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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



File: 
WAC 03 034 53215

Office: CALIFORNIA SERVICE CENTER Date:

DEC 13 2003

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)

ON BEHALF OF PETITIONER:



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 Citizenship and Immigration Services (CIS) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a financial consulting and insurance services firm. It seeks to employ the beneficiary permanently in the United States as an assistant marketing manager. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

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.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. It is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petition's priority date in this instance is July 14, 1998. The beneficiary's salary as stated on the labor certification is \$36,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage, of personnel

records, and of educational qualifications, as set forth in Form ETA 750. In a request for evidence (RFE) dated January 10, 2003, the director requested additional evidence to establish the petitioner's ability to pay the proffered wage from the priority date to the present. Also, the RFE exacted evidence of a baccalaureate degree or the foreign equivalent of a baccalaureate degree, of the institution's transcript of courses, credits, and the degree bestowed, and of a photocopy of the degree. The RFE required that the evaluation assess equivalency of educational qualifications with regard to whether the beneficiary obtained the education in the United States or a foreign country.

In response to the RFE, counsel submitted an evaluation from the American Evaluation Institute (the AEI report). This report relied on the beneficiary's "Bachelor of Science in Electrical and Electronics Engineering" and just six (6) years of experience as an entrepreneur in a very successful business. Counsel, too, argued, in a brief dated March 20, 2003 (the RFE brief), that the AEI report documents the equivalent of a Bachelor's Degree in Business Administration, based on the experience, plus more than five (5) years. These, it was said, more than satisfy the two (2) years of experience in the job offered or a related occupation, further required by the Form ETA 750.

The director considered the "Full Technological Certificate of the second class with the title Licentiate of Electrical Engineering" (the certificate) from the Victoria Jubilee Technical Institute (Institute) under the altered date of June 1975. The director concluded that the beneficiary's degree equivalency was mainly based on work experience, rather than formal education, determined that the Form ETA 750 and regulations did not provide for the substitution of experience for education, and denied the petition.

On appeal, counsel submits a brief. Counsel argues that the combination of the beneficiary's formal education and experience justify the finding of the equivalent of a Bachelor's Degree in Business Administration.

Counsel states on appeal:

The employer by adding the word "equivalent" intended the requirements to be a Bachelor's Degree in Business Administration or an equivalency by way of a Foreign Degree or a combination of education and experience...

The petitioner amended the Form ETA 750, in block 14, to read "College Degree Required: Bachelors Degree" and, also, "Major

Field of Study: General [stricken] Bus. Adm. [inserted]." The full amendment, as filed August 28, 2002, stated "Business Administration or equivalent" in the part of the Education block for the major field of study only. Contrary to counsel's contention, the Form ETA 750, in block 14, attached equivalence to the major field of study, but neither to the bachelor degree nor to the distinct training and experience qualifications.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services (CIS), formerly the Service or INS, must look to the job offer portion of the labor certification, Form ETA 750 in block 14, to determine the required qualifications for the position. CIS 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, *Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The RFE required that the petitioner present a transcript of courses, credits, and the degree bestowed from the Institute, in accord with 8 C.F.R. § 204.5(g)(2). The AEI report avers that the beneficiary had course work required to achieve the bachelor curriculum at the university level, but does not offer the primary evidence, the transcript, or show that it is unavailable. Where the petitioner is notified and has a reasonable opportunity to address the deficiency of proof, evidence submitted on appeal will not be considered for any purpose, and the appeal will be adjudicated based on the record of proceedings before CIS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

Counsel next contends in support of the AEI report that:

[CIS] regulations also provide for H1B purposes, 3 years of experience may be converted to 1 year of education for purposes of establishing a Bachelors Degree Equivalency to qualify an applicant for an H1B professional position. The Immigration case history is replete with precedent decisions upholding the equivalency provisions of the law. . . .

The AEI report states in its evaluation that:

The education of [the beneficiary], based on certificates, work experience, and transcripts[,] is equivalent to an Accredited American Bachelor of Science in Business Administration Degree. This

educational program and work experience is equivalent to a total of One Hundred Twenty-six American accredited college or university credits.

The petitioner has not indicated, however, that a combination of education and experience can be accepted as meeting the minimum educational requirements, as stated on the labor certification. Therefore, the combination of education and experience may not be accepted in lieu of education.

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. The Form ETA 750 required that the beneficiary have a bachelor degree. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, and, indeed, the amendment left the qualification of simply a bachelor degree untouched, the director's decision to deny the petition must be affirmed.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Counsel, lastly, affirms the petitioner's confidence in the choice of AEI to evaluate the combination of education and experience. The AEI report is moot, since the Form ETA 750, block 14, did not authorize the use of training and experience, except for two (2) years of experience in the job offered or the related field of sales and administration.

The Form ETA 750, in block 14, indicated that the occupation of sales manager, titled in block 9 as assistant marketing manager, required a bachelor degree. Counsel and the AEI report claim a "Bachelor of Science in Electrical and Electronics Engineering" plus experience. The institute, however, conferred only the certificate.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence

pointing to where the truth, in fact, lies, will not suffice.

Moreover, the certificate does not, in the absence of transcripts, document a bachelor degree with four (4) years of college course work, as required by the Form ETA 750. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner has not established that the beneficiary had a bachelor degree at the priority date. Therefore, the petitioner has not overcome this portion of the director's decision.

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 met that burden.

ORDER: The appeal is dismissed.