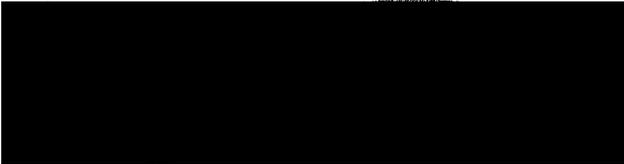




U.S. Citizenship  
and Immigration  
Services

34



FILE: EAC 02 042 51325 Office: VERMONT SERVICE CENTER

SEP 09 2004  
Date:

IN RE: Petitioner:  
Beneficiary:



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

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Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**DISCUSSION:** The employment based immigrant 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 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 computer software development firm. It seeks to employ the beneficiary as a programmer/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, former counsel (hereinafter "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 July 14, 2000.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (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 programmer/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 possess. It states the following:

- |     |                            |                        |
|-----|----------------------------|------------------------|
| 14. | Education                  |                        |
|     | College                    | 4                      |
|     | College Degree Required    | Bachelor or equivalent |
|     | Major Field of Study       | Computer Science       |
|     | Experience                 |                        |
|     | Job Offered                | 2                      |
|     | Related Occupation         |                        |
| 15. | Other Special Requirements | none                   |

Part B of the ETA 750, signed by the beneficiary, indicates that he is a member of the Chartered Institute of Management Accountants, London, England, a member of the Australian Computer Society, and studied at the National Institute of Business Management in Sri Lanka.

As evidence of the beneficiary's formal education, counsel initially submitted a copy of a letter, dated September 21, 1993, from the National Institute of Business Management, [REDACTED] stating that the beneficiary completed the [REDACTED] in 1992." Accompanying this letter are copies of two undated diplomas including the beneficiary's diploma in computer system design and a "Higher Diploma in Computer Based Information Systems," also awarded by the National Institute of [REDACTED]. Counsel also submitted a copy of a certificate from the Australian Computer Society, which states that the beneficiary successfully passed an examination in November 1992 and holds a professional membership in the Society. Counsel further offered copies of two notices stating that the beneficiary passed examinations in November 1994 and November 1995, held by The Chartered Institute of Management Accountants, London, as well as a copy of a transcript from the Virginia Commonwealth University in the United States reflecting that the beneficiary has taken undergraduate courses at that institution.

Counsel also submitted an academic evaluation from [REDACTED] of the [REDACTED] Inc., dated June 2, 1999. [REDACTED] reviewed the beneficiary's professional grade membership in the Australian Computer Society, his diplomas from the National Institute of Business Management, Sri Lanka, and his examination results from The [REDACTED]. He states:

In summary, it is the judgement of Globe Language Services that [the beneficiary] has the equivalent of a High School Diploma and 106 semester credits of undergraduate study in Accounting and Computer Science from regionally accredited institutions and 16 semester credits of professional study in Computers in the United States.

On March 5, 2002, the director requested additional evidence from the petitioner establishing that the beneficiary has the required experience, training, or education set forth in the ETA 750. The director advised the petitioner that the beneficiary must have a U.S. bachelor's degree or a foreign bachelor's degree that is equivalent to the U.S. degree.

In response, the petitioner submitted an evaluation, dated April 8, 2002, from the International Education Evaluations, Inc. The signature of the author is not legible. This evaluation states:

[The beneficiary] presents from [REDACTED] the Diploma in Computer System Design and the Higher Diploma in Computer Based Information Systems and from the United Kingdom approximately one semester of academic credit in business/accounting. In the United States the two Diplomas equate to three years of academic credit in a computer science curriculum, and the additional semester of academic credit equates to one semester of academic credit in a business/accounting curriculum. Alternatively, the two Diplomas may be equated to the U.S.A. Associate in Applied Science degree in Computer Science plus one year of academic credit.

The director denied the petition on July 9, 2002. The director found that the evidence submitted did not meet

the requirements of the approved labor certification because the beneficiary does not possess a U.S. bachelor's degree or a foreign degree that is equivalent.

On appeal, counsel cites a 1991 DOL case for the proposition that "education" as defined in item 14 of the ETA 750, more particularly the "equivalent" to a U.S. bachelor's degree, can include any combination of education, training or experience. Counsel asserts that the DOL interpretation should be controlling.

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 (9<sup>th</sup> Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1<sup>st</sup> Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). 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 Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) 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.

The above regulation uses the singular description of a foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

The labor certification clearly requires an applicant for the position to have four years of college, culminating in the receipt of a U.S. bachelor's or foreign equivalent degree in computer science. A bachelor degree is generally found to require 4 years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the beneficiary's past work experience may not be substituted for a four-year degree. The record does not contain an official college or university record showing that the beneficiary possesses a baccalaureate degree from any institution of higher learning as required by 8 C.F.R. § 204.5(l)(3)(ii)(C). Further, neither of the two evaluations submitted in support of the beneficiary's credentials conclude that the beneficiary possesses any baccalaureate degree.

Counsel asserts that the beneficiary's experience should be measured using the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions based on an ETA 750. The beneficiary was required to have a bachelor's degree or a foreign equivalent degree as set forth on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed. Even if viewed as a petition for a skilled worker, the regulation at 8 C.F.R. § 204.5(1)(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. The labor certification does not define or accept any equivalency less than a bachelor's degree.

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. Therefore, the beneficiary is not eligible for the visa classification sought.

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.