



U.S. Citizenship
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FILE: [REDACTED]
EAC-03-121-51970

Office: VERMONT SERVICE CENTER

Date: 03 19 2001

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

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 petition¹ was denied by the Acting Center Director (director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a retail clothing store. It seeks to employ the beneficiary permanently in the United States as a retail store manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that the beneficiary possessed the requisite Bachelor's Degree as stated on the labor certification application at the time the request for certification was filed and denied the petition accordingly.

On appeal, counsel asserts that the offered position is a skilled position rather than a professional one and that the beneficiary possessed the requisite qualifications, or the equivalent thereof.

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 hold baccalaureate degrees and who are members of the professions.

The first issue to be discussed in this case is whether or not the petitioner seeks the benefits for the beneficiary as a professional or skilled worker. Current law combines the pre-1990 third and sixth preference into the employment-based third preference visa category as skilled workers, professionals, and other workers. On the Form I-140 the petitioner checked Part 2., Item e, a skilled worker or professional. In the instant case, Form ETA 750 requires 4 years college studies, Bachelor's degree in Business Administration and 2 years experience. The labor certification appears to support either a professional or a skilled worker. The petitioner should specify that the petition is filed for the beneficiary as a skilled worker under section 203(b)(3)(A)(i) of the Act or professional under section 203(b)(3)(A)(ii) of the Act with the filing of the petition. In the letter dated March 26, 2004 in response to the director's request for additional evidence (RFE), counsel claimed that the petitioner was sponsoring the beneficiary not as a professional, but rather as a skilled worker. Counsel makes this claim again on appeal. The record in the instant case provides no reason to preclude consideration of any later submitted request from the petitioner that the petition be considered as a petition for a skilled worker. The AAO will review the petition as a petition for a skilled worker instead of a professional.

The second issue to be discussed in this case is whether or not the petitioner established the beneficiary's qualifications for the proffered position. 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. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system

¹ The petitioner previously filed a I-140 petition (Receipt Number: EAC-) with the Vermont Service Center for the same beneficiary on July 21, 1999. On January 5, 2001 the director denied the petition finding that the beneficiary did not possess the required degree because his equivalent comes from combination of his education and working experience.

of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is January 14, 1998.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Application for Alien Employment Certification, Form ETA-750A, Items 14, set forth the minimum education, training, and experience that an applicant must have for the position of retail store manger. In the instant case, Item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	7 years
High School	4 years
College	4 years
College Degree Required	Bachelor's
Major Field of Study	Business Admin.
Training	blank
Experience	
Job Offered (number)	2 years or
Related Occupation (number)	2 years
Related Occupation	Manager

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In the instant case, the petitioner must demonstrate that on January 14, 1998, the beneficiary had 4-years college studies, a Bachelor's Degree in Business Administration and two years of experience in job offered or 2 years of experience in manager occupation. However, the petitioner did not demonstrate that the beneficiary has all the qualifications.

The petitioner did not submit any evidence (such as diploma, certificate, transcripts and registration/enrollment records) of the beneficiary's high school and 4-years of college studies. The only document concerning the beneficiary's education and Bachelor's Degree in Business Administration in the record is an evaluation report from Dr. Gerald L. Itzkowitz of Morningside Evaluations and Consulting. The petitioner did not submit any supporting documents with the report. 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. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The beneficiary set forth his credentials on Form ETA-750B and signed his name on January 13, 1998 under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting

information of the beneficiary's education, he indicated that he studied in the field of business administration at Indiana University in Bloomington, Indiana from 1980 and 1982 and received Bachelor's degree; that he studied in the field of hotel management at Montgomery College in Rockville, Maryland from 1978 to 1980 without any degrees or certificates received. However, the petitioner did not submit a copy of the beneficiary's degree from Indiana University or his transcripts from Indiana University and Montgomery College. The AAO notes that these documents were specifically requested by the director during the adjudication of the previously filed identical petition. Instead, the evaluation report indicated that the only college education the beneficiary had was one year academic coursework at Montgomery College in Iran from 1999 to 2000.² The record, however, indicates that the beneficiary entered the United States on December 4, 1978³, and was living in Washington DC area from September 1991 to January 31, 2003⁴. The evaluator did not state upon what documents his report was based and did not explain how the beneficiary attended the college in **Iran** in 1999-2000 while he was living in the United States. The evaluation report indicated that from 1978 through 1984, the beneficiary was employed as a waiter, bartender, lead waiter and bartender, and assistant restaurant manager for the Peppermill French Restaurant, Library Disco and Bar, and Bethesda Marriott Hotel, respectively. The evaluator did not explain how the beneficiary obtained these experiences while he studied at Montgomery College in Rockville, Maryland and Indiana University in Bloomington, Indiana from 1978 to 1982. Because of these defects, the evaluation report will be given little weight in these proceedings.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states: Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. ... It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

On December 30, 2003 the director issued a request for additional evidence (RFE) providing guidance for the evaluation. The director specially stated that: "for an I-140, Immigrant Petition for Alien Worker Petition, an acceptable evaluation should: 1) Consider formal education only, not practical experience."

The evaluation contained in the record used 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. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). Counsel's asserts on appeal that: "In fact, the regulations elsewhere allow experience to be taken into account when determining an alien's qualifications (see 8 C.F.R. §214.2(h)(3)(iii)(C))". Counsel's assertion is a misplaced. Counsel cited wrong regulations. The regulation allowing experience to be taken into account to determine alien's qualification is the regulation at 8 CFR § 214.2(h)(4)(iii)(D)(5). Furthermore, 8 CFR § 214.2(h)(4)(iii)(D)(5) applies to H1B petitions, not immigrant petitions. The instant petition is an immigrant petition, therefore, the regulation is not applicable.

Counsel also contends on appeal that the restrictions on educational evaluations does not apply to the petition for a skilled worker. Counsel's assertion is not based on legal authority. There is no provision differing a professional petition from a skilled worker petition with reference to the evaluation of credentials. Instead, both regulatory provisions governing the two third preference visa categories clearly require that the

² The evaluation report states in pertinent parts: "The following evaluation is based upon an analysis of Mr. [REDACTED] employment experience as well as his attainment of one year of academic coursework from the Montgomery College in Iran. ... The Montgomery College is an accredited institution of higher learning in Iran."

³ Shown on Part 3 of Form I-140 and Part 1 of Form I-485.

⁴ Shown on Form G-325A, Biographic Information.

petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a “professional” because the regulation requires it and for a “skilled worker” because the regulation requires that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience. The beneficiary in the instant case was required to have a bachelor's degree as specified on the Form ETA 750. The record does not contain he has such a degree, therefore, he cannot qualify for the classification sought. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Counsel cited several precedents⁵ to support her assertion. In some cases cited the beneficiaries had bachelor's degrees. The other cases concerned nonimmigrant petitions instead of immigrant petitions. No precedents cited by counsel expressly indicated that a petitioner could use experience to equate the beneficiary's education in a skilled worker petition.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.

⁵ Matter of Asuncion, 11 I&N Dec. 660 (BIA 1965); Matter of Shin, 11 I&N Dec. 686 (D.D. 1966); Matter of Sun, 12 I&N Dec. 535 (D.D. 1966); Matter of Medina, 13 I&N Dec. 506 (Reg. Comm'r 1970); and Matter of Portugues, 19 I&N Dec. 194 (Comm'r 1984).