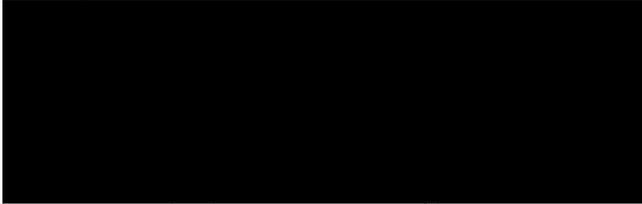


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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536



U.S. Citizenship
and Immigration
Services

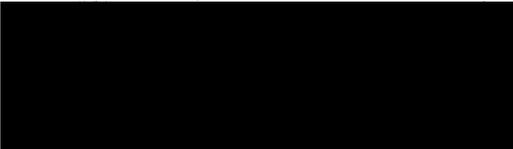


FILE: EAC 02 015 51614 Office: VERMONT SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the Vermont Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The previous decision of the AAO will be affirmed. The petition will be denied.

The petitioner is a computer software and development company. 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 approved by the Department of Labor. The director and the AAO denied the visa petition because the petitioner failed to establish that the beneficiary possessed the required educational qualifications set forth on the labor certification. Counsel submits a motion to reopen that is accompanied by additional documentary evidence submitted for the first time into the record of proceeding. Thus, the motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

The labor certification indicated that the position of programmer analyst required a bachelor of science degree in computer science, mathematics, or engineering, in addition to five years of relevant professional experience. The director determined that the beneficiary did not possess the required degree and denied the petition.

On appeal, the AAO upheld the director's findings, noting that the evidence in the record showed that the beneficiary possessed a bachelor of science in chemistry, which was not one of the acceptable fields listed by the petitioner on the labor certification. Although the petitioner submitted an educational evaluation confirming that the combination of the beneficiary's formal education was the equivalent of a bachelor of science in computer science from an accredited college or university in the United States, both the director and the AAO rejected the evaluation's claims.

With the motion to reopen, counsel for the petitioner submits an additional educational evaluation in support of the beneficiary's educational qualifications.

Eligibility in this matter hinges on the beneficiary's educational qualifications, as set forth on the labor certification. Although the labor certification is an integral part of the visa petition, the issuance of a labor certification does not mandate the approval of the relating petition. To be eligible for approval, the 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 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is June 29, 2000.

The record contains a copy of the petitioner's transcript and diploma from Andhra University, demonstrating that he obtained a bachelor of science in chemistry, zoology, and botany. In addition, the record contains a diploma verifying the beneficiary's completion of a one-year program in systems management, and an advanced diploma evidencing completion of a six-month course of study in software engineering. The director found this evidence alone to be insufficient to satisfy the educational requirements set forth on the labor certification, and requested a professional educational evaluation.

The petitioner submitted an evaluation from Credentialing and Evaluation Services, which equated the petitioner's bachelor of science to an associate degree from an accredited college or university in the United

States. In addition, the evaluation stated that the advanced diploma in software engineering was the equivalent of one year of college or university studies at an accredited college or university in the United States. The evaluator concluded that based on the totality of his formal education, the beneficiary possessed the U.S. equivalent of a bachelor of science degree in computer science.

The director rejected this evaluation and denied the petition, concluding that the combination of education was not the equivalent of a four-year degree in computer science as required by the petitioner on the labor certification application.

On appeal, counsel submitted an incomplete case reference and a photocopy of a page that appears to be from an immigration law sourcebook. No explanation or application of this evidence to the case at hand was submitted. The AAO did not address this evidence, and rendered its decision based on the information in the record. The AAO concurred with the director's finding that the petitioner had not submitted sufficient evidence to satisfy the requirements set forth on the labor certification.

To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (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. In this case, the petitioner is clearly required to have a four-year bachelor of science degree in computer science, mathematics, or engineering.

In response to the decisions of the director and the AAO, counsel for the petitioner submits a motion to reopen. The motion includes a newly-submitted educational evaluation from Morningside Evaluations and Consulting, which confirms that the beneficiary obtained a bachelor of science degree in chemistry, botany, and zoology, and states that a review of the beneficiary's credit hours and courses taken warranted the conclusion that his educational background is "substantially similar" to three years of academic studies leading to a degree from an accredited institution of higher learning in the United States. In addition, the evaluation discusses the beneficiary's diplomas in systems management and software engineering as well as the beneficiary's professional experience, and concludes that the combination of all of these accomplishments equates to a bachelor of science in computer science from an accredited university in the United States. This evaluation is not sufficient to overcome the petition's denial.

First, the educational evaluations from both Morningside Evaluations and Consulting and Credentialing and Evaluation Services have their own disclaimers to the effect that they are advisory opinions only. The director did not err in rejecting them. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The beneficiary was required to have a bachelor of science degree in one of three specific fields as set forth on the Form ETA 750. On Form ETA 750, the petitioner does not indicate that a combination of education and experience would satisfy the requirements of the proffered position in lieu of a four-year degree. If this were the case, the petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Finally, 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). Thus, the petitioner may not include the beneficiary's professional experience or combine multiple degrees to create an equivalency of its own requirement of a four-year degree. Since there

is no evidence establishing that the beneficiary possesses a four-year bachelor of science degree in computer science, the petition may not be approved.

It should be noted that counsel's statements submitted with the motion to reopen regarding the beneficiary's qualification are not persuasive. Specifically, counsel fails to provide any additional evidence in support of his allegations. The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). In addition, it is noted that with the initial appeal of this petition, counsel provided an incomplete citation to *Augat v. Tabor*, 719 F. Supp. 1158 (D. Mass 1989), and a photocopy of a one-page excerpt from what appears to be an immigration law sourcebook. In addition to failing to provide a bibliographic reference for this document, counsel omitted any reference or explanation as to how this material applied to the case at hand.¹ This documentation is not considered to be credible evidence by the AAO.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1977); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). The petitioner has not met that burden.

ORDER: The motion to reopen is granted. The AAO's decision of December 12, 2002 is affirmed. The petition is denied.

¹ The AAO notes that the facts in *Augat* deal with the determination of whether an immigrant worker is a member of the professions. The issue in this case is not whether the beneficiary is a member of the professions, but whether he has met the requirements set forth by the petitioner on the labor certification.