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U.S. Citizenship  
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Services



FILE:

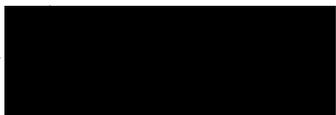


Office: VERMONT SERVICE CENTER

Date: MAY 17 2004

IN RE:

Petitioner:  
Beneficiary:



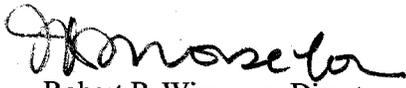
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

The petitioner is a company operating thirteen retail donut shops. It seeks to employ the beneficiary permanently in the United States as a marketing supervisor. 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.

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 as of the petition's priority date.

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 April 16, 2001. The beneficiary's salary as stated on the labor certification is \$47,738.19 per year.

The Form ETA 750 indicates that the position of marketing supervisor requires a bachelor's degree in business and two years of experience in the job offered or in the related occupation of management.

In the petition as originally submitted the petition type in part 2 was marked with an "x" in the block beside letter "d," for a member of the professions holding an advanced degree or an alien of exceptional ability. Counsel's initial submission included no evidence of the beneficiary's education.

The director issued a request for evidence (RFE) to the petitioner dated November 12, 2002. The RFE stated that the petition did not appear to be approvable to classify the beneficiary as a second preference alien under section 203(b)(2) of the Act because the labor certification indicates that the position requires less than five years experience to accompany a bachelor's degree. The RFE then included a section to be completed by the petitioner in which the petitioner could request that the petition be adjudicated under a different preference category.

In the RFE the director also requested evidence of the beneficiary's education. The RFE specifically requested evidence to establish that the beneficiary had a bachelor's degree in the field of business as of April 16, 2001, the date of filing. The RFE also requested a copy of the beneficiary's college transcript, and, if the beneficiary has a foreign degree, an advisory evaluation of that degree.

Counsel responded to the RFE with a letter dated January 8, 2003 accompanied by the RFE. On the RFE the request for a different preference category had been completed so as to request that the petition be adjudicated as a third preference petition under section 203(b)(3)(A)(i) of the Act. Counsel also submitted evidence consisting of copies of the following documents: the beneficiary's transcripts dated March 1988 and March 1990 from the Gujarat Secondary Education Board, Gandhinagar; the beneficiary's transcripts dated April 1991 and May 1992 from Gujarat University; a diploma dated October 1, 1992 from Bharatiya Vidya Bhavan, Bombay, India, awarding the beneficiary a diploma in Marketing and Sales Management; a diploma dated January 20, 1995 from Gujarat University, Ahmedabad, awarding the beneficiary the degree Bachelor of Science (Special); an undated letter from Star Foods, Inc., Ahmedabad, confirming the employment experience of the beneficiary from May 1992 until June 1995; a letter dated June 27, 2002 from Sonia Salts & Brine (P) Ltd., Patdi, Gujarat (India),

confirming the employment experience of the beneficiary from July 1995 until September 1997; an evaluation report of the beneficiary's education dated April 21, 1999 by the Foundation for International Services, Inc.; newspaper advertisements dated January 8, 2001 and January 23, 2001 for the positions of marketing supervisor and marketing manager, respectively; a job notice for marketing supervisor indicating the posting of the notice from April 25, 2002 until May 7, 2002; a letter dated November 11, 2002 from the petitioner confirming the beneficiary's experience since December 1999 with the petitioner as a regional sales and marketing manager; a printout of an Internet Web page of the U.S. Department of Labor, Employment and Training Administration, dated December 19, 2002 showing typical job qualifications required for market research analysts; and additional copies of the petitioner's Form ETA 750 and I-140 petition.

The director determined that the evidence did not establish that the petitioner had a bachelor's degree as of the priority date. The director then denied the petition.

On appeal, counsel submits a brief and evidence. All of the evidence submitted on appeal consists of additional copies of documents previously submitted for the record.

Counsel states on appeal that the combination of education and experience of the beneficiary is equivalent to a United States bachelor's degree.

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. 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).

The evaluation report of the beneficiary's education dated April 21, 1999 by the Foundation for International Services, Inc. finds that

[the beneficiary] has the equivalent of two years of university-level credit from an accredited college or university in the United States and has, as a result of his educational background, professional training and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in business administration from an accredited college or university in the United States.

The evaluation report does not find that the beneficiary holds a foreign degree equivalent to a United States bachelor's degree. Rather the evaluation relies on a combination of the beneficiary's education, professional training and employment experience in finding that the beneficiary has the "background equivalent" of an individual with a bachelor's degree. Moreover, in calculating the equivalent education from the beneficiary's experience the report uses the formula of "3 years experience = 1 year of university-level credit." That formula is applicable to nonimmigrant petitions, but it is not applicable to immigrant petitions. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

Counsel's brief asserts that the petition should be evaluated under the criteria applicable to skilled workers, governed by Section 203(b)(3)(ii) of the Act, rather than under the criteria applicable to professionals governed by Section 203(b)(3)(i) of the Act. With regard to the preference category, the Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professionals, 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 counsel'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 beneficiary's educational qualifications.

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 business on April 16, 2001 or a foreign equivalent degree. Therefore, the petitioner has not overcome that portion of the director's decision.

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.