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U.S. Citizenship
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Services

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FILE: [REDACTED]
SRC-02-103-52754

Office: TEXAS SERVICE CENTER Date: APR 13 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

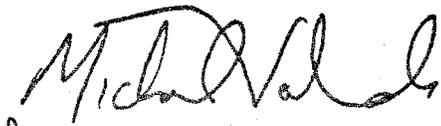
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

DISCUSSION: The Director of the Texas Service Center denied the preference visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The prior decision of the AAO will be affirmed. The petition will remain denied.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. In response to a request for evidence from the director, the petitioner indicated that it is seeking classification under the skilled worker category.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of a skilled worker that:

(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.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however, to be eligible for approval, a beneficiary must also 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 August 7, 2000.

The petitioner is involved in the hospitality industry and owns and operates a hotel chain. It seeks to employ the beneficiary permanently in the United States as a sales and marketing manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition.

On August 21, 2002, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position because the beneficiary did not hold a bachelor's degree in sales and marketing. The director determined that the beneficiary's educational credentials reflected that the beneficiary holds a three-year bachelor's degree in sociology, and that the credential evaluation submitted to

support the petition erroneously combined her prior employment experience and educational background in its equivalency determination.

On appeal, the petitioner submitted no new evidence, and counsel asserted that the director erred by failing to "take into account the fact [that] the job requirements include a range of related fields, and/or the beneficiary qualifies on the basis of a combination of her formal education, practical training and relevant work experience."

The AAO dismissed the appeal on December 13, 2003, concurring with the director's decision that the petitioner failed to establish that the beneficiary is qualified to perform the duties of the proffered position. The AAO's decision detailed the evidentiary submissions contained in the record of proceeding which will not be repeated in this decision. The AAO, citing to *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977), determined that the beneficiary's three-year degree in sociology from Osmania University in India is not equivalent to a four-year baccalaureate degree in sales and marketing, and that no legal authority, nor the terms of the ETA 750A, permit a substitution or combination of degrees or employment experience or related degrees to meet the requirements of the proffered position. The AAO also referenced the Indian government's department of higher education's structure of its higher educational programs to note that there are both four-year and three-year degree programs available in Indian universities.

On motion to reopen, counsel submits additional evidence and a brief. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship & Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Counsel asserts that the AAO's citation to *Matter of Shah*, 17 I&N at 244 was erroneous as the facts in *Shah* are distinguishable from the facts of the instant petition. The petitioner submits a letter stating that the beneficiary has increased its sales volume and is an important employee and a certificate from Cornell University's School of Hotel Administration showing that the beneficiary completed a Marketing Analysis in the Hospitality Industry's Professional development program on January 23, 2004. Thus, since new evidence is presented and an assertion made that the AAO's decision contradicts precedent, the motion qualifies for consideration as a motion to reopen and a motion to reconsider.

Upon review, the AAO's prior adjudicator properly evaluated the evidence contained in the record of proceeding and made an accurate determination that the petitioner has failed to establish that the beneficiary meets the requirements of the proffered position at the time of filing the petition. The pertinent regulations at 8 C.F.R. §§ 204.5(l)(3)(ii)(C) and 204.5(l)(3)(ii)(B) use a singular description of 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.

To determine whether a beneficiary is eligible for an employment based immigrant visa under the governing regulatory provisions, 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 sales and marketing manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education
Grade School

High School	4
College	4
College Degree Required	B.A.
Major Field of Study	Sales & Marketing

Thus, the Form ETA 750 clearly requires a bachelor degree that includes four (4) years of education. Thus, even if the petitioner was petitioning under the "skilled worker" provision of the third preference visa category instead of the "professional" provision of the third preference visa category, 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 this case, the labor certification clearly indicates that the proffered position requires a degree, not 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. Evidence of a baccalaureate degree shall be in the form an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study. See 8 C.F.R. § 204.5(1)(3)(2)(C). Contrary to counsel's attempt to distinguish the facts in the *Shah* case, a bachelor degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional. The petitioner did not delineate any equivalency in the terms of the ETA 750A setting forth the requirements of the proffered position. Therefore, the combination of education and experience may not be accepted in lieu of a four-year degree.

The evidence submitted with the motion to reopen is not relevant to the issues of this proceeding. The additional educational accolades achieved by the beneficiary occurred after the filing of the petition. A petitioner must establish the elements for the approval of the petition at the time of filing. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Additionally, the beneficiary's contributions to the petitioner's business are not relevant to whether or not she meets the qualifications of the proffered position.

The AAO affirms its prior decision that the petitioner has not established that the beneficiary is qualified for the proffered position, either under a skilled worker or a professional under the third preference immigrant visa category, since it has not proven that the beneficiary holds a four-year baccalaureate degree or foreign equivalent.

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 motion to reopen or reconsider is granted. The prior decision of the AAO, dated December 13, 2003, is affirmed. The petition remains denied.