

PUBLIC COPY

B6

U.S. Department of Homeland Security

Citizenship and Immigration Services

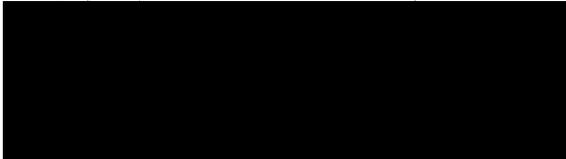
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE

CIS. AAO, 20 Mass, 3042

425 I Street, N.W.

Washington, DC 20536



File: WAC 01 280 58438

Office: CALIFORNIA SERVICE CENTER

Date: DEC 16 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:



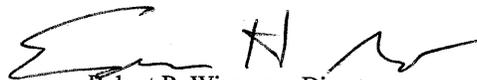
INSTRUCTIONS:

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 distributor of steel, aluminum, and tubing. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the Immigrant Petition for Alien Worker (I-140 or petition) with nine (9) attachments (tabs) 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.

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. 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). In this case, the priority date is February 28, 1998.

Form ETA 750 is an integral part of the I-140, but the issuance of a labor certification does not mandate the approval of the relating I-140. The Form ETA 750, in block 14 and block 15 of Part A, details the minimum education, training, and experience to perform the job. It specified a four (4) year bachelor's degree with a major field in computer science or computer engineering or equivalent. It required, separately, three (3) years of experience in the job offered or the related occupation of development and enhancement programming for large-scale industrial-commercial software packages. Finally, special requirements, in Block 15 of the ETA 750, included the command of DIBOL programming language and fluency in VAX/VMS DCL commands and procedures.

The director had denied, on April 30, 2001, an I-140 for the beneficiary based on the same Form ETA 750 (first decision). The petitioner filed a new I-140 on September 10, 2001. The director

observed that a bachelor's degree in computer science or computer engineering was a minimum qualification for the position and that another degree, in this case, history, did not comply with the Form ETA 750 for purposes of an immigrant visa. The director again denied the petition in a decision dated February 27, 2002 (second decision).

Counsel tabulates nine (9) items of evidence on appeal and states that "or equivalent," as to a major field of study, includes experience, and, thus, the degree is not limited to the stated major fields of study or four (4) year duration. The letter dated May 29, 2001 (company letter), tab 3, and the summary dated December 21, 2001 (counsel's letter), tab 7, inject company policy and industry practice. Counsel asserts that they control the interpretation of the Form ETA 750 and mandate the substitution of experience in lieu of education. Counsel cites American Immigration Lawyers Association (AILA) Notes, e. Equivalency, page 1 of 1, dated May 2001 (AILA notes) as authority for this proposition as a binding policy directive (tab 1, 2).

Counsel further justifies the rule of company policy and industry practice by reference to its own Form 10K filed as of March 31, 2000 with the Securities and Exchange Commission, tab 9, and to the *Occupational Outlook Handbook* of the Department of Labor. This reliance is misplaced.

The Citizenship and Immigration Services (CIS), formerly the Service or INS, simply responded in the AILA notes:

If there are cases where the skilled worker classification is not being considered even though there are provisions for it on the ETA-750, please fax a statement explaining the situation [as directed].

It should be noted that if the ETA-750 . . . does not specify equivalency, then no consideration will be given for classification as a skilled worker.

The AILA notes and response authorize consideration as a skilled worker. The director did that. CIS's response did not broadly direct the substitution of either experience or company policy and industry practice in contravention of any Form ETA 750 and did not open any inquiry along that line. Counsel, however, parries, without citation, "It is the employer, and not [CIS], who defines minimum requirements for any given position."

The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I & N Dec. 503, 506 (BIA 1980).

Counsel bases the definition of the minimum requirements for a degree on an evaluation from Foundation for International Services, Inc. (FIS), tab 8. FIS states that the beneficiary obtained, in India, various diplomas and certificates and the three (3) year degree of Bachelor of Arts (Honours Course) (10+2+3 Scheme). FIS concludes that the beneficiary has, as a result of progressively more responsible employment experiences (3 years of experience=1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

The Form ETA 750 has not indicated, however, that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification. The Form ETA 750, Block 14, Education, [*] allows only an equivalent major field of study within the educational component. Counsel does not argue that history is. The Form ETA 750 must prevail over the company letter and counsel's letter. Hence, the combination of education and experience may not be accepted in lieu of education.

The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. The Form ETA 750 did not incorporate the contents of tabs 3, 7, and 9. Since that was not done, the director's decision to deny the petition must be affirmed.

In evaluating the beneficiary's qualifications, CIS 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, *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 Form ETA 750 in this record specified a four (4) year degree in respect to education. FIS evaluates the (10+2+3) scheme for three (3) years. A certificate from a branch of the Goethe Institute in New Delhi, India represents eight (8) semester hours of university level credit in German language studies from an accredited college or university in the United States. The record supports no claim that the German language hours or any further academic work equaled either a four (4) year degree or

showed a major field of study in computer science, computer engineering or the equivalent.

Counsel asserts, generally:

Under the proper legal doctrine, an employer who allows American applicants, and not just the alien, to use experience equivalency, does not violate any legal principle or any provision relating to the adjudication of I-140 petitions. (See, for example, SYSCORP, 89 INA 12 and other cases cited in [the company letter].

The contention itself falls short of any authority to add, to the terms of this Form ETA 750, any equivalence for an element other than the major field of study. Finally, the citations include no published decision concerning equivalence. While 8 C.F.R. § 103.3(c) provides that the CIS's precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

The petitioner has established neither that the beneficiary holds a four (4) year bachelor's degree nor that the beneficiary's degree reflects a major field of study in "computer science, computer engineering or equivalent." The petitioner has not overcome this portion of the second 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.