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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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File:  Office: TEXAS SERVICE CENTER

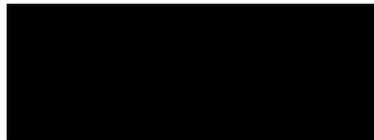
Date: 19 SEP 2002

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 preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner provides business solutions and services to petrochemical companies. It seeks to employ the beneficiary permanently as an information technology senior consultant. 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 priority date. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 11, 2000.

As required by 8 CFR 204.5(k)(4), the petitioner has submitted an individual labor certification, Form ETA-750, which has been endorsed by the Department of Labor. The ETA-750 reflects the following:

Item 14: Education - Master* or equivalent in
Computer Science, MIS, Electrical
Engineering or related field
Experience - 1 year in the job offered or
1 year in the related occupation of
information technology

Item 15: *Master's degree plus (+) one year of
experience in the field of information
technology OR Bachelor's degree plus (+)
three years of experience in the field of
information technology * * as determined by
properly evaluated credentials.

The labor certification specifically requires a master's degree and one year of experience in the job offered as the minimum level of education and experience required to perform satisfactorily the job duties of the proffered position. Through the use of asterisks, the petitioner has indicated at block 15 that it will accept a bachelor's degree and three years of experience as the equivalent of the required master's degree and one year of experience.

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

On appeal, counsel for the petitioner concedes that the beneficiary does not qualify as a professional as he does not have a bachelor's degree or a foreign equivalent degree. However, counsel asserts that the director improperly interpreted the minimum educational requirements on the labor certification as a bachelor's degree or an "equivalent foreign degree," instead of a bachelor's degree or "the equivalent of a bachelor's degree." Counsel insists that the beneficiary's education and work experience have been determined to be the equivalent of a bachelor's degree in Mechanical Engineering. 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 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).

The record contains an educational evaluation from Professor James P. Ostrowski from the University of Pennsylvania, which states that the beneficiary has completed the requirements for completion of two years of academic study toward a Bachelor of Science degree in Mechanical Engineering, and has, as a result of his six years employment experience and training, an educational background the equivalent of an individual with a bachelor's degree in Mechanical Engineering from an accredited 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 bachelor'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 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 or equivalent in Mechanical Engineering on January 11, 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.