

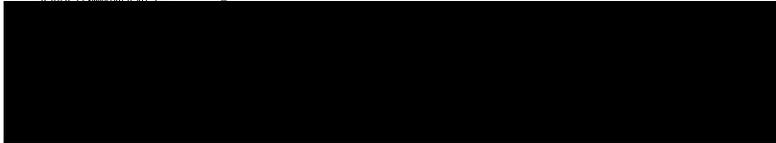


B6

U.S. Department of Justice
Immigration and Naturalization Service

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
U.I.L.B. 3rd Floor
Washington, D.C. 20536



File: EAC 01 136 54092 Office: VERMONT SERVICE CENTER Date:

JAN 29 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)

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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a retail firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. 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.

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).

Eligibility in this matter turns on whether the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the labor certification as of the petition's priority date, which 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). Here, the petition's priority date is November 13, 2000.

The Form ETA 750, in block 14, detailed the minimum education, training, and experience to perform the job. It specified a four (4) year bachelor degree with a major in "CS;MIS;Science/Bus" and three (3) years of experience in the job offered.

Counsel initially submitted insufficient evidence that the beneficiary met the requirements for the position as stated in Form ETA 750. In a request for evidence (herein RFE) of September 20, 2001, the director required an evaluation of education

reflecting formal education only, collegiate training as post-secondary or not, a detailed explanation of the material evaluated, and the qualifications of the evaluator. In response to the RFE, the petitioner submitted the Evaluation Report dated October 13, 1997 from Foundation for International Services, Inc. and attachments (FIS report). The director noted that the applicable regulation requires initial evidence of a foreign equivalent degree and that the Form ETA 750 did not provide for experience in place of the required degree. See 8 C.F.R. 204.5(l)(3)(ii)(C). The director determined that the petitioner did not establish that the beneficiary met the qualifications for the position as stated in block 14 of the Form ETA 750 and denied the petition.

Counsel states on appeal, "The beneficiary qualifies under the petition Ms Purov has the equivalent of Bachelor Degree and this satisfies 8 C.F.R. 204.5(l)(g)(ii)(c)." (Sic, but see 8 C.F.R. 204.5(l)(3)(ii)(C), *supra*, and 8 C.F.R. 204.5(l)(2)).

Counsel's brief interprets the FIS report to the effect that:

... This evaluation on paragraph six states that [the beneficiary] has the equivalent of a degree of electronics engineering technology from an accredited community college and as a result of her educational background, professional training, and employment experiences an educational background equivalent to a bachelors degree in computer science from the University (sic) in the United States. This is a degree as envisioned by the regulation.

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. The Service 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, 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, 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 brief misconstrues a Service memorandum of March 20, 2000, Educational and Experience Requirements for Employment-Based

Second Preference (EB-2) Immigrants. As counsel notes, it involves a different regulation. The memorandum considers hypothetical cases about advanced degrees, but counsel points to no published citation relating any of them to the instant petition. While 8 CFR 103.3(c) provides that Service precedent decisions are binding on all Service 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).

Counsel gives no citation, and none supports, his proposition that:

It should be noted that the [Service] takes the position that from employment two cases, equivalency and experience are adequate to satisfy the degree requirement.... It would not make sense (sic) to allow this for an EB-2 case and deny it the use on EB-3.

The Service must look to the requirements of the Form ETA 750. The FIS report established that the beneficiary had only an Associate degree and no bachelor or foreign equivalent degree as of the priority date. Therefore, the petitioner has not overcome this portion of the director's decision.

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 beneficiary was 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 Form 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 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.