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

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office:

Vermont Service Center
[Redacted]

Date:

JUL 13 2005

IN RE:

Petitioner:

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:

[Redacted]

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 service center director denied the employment-based visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner stated that it was subsidiary of Imrex, Inc. The petitioner is a manufacturer of mechanical and hydraulic products. It seeks to employ the beneficiary permanently in the United States as a mechanical engineer. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the petitioner failed to provide sufficient evidence that the beneficiary is qualified for the proffered position. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner contends that the initial I-140 petition can be adjudicated as either a professional or skilled worker classification and submits additional documentation.

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 nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of 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)(3)(ii)(C) states the following:

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 that the minimum of a baccalaureate degree is required for entry into the occupation.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition's filing date. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is October 4, 1999.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of mechanical engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	0
High School	0
College	4
College Degree Required	Bachelor (or equiv)
Major Field of Study	Mechanical Engineer/Machine Tool Technology

The petitioner also specified that any applicants have two years of experience in the job offered. Under Item 15, the petitioner also set forth additional special requirements as follows: "Knowledge of inspection as computerized measuring machines (Mitutoyo, Brown & [S]harp, etc.) and programming them to inspect the designed part. Act as supervisor for the Toolmaker." The job offered lists the following duties on Item 13:

Research, plan, & design specialty mechanical & electromechanical products & systems & CNC machines. Handling Tool Room precision lathes & colechester manual lathes in carrying out job duties on a daily basis. Directed personnel, incl[uding] machinists, in fabrication of test control apparatus/equipment, ensure that products/systems conform to engineering design & customer specifications. Must have knowledge of, understand & be able to work with computerized numerical machines (CNC). Must be able to use special tools and processes used by these tools on a [day] by day basis. Must be capable of operating the computer numerical controls to prepare the necessary designs and programs[s], using Master Cam and Solid Works computer programs for detail, design and manufacturing of parts made from different materials, including, but not limited to Titanium, Mol[y]bdenum, Copper, etc.

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended the College of Technology, in Dublin, Ireland, from 1989 to 1991 and received a certificate in the field of mechanical engineering. The beneficiary also indicated that he received a certificate of study for a course in geometric "toleracing" from Regional Tech College, in Tallaght, Ireland, in 1995. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that he worked in the following positions for the petitioner and an Irish company:

1. The petitioner, Allied Dynamics, Mechanical Engineer, July 1997 – Date of filing ETA 750;
2. Pressco Jig & Tool Co. Ltd., Dublin, Ireland, Mechanical Engineer, July 1988 to July 1997, and Apprentice Mechanical Engineer, July 1984 to July 1988.

With the initial petition, the petitioner provided no academic credential evaluation. Because the evidence was insufficient, on July 23, 2003, the director requested an advisory evaluation of the beneficiary's formal education to establish its equivalent to a U.S. baccalaureate degree. The director requested that the evaluator consider formal education only, and not practical experience; that the evaluator state if the collegiate training was post-secondary

education; that the evaluator provide a detailed explanation of the materials evaluated; and that the evaluator briefly state his or her qualifications and experience.

In response, counsel for the petitioner submitted an educational evaluation from [REDACTED] International Evaluation Services, Marlboro, New Jersey. In his evaluation, dated April 4, 1997, [REDACTED] examined the beneficiary's two certificates of studies, which were also submitted to the record. One certificate is entitled Department of Education Trade Examinations, from College of Technology, City of Dublin Vocational Education Committee. This certificate provides grades for the examinations undertaken by the beneficiary in 1991 in the trade of mechanical engineering. There is not indication on the document as to the number of years of studies undertaken by the beneficiary. The second certificate is from Regional Technical College, Tallaght, Ireland, that certifies the beneficiary successfully completed a geometric tolerancing course designed for Bayer Diagnostics Manufacturing Ltd. and their suppliers. Two instructors signed the document that contains no date or further information as to the length of the coursework. The petitioner also submitted copies of letters from the beneficiary's previous employer in Ireland that provided detailed descriptions of his job duties there.

[REDACTED] examined the beneficiary's work history in depth, and, using a three-for-one formula for gauging the equivalency of years of relevant work experience to years of studies, stated that based on the beneficiary's twelve and a half years of documented professional experience, the beneficiary had the equivalent of 125 semester credits hours of undergraduate study. [REDACTED] found the beneficiary's work experience to fulfill the semester credit hours requirement for a U.S. baccalaureate degree. [REDACTED] also stated that the beneficiary had achieved, through his education and work experience, the equivalent of a bachelor's degree in machine tool technology from an accredited U.S. educational institution.

The director denied the petition on September 30, 2003, finding that the record did not establish that the beneficiary possessed the educational equivalent of a bachelor's degree as stated on the petitioner's labor certification. The director stated that the submitted evaluation was of limited probative value, because the evaluator examined both the work experience and academic studies of the beneficiary, and that the petitioner had not established that the beneficiary met the requirements of the proffered position as indicated on the submitted labor certification. The director further stated that since the beneficiary did not possess the equivalent of a baccalaureate degree, he could not be classified as a professional as defined in Section 203(b)(3)(A) in the Act.

On appeal, the petitioner asserts that it is willing to accept either a four-year bachelor degree or the equivalent of a four-year bachelor degree that could be achieved through any combination of work and education. According to the petitioner, a previous AAO decision stated that when alternative experience could not be relied upon as a substitute for a degree to qualify as a professional, the INS, now CIS, could determine whether the beneficiary qualifies as a skilled worker. The petitioner then requests that the I-140 petition be processed as a skilled worker rather than as a professional, and notes that both classifications comprise only one visa category.

The petitioner also submits an excerpt from *Matthew Bender*, § 39.05 on 3rd EB Preference: Skilled Workers, Professionals, and Other Workers, as well as an excerpt of notes taken at a meeting between the American Immigration Lawyer Association (AILA) and an unidentified legacy INS office, as taken off of the AILA Internet website. These notes refer to the examination of I-140 petitions for classification as a skilled worker, when a petition for a professional classification is denied based on the beneficiary's lack of a baccalaureate degree. Counsel asserts

that CIS should consider the beneficiary as qualified either under the professional or skilled worker category of the third preference category of the immigrant visa sought.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for “professionals,” states the following:

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 that the minimum of a baccalaureate degree is required for entry into the occupation.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision. And for the “professional category,” the beneficiary must also show evidence of a “United States baccalaureate degree or a foreign equivalent degree.” Thus, regardless of category sought, the petitioner must show that the beneficiary meets the requirements of the Form ETA 750A, which includes a four-year baccalaureate degree.

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, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a four-year bachelor’s degree of mechanical engineering/machine tool technology or equivalent (four years in college) degree in mechanical engineering/machine tool technology. In addition, the petitioner requested two years of work experience in the job offered.

The petitioner has established that the beneficiary has more than two years of relevant work experience in the job offered. The only issue to be discussed in the remainder of this decision is whether or not the beneficiary has a bachelor’s degree or its equivalent in mechanical engineering/machine tool technology.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be an equivalent degree, not 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. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. 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. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional.

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). The regulation uses a singular description of foreign equivalent degree. 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 third preference visa category purposes.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree, or an equivalent degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent degree to a U.S. bachelor's degree.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from Ireland could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the beneficiary's formal education consists of less than a four-year curriculum. The evaluations submitted with the evidence in this proceeding suggesting that the beneficiary's two certificates for studies or coursework in relevant fields but for undetermined periods of time, and his subsequent employment experience should be considered as the equivalent of a baccalaureate degree is not accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United State's bachelor's degree because it includes employment experience in the evaluation. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Contrary to petitioner's assertion on appeal, Item 14 of the Form ETA 750A does not expand the educational requirements to encompass work experience that is equivalent to a bachelor's degree. A "Bachelor or equivalent" listed under a question eliciting "College Degree Required," can lead to no alternate conclusion, especially since additional employment experience was set forth under the box eliciting employment experience requirements.

The petitioner's reliance upon AILA's transcribed notes and upon an unpublished AAO decision is also without merit. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). It is not clear that the hypotheticals in the AILA notes and other statements are to be interpreted as the petitioner did. The AAO does not have the cases with the facts summarized in the AILA meeting to ascertain similarity to the instant case. Additionally, some of the service center comments appear to be broad statements that the service centers will consider a petitioner's qualification in either a skilled worker or professional category of the third preference immigrant visa category and not necessarily a more specific view that experience could substitute for a bachelor's degree. Furthermore, the transcribed AILA notes are not precedent, and their utilization in these proceedings would constitute error. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. V. Montgomery*, 825 F.2d 1084 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988). It is also noted that the AAO's authority over a service center is similar to that of a court of appeals and a district court. Even if a service center director had previously approved immigrant petitions on behalf of other similarly unqualified beneficiaries, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, either under a skilled worker or a professional under the third preference immigrant visa category, since it has not proven that the beneficiary holds a four-year baccalaureate degree or foreign equivalent.

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.