

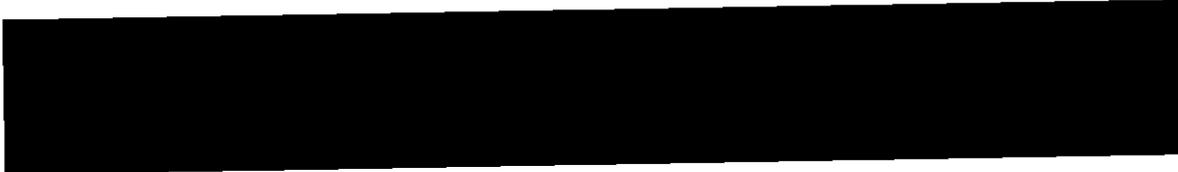


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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 99 203 51268 Office: CALIFORNIA SERVICE CENTER Date: 7 JAN 2002

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a tour operator. It seeks to employ the beneficiary permanently as a manager, advertising. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's filing date.

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 the granting of 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 or seasonal nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the petition's filing date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 6, 1998.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of manager, advertising required a Master's degree or equivalent in Advertising.

The director denied the petition noting that the beneficiary had the equivalent of a Bachelor's degree in Political Science, but did not have the required Master's degree in Advertising.

On appeal, counsel argues that the beneficiary fully meets the requirements as stated in 8 C.F.R. 204.5(l)(3)(ii)(B) for a skilled worker. Counsel further argues that:

As drafted, both the I-140 Petition ("Form I-140") and the California Service Center Optional Flagging Checklist for Employment-Based Petitions ("Checklist") encompass both "skilled workers" and "professionals" within a single category. Although Section 203(b)(#)(A) of the Immigration and Nationality Act ("INA") recognizes three

separate subcategories (skilled workers, professionals and other workers), the Form I-140 and Checklist make only a twofold distinction: skilled workers **and** professionals, on the one hand, as opposed to "other workers" or EW3, on the other.

Counsel's argument is not persuasive. As noted by the director:

The petitioner submitted an evaluation report dated July 8, 1999 from the Foundation for International Services, Inc. In that evaluation report, it also stated as follows: In summary, it is the judgement of the Foundation that [the beneficiary] has the equivalent of a bachelor's degree in political science from an accredited college or university in the United States and has, as a result of his educational background, professional training and employment experiences (three years of experience equals one year university-level credit), has an educational background equivalent of an individual with a bachelor's degree in marketing and management from a accredited college or university in the United States. Furthermore, as a result of his having the equivalent of a U.S. baccalaureate degree followed by at least five years of progressive experience in the specialty, [the beneficiary] also has an education background the equivalent of an individual with a master's degree in marketing from an accredited college or university in the United States.

Counsel states that the petitioner has submitted documentation to establish that the beneficiary had a combination of education and experience to meet the requirements set forth in the Form ETA 750 prior to the filing date of the petition. The three year experience for one year of education rule used in the evaluation, however, is applicable to nonimmigrant H1B petitions, not immigrant petitions. The beneficiary is required to have a master's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

The labor certification specifically requires a Master's degree in advertising; it does not state that a Bachelor's degree in a related field will satisfy the requirement. The issue here is whether the beneficiary met all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a Master's degree in Advertising on January 6, 1998. Therefore, the petition may not be approved.

Additionally, it is noted that the petitioner has not established that it had the ability to pay the proffered wage. As the appeal will be dismissed on the grounds discussed, this issue need not be examined further.

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 not sustained that burden.

ORDER: The appeal is dismissed.