

PUBLIC COPY

U.S. Department of Homeland Security

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

Bureau of Citizenship and Immigration Services

B6

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536



File: WAC 01 283 51458

Office: California Service Center

Date: **JUL 16 2003**

IN RE: Petitioner:
Beneficiary:



Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to section 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 the Bureau of Citizenship and Immigration Services (Bureau) 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.

Aileen E. Crawford for
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 on appeal. The appeal will be dismissed.

The petitioner is a real estate investment company. It seeks to employ the beneficiary permanently in the United States as its director of marketing. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that the beneficiary has the education required by the Form ETA 750.

On appeal, counsel submits a brief.

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.

Furthermore, 8 CFR § 204.5(l)(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.

(C) *Professionals.* If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree.

Eligibility in this matter hinges on the petitioner demonstrating that the beneficiary was qualified for the proffered position on the priority date, 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 request for labor certification was accepted for processing on March 28, 2001. The labor request states that the requirements of the position include a bachelor's degree in business.

With the petition, counsel submitted no evidence pertinent to the beneficiary's education. Because the evidence submitted did not demonstrate that the beneficiary has the degree demanded by the Form ETA 750, the California Service Center, on January 24, 2002, requested evidence that the beneficiary has that degree.

In response, the petitioner submitted the report of an educational evaluator, dated April 1, 1997. That report states that the beneficiary's education and experience is the equivalent of a bachelor's degree in business administration with concentrations in marketing and finance.

On February 22, 2002, the Acting Director, California Service Center, issued a Notice of Intent to Deny in this matter. That notice implied that the petition was filed for a professional pursuant to 8 C.F.R. § 204.5(1)(3)(ii)(C) and observed that that section of law does not permit the consideration of experience in lieu of the required bachelors degree.

In response, counsel submitted a letter, dated March 7, 2002. In that letter, counsel argued that the petition clearly states that it is filed for a skilled worker pursuant to 8 C.F.R. § 204.5(1)(3)(ii)(B), and that such petitions do not necessarily require a bachelors degree.

On May 10, 2002, the Acting Director, California Service Center, denied the petition, finding that the evidence submitted did not demonstrate that the beneficiary has the requisite education. The Acting Director observed that the Form ETA 750 clearly states that the position requires a bachelors degree in business, and does not allow for work experience in lieu of that degree.

On appeal, counsel states that the petitioner's requirements for the proffered position were a baccalaureate degree or its equivalent in business. Counsel stated that the petition had been denied because the beneficiary was ineligible as a professional pursuant to 8 C.F.R. § 204.5(1)(3)(ii)(C), although the petition had actually been filed for a skilled worker pursuant to 8 C.F.R. § 204.5(1)(3)(ii)(B).

Counsel further argued that, even if analyzed as a petition for a professional pursuant to 8 C.F.R. § 204.5(1)(3)(ii)(C), the Service had previously approved an H1B non-immigrant petition for the same petitioner and beneficiary based on the same facts.

Contrary to counsel's assertion on appeal, the Form ETA 750, as approved by the Department of Labor, does not call for a bachelors degree in business or *its equivalent*. That labor certification

clearly requires a bachelors degree and does not mention any experience equivalent. For this petition to be approved, the petitioner must demonstrate that the beneficiary is eligible for the proffered position in accordance with the requirements stated on that labor certification.

Counsel's assertion that an H1B petition for the same petitioner and beneficiary was approved is inapposite. H1B petitions are for positions which ordinarily require four years of college and a bachelors degree. The regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for that education and degree. No such substitution of experience in lieu of education and a degree is sanctioned by the laws and regulations applicable to the visa category in the instant case.

In this case, the labor certification, prepared and filed by the petitioner, clearly requires a degree in business. The evidence submitted does not demonstrate that the beneficiary has such a degree. Neither the petitioner nor this office is able to amend the requirements stated on an approved labor certification in order to render a petition approvable. The petitioner has not demonstrated that the beneficiary has the requisite training shown on the labor certification. Therefore, the petition may not be approved.

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.