

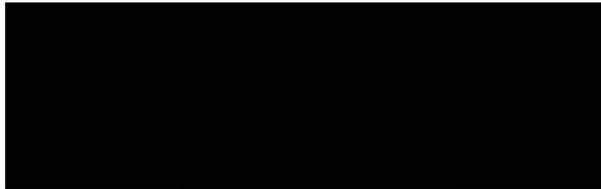


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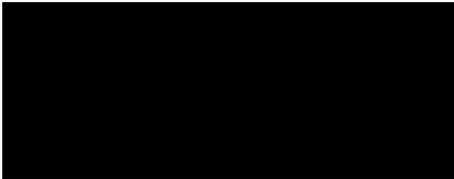
Petitioner:

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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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

On appeal, the counsel submits a brief.

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.

8 CFR § 204.5(l)(3)(ii) states, in pertinent part:

(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.

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.

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 April 25, 2004. The petitioner selected Part 2, box "e" of the I-140 petition. That selection states, "A professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree) or a skilled worker (requiring at least two years of specialized training or experience)."

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, Form ETA 750 A, item 14 describes the requirements of the proffered position and occupation of system analyst as follows:

- 14. Education (enter number of years)
 - Grade School Blank
 - High School Blank
 - College 4
 - College Degree Required Bachelor's Degree
 - Major Field of Study Comp. Sci., Math, Physics, Eng'g. or related discipline
 - Training Blank
 - Experience
 - Job Offered
 - Number - Years | Mos. 2 "or"
 - Related Occupation
 - Number - Years | Mos. 2
 - Related Occupation
 - Specify Software Development Occupation

The employer who is the petitioner has prepared the above ETA 750A as an essential part of the labor certification process used to support a preference visa petition that is employment based. The employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria. In the present case, the above requirements also state that the occupation of system analyst requires a four-year college degree or its equivalent, in the computer science, mathematics, physics or engineering or related fields. In a related occupation identified as Software Development Occupation, the employer/petitioner requires two years of occupational experience.

Along with Form ETA 750, Part A, set forth above, the employer also is required to submit Form ETA 750, Part B that is a "Statement of Qualifications of Alien." Part B identifies the alien, specifies her current and prospective address in the United States, her education including trade and vocation training, and lists her work experience.

The Form ETA 750 Part B prepared by the beneficiary states the following education history:

Block 11

Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

University of Witwatersrand, South Africa

Field of Study	<u>Computer Science</u>
From ...[mo./yr]	<u>1983</u>
To ...[mo./yr.]	<u>1986</u>
Degrees or Certificates Received	<u>Bachelor's Degree</u>

University of South Africa

Field of Study	<u>Marketing Management</u>
From ...[mo./yr]	<u>1999</u>
To ...[mo./yr.]	<u>2000</u>
Degrees or Certificates Received	<u>Post-graduate diploma</u>

The director issued a request for evidence dated June 8, 2004. The director requested evidence that the beneficiary possessed a U.S. bachelor's degree in computer science, mathematics, physics or engineering or related fields or a single source, foreign degree that is equivalent to a U.S. baccalaureate degree.

The petitioner submitted a memorandum from CIS on degree equivalency; copies of federal regulation; and, a brief of the issue asserting that the beneficiary is qualified based upon her education and that the two foreign degrees satisfy the foreign equivalency requirement. Further, counsel contends that CIS should follow its own operating manual and defer to the petitioner's determination as to who is qualified for the job based upon its evaluation of the qualifications required.

The director denied the petition on July 14, 2004, finding in pertinent part that the evidence submitted did not establish that the beneficiary does not possess a single-source foreign degree, which is the equivalent of a four-year United States bachelor degree.

On appeal, the counsel asserts that the director erred in denying the petition as the "... beneficiary has completed the requisite education to meet the foreign equivalent degree standard." The petitioner submits three education evaluations.

The petitioner submitted an education credential evaluation dated September 20, 2004, of the beneficiary's foreign schooling as it equates to a higher education offered in the United States.

The evaluation prepared by the [REDACTED] dated July 21, 200 states in pertinent part:

* * *

“[The beneficiary’s degree results from] ... a three-year program of study which, when taken with ... [the one year program of study in Marketing] is equivalent to a Bachelor’s degree in Mathematics and Computer Science ...”

The petitioner submitted an education credential evaluation dated September 20, 2004, of the beneficiary’s foreign schooling as it equates to a higher education offered in the United States.

The Morningside Evaluations and Consulting evaluator stated in pertinent part:

* * *

[The beneficiary] ... completed coursework in general studies and her area of concentration, Mathematics and Computer Science, which leads to a degree from the University. A general studies curriculum includes coursework in English, the social sciences, mathematics, and the sciences, which are a requisite component of a university degree from an institution of higher learning in the United States.

There is no evidence in transcripts submitted into evidence that the beneficiary completed any of the above courses mentioned other than mathematics and computer science. This evaluator opines that the beneficiary has the United States’ equivalent degree of a Bachelor of Science degree in Applied Mathematics and Computer Science.

The petitioner also submitted an education credential evaluation dated October 4, 2004, of the beneficiary’s foreign schooling as it equates to a higher education offered in the United States. The evaluation prepared by Professor [REDACTED] Professor of Computer Informations Systems, Medgar Evers College of the City University of New York stated in pertinent part:

* * *

“It is my judgment that Ms. [REDACTED] attained the equivalent of a Bachelor of Science Degree, with a dual major in Computer Science and Mathematics, from an accredited college or university in the United States...”

As reasons for this opinion, Professor [REDACTED] states students in South Africa “... typically have completed the equivalent of one year of bachelor’s level studies prior to beginning university programs.” He further states that the completion of a three-year bachelor’s programs at universities in South Africa is equivalent to the completion of four-year bachelor’s programs at universities in the U.S.”

There is no evidence submitted of the beneficiary’s pre-university education.

CIS may, in its discretion, use as advisory opinions, statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*,

19 I&N Dec. 791 (Comm. 1988). In this instance, by two of petitioner's credential evaluators above mentioned [REDACTED], the beneficiary has less than a four-year college degree. Neither evaluator mentions the post-graduate diploma in marketing management, nor do they assert that the combination of all the years of higher education received from two universities equates to a four-year bachelor's degree.

The regulations define a third preference category professional as 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." See 8 C.F.R. § 204.5(l)(2) and 8 C.F.R. § 204.5(l)(3)(ii)(C). In addition, the Form ETA 750 separates education from experience.

The above regulations at 8 C.F.R. § 204.5(l)(3)(ii)(C) use a singular description of foreign equivalent degree. Thus, for professionals, 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.

Counsel also submits a copy of a letter dated January 7, 2003, from [REDACTED] of the INS Office of Adjudications to counsel in other cases, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Within the July 2003 letter, Mr. [REDACTED] states that it is not the intent of the regulations that only a single foreign degree may satisfy the equivalency requirement.

At the outset, it is noted that private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); see also, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

Moreover, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. There is no comparable provision to substitute 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. We do not find the determination of the credentials evaluations probative in this matter. It is further noted that a bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245.

In keeping with *Matter of Shah*, the AAO will only consider degrees earned in less than four years to be a single foreign equivalent of a U.S. Bachelor's degree if the academic program was a four year program and the beneficiary finished in less time or obtained advanced credit.

The record indicates that the beneficiary does not hold a U.S. bachelor's degree or a foreign equivalent degree and that beneficiary does not have the required number of years of college education.

The beneficiary also holds a postgraduate diploma from the University of South Africa. However, the record does not demonstrate the postgraduate diploma in marketing management is a single academic degree that is a foreign equivalent degree to a U.S. bachelor's degree. As stated above, the regulation 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. The combination of a degree deemed less than the equivalent to a U.S. baccalaureate degree and a postgraduate diploma does not meet that requirement.

Counsel asserts that since the U.S. Department of Labor issued the certified Alien Employment application that CIS may not inquire into it. In determining the respective jurisdictions of the Department of Labor and this Service, one may turn to the entire body of recent court proceedings interpreting the interplay of the agencies and strictly confining the final determination made by the Department of Labor. See Stewart Infra-Red Commissary, Etc. v. Coomey, 661 F.2d 1 (1st Cir. 1981); Denver Tofu Company v. District Director, Etc., 525 F. Supp. 254 (D. Colo. 1981); and Joseph v. Landon, 679 F.2d 113 (7th Cir. 1982).

These cases recognize the labor certification process and the authority of the Department of Labor in this process stem from section 214(a)(14) of the Act, 8 U.S.C. 1182(a)(14). In labor certification proceedings, the Secretary of Labor's determination is limited to analysis of the relevant job market conditions and the effect, which the grant of a visa would have on the employment situation. This Service, through the statutorily imposed requirement found in section 204 of the Act, 8 U.S.C. 1154, must investigate the facts in each case and, after consultation with the Department of Labor, determine if the material facts in the petition including the certification are true.

Although the advisory opinions of other Government agencies are given considerable weight, the Service has authority to make the final decision about a beneficiary's eligibility for occupational preference classification. The Department of Labor is responsible for decisions about the availability of United States workers and the effect of a prospective employee's employment on wages and working conditions. The Department of Labor's decisions concerning these factors, however, do not limit the Service's authority regarding eligibility for occupational preference classification. Therefore, the issuance of a labor certification does not necessarily mean a visa petition will be approved.

Counsel contends that CIS should follow its own operating manual and defer to the petitioner's determination as to who is qualified for the job based upon its evaluation of the qualifications required. The Administrative Appeals Office is never bound by a decision of a service center or district director. See Louisiana Philharmonic Orchestra vs. INS, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). The authority to adjudicate appeals is delegated to the AAO by the Secretary of Homeland Security pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. As noted above, CIS defers to the petitioner's requirements when it examines the job offer portion of the labor certification to determine the required qualifications for the position. In the present case, counsel is asserting that a three-year university degree equates to a four-year college bachelor degree. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980).

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(1), 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.