



B6

U.S. Department of Justice  
Immigration and Naturalization Service

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy



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

File: EAC 01 166 51002 Office: VERMONT SERVICE CENTER

Date: OCT 30 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 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 immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a multi-lingual Asia advertising firm. It seeks to employ the beneficiary as a production manager. Accordingly, the petitioner filed the current petition to classify the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(ii). The director determined that the beneficiary did not possess the required educational background, as stated on the Form ETA-750, Application for Alien Employment Certification.

On appeal, counsel for the petitioner states that the director misinterpreted the law and facts in finding that the beneficiary did not possess the required level of education. Counsel further asserts that the beneficiary qualifies for the visa classification as a skilled worker.

Section 203(b)(3) of the Act states, in pertinent part:

(A) In general. - Visas shall be made available . . . to the following classes of aliens who are not described in paragraph (2):

(i) Skilled workers. - Qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least 2 years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

(ii) Professionals. - Qualified immigrants who hold baccalaureate degrees and who are members of the professions.

Section 101(a)(32) of the Act states that "[t]he term 'profession' shall include but not be limited to architects, *engineers*, lawyers, physicians, surgeons, and teachers . . . ." (Emphasis added.)

8 CFR 204.5(1)(2) defines the terms "professional" and "skilled worker" as follows:

*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.

*Skilled worker* means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision.

Furthermore, 8 CFR 204.5(1)(3)(ii)(B) and (C) state:

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(C) *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. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

As required by 8 CFR 204.5(1)(3)(i), the petitioner submitted an individual labor certification, Form ETA-750, which has been endorsed by the Department of Labor. At block 14, the labor certification requires four years of college and states that a Bachelor of Arts degree in Graphic Design is the minimum level of education required for a worker to perform the job duties in a satisfactory manner. The labor certification specifically requires a degree with a major in Graphic Design. The labor certification does not state that any lesser level of education will satisfy the requirement.

The director denied the petition, noting that the beneficiary did not possess a United States bachelor's degree or a foreign equivalent degree.

On appeal, counsel argues that "the cover letter to the petition clearly states that the petitioner is applying for the beneficiary as a 'skilled worker'. Under the Immigration and Nationality Act, a skilled worker is not required to have a baccalaureate degree." Counsel's assertion is not persuasive. The labor certification was certified for a graphic designer 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 bachelor's degree.

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 bachelor's degree for this immigrant classification. In the amendment to the labor certification, the petitioner stated that the beneficiary's "combined education and progressively more responsible work experience have been determined to be the equivalent to the completion of a U.S. bachelor's degree in graphic design." In claiming this, the petitioner appears to paraphrase and rely on the nonimmigrant regulations at 8 CFR 214.2(h)(4)(iii)(D)(5), which provide that progressively responsible work experience may be substituted for a year of education in a nonimmigrant H-1B petition. For this immigrant classification, a beneficiary must possess an actual baccalaureate degree when the labor certification requires a bachelor's degree as the required level of education.

The burden of proving eligibility for the benefit sought remains entirely 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.