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FEB 10 2005



FILE: [Redacted]
EAC 02 251 50401

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

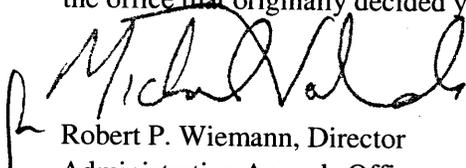
PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to
Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a jewelry manufacturer. It seeks to employ the beneficiary permanently in the United States as a jewelry sorter. 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 failed to establish that the beneficiary had the requisite two years work experience required by the offered position.

On appeal, counsel submits additional evidence and asserts that the beneficiary's post-secondary education qualifies her for the position offered.

Section 203(b)(3)(A)(i) of 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is March 29, 2001.

As noted on Part A, item 14 of the approved labor certification (ETA-750), the beneficiary must have two years of experience in the job offered as a jewelry sorter. Other than six years of grade school and six years of high school, no other requirements for the certified position are specified on the application for alien employment certification. The sole issue raised on appeal is whether the beneficiary's academic studies at the State University of New York College at Buffalo may be considered as the equivalent of two years of experience in the job offered.¹

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

(ii) Other documentation—

- (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.

The regulation at 8 C.F.R. § 204.5(l)(2) also states that an alien beneficiary's relevant post-secondary education may be considered as training for the purpose of determining whether he or she has met the requirements for designation as a *skilled worker*.

¹ The labor certification appears to have been corrected to delete other requirements that had originally appeared in item(s) 14 and 15.

Because the record did not initially contain sufficient documentation to establish that the beneficiary possessed the employment experience specified on the labor certification, the director requested additional evidence on November 13, 2002.

In response, the petitioner, through counsel, resubmitted a copy of the beneficiary's grade transcript from the State University of New York College at Buffalo that had initially accompanied the submission of the petition. It shows that the beneficiary had transferred credit from a Chinese institution and had subsequently completed 60 semester credits at the State University of New York College, beginning with the fall of 1996 and ending the spring of 1998. She was awarded a Bachelor of Science in Design in 1998. The transcript indicates that at least six of her courses involved the study of jewelry.

In denying the petition, the director found that the beneficiary's college studies failed to establish any prior work experience as a jewelry sorter.

On appeal, counsel maintains that the beneficiary's academic credentials are sufficient to establish her qualification for the visa classification because long-standing CIS policy has been to accept one year of academic study as the equivalent of three years of work experience. Counsel also submits a letter, dated May 12, 2003, from [REDACTED] of the State University of New York in support of this argument. [REDACTED] claims that the beneficiary's course of study in jewelry design at the university has been more in-depth and broad than a two-year working experience.

The AAO concurs with the director's conclusion and rejects the suggestion that the beneficiary's academic studies at the State University of New York should be considered the equivalent of two years of work experience as a jewelry sorter as required by the terms of the labor certification. 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). CIS must look to the labor certification to determine the qualifications for the position. It 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 distinguishes between academic requirements, training, and experience in the job offered. Counsel's assertion that the formula of equating three years of work experience to one year of education should be applied here is misplaced. That equivalence specifically applies to non-immigrant H1B petitions, not to immigrant petitions. It is further noted that "employment" is defined as permanent full-time work by an employee for an employer other than oneself. See 20 C.F.R. § 656.3. It follows that employment experience in the job offered is completely different than academic requirements. Moreover, unless unambiguously set forth on the labor certification, the only substitution in this classification that may be applicable, as noted by 8 C.F.R. § 204.5(i)(2), *supra*, is that of relevant post-secondary education for specified training requirements, not specific work experience in the job offered. By the terms of the labor certification, the beneficiary was specifically required to have two years of employment (not college) experience in the certified position of jewelry sorter. The petitioner's actual minimum requirements

regarding past employment experience could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

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.