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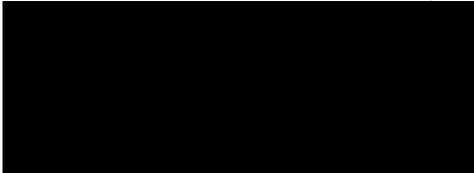
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U.S. Department of Homeland Security

Citizenship and Immigration Services

*B6*

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



File: WAC 01 284 54232

Office: CALIFORNIA SERVICE CENTER Date:

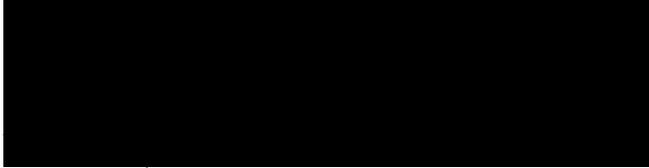
**DEC 17 2003**

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 an intermediate care facility for developmentally disabled children. It seeks to employ the beneficiary permanently in the United States as a residence supervisor. 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.

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. 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). In this instance, the priority date is February 16, 2001.

Counsel initially submitted insufficient evidence, both of the petitioner's ability to pay the proffered wage at the priority date, and continuing until the beneficiary obtains lawful permanent residence, and of the conferral of any degree on the beneficiary. In a request for evidence (RFE) dated February 21, 2002, the director exacted the petitioner's corporate tax return or audited financial statements, as well as evidence of education in transcripts and a copy of the degree conferred.

Counsel submitted two (2) individuals' Form 1040 for 2000 and asserted that the petitioner was not incorporated. Schedule C reported no wages paid, although the Immigrant Petition for Alien Worker (I-140) stated that the petitioner had 20 employees. The response to the RFE did not include a copy of any degree conferred

on the beneficiary.

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and did not include a copy of any degree and, thus, denied the petition.

On appeal, counsel, despite assertions in response to the RFE, now produces the corporate petitioner's 2000 and 2001 Form 1120, U.S. Corporation Income Tax Returns. The pertinent return for 2001 reports taxable income before net operating loss deduction and special deductions of \$49,851, equal to or greater than the proffered wage. The petitioner has satisfied proof of the ability to pay the proffered wage at the priority date.

The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. § 103.2(b)(1) and (12).

The remaining issue hinges on whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the priority date, the day it was filed with the Department of Labor (DOL). The Form ETA 750, in block 14, accumulated four (4) educational qualifications for the position of residence supervisor. These were six (6) years of grade school, four (4) years of high school, two (2) years of college, and a degree of bachelor of science. Block 14 exacted no training or experience, and block 15, for special requirements, was blank.

Counsel selectively states in the brief on appeal that:

Item #14 of the [Form ETA 750] indicated the minimum educational requirement as 2 years. This is the true intention of the Petitioner. Please see Exhibit 1 for Petitioner's attestation. This was made clear to the lawyer who prepared the Form ETA 750. The requirement for bachelor's degree was a clerical error.

Provisions of 8 C.F.R. 103.2(b)(11) mandate:

(11) *Submission of evidence in response to a [CIS] request.* All evidence submitted in response to a [CIS] request must be submitted at one time. The submission

of only some of the requested evidence will be considered a request for a decision based on the record.

(12) *Effect where evidence submitted in response to a request does not establish eligibility at the time of filing.* An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish eligibility at the time the application or petition was filed. . . .

The original Form ETA 750 was validated as of the priority date, and the AAO has no authority to use Exhibit 1 on appeal to revise it. 20 C.F.R. § 656.30(b)(1). The Form ETA 750 required the degree, and the petitioner must establish the beneficiary's eligibility at the priority date.

Counsel concedes on appeal that:

According to the website of O-Net, the Job Zone for this position is Job Zone 3. It states that "most occupations in this job zone require training in vocational schools, related on-the-job experience or an associate degree. Some may require a bachelor's degree."

To determine whether a beneficiary is eligible for a third preference immigrant visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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. 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).

Counsel's venture to a website goes far beyond the Form ETA 750. Strikingly, part of counsel's emphasis concedes that a bachelor's degree may be required.

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).

Counsel continues that:

Any contraction and vagueness in the educational requirement would have been resolved if the whole application was considered. . . . It would have been futile to require a bachelor's degree knowing that this can be considered by the DOL as restrictive or that the beneficiary would [not] qualify considering that he has no college degree.

Counsel's argument is not persuasive. It ascribes the authority to Citizenship and Immigration Services (CIS) to interpret the intentions of the DOL, to alter the Form ETA 750 on such hearsay as exhibit 1 on appeal, and to search the Form ETA 750 in these quests. Counsel provides a copy of a decision, said to assign special liberty to pursue the meaning when asterisks appear. The appeal now before the AAO, however, involves a Form ETA 750 with no asterisk. It plainly accumulated four (4) educational criteria and unambiguously required them all.

Moreover, no published citation accompanies the decision, and the record of proceedings of that decision is not before the AAO. While 8 C.F.R. § 103.3(c) provides that CIS 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).

On appeal, counsel, alternatively, suggests that the beneficiary's three (3) years in college met the petitioner's educational requirement for two (2) years of college course work, though the brief concedes that:

The Beneficiary's college transcript was evaluated by the International Education Research Foundation which issued an equivalency report that his education is equivalent to 55½ [sic] semester units of undergraduate course work in regionally accredited US college[s] and universities.

The evaluation from International Educational Research Foundation, Inc. (IERFI evaluation) found 54.5 semester units in the Feati University transcript of the beneficiary's undergraduate course work (Feati transcript). The IERFI evaluation conspicuously omits any verification of two (2) years of college course work.

Even if some legerdemain waives the bachelor's degree off the Form

ETA 750, block 14 separately requires two (2) years of college course work, equal to 60 semester hours. The beneficiary does not meet even counsel's optional qualification.

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).

The RFE exacted evidence of courses taken and credits received. 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).

After a review of the Form ETA 750, Feati transcript, IERFI evaluation, and counsel's representations, it is concluded that the petitioner has not established that the beneficiary met all of the educational qualifications, as stated by the petitioner in block 14 of the Form ETA 750. Further investigation of the ability to pay the proffered wage, continuing until the beneficiary obtains lawful permanent residence, is moot.

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.