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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VERMONT SERVICE CENTER
EAC 03 049 55272

Date: DEC 21 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)

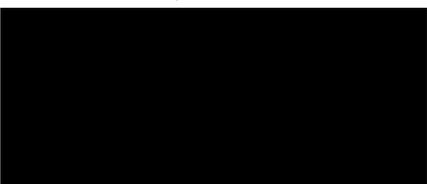
ON BEHALF OF PETITIONER:



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 preference visa petition was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer software development firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The Acting Director determined that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied and denied the position accordingly.

On appeal, counsel submits a brief.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for granting 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.

The regulation at 8 C.F.R. § 204.5(l)(2) states, in pertinent part:

“Professional means a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professions.”

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

Professionals. 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.

If the petition is for a professional pursuant to 8 C.F.R. § 204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on January 25, 2002. The Form ETA 750 states that the proffered position requires four years of college culminating in a bachelor's degree in computer science, three years of experience in the position offered or a related occupation, and knowledge of various programs and operating systems.

With the petition, counsel submitted, as evidence of the beneficiary's education, a photocopy of a diploma showing that the beneficiary graduated from McGill University in Montreal on June 8, 1979. That diploma does not state the beneficiary's major course of study. Counsel also submitted various documents pertinent to the beneficiary's employment experience.

Because the evidence submitted was insufficient to demonstrate that the beneficiary has a baccalaureate degree in computer science,¹ the Vermont Service Center, on October 24, 2003, requested additional evidence pertinent to the beneficiary's education.²

In response, counsel submitted a copy of the beneficiary's transcript from McGill University. The transcript shows that the beneficiary took only two computer science classes while at McGill and that he was awarded a bachelor's degree with a major in biology at the end of the spring semester of 1979.

Counsel also submitted a letter, dated November 17, 2003, from an evaluation service. That letter states that the beneficiary's education and experience, taken together, are the equivalent of a bachelor's degree in computer systems analysis.³

The Acting Director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on May 6, 2004, denied the petition. The decision of denial did not address the evaluation service's November 17, 2003 letter.

On appeal, counsel asserts that the failure to consider the November 17, 2003 credential evaluation letter requires that the decision be reversed. Counsel further argues that the beneficiary's education and experience, as that letter asserts, are the equivalent of the requisite bachelor's degree in computer science. Counsel further cites *Hong Kong TV Video Program, Inc. v. Ilchert*, 685 F.Supp. 712 (1988), *Augat, Inc. v. Tabor*, 719 F.Supp. 1158 (1989), *Matter of Shin*, 11 I&N Dec. 686 (DD 1969), and *Matter of Devnani* 11 I&N Dec. 800 (1966) for the proposition that the beneficiary "can qualify as a professional under the EB-3 category even without a bachelor's degree based upon academic and experiential equivalencies."

Initially, this office disagrees with counsel's assertion that this matter must be reversed if the Acting Director failed to adequately consider the evidence. If the evidence were insufficiently considered, the remedy for that error would be for this office to consider the evidence fully. This office shall, in any event, consider all of the evidence, and further inquiry into whether the Acting Director acted properly in that regard is unnecessary.

Matter of Shin, supra, is a case in which a District Director found that the beneficiary, who had a master's degree, qualified as a professional based on possession of that degree. Initially, this office notes that a master's degree is a higher degree than a bachelor's degree. Because the beneficiary in the instant case possesses neither a bachelor's degree nor any other college degree, the instant case is clearly distinguishable.

In *Matter of Devnani, supra*, the beneficiary had both a two-year bachelor's degree in chemistry and a master's degree in business administration. The Acting District Director decided, in that case, that the

¹ The evidence also did not conform to the requirement of 8 C.F.R. § 204.5(l)(3)(ii)(C) that evidence of the beneficiary's degree should necessarily specify the beneficiary's "area of concentration of study."

² The Service Center issued a previous Notice of Action on January 29, 2004. The evidence requested in that notice, however, is not relevant to the basis for the subsequent denial of the instant visa petition.

³ This office summarily accepts that a bachelor's degree in computer systems analysis is equivalent to a degree in computer science.

beneficiary qualified as a professional notwithstanding that he did not have a U.S. four-year bachelor's degree or an equivalent foreign degree. The text of that case does not indicate that the approved labor certification stated that a bachelor's degree was a prerequisite of the proffered position, as the labor certification in this case does. Further, this office is not bound by the decisions of Acting District Directors. Counsel was free to cite the reasoning of that decision and to argue that it is convincing, but did not.

In *Hong Kong TV Video Program, Inc. v. Ilchert, supra*, the court found that the beneficiary of a petition for an H-1 non-immigrant visa qualified as a professional based on her experience. That case does not relate directly to the proposition for which counsel cited it, that is, that such experiential equivalents are applicable to the instant EB-3 immigrant category. The language of that decision appears to limit the decision to H-1 non-immigrant visas.

Further, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id* at 719. Again, counsel was free to note the reasoning of that case and argue that it is convincing and should be logically extended to immigrant visa categories, but did not.

In *Augat, Inc. v. Tabor, supra*, the petitioner sought an EB-3 immigrant visa, as in the instant case. In that case the court found that, although the proffered position was for a professional, the beneficiary was qualified by virtue of his experience, notwithstanding this lack of a college degree. This is clearly the most salient of the cases cited by counsel.

That case is still distinguishable from the instant case. The text of that case contains no indication that the approved labor certification in that case required a bachelor's degree. In fact, the petition appears to have been denied because the proffered position did not require a bachelor's degree and was found, therefore, not to be a professional position within the meaning of sections 101(a)(32) and 203(b)(3)(A)(ii) of the Act. Whether the approved labor certification in that case specified that the position required a bachelor's degree remains unclear.

Finally, all of the cases cited by counsel predate IMMACT 90, which changed to governing statute to specifically include a degree requirement for professionals. As those decisions interpreted the previous law, rather than the law as it now stands, they are not convincing precedent.

The labor certification in this case states that the proffered position requires four years of college culminating in a bachelor's degree in computer science or a related field. The evidence indicates that the beneficiary's bachelor's is in biology, rather than a field that might be construed as related to computer science. Counsel argues that the beneficiary's employment experience qualifies him for the position, notwithstanding that it would ordinarily require a bachelor's degree.

The regulation at 8 C.F.R. § 204.5(k)(2) allows an alien to substitute a bachelor's degree plus five years of progressive experience for an advanced degree. The regulation at 8 C.F.R. § 214(h)(2)(iii)(D)(5) permits the

substitution of three years of experience for one year of college for special occupation nonimmigrants. Clearly CIS' predecessor agency was capable of issuing regulations providing for the substitution of experience for education in a limited context. Despite this capability, no such provisions appear at 8 C.F.R. § 204.5(l) and its subparagraphs relating to professionals and skilled workers.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for education and a degree, the laws and regulations applicable to the visa category in the instant case sanction no such substitution of experience for education and a degree and provide no formula pursuant to which such experience might be credited in lieu of education and a degree.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is 8 C.F.R. § 204.5(l)(1), which states that a "United States baccalaureate degree or a foreign equivalent degree" qualifies a beneficiary for a professional position pursuant to section 203(b)(3)(A)(ii) of the Act. That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree. No such equivalent is available if the petition is analyzed as a petition for a skilled worker. No criterion exists pursuant to which the beneficiary's experience, or experience coupled with education, absent the requisite bachelor's degree, may be analyzed to see whether it is equivalent to that requisite degree.

The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree⁴ but did not.⁵ The petitioner was free to submit a labor certification that required only experience, rather than any education at all. The petitioner, however, chose to include an education and degree requirement, and the Acting Director was therefore correct in treating the petition as one for a professional, and in using the criteria in the regulation at 8 C.F.R. § 204.5(l)(2) to evaluate the term "or equivalent" in the labor certification.

If the instant petition is analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act it necessarily fails, as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) makes clear that such a position requires a U.S. bachelor's degree or an equivalent foreign degree in computer science or a related subject, and the beneficiary does not have that required degree.

If that the instant petition is analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act the result is the same. If the petition is considered as a petition for a skilled worker, the requirement as stated on the ETA 750 for a bachelor's degree or the equivalent would be unaffected. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on

⁴ In that event the petition would be analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. Because it would not, in that event, necessarily require a minimum of a bachelor's or equivalent foreign degree and would not, therefore, be a petition for a professional pursuant to section 203(b)(3)(A)(ii).

⁵ Had the petitioner specified an acceptable substitute for the requisite bachelor's degree in this case, that would have opened the position to U.S. workers without degrees. Although those non-graduate workers were apparently excluded from consideration for the proffered position, the petitioner now seeks to hire an alien worker without such a degree. The purpose of the instant visa category is to provide alien workers for U.S. positions, but only if qualified U.S. workers are unavailable. To permit the petitioner to alter the terms of the approved labor certification such that the beneficiary is eligible for the petition after the petitioner excluded U.S. workers with similar qualifications would frustrate the purpose of the visa category.

the approved Form ETA 750 labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. The instant petition, submitted pursuant to 8 C.F.R. §204.5(I), may not be approved.

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.