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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: WAC 00 270 53416 Office: CALIFORNIA SERVICE CENTER

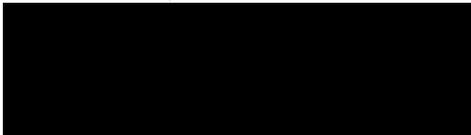
Date: 26 SEP 2002

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, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The 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 an electronic components distribution company. It seeks to employ the beneficiary permanently as a system analyst. Accordingly, the petitioner filed the current petition to classify the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i). The director denied the petition after determining that, at the time of filing, the beneficiary did not possess the required educational background, as stated on the Form ETA-750, Application for Alien Employment Certification.

On appeal, counsel states that the director misinterpreted the law and facts in finding that the beneficiary did not possess the required level of education.

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.

Furthermore, 8 CFR 204.5(1)(3)(ii) states, in pertinent part:

(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.

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 states that the minimum qualifications required for the position are a Bachelor of Science degree in Computer Science.

The labor certification does not state that the equivalent of a bachelor's degree or any other level of education will satisfy the requirement.

To be eligible for approval, a beneficiary must have all the training, education, and experience specified on the labor certification as of the date that the request for labor certification was accepted for processing by the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Education and experience gained subsequent to the priority date may not be considered in support of the petition, since to do so would result in according the beneficiary a priority date for visa issuance at a time when he is not qualified to perform the duties sought by the petitioner. Matter of Katigbak, 14 I&N Dec. 45 (Reg. Comm. 1971).

In the present petition, the filing date of the labor certification is June 27, 2000. The beneficiary possesses the equivalent of three years of university level credit in business.

The director determined that the petitioner had not established that the beneficiary had the required Bachelor's degree as of the filing date of the petition 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 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 assertions are 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).

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 of Science degree in Computer Science 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 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.