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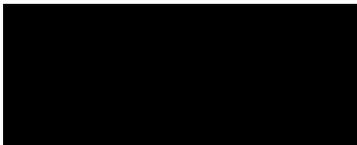
Date: **DEC 21 2005**

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

The petitioner is an apparel wholesaler. It seeks to employ the beneficiary permanently in the United States as a market research 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 and additional evidence.

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 Immigration and Nationality Act (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 30, 1998. The Form ETA 750 states that the proffered position requires a bachelor's degree in marketing and two years in the proffered position.

The Form ETA 750, Part B states that the beneficiary has a bachelor's degree in “sciences” from DAV College in Meerut, India and a bachelor's degree in export management from FICCI Ladies Organization in New Delhi, India. With the petition, counsel submitted a diploma and an English translation stating that the

beneficiary received a bachelor's degree in Botany, Chemistry, and Zoology from Meerut University in 1973. Counsel also submitted documents pertinent to the beneficiary's employment history.

Because the evidence submitted was insufficient to demonstrate that the beneficiary has the requisite baccalaureate degree in management the Vermont Service Center, on August 1, 2003, requested additional evidence pertinent to the beneficiary's education. The Service Center specifically requested a copy of the college transcript pertinent to the beneficiary's claimed bachelor's degree in export management. The Service Center also requested an advisory evaluation of the beneficiary's formal education and stipulated that the evaluation should consider the beneficiary's education only, rather than including his employment experience.

In response, counsel submitted a letter dated October 23, 2003 in which counsel stated that the beneficiary received a diploma from Federations of Chambers of Commerce & Industry (FICCI) in 1991, but that the FICCI does not retain student records after three years. Counsel provided no evidence in support of either assertion. Counsel also submitted a certification that the beneficiary had successfully completed a three-day FICCI seminar entitled "How to Start an Export Business.

Further still, counsel submitted a credential evaluation stating that the beneficiary's bachelor's degree in botany, chemistry, and zoology and his attendance at the FICCI seminar, in the aggregate are the equivalent of three years of college study and an additional one unit course in marketing management specializing in export management.

The Acting Director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree in management or an equivalent foreign degree, and, on February 5, 2004, denied the petition.

On appeal, counsel asserts that the petition clearly indicated that the proffered position is a position for a skilled worker in that block two was checked in section E of the Form I-140 petition. Counsel implies that the petition should therefore be analyzed as calling for a skilled worker rather than a professional. Counsel further notes that the beneficiary has extensive experience in the field of the proffered position. Further still counsel states,

The petitioner intended to seek an individual with a bachelor's degree in Marketing (functional or non-functional) and two years of experience in the job offer. [sic] The petitioner's core requirement was only two years up to and including four years of combined work experience and education/training in accordance with the specific vocational preparation (SVP) typically required for the instant position. The petitioner referred to the DOT – Dictionary of Occupational Titles for this requirement at the time of filing. *Enclosed please find Affidavit from the petitioner' confirming the same.* [Emphasis in the original.]

With the appeal counsel submitted an affidavit, dated April 1, 2004, from the petitioner's president. In that document the petitioner's president confirms that the petitioner's "core requirement" for the proffered position was two years of experience as a market research analyst. The affidavit further states, "The requirement of having a bachelor's degree was merely set as a requirement in order to expand this job offer to

more U.S. workers. The affidavit does not explain how the additional requirement of a bachelor's degree opened the position to more U.S. workers, rather than restricting it.

Counsel apparently implies that the petitioner should not be bound by the terms of the approved Form ETA 750 labor certification, but only by the petitioner's "core requirement," which was not stated on the Form ETA 750. Counsel's argument is unconvincing.

The labor certification in this case states that the proffered position requires a bachelor's degree in marketing and two years experience in the proffered position. The evidence indicates that the beneficiary's bachelor's degree is in botany, chemistry, and zoology. That degree is not equivalent to a degree in marketing. Although the beneficiary claimed, on the Form ETA 750, Part B, to have a bachelor's degree in marketing, no evidence was submitted in support of that assertion. Counsel states that such evidence is no longer available. That statement is insufficient to demonstrate the beneficiary's eligibility, especially in the absence of evidence to demonstrate its veracity.

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.¹

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 degree² but did not. The Acting Director was therefore correct in treating the petition as one

¹ Nor do the regulations sanction the substitution of education for experience.

² 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

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.

This office is unpersuaded by the petitioner’s president’s assertion that the requirement on the labor certification of a bachelor’s degree, in addition to two years of experience, somehow opened the proffered position to additional U.S. workers. That requirement is cumulative, rather than in the alternative, and excluded U.S. workers without degrees in marketing.

Had the petitioner **not** specified a degree requirement that would have opened the position to additional U.S. workers. Had the petitioner specified an acceptable substitute for the requisite bachelor’s degree in this case, that, too, would have opened the position to U.S. workers without degrees. Although non-graduate workers were 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.

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.

Counsel’s argument that the petitioner, by checking block two in section E of the Form I-140 petition, specified that the position is for a skilled worker is unconvincing. That box indicates that the proffered position is for “A skilled worker (requiring at least two years of specialized training or experience) or professional.” Checking that box does not clearly indicate that the proffered position is a position for a skilled worker, rather than a professional, as counsel asserts.

In any event, if 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. To determine whether a beneficiary is eligible for a third preference visa, the Service must ascertain whether the alien is, in fact, qualified for the certified job. 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 *Madany 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.

would not, therefore, be a petition for a professional pursuant to section 203(b)(3)(A)(ii). Even if the instant petition were construed as a petition for a skilled worker, however, the petitioner would be obliged to demonstrate that the beneficiary is qualified for the proffered position pursuant to the terms of the approved ETA 750 labor certification. In evaluating the beneficiary’s qualifications, the Service must look to the job offer portion of the labor certification to determine the required qualifications for the position. The Service 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 *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

1981). If the petition were considered as a petition for a skilled worker, the requirement as stated on the ETA 750 for a bachelor's degree would be unaffected.

The petitioner failed to demonstrate that the beneficiary has a United States baccalaureate in marketing or an equivalent foreign degree. The instant petition, submitted pursuant to 8 C.F.R. §204.5(l), 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.