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Immigration and Naturalization Service

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



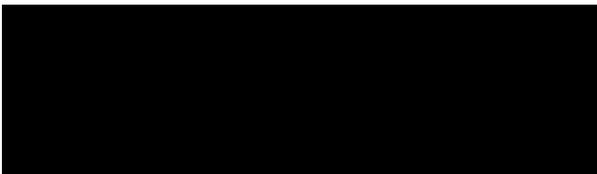
File: [Redacted] Office: NEBRASKA SERVICE CENTER

Date: OCT 29 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 that 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 that 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 that 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the Director, Nebraska Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed and the petition will be denied.

The petitioner is a manufacturer and distributor of frozen novelties. It seeks to employ the beneficiary permanently in the United States as a managing director (C.E.O.). 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 priority 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 priority date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is August 25, 1998.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of managing director (C.E.O.) required a Master's degree or equivalent in business administration and five years of experience in the job offered.

The director denied the petition noting that the beneficiary did not have the required Master's degree in business administration.

On motion, counsel reiterates his argument that "as a result of his lengthy and distinguished career as a manager and an executive in the dairy business, [the beneficiary] possesses the equivalent of a master's degree in business administration." Counsel concludes

that the beneficiary is qualified for immigrant classification as a skilled worker, pursuant to § 203(b)(3)(A)(i) of the Act.

Counsel's assertions are not persuasive. The labor certification was certified for a professional and requires a candidate with a specific degree. To determine whether a beneficiary is eligible for a third preference immigrant visa, the Service must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position; the Service 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 Madany v. Smith, 696 F.2d 1008 (D.C. Cir. 1983); K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006 (9th Cir. Cal. 1983); Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey, 661 F.2d 1 (1st Cir. 1981).

Despite counsel's protests, the director properly interpreted the Form ETA-750 as stating that the position requires a master's degree or a foreign equivalent degree. In the initial filing, counsel clearly indicated that the petitioner was seeking to classify the beneficiary as a professional under § 203(b)(3)(A)(ii) of the Act.

In the context of an immigrant petition for a professional, the term "equivalent" connotes "a foreign equivalent degree." See 8 CFR 204.5(l)(3)(ii)(B). Because the petitioner was clearly seeking the beneficiary as a professional, and because the labor certification failed to state otherwise, the director properly interpreted "master or equivalent" as requiring a master's degree or a foreign equivalent degree. Had the director interpreted the labor certification as requiring a "master's degree or the equivalent of a master's degree," the beneficiary would have been statutorily ineligible, as neither the statute nor the regulations provide for the consideration of a degree equivalency in an immigrant petition for a professional.

A degree equivalency, whether based on work experience or a combination of lesser degrees, will not suffice to qualify a beneficiary as an immigrant under §§ 203(b)(3)(A)(i) or (ii) of the Act when the labor certification requires a specific degree. Neither the statute nor the regulations allow for the consideration of a "work equivalency" of a master's degree for this immigrant classification.

The petitioner has not established that the beneficiary had a Master's degree in business administration on August 25, 1998. Therefore, the petition may not be approved.



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 Associate Commissioner's decision of April 16, 2001 is affirmed. The petition is denied.