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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy.

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

File: EAC 01 062 54318 Office: VERMONT SERVICE CENTER Date: 04 SEP 2002

IN RE: Petitioner:
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:

[redacted]

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

Ellen E Crawford for

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference 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 luxury hotel. It seeks to employ the beneficiary permanently as a benefits manager. 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.

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 July 31, 2000.

The Application for Alien Employment Certification (Form ETA 750) indicated that the position of benefits manager required a Bachelor's degree in Hospitality Management or equivalent, and one year of experience in the related occupation of Hotel Manager.

The director determined that the petitioner had not established that the beneficiary had the required Bachelor's degree and denied the petition.

On appeal, counsel asserts that the beneficiary did meet the minimum qualifications of the labor certification, as the beneficiary had the "equivalent" of a bachelor's degree. Counsel observes that the beneficiary was granted status as an H-1B nonimmigrant based on the equivalent of a bachelor's degree. Counsel also notes that the director incorrectly reviewed the petition as requesting classification as a professional, pursuant to section 203(b)(3)(A)(ii), rather than a skilled worker.

Counsel's assertion is not persuasive. 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).

The record contains an educational evaluation from the Foundation for International Services, Inc., which states that the beneficiary has, as a result of her educational background, professional training and employment experiences, an educational background the equivalent of an individual with a bachelor's degree in Hotel Management from an accredited university in the United States.

Despite counsel's arguments, the Service will not accept a claim of degree equivalency when a labor certification plainly and expressly requires a candidate with a specific degree. As noted previously, the labor certification, at block 14, specifically requires a Bachelor's degree in Hospitality Management or equivalent as the minimum level of education needed to perform the job duties. The labor certification does not provide for a degree equivalent as the minimum level of education, regardless of whether the equivalency is based on work experience, training, or a combination of lesser degrees.

Counsel incorrectly suggests on appeal that this petition must be approved because the beneficiary was previously granted nonimmigrant classification as an H-1B nonimmigrant based on a degree equivalency. 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 section 203(b)(3)(A)(i) or (ii) of the Act when the labor certification requires a specific degree. On the other hand, the nonimmigrant regulations at 8 CFR 214.2(h)(4)(iii)(D)(5) provide that progressively responsible work experience may be substituted for a year of education in a nonimmigrant H-1B petition. Neither the statute nor the regulations allow for the "equivalency" of a bachelor's degree for this immigrant classification. 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.

Finally, the fact that the director reviewed the petition as requesting classification as a professional, pursuant to section 203(b)(3)(A)(ii), is not fatal to his decision. Regardless of whether a petitioner files as a skilled worker under section 203(b)(3)(A)(i) of the Act, or as a professional under section 203(b)(3)(A)(ii) of the Act, the petitioner must establish that the

beneficiary possessed the required training, education, and experience as of the date that the request for labor certification was accepted for processing by the Department of Labor.

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 bachelor's degree on July 31, 2000. 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 appeal is dismissed.