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U.S. Citizenship
and Immigration
Services



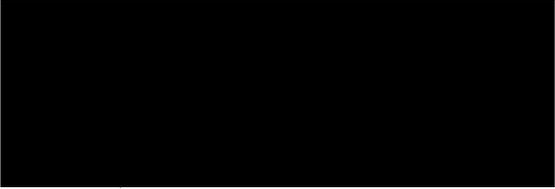
FILE: WAC 02 147 50611 Office: CALIFORNIA SERVICE CENTER

Date OCT 01 2004

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

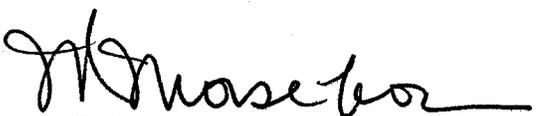
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

The petitioner seeks to classify the beneficiary as an employment based immigrant pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3), as a skilled worker or professional. The petitioner is a software development and consulting firm. It seeks to employ the beneficiary as a systems analyst. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director denied the petition because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel asserts that the beneficiary has the necessary credentials to meet the qualifications set forth in the approved labor certification.

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 other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, 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, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is February 27, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification Form ETA-750A, items 14 and 15 set forth the minimum education, training, and experience that an applicant must have for the position of a systems analyst. In the instant case, item 14 shows the required number of years and type of educational background and experience an applicant for the position must have. It states the following:

- | | | |
|-----|-------------------------|--------------------------------------------------------|
| 14. | Education | |
| | College | X |
| | College Degree Required | B.S.* |
| | Major Field of Study | Computer Science, Business, Engineering or Mathematics |
| | Experience | |
| | Job Offered | 2 or |
| | Related Occupation | 2 any computer related acceptable |

15. Other Special Requirements

* Equivalency to U.S. degree acceptable if determined pursuant to recognized U.S. standards.

Part B of the ETA 750, signed by the beneficiary, indicates that he studied at the University of Sonora, Sonora,

Mexico between 1991 and 1995, but did not attain a degree. As evidence of the beneficiary's formal education, counsel initially submitted various educational documents without English translations. Counsel also submitted an evaluation report from the Foundation for International Services, Inc. (FIS), dated February 15, 2001, along with an undated "Certificate of Excellence" from Microsoft, indicating that the beneficiary is recognized as a "Microsoft Certified Professional." The FIS evaluation report states that, based on a review of the beneficiary's transcripts from the Universidad [REDACTED] and the University of Sonora, along with the beneficiary's resume, copies of two employment verification letters from past employers, and several certificates of completion "equivalent to the completion of professional training" offered by private entities in the United States,¹ it finds that the beneficiary possesses the U.S. equivalent of a high school education (Autonomous University of Coahuila), plus three years of university level credit (University of Sonora) from an accredited college or university in the United States. The evaluation further concludes that the beneficiary's combination of experience and education is the equivalent of a bachelor's degree in computer information systems from an accredited U.S. college or university.

On July 1, 2002, the director requested additional evidence from the petitioner relating to the beneficiary's education and/or training. The director instructed the petitioner to submit evidence establishing that the beneficiary possesses the required education and/or training specified in the approved labor certification. The director advised the petitioner that a copy of the official college or university transcript must be submitted if a baccalaureate degree is required by the ETA 750A. The director informed the petitioner to submit certified English translations of any documents in a foreign language.

In response, counsel submitted copies of various documents reflecting the beneficiary's academic and professional training. One document entitled "diploma" indicates that he attended a two-day conference of clinical chemists in October 1992. Counsel submitted copies of the beneficiary's grade transcripts from the Autonomous University of Coahuila, which he attended from 1988 to 1990, when he was sixteen to eighteen years old, as well as his transcript from the University of Sonora, which states that he partially passed a study plan in a program designed for a biologist chemist. Counsel also includes a copy of a University of Sonora certificate of honorable mention for a 1993 two-day student presentation in which the beneficiary was a participant.

The director issued a notice of intent to deny the petition on November 26, 2002. The director noted the submission of the beneficiary's educational transcripts, but found that they failed to indicate that the beneficiary possessed a bachelor's degree as required by the terms of the approved labor certification.

Counsel responded by submitting another credentials evaluation, dated May 5, 1999, from [REDACTED] Incorporated. This evaluation states that the beneficiary's attendance at the Autonomous [REDACTED] represented the equivalent of the completion of a U.S. high school program and that his studies at the University of Sonora represented the equivalent of the completion of three years of study at a U.S. institution. This evaluation concludes that the beneficiary's studies equal a U.S. associate's degree in chemistry, "plus completion of the third year in a Bachelor of Science in Biochemistry program at an accredited institution." In his response, to the director's notice of intent to deny, counsel asserts that work experience can be combined with formal education to achieve the requisite background. Counsel cites several cases in support of this proposition.

It is noted that all the cases cited by counsel in his response were all decided prior to the amendments to Title 8 of

¹ Neither the beneficiary's resume, nor more than one certificate from a private organization was included with the petition.

the Code of Federal Regulations, adopted in 1991. The commentary discussing the final rule implementing section 121 of the Immigration Act of 1990, by providing for petitioning procedures for employment-based immigrants under sections 203(b)(1) through (5) of the Immigration and Nationality Act, explains the CIS (formerly INS) position relating to acquiring third preference "professional" classification with a baccalaureate degree gained with experience:

The Act specifies that a 'professional' must have a baccalaureate degree. The Act does not require a United States degree, and the Service will therefore recognize an equivalent foreign degree. The Act does not, however, refer to gaining baccalaureate degree equivalency through experience, as the legislative history does with respect to an advanced degree. Therefore, the Service believes that, to carry out Congress's intent, it must require a baccalaureate for professionals in all employment-based immigrant contexts. 56 Fed. Reg. 60897 (Nov. 29, 1991).

The director denied the petition, finding that the petitioner had failed to demonstrate that the beneficiary possessed a foreign bachelor's degree equivalent to a United States baccalaureate.

On appeal, counsel submits a third evaluation from [REDACTED] of the City University of New York, dated February 3, 2003. This evaluation states that the beneficiary simultaneously possesses the U.S. equivalent of three years of university study in chemistry and, by combining the beneficiary's employment experience and coursework at the University of Sonora, indicates that he has obtained the U.S. equivalent of a bachelor of science degree in computer science.

Counsel asserts that the director overlooked the specificity of the approved ETA 750A in concluding that the labor certification does not indicate what standards were used to determine equivalency. Counsel maintains that in certifying the labor certification, the DOL has defined the beneficiary as the acceptable designate and approved the interpretation that a foreign equivalent baccalaureate degree can result from the combination of employment experience and formal education. Counsel also states that the director should have considered the petition as one for a skilled worker under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i).

Counsel's assertion is not persuasive. At the outset, it is noted that CIS, not the DOL, has the final authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany 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 v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989).

Matter of Sea Inc., 19 I&N Dec. 817 (Comm. 1988), provides:

[CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) also provides in pertinent part:

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 of 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 member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for an entry into the occupation.

While 8 C.F.R. § 204.5(l)(3)(ii)(C) relates to professionals, we find that “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration or study” is applicable to what constitutes evidence of a degree. Because neither the Act nor the regulations indicate that a bachelor’s degree must be a United States bachelor’s degree, CIS will recognize a foreign equivalent bachelor’s degree to a United States baccalaureate. The language set forth in item 15 of the ETA 750A in this case is actually superfluous, since any determination of equivalency will be adjudicated according to U.S. standards. This is a U.S. employer applying for a preference visa for a U.S. position pursuant to U.S. law. Beyond that, Item 15 does not substantially modify or amend the terms of the labor certification in item 14 that require that the applicant must have a bachelor of science degree with a major in computer science, business, engineering, or mathematics, or a foreign equivalent degree to a U. S. baccalaureate degree as set forth above.

In this case, however, the beneficiary’s studies at the University of Sonora or the Autonomous University of Coahuila have not been shown to be the equivalent to a United States bachelor’s degree, or to any baccalaureate degree. The evidence contained in the record shows that the beneficiary did not complete a baccalaureate program. The FIS and Robotham reports erroneously combine the beneficiary’s employment experience with his formal education in evaluating the beneficiary’s foreign education. The Huart report failed to find that the beneficiary possesses any bachelor’s degree. None of these evaluations can be viewed as probative in evaluating the beneficiary’s foreign education.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. Counsel’s assertions relating to the formula of three years of employment experience equating to one year of university-level credit used by the FIS and Huart evaluations applies only to nonimmigrant visas such as those cited in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Even if viewed as a petition for a skilled worker, 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the evidence must show that the alien has the education, training, or experience, and any other requirements of the individual labor certification. Contrary to counsel’s assertions, this labor certification does not define or accept any equivalency less than a bachelor’s degree. Additionally, although 8 C.F.R. § 204.5(k)(2) permits a certain combination of progressive work experience and a bachelor’s degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. It is further noted that a bachelor’s degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. Based on similar reasoning, the evidence fails to establish that this beneficiary’s education represents a four-year baccalaureate degree.

In evaluating a beneficiary’s qualifications, CIS must look to the job offer portion of the labor certification to

determine the required qualifications for the position. The AAO cannot conclude that the terms of the labor certification in this case describe any foreign equivalent degree less than a bachelor's degree. In this regard, the interpretation of this labor certification does not differ from that expressed in the December 12, 2002, AAO case that counsel submits in support of his assertions on appeal. The only clear amendments to the degree in this case are offered as alternatives to the field of study as set forth in item 14. CIS may not ignore a term, nor impose additional requirements in reviewing a labor certification. 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).

Based on the evidence submitted, the AAO concurs with the director that the petitioner has not established that the beneficiary possesses a United States bachelor's degree or a foreign equivalent degree as required by the terms 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 sustained that burden.

ORDER: The appeal is dismissed.