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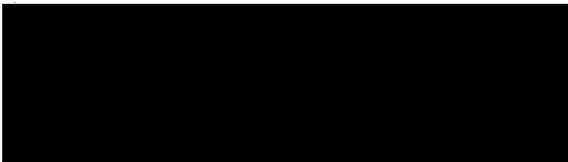
FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC 00 283 54661

Date: FEB 22 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the preference-visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, affirming the director's decision. The matter is now before the Administrative Appeals Office (AAO) on a motion to reopen and reconsider. The motion will be granted. The previous decisions of the director and AAO will be affirmed. The petition will be denied.

The petitioner is a retail footwear and athletic apparel company. It seeks classification of the beneficiary pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3), and it seeks to employ the beneficiary permanently in the United States as a "chief computer programmer." The director determined that the petitioner had not established that the beneficiary meets the qualifications specified in the ETA 750 on the priority date of the visa petition, May 2, 2000, and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the motion for reconsideration, counsel submits an affidavit from the petitioner; a revised educational evaluation; and an audited copy of the petitioner's 2001 financial report to show the petitioner has the financial ability to pay the proffered wage. Counsel contends the credentials evaluation shows the beneficiary qualifies for the position. He further addresses an issue the AAO raised without analysis, that the petitioner has not established its ability to pay the proffered wage.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. The motion qualifies as a motion to reconsider because, in the brief, counsel asserts that the director incorrectly applied the pertinent law.

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.

Eligibility in this matter hinges on the petitioner demonstrating 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 and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on May 2, 2002. The labor

certification, dated August 30, 2000, states that the position requires a four-year bachelor's degree in computer science or physics and two years experience as a programmer analyst.

According to counsel's September 30, 2000 enclosure letter, he submitted the alien employment certification; the petition; the petitioner's support letter; the beneficiary's diplomas¹; and a former employer's letter. The letter asserts that the diplomas attest to:

- Completion of a "three-year integrated course at the University of Bombay diploma in April 1988 for a Bachelor of Science degree in physics; and,
- Completion of one year's worth of coursework in computer software, systems analysis and applications offered by the Board of Technical Examinations, Maharashtra state, India, in 1991.

Because the filing did not include a credentials evaluation, the Service Center on May 19, 2001, requested one. In response, the petitioner submitted such a report dated June 19, 2001, from the Foundation for International Services, Inc. The report mentions the beneficiary's job experience totaling 9 and a-half years acquired between July 1989 and February 1999. Referring to both the degree and the professional experience, figuring three years professional experience are worth one year of academic coursework, the evaluation concludes the experience and coursework combined are the equivalent of three years university-level credit in physics from an accredited United States college or university. The report does not refer to the Board of Technical Examinations diploma.

On August 3, 2001, the director denied the petition, determining that the evidence had not established the beneficiary met the qualifications specified in the ETA 750.

In the appeal, filed September 10, 2001, counsel submitted two new credentials evaluation reports:

- An August 21, 2001 report from the Trustforte Corporation evaluated the beneficiary's qualifications. Unlike the June 19, 2001 report from the Foundation for International Services, Inc., however, the report from Trustforte reviews the beneficiary's educational attainments but not her work experience and concludes that the University of Bombay degree, by itself, was equivalent to "three years of academic studies leading to a Bachelor of Science degree, with a concentration in Physics." The evaluator then found the advanced diploma from the Board of Technical Examinations, for computer coursework between 1988 and 1990, added another year of coursework that is the equivalent of bachelor's-level computer sciences courses offered by a U.S. college or university. The report concluded the beneficiary had "attained the equivalent of a Bachelor of Science Degree, with a concentration in Physics and Computer Science, from an accredited institution of higher education in the United States."
- A facsimile copy of a second evaluation report, dated August 2001 from the International Credentials Evaluation and Translation Service likewise evaluated both diplomas and concluded that she had "satisfied similar requirements to the completion of a Bachelor of Science Degree in computer Science from an accredited institution of a tertiary education in the United States."²

¹ The diploma from the Board of Technical Examinations is not among the documents included in the record as submitted with the petition.

² Counsel only submitted a facsimile copy because "[w]e could not get the original in time to meet the filing deadline."

On May 29, 2002, the AAO reviewed only The Trustforte Corporation credential evaluation but not the one from the International Credentials Evaluation and Translation Service. The AAO then dismissed the appeal and denied the petition, finding that the record did not establish “that the beneficiary had a bachelor of science [sic] degree in computer science or physics on May 2, 2000.”

On June 24, 2002, counsel filed the instant motions to reconsider and reopen and counsel now asserts the AAO erred by:

1. Failing to consider the International Credentials Evaluation and Translation Service report; and,
2. Treating the new evaluations as if untimely because submitted after the priority date established by the filing of the labor certification with the Department of Labor.

Counsel also submits a revised evaluation from the Foundation for International Services, Inc., dated June 17, 2002, that purports to take into account the Board of Technical Examinations diploma along with the three-year University of Bombay Bachelor of Science diploma. Unlike its first evaluation, the Foundation now omits reference to the beneficiary’s professional experience in its analysis and concludes that the beneficiary “has the equivalent of a bachelor’s degree in computer science.”

Taking up counsel’s assertion that the AAO should have considered the credentials report of the International Credentials Evaluation and Translation Service, whether or not it was submitted in original documentary form or as a facsimile copy was not critical to CIS considering the report’s contents. Thus, the regulation at 8 C.F.R. § 204.5(g)(1) states:

In general, ordinary legible photocopies of such documents (except for labor certifications from the Department of Labor) will be acceptable for initial filing and approval...

Because the AAO did not declare that it would only consider original documents, the AAO appears to have overlooked the report. Nonetheless, the report was cumulative to the evidence the AAO did take into account in making its decision. The two credentials evaluations that the petitioner submitted in its appeal to the AAO reached the same conclusions.

A further issue is whether the record should include any of the credentials evaluations submitted on appeal merit inclusion into the record. Counsel makes no claim that the newly submitted evidence was unavailable previously, nor is any explanation offered for the failure to submit this evidence prior to the decision of the district director.

The question of evidence submitted for the first time on appeal is discussed in *Matter of Soriano*, 19 I & N Dec. 764 (BIA 1988), where the BIA stated as follows:

Where a visa petition is denied based on a deficiency of proof, the petitioner was not put on notice of the deficiency and given a reasonable opportunity to address it before the denial, and the petitioner proffers additional evidence addressing the deficiency with the appeal, then in the ordinary course we will remand the record to allow the district or Regional Service Center director to consider and address the new evidence. A petitioner may be put on notice of evidentiary requirements by various means, such as a requirement in the regulations that a particular document be submitted with the visa petition; a notice of intent to deny, letter, or form noting the deficiency or requesting additional evidence; or an oral statement at an interview that additional evidence is required. Where, however, the petitioner was put on notice of the required evidence and given a reasonable opportunity to provide it for the record before the denial, we will not consider evidence submitted on appeal for any purpose. Rather, we will

adjudicate the appeal based on the record of proceedings before the district or Regional Service Center director.

Because the AAO did review the one evaluation, however, adding the two more credentials evaluation to the record changes little. Of perhaps greater concern is how credibly the Foundation for International Services, Inc. could alter its June 19, 2001 report with new findings in a new report dated June 17, 2002. In the latter report, the Foundation takes into account the advanced diploma in computer software, systems analysis and applications from the Board of Technical Examinations. It then concludes that the beneficiary "has the equivalent of a bachelor's degree in computer science "as offered during the late 1980s and early 1990s from an accredited college or university in the United States." The report does so by finding the University of Bombay diploma is the equivalent of three years of coursework toward a university-level physics degree from a U.S. college or university, and by finding the Board of Technical Examinations diploma the equivalent of one year of university coursework in computer science. The revised Foundations report, however, does not reconcile the differing conclusions reached in its two evaluations.

Counsel contends in his motion to reopen that the revised Foundation report shows the beneficiary "has the equivalent of a bachelor's degree in computer science as offered during the late 1980s –early 1990s."

The Department's regulation at 8 C.F.R. §204.5(l)(2) states in 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.

No provision pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore if counsel's assertion were accepted that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree, but the petitioner chose not to do so. The 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.

The three educational evaluations do not show that the beneficiary holds a foreign equivalent degree. Rather the first evaluation relied on a combination of the beneficiary's education, professional training and employment experiences in finding that the beneficiary has the "background equivalent" of an individual with a bachelor's degree. Moreover, in calculating the equivalent education from the beneficiary's experience the report uses the formula of "3 years experience =1 year of university-level credit." That formula is applicable to nonimmigrant petitions, but it is not applicable to immigrant petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3).

Regarding the second and third evaluations, counsel asserts that the petition should be evaluated solely on the basis of academic coursework.

The regulations define a third preference category professional as a "qualified alien who holes at least a United States baccalaureate degree or a foreign-equivalent degree and who is a member of the professions." [Emphasis supplied.] See 8 C.F.R. § 204.5(l)(2). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies for the classification of professional that:

(C) *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. To show that the alien is a member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the profession.

The above regulations describe the foreign degree in the singular. Thus, 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 the third preference visa category purposes.

The Form ETA 750 requires a bachelor's degree in computer science or physics. A bachelor's degree generally requires four years of education. *Matter of Shah*, 17, I&N Dec. 244 (Reg. Comm. 1977). Neither experience, nor a combination of degrees, nor a combination of a degree and experience, may be substituted for the requisite bachelor's degree or equivalent foreign degree. The regulations explicitly allow substitution of a foreign degree that is the equivalent of a United States bachelor's degree. The record does not contain any evidence that the beneficiary has a United States bachelor's degree. The petitioner is obliged to show, therefore, that the beneficiary has a foreign degree, which is the equivalent of a United States bachelor's degree.

This office notes that if the petition were analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act rather than a professional pursuant to section 203(b)(3)(A)(ii) of the Act the result would be unchanged. In order to support approvability of a petition for a skilled worker the petitioner is obliged to submit evidence that the beneficiary possesses the requirements shown on the ETA 750. Again, the Form ETA 750 states that the proffered position requires a bachelor's degree in computer science or electrical engineering.

The beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in business on April 16, 2001 or a foreign equivalent degree. Therefore, the petitioner has not overcome this portion of the director's decision.

Therefore, the objection of the AAO has not been overcome on the motion.

The AAO also found that, beyond the director's decision, that the petitioner had not established the petitioner's ability to pay the proffered wage. Counsel also asserts to the contrary that, based upon its \$2.46 billion in yearly expenses, of which \$1.75 billion are for wages. Given that the foregoing numbers are substantiated in an audited financial statement submitted on appeal, the AAO concludes that the petitioner has established its financial ability to pay the proffered wage.

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 with regard to the beneficiary's qualifications as specified in the ETA 750. Accordingly, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of May 29, 2002, is affirmed. The petition is denied.