

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

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[Redacted]

File: LIN 99 244 53256

Office: NEBRASKA SERVICE CENTER

Date:

SEP 09 2003

IN RE: Petitioner:
Beneficiary:

[Redacted]

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:

[Redacted]

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 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and reopened on counsel's motion to reconsider. The director then issued a request for evidence (RFE) and, ultimately, denied the Immigrant Petition for Alien Worker (I-140) again. Counsel appealed this denial, and the Administrative Appeals Office (AAO) dismissed the appeal. The petition is, again, before the AAO on substituted counsel's (new counsel's) motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and AAO will be affirmed, and the petition will be denied.

The petitioner is a medical doctor and seeks to employ the beneficiary permanently in the United States as an audit clerk. 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, block 14, as of the petition's priority date. The date that the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor fixes the priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, it is January 21, 1997.

Counsel submitted, with the Form ETA 750, 37 pages of the beneficiary's transcripts of courses, and a cooperative training certificate, and translations (the baccalaureate record), from the School of Public Accounting of the Free University of Cali, Colombia (the university). Two (2) pages were the university's irregular statement and translation about, variously, eleven (11) semesters or semester hours, with no course detail, "during the Academic Period which [sic] of August to December 1990." The Academic Secretary of the School of Business executed this irregular transcript summary.

The petitioner offered the "Evaluation Report" of the Foundation for International Services, Inc., dated June 7, 1994 (FIS 1). It interpreted three and a half years of university-level credit, plus a cooperative training element (practicum report), as the equivalent of a bachelor's degree in accounting from an accredited college or university in the United States, by virtue of educational background and employment experiences.

In a decision dated April 28, 2000 (D1), the director reasoned that the Form ETA 750 required four (4) years and a bachelor's degree. Since the beneficiary had only three and a half years of education and no bachelor's degree, the director denied the petition. Counsel filed a motion to reconsider on May 13, 2000 [M1], attached a new "Evaluation Report" of FIS, post-dated May 30, 2000 [FIS 2], and said that FIS 2 was based on new documentation, without specifying it. Further, the writer of FIS 2 implied that he had just received even the record of subjects, credit hours, and grades. FIS 2 said that they justified the equivalent of a four-year bachelor's degree in accounting from an accredited college or university in the United States.

Thereupon, the director demanded in the RFE issued July 21, 2000:

Submit a copy of all the documentation that was considered on [FIS 2]. Only a copy of [FIS 2] was submitted that refers to a document from the Universidad Libre, Seccional Cali, Colombia [university] dated May 23, 2000.

Counsel responded with the baccalaureate record, for the second time. This one, however, substituted, instead of the irregular transcript summary, an improved certificate from the same official of the university, but in the capacity of Academic Secretary, Economics, Administrative, and Accounting Sciences (a legible transcript summary). The legible transcript summary said that the beneficiary attended eleven (11) semesters, "between February 1984 to December 1990 during six consecutive years," and passed her practical training during that period. It did not attest to the conferral of any degree.

In a decision dated September 7, 2002 (D2), the director acknowledged and summarized, but did not analyze, the new, legible transcript summary. D2 considered only the conflict between FIS 1 and FIS 2, and concluded that it impeached evidence of four (4) years of academic work. The director determined that the record did not establish that the beneficiary was qualified at the priority date.

Counsel appealed on October 2, 2000 and stated:

[FIS 2] included the following new documents, NOT PREVIOUSLY SUBMITTED, listed in paragraph 1 of [FIS 2]:

1. Copy of certificate from the [university] showing that [the beneficiary] completed her studies between February 1984 to December 1990 during six consecutive years; and
2. Copies of certificates with translation listing the subjects examined, including the credit hours and grade for each.

On the contrary, the baccalaureate record, counsel's item 2, clearly was previously submitted and considered in FIS 1 and in D1, as was the practicum report. 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's item 1, on appeal, referred to the university's new, legible transcript summary. In a decision dated June 19, 2001 (D3), the AAO doubted four (4) years of baccalaureate work, because of the conflict between FIS 1 and FIS 2, and questioned the conferral of the bachelor's degree. The AAO determined that the petitioner did not establish that the beneficiary had a bachelor's degree in accounting and dismissed the appeal.

In response to D3, new counsel filed a motion to reopen and reconsider [M2]. M2 offers a third report, the "Evaluation of the Credentials of [the beneficiary] for the Equivalence of a U.S. Bachelor's Degree," by one CLK [CLK3]. Counsel states that competent, objective evidence, as set forth in CLK3, supports the equivalent of a bachelor's degree in accounting, by the standards of an accredited college or university in the United States.

CLK3 evaluates the beneficiary's academic credits as 11 semesters of 15 credit hours each, where a baccalaureate requires only 8 semesters. CLK3 finds that the beneficiary has 20 accounting courses where only 12 fulfill a major.

CLK3 provides no reference of hours for a major. CLK3, evidently, considered the practicum report. It does not explain or evaluate the meaning or weight of 18 unusual entries in the baccalaureate record. A typical few of the 18 are "Mathematics 1 Validated," twice "Repeated the Semester," "Introduction to Management was Validated," "Completed Company Policy and Evaluation of Projects during the Second Academic Period of 1989," or "Passed." They do

not support 11 semesters of university level course work or verify hours of a major.

CLK3, also, went beyond academic course work and awarded credit in accord with practices at the evaluator's institution (C-OH-SU):

It should be noted that like many colleges and universities today, [C-OH-SU] offers credit for International Opportunities, Independent Study, Advance Placement, Individualized Majors, Cooperative Education and Internships.

CLK3 established no measure of credits that it attributed to the beneficiary on these bases. CLK3 did not find the conferral of any degree on the beneficiary from the baccalaureate record or otherwise.

The baccalaureate record was inconsistent with the alleged 11 semesters of course work and the completion of excess courses for a major. The beneficiary's new, legible transcript summary did not support the conferral of a baccalaureate degree from her university. The director did not err in rejecting FIS 1 or FIS 2. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The Form ETA 750, in block 14, indicated that the position of audit clerk required four (4) years of college course work, a bachelor's degree, or the equivalent, with a major in accounting, and two (2) years of experience in the job offered or the related occupation of accounting. Form ETA 750, block 15, relates only to the accrual of experience, not the conferral of a degree.

The issue is whether the beneficiary possessed a baccalaureate degree, or the equivalent, as stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The new, legible transcript summary does not confirm any award of a degree, but only a program of studies leading to one. CLK3 does not rise above it.

The RFE specially requested every document from the beneficiary's university used in her educational evaluation. The petitioner produced only the new, legible transcript summary. It has no record of the conferral of a degree. 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 Citizenship and Immigration Services (CIS), formerly the Service or INS. *Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

The I-140 referenced the petition, at once, as for a professional and for a skilled worker. Regulations in 8 C.F.R. § 204.5(l)(3)(ii) specify for the classification of a professional that:

(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 and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.

New counsel requests an alternative consideration of the petition as one for a skilled worker. D3 stated the determinative point, namely, that the beneficiary must meet all of the requirements as formulated by the petitioner in block 14 of the Form ETA 750. As a skilled worker, the beneficiary must, still, hold a foreign equivalent degree to comply with the requirements of the Form ETA 750.

Also, counsel urges that CIS should reconsider its position that a bachelor's degree, or the equivalent, means a United States bachelor's degree or the foreign academic equivalent. CIS, it is said without authority, should count experience and other factors, set forth in CLK3, as academic course work or part of a 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).

Charges of the ineffective assistance of counsel do not appear to be controlling. The provisions of 8 C.F.R. § 204.5(1)(3)(ii) impose the burden of proof that the petitioner cannot sustain.

Any appeal or motion based upon a claim of ineffective assistance of counsel requires under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988):

that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and

that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not why not.

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 motion to reopen is granted, and the previous decisions of the director and the AAO are affirmed. The petition is denied.