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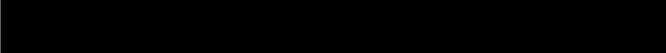


U.S. Citizenship
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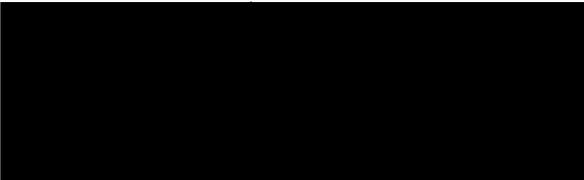
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FILE:  Office: CALIFORNIA SERVICE CENTER Date:
WAC-03-068-34095

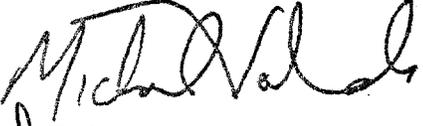
IN RE: Petitioner: 
Beneficiary: 

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

DISCUSSION: The preference 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 is a church. It seeks to employ the beneficiary permanently in the United States as a director of Christian education. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the petitioner had not established that the beneficiary's qualifications for the position were established prior to filing the petition.

On appeal, the petitioner's counsel contends that the beneficiary was qualified for the proffered position at the time of filing the petition.

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 nature, for which qualified workers are not available in the United States.

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. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). 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). In this case, that date is September 17, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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 director of Christian education. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	completed
High School	completed
College	2
College Degree Required	Associate Degree
Major Field of Study	Any major fields of study

Additionally, the proffered position requires two years of experience either in the job offered or in the related occupation of religious worker. The two years of experience in the job offered would follow the duties detailed in Item 13 of the Form ETA 750A which states the following, in pertinent part:

Plan, organize, and direct Christian education program in Presbyterian Church to promote religious education among congregation members. Analyze revenue and program cost data to determine budge [sic] allocation. Develop Bible study courses and supervise instructional staff in material preparation and instruction methods. Counsel students. Promote student

participation in extracurricular congregational activities and children's participation in Sunday school. Order and distribute school supplies.

Item 15 does not indicate any special requirements.

The beneficiary set forth her credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), she indicated that she attended The Korea Shepherd Theological Seminary in Seoul, Korea, earning an Associate degree in Theology, from 1989 to 1991. She provided no further information concerning her educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that she worked for the petitioner since July 1999 and for Peace Church from 1994 to 1998, a church in Seoul, Korea, for which she was the Christian Education Director and performed many duties similar to the duties of the proffered position.

With the initial petition, the petitioner provided a copy of a credential evaluation from the Foundation for International Services, Inc. (FIS), that concluded that the beneficiary's transcript of grades and graduation from The Korea Shepherd Theological Seminary in Korea "is equivalent to two years of religious training form [sic] a seminary in the United States." FIS further stated that the combination of the beneficiary's education and employment experience and religious training resulted in her having "an educational background the equivalent of an individual with an associate's degree in religious education from an accredited college or university in the United States."

The petitioner provided a copy of the beneficiary's school transcripts and certificate of graduation from The Korea Shepherd Theological Seminary, in Korean, with a certified English translation; as well as a copy of a Preschool Director Certificate issued by the American Education University in California, issued in March 2000; and an affidavit of employment verifying the beneficiary's employment as a Christian Education teacher from 1994 to 1998 at the Korean Presbyterian Peace Church, in Korean, with a certified English translation.

Because the evidence was insufficient, the director requested additional evidence on October 1, 2003, specifically requesting evidence that the beneficiary "possesse[d] the education listed on the Form ETA 750¹."

In response to the director's request for evidence, the petitioner submitted previously submitted evidence, and counsel's accompanying letter states, in pertinent part,

Here, the [b]eneficiary completed a two-year courses [sic] in Child Christian Education, was awarded with several professional certificates, and possesses in excess of four years experience

¹ The director issued a request for evidence prior to this seeking evidence pertaining to the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The AAO reviewed the record of proceeding concerning this issue and determines that the petitioner has established its continuing ability to pay the proffered wage beginning on the priority date.

in the said capacity. Through an expert evaluation by [FIS], as a result of her education program and progressive experience, the beneficiary indeed possesses the equivalent of an Associate's degree in religious education from an accredited college of [sic] university in the United States and more than two years experience in the required capacity.

Counsel also asserted that the Department of Labor's (DOL) certification of the Form 750 ETA "clearly attests that [the b]eneficiary's qualification meets the minimum requirements states [sic] on the labor certification at the time the request for certification was filed."

The director denied the petition on November 5, 2003 because the credential evaluation stated that the combination of education and experience resulted in an equivalency that does not meet the minimum requirements of the proffered position.

On appeal, counsel asserts that the beneficiary was awarded an associate's degree from the Korea Shepherd Theological Seminary in 1991, and also states that the combination of her various educational achievements and employment experiences equate to an associate's degree as acknowledged by an "expert evaluation" provided by FIS. Counsel cites to BALCA case law and *Augat, Inc. v. Tabor*, 719 F.Supp. 1158 (D.Mass. 1989); *Hong Kong TV Video Program, Inc. v. Ilchert*, 685 F.Supp. 712 (N.D. Cal. 1988); and *Globenet, Inc. v. Attorney General*, 1989 U.S. Dist. LEXIS 7154, No. 88-1261 (D. D.C. January 10, 1989) for the premise that CIS errs by failing to consider education and experience, a combination of factors, in determining a beneficiary's qualifications for a professional third preference immigrant visa category. Additionally, counsel reiterates her prior argument that DOL's certification of the Form 750 ETA "clearly attests that [the b]eneficiary's qualification meets the minimum requirements states [sic] on the labor certification at the time the request for certification was filed."

At the outset, counsel fails to state how DOL Bureau of Alien Labor Certification Appeals (BALCA) case is applicable to the instant petition before the Department of Homeland Security's AAO and binding in these proceedings. Additionally, DOL's certification of the Form ETA 750 does not supercede CIS' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of the whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i) of the Act and 8 C.F.R. § 204.5(1)(3).

Additionally, CIS does not see how *Augat* and *Hong Kong TV* are binding precedents on CIS outside of the district of Massachusetts and California, respectively. *Augat* is inapplicable to the instant petition because in that case the court defined "professional" as it was defined in the Act from its historical context, when section 1153(a)(3) failed to define "professional" with a baccalaureate degree. The Act currently defines "professional" for third preference visa petitions as "immigrants who hold baccalaureate degrees." See Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Thus, *Augat* is irrelevant as it defines third preference petition "professionals" prior to Congress amending that same statutory provision and providing the current definition given to "professionals" that includes a degree requirement. *Augat* is thus distinguishable and irrelevant. *Hong Kong TV and Globenet, Inc.* are also irrelevant as they also pre-date the current statutory definition of third preference category "professionals" and involve nonimmigrants not immigrants. Regardless, the petitioner is seeking classification under the skilled worker category instead of the professional category. Thus, counsel's recitation of cases involving the professional category is without merit.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision.

Additionally, the regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

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). In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750, which in this case means an associate degree in any major field of study and two years of qualifying employment experience.

In this case, the labor certification clearly indicates that any qualified applicant for the proffered position must have an associate’s degree in any field, not the equivalent of an associate’s degree, and not the combination of degrees, education, and experience that are the equivalent of an associate’s degree. Additionally, in this case the petitioner submitted its “expert evaluation” that determined that the beneficiary’s education alone was not the equivalent to an

associate's degree. Contrary to counsel's inconsistent assertions, the beneficiary's graduation from The Korea Shepherd Theological Seminary in Korea was never deemed equivalent to an associate's degree by the "expert evaluation" provided by FIS, which stated that it carefully analyzed the underlying transcripts and credit hours from that school. Apparently, the credit hours taken by the beneficiary at The Korea Shepherd Theological Seminary in Korea were not the equivalent of an associate's degree program at an accredited college or university in the United States, or the evaluation would have stated so. FIS only determined that the beneficiary had an associate's degree from the combination of her training, employment experience, and completion of the program at The Korea Shepherd Theological Seminary in Korea, which, as noted above, does not comply with the clearly stated requirements of the proffered position as delineated on the Form ETA 750A that do not include a combination equivalency of an associate's degree. Thus, the petitioner has failed to establish that the beneficiary is qualified for the proffered position as the requirements are delineated on the Form ETA 750A. The AAO concurs with the director's decision.

The AAO further determines that the petitioner has established that it has two years of qualifying employment experience as the employment experience letter contained in the record of proceeding conforms to the regulatory requirements set forth at 8 C.F.R. § 204.5(l)(3).

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.