



U.S. Citizenship
and Immigration
Services

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FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date:

APR 26 2004

IN RE:

Petitioner:

[Redacted]

Beneficiary:

PETITION: 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: SELF-REPRESENTED

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.

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Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development firm for business applications. It seeks to employ the beneficiary permanently in the United States as a senior application developer. 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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

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). In this instance, it is October 9, 2001.

The Form ETA 750 indicated that the position of senior application developer required a bachelor's degree or equivalent in the field of computer science and 6 years of experience in the job offered or 6 years of experience in the computer industry.

In a decision dated April 8, 2003 the director found that the beneficiary did not have the minimum job qualifications as required on the labor certification, and denied the petition.

The Form I-290B Notice of Appeal was received on May 8, 2003. The appeal was submitted by an attorney in the petitioner's legal department. On the notice of appeal the petitioner indicated that a brief and/or additional evidence would be submitted to the AAO. On June 9, 2003 the petitioner's brief was received by the AAO, along with additional evidence consisting of an educational evaluation dated January 20, 2003, an evaluation which had not been previously in evidence.

The AAO will first evaluate the decision of the director based on the evidence in the record prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

In his decision the director found that the beneficiary lacked a bachelor's degree. The director found that the evaluation of the qualifications of the beneficiary in the record indicates that the primary basis for the beneficiary's qualification lies in his work experience. The director found that under 8 C.F.R. §205.4 no provision allows for consideration of professional experience in lieu of or in combination with a foreign degree in order to equate to a bachelor's degree.

In its brief the petitioner asserts that the language in the ETA 750 requiring a bachelor's degree "or equivalent" does not restrict the employer to any particular method to establish an "equivalent" to a bachelor's degree. The petitioner's brief asserts that if a specific definition of the term "or equivalent" were included in block #15 of the Form ETA 750, the petitioner would risk a finding by the Department of Labor that the job requirements had been tailored to meet the specific qualifications of the alien beneficiary, a finding which would lead to the denial of the labor certification. The petitioner asserts that,

Use of the term "or equivalent" in connection with a specified educational requirements [sic], is preferred by DOL-ETA as it provides the least restrictive means for employers to utilize when considering the variety of educational and experience backgrounds of the U.S. applicants for the position offered.

Petitioner's Brief, at page 4.

The petitioner provides no citation of authority for the assertion that the Department of Labor prefers the use of the term "or equivalent." Nor does the petitioner cite any authority in support of its assertion that including a definition of "or equivalent" in block 15 of the ETA 750 is viewed by the Department of Labor as an overly restrictive job requirement.

The educational evaluation submitted with the petition relied on the beneficiary's combination of training and experience to find that the beneficiary had the equivalent of a bachelor's degree. As the director noted, the evaluation concludes that "the combination of computer training and fourteen years of documented work experience is at a minimum, the functional equivalent of a Bachelor's Degree in Computer Science." George J. Petrello, Letter, (June 30, 1998). The evaluation therefore does not find that the beneficiary has a foreign degree which is equivalent to a United States bachelor's degree.

Moreover, even by its own terms, the educational evaluation does not examine all of the requirements for a bachelor's degree, but only the beneficiary's experience pertaining to a major program in computer science. The evaluation states that it "does not judge on the general education courses taken outside of the major course of study, which, if they are required, vary from university to university." *Id.* One of the characteristics which distinguishes degrees granted by colleges and universities from technical training programs is a requirement for certain general education courses. Therefore, even if the training and experience of the beneficiary were considered to be equivalent to courses in the major field of computer science, the educational evaluation in the record prior to the director's decision still fails to establish that the beneficiary has education and experience equivalent to general education courses for a bachelor's degree.

The petitioner asserts that the director improperly evaluated the petition as one for a professional, rather than as one for a skilled worker. The petitioner asserts that nothing in the Act restricts a petitioner from seeking classification as a skilled worker under Section 203(b)(3)(A)(i) rather than as a professional under Section 203(b)(3)(A)(ii), even where the labor certificate states that the minimum job qualifications include a bachelor's degree, or the equivalent. It is true that with regard to the preference category the Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professional, for a single check box applies both to skilled workers and to professionals. Nonetheless, even if the instant petition is considered as a petition for a skilled worker, the requirements as stated on the ETA 750 for a bachelor's degree or the equivalent would be unaffected. Moreover, the only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals.

The regulation at 8 C.F.R. § 204.5(1)(2) states in pertinent part

Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision. . . .

No provision pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore if the petitioner's assertion were accepted that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree, but the petitioner chose not to do so. The director was therefore correct in treating the petition as one for a professional, and in using the criteria in the regulation at 8 C.F.R. § 204.5(1)(2) to evaluate the term "or equivalent" in the labor certification.

Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in computer science on October 9, 2001 or a foreign equivalent degree. Therefore, the petitioner has not overcome this portion of the director's decision. The decision of the director was correct, based on the evidence in the record prior to the director's decision.

The AAO will next consider the evidence submitted for the first time on appeal. The petitioner submits for the first time on appeal an educational evaluation by Richard A. Lejk dated January 20, 2003, a date about two and one-half months prior to the April 8, 2003 date of the director's decision. The petitioner makes no claim that the newly-submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director. Nevertheless, the evaluation does not find that the beneficiary possesses a foreign degree equivalent to a United States degree. Rather it finds that the beneficiary's "professional employment record presents at least four years of university-level credit towards a major in computer science."

The petitioner has failed to establish that the beneficiary meets the educational requirements of the labor certification.

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.