, 2017).

The Provisional Degree Certificate issued to the beneficiary in this case satisfies the degree definition as it stated that she “is qualified for the award of the degree of Bachelor of Engineering for having passed the prescribed examination held during July 2008 in First Class with University Seat No. ...”² This conclusion is supported by the authoritative opinion of the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which has determined that “[a] Provisional Degree Certificate is issued to any student who has completed all degree requirements.” Provisional Degree Certificate, Credential Statement, AACRAO Electronic Database for Global Education (EDGE) (hereafter “AACRAO EDGE Statement”).³

² See Exhibit B to Petitioner’s Memorandum in Response to Notice of Intent to Deny.

³ See Petitioner’s Supplemental Evidence attached to its attorney’s letter to the AAO dated July 20, 2016. AACRAO, a “non-profit voluntary professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries,” describes EDGE as “the most comprehensive collection of data on worldwide post-secondary education systems available” for the evaluation of foreign educational credentials. See

Based upon its review and comparison, ACCRAO recommends that **“the Provisional Degree Certificate be accepted for what it is, and that is evidence of completing all requirements for the degree in question, the name of the degree and the date upon which it was approved by the responsible university governing body.”** *Id.* (emphasis in original).

AACRAO is a body that the AAO has relied upon as authoritative with respect to educational credentials. For example, “USCIS [has] recognized that, unlike other foreign credential evaluators, ‘[a]uthors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials.’” *Viraj, LLC v. Holder*, 2:12-CV-00127-RWS, 2013 U.S. Dist. LEXIS 66077, *14 & n.6 (N.D. Ga. May 8, 2013), *aff’d*, 578 Fed. Appx. 907, 910 (11th Cir. 2014).⁴

The award of the final degree, which the Provisional Degree Certificate stated “will be conferred ... at the next convocation or thereafter,” is just a formality that has nothing to do with the substantive requirements for a degree. In fact, receipt of the final degree or diploma at a formal convocation or award ceremony is not even necessary. “[I]t is common knowledge in [India, Pakistan and Bangladesh] that *the only difference between a Provisional Degree Certificate and Degree Certificate is that the graduate has attended a university convocation ceremony.*” AACRAO EDGE Statement (emphasis in original). Consequently, with respect to

“About AACRAO” <http://www.aacrao.org/about> and “AACRAO EDGE” <http://edge.aacrao.org/aacrao-edge-login-page.php?uri=/> (both accessed Feb. 23, 2017).

⁴ In *Viraj*, the AAO accepted an AACRAO EDGE evaluation that a foreign national’s particular foreign master’s degree was only comparable to a U.S. bachelor’s degree. That is not the issue here, as NSC agrees that the beneficiary’s foreign bachelor’s degree is the equivalent of a U.S. bachelor’s degree. However, this difference is immaterial to the reliability of an AACRAO recommendation.

both academic and employment purposes, “*there is no need [for a graduate] to obtain the Degree Certificate.*” *Id.* (emphasis in original).

In at least one non-precedent decision, the AAO agreed with the assessment that a “degree” is conferred when the requirements are met and not when a degree certificate or diploma is presented at a formal convocation ceremony. Amicus urges the AAO to adopt the reasoning of this 2015 decision, which concluded: “Based on the plain language of [INA § 203(b)(2)(A)] and the ordinary meaning of the term ‘degree’ in an academic context, the record establishes the beneficiary’s possession of a foreign equivalent of a U.S. Bachelor’s degree upon completion of his studies and exams.” *Matter of New York City Dep’t. of Educ.*, A 206 614 847 at 3 (AAO June 18, 2015) (footnote omitted) (cited by Petitioner and rejected by the NSC in this case).

B. Alternatively, a Provisional Degree Certificate is One Form of an Official Academic Record, which is Sufficient Evidence to establish that the Foreign National has the Required Degree.

Alternatively, even if the AAO were to conclude that the term “degree” is ambiguous, the NSC’s equation of a degree award to the date on a diploma is not a “product of reasoned decisionmaking.” *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 52 (1983). Such a narrow interpretation conflicts with congressional intent and the implementing regulations as it ignores how the agency establishes that the foreign national has the degree.

An interpretation that includes documents other than a diploma as evidence that the foreign national has met the degree requirements has a rational basis in the statute and regulations when placed in context. This broader interpretation takes into account the “advanced degree” equivalent found in the Joint Statement of the Committee of Conference and the corresponding regulatory definition as well as the initial evidence regulation. *See* § III *supra*.

USCIS' own interpretation of the degree requirement in the initial evidence regulation specifically designates "[a]n official academic record" as establishing that a foreign national "has a . . . baccalaureate degree. *See* 8 C.F.R. § 204.5(k)(3)(i)(B).

In contrast, a diploma (degree certificate) limitation improperly negates the initial evidence regulation—if the agency intended to limit the evidence to a diploma, it knows how to say so. This broader interpretation also is consistent with the ordinary meaning of "[a]n official academic record," as discussed below.

Without resolution by the AAO, inconsistent adjudication is likely to continue as there is neither a precedent decision, nor a policy memorandum nor a provision in the Adjudicator's Field Manual that resolves the issue of what document is required in the EB-2 category to establish that a foreign national has a baccalaureate (bachelor's) degree. Contrary to NSC's position, Appendix 22-1 of the USCIS Adjudicator's Field Manual⁵ states with regard to adjudicators establishing whether a foreign national has the requisite advanced degree or equivalent:

Whether the alien beneficiary actually possesses the advanced degree should be demonstrated by evidence in the form of a transcript from the institution that granted the advanced degree. An adjudicator must similarly consider the baccalaureate transcript and the alien's post-baccalaureate experience for the alien beneficiary claiming the equivalent to an advanced degree.

In non-precedent decisions, the AAO has taken inconsistent positions. *Compare Matter of New York City Dep't. of Educ.*, A 206 614 847 at 3 (AAO June 18, 2015) (discussed in

⁵ Appendix 22-1, Memorandum from Michael D. Cronin, then Acting Assoc. Comm'r Office of Programs, INS and William R. Yates, then Deputy Exec. Assoc. Comm'r Office of Field Operations, INS to All Service Center Directors and Regional Directors, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants*, HQ 70/6.2, AD00-08 (March 20, 2000), AFM, Redacted Public Version <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-26573/0-0-0-31107.html> (accessed Feb. 23, 2017).

§ IV(A) *supra*) with *In re: Name Redacted* at 5 (AAO April 14, 2015) (beneficiary must have the degree “in hand, not just be eligible for it”).⁶

The AAO should now reject the view that a foreign national must “have her baccalaureate degree in hand,” i.e., that only a diploma could satisfy the meaning. In the United States, an official transcript would constitute such an official academic record as it lists the type of degree that the individual received (for example, a B.A.), including the date and the major, and it has official imprimatur, such as a registrar’s or other authorized official’s signature and frequently a seal.⁷

Other types of documents also qualify. The AACRO EDGE Statement explains that the Provisional Degree Certificate, issued in India, Pakistan and Bangladesh, is “the equivalent of a US degree statement on a transcript,” because both include evidence that all degree requirements were completed, the name of the degree and the date the degree was approved by the applicable academic governing body (the “academic senate” for U.S. universities). The Statement also demonstrated that convocation ceremonies are often an empty formality, with these ceremonies often delayed in the foreign countries for months or years after a student completes the degree requirements, while in the U.S., students often receive a blank sheet of paper, with the official diploma mailed months later.

⁶ https://www.uscis.gov/sites/default/files/err/B5%20-%20Members%20of%20the%20Professions%20holding%20Advanced%20Degrees%20or%20Aliens%20of%20Exceptional%20Ability/Decisions_Issued_in_2015/APR142015_01B5203.pdf.

⁷ See, e.g., Official Academic Transcript, University of California at Davis, Office of the University Registrar, <https://registrar.ucdavis.edu/records/transcripts/>; Academic Transcript Requests, Brown University, Office of the Registrar, <https://www.brown.edu/about/administration/registrar/academic-transcript-requests> (“The Official Academic Transcript contains all essential academic data, including dates of attendance ... degree received must bear the college seal, be recently dated and have the [registrar’s signature].) (Both accessed Feb. 23, 2017).

As the AACRAO EDGE Statement demonstrates, either the U.S. official transcript with degree statement or the Provisional Degree Certificate would satisfy the initial evidence requirement in 8 C.F.R. § 204.5(k)(3)(i)(B) of an “official academic record” because each contains the evidence of completing all degree requirements, the name of the degree and the date upon which it was approved by the academic governing body. So long as a document issued by a foreign university contained the same evidence, whether the university called it a Provisional Degree Certificate or not, the document would be an “official academic record” under the initial evidence regulation. This official academic record satisfies the “degree” component of the equivalency to an “advanced degree” intended by Congress, as explained in the Joint Statement of the Committee of Conference and the corresponding regulatory definition of the equivalency.

The equation of degree with the diploma date also conflicts with the agency’s interpretation of a “degree” for an H-1B nonimmigrant visa classification. The AAO should apply the “ ‘normal rule of statutory construction’ that ‘identical words used in different parts of the same act are intended to have the same meaning.’” *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Dep’t of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). The statutory definition of “specialty occupation” includes “attainment of a bachelor’s or higher degree” INA § 214(i)(1)(B). As evidence that a foreign national has the bachelor’s degree, USCIS does not require only a diploma. Rather, USCIS will accept official academic records in addition to a diploma:

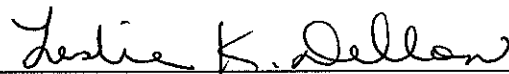
School records, diplomas, degrees, affidavits, declarations, contracts, and similar documentation submitted must reflect periods of attendance, courses of study, and similar pertinent data, be executed by the person in charge of the records of the educational or other institution, firm, or establishment where education or training was acquired.

See 8 C.F.R. § 214.2(h)(4)(iv)(A)(1). *See also* AFM ch. 31.3(g)(2) (“The petitioner may establish from an authoritative source or from transcripts, certificates or other such school records that the alien has college-level education.”)

Finally, this case exemplifies the absurd result of equating the degree with the diploma date. In its denial, NSC states that “the evidence submitted indicates that the beneficiary has approximately 1,760 of the required 1,825 days (5 years needed).” Decision at 2. In other words, by using the diploma date, the foreign national is 65 days short of the “five years of progressive experience in the specialty.” 8 C.F.R. § 204.5(k)(2). The beneficiary’s 65 days of progressive experience after meeting the degree requirements are no different from her progressive experience after the diploma date. Any contrary result undermines Congress’ intent behind “advanced degree” in the statute.

For the reasons stated above, the AAO should reject a narrow interpretation of the term “degree” as the diploma date and require adjudicators to accept other evidence, which by a preponderance of the evidence, shows that the foreign national has the degree.

Respectfully submitted this 24th day of February, 2017.



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Exhibit Index

Exhibit A

Description: List of the House and Senate Conference Managers, Committee of Conference for S. 358 (IMMACT90).

Submitted to demonstrate that the conference managers represented a wide spectrum on immigration.

Exhibit A

(a) USE OF FUND.-The Secretary of Labor shall provide for grants to States to provide educational assistance and training for United States workers. The Secretary shall consult with the Secretary of Education in making grants under this section.

(b) ALLOCATION OF FUNDS.-Within the purposes described in subsection (a), funds in the account used under this section shall be allocated among the States based on a formula, established jointly by the Secretaries of Labor and Education, that takes into consideration-

(1) the location of foreign workers admitted into the United States,

(2) the location of individuals in the United States requiring and desiring the educational assistance and training for which the funds can be applied, and

(3) the location of unemployed and underemployed United States workers.

(c) DISBURSEMENT TO STATES.-

(1) Within the purposes and allocations established under this section, disbursements shall be made to the States, in accordance with grant applications submitted to and approved jointly by the Secretaries of Labor and Education, to be applied in a manner consistent with the guidelines established by such Secretaries in consultation with the States. In applying such grants, the States shall consider providing funding to joint labor-management trust funds and other such non-profit organizations which have demonstrated capability and experience in directly training and educating workers.

(2) Not more than 5 percent of the funds disbursed to any State under this section may be used for administrative expenses.

(d) LIMITATION ON FEDERAL OVERHEAD.-The Secretaries shall provide that not more than 2 percent of the amount of funds disbursed to States under this section may be used by the Federal Government in the administration of this section.

(e) ANNUAL REPORT.-The Secretary of Labor shall report annually to the Congress on the grants to States provided under this section.

(f) STATE DEFINED.-In this section, the term "State" has the meaning given such term in section 101(a)(36) of the Immigration and Nationality Act.

And the House agree to the same.

That the House recede from its amendment to the title of the bill.

From the Committee on the Judiciary, for consideration of the Senate bill, and the House amendment, and modifications committed to conference.

JACK BROOKS,

BRUCE A. MORRISON,

BARNEY FRANKS,

CHARLES E. SCHUMER,

HOWARD L. BERMAN,

R.L. MAZZOLI,

HAMILTON FISH,

LAMAR SMITH,

BILL MCCOLLUM.

From the Committee on Education and Labor, for consideration of Section 113 and title V of the Senate Bill, and sections 103, 104, 106, 112-113, 311-312, 314(e), and 315 of the House amendment, and modifications committed to conference:

WILLIAM D. FORD,

GEORGE MILLER,

TOM SAWYER.

From the Committee on Ways and Means, for consideration of section 110 of the Senate bill, and modification committed to conference:

DAN ROSTENKOWSKI,

PETE STARKS,

ANDREW JACOBS, Jr.,

BILL ARCHER,

GUY VANDER JAGT.

From the Committee on Post Office and Civil Service, for consideration of title IV of the Senate bill, and modification committed to conference:

WILLIAM D. FORD,

TOM SAWYER,

BEN GILMAN,

JOHN J. MOAKELY.

Mr. Moakley is appointed as a conferee for consideration of section 324 of the House amendment, and modification committed to conference.

Managers on the Part of the House.

EDWARD M. KENNEDY,

PAUL SIMON,

AL SIMPSON,

STROM THURMOND.

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 358) to amend the Immigration and Nationality Act to change the level, and