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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JUN 07 2005
EAC 03 027 50703

IN RE: Petitioner: [redacted]
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:

[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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a wholesale import-export company. It seeks to employ the beneficiary permanently in the United States as a grade II wholesaler. As required by statute, accompanying the petition is a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor. The director determined the petitioner did not establish that the beneficiary possessed the requisite college degree for the preference classification 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 September 18, 2002. The Form ETA 750 states that the proffered position requires a bachelor's degree in any field of study plus two years experience in the proffered job or in any marking or management position.

With the petition, counsel submitted:

- A Form G-28;
- An original certified Form ETA 750 application with the beneficiary's signature attesting to her current employment with the petitioner as an import/export wholesaler with a "01/1999" starting date;

- Correspondence on letterhead dated July 18, 2001, certifying that the beneficiary worked as import-export manager during "06/1994 to 06/1996;"
- A credentials evaluation report dated August 10, 2001, stating the beneficiary's education was the equivalent of a U.S. bachelor's degree in international business marketing;
- The beneficiary's 2001 Form 1040 individual income tax return with attached Form W-2; and,
- The petitioner's 2000 Form 1120 corporate income tax return.

The director on September 18, 2003, sent a request for evidence (RFE) asking about the beneficiary's education, and specifically requesting a copy of the beneficiary's college transcript.

In response, counsel submitted:

- Counsel's letter of November 26, 2003, asserting that Citizenship and Immigration Services (CIS) must consider both job experience and education in deciding if the beneficiary has the equivalent of a bachelor's degree;
- An Internal Revenue Service transcript of the beneficiary's 2001 Form 1040 income tax return;
- The petitioner's 2001 Form 1120 tax return; and,
- The petitioner's bank statements covering January 2001 to August 2003.

The director determined the new evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or its foreign equivalent, and on January 28, 2004, denied the petition.

On appeal, counsel asserts that the director erred:

- By failing to give due credit to the beneficiary's prior job experience in determining if her credentials satisfied the "foreign equivalent degree" requirement; and
- By refusing to defer to the petitioner, as employer, in deciding if the proffered position requires a professional or skilled worker.

The issue here is whether the beneficiary meets the requirements set forth on the Form ETA 750 application. The director correctly interpreted the regulations to state that the Form ETA 750 sets the job requirements, not the petitioner-employer. When a labor certification plainly and expressly requires a degree, CIS will require a degree and not its equivalent. To determine whether a beneficiary is eligible for a third preference immigrant visa, the CIS must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, the CIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. The 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 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

For his assertion that experience may substitute for education, counsel cites *Children's Medical Center of Dallas* v. *INS*, CA3 –87-2330-T (Tex. 1988), which involves a non-immigrant visa for which both experience and formal education were both considered appropriate in evaluating what is "the equivalent of a Bachelor's degree." The record contains an evaluation from the Foundation for International Services Inc, which states that the beneficiary obtained the equivalent of two years of university-level credit from an accredited college or university in the United States. The overall evaluation concludes, based upon both her educational and her job experience history that the beneficiary has "the equivalent of an individual with a bachelor's degree in international business marketing from an accredited college or university in the United States." 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).

The evaluation used the rule that treats three years of experience as the equivalent of one year of education. This rule is found in the H1B regulations, not in those governing immigrant status. The beneficiary was required to have the kind of bachelor's degree specified on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the petitioner submitted the Form ETA 750 for certification by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Since the regulations clearly require a degree, this office cannot accept less than a degree plus job experience in its place. By contrast, the H1B regulations contemplate acceptance of three years experience as the equivalent of a year of education. The regulations governing skilled workers for immigrant visas are silent on whether degree equivalencies may be accepted. Without guidance from the regulations, CIS must abide by the requirements of the ETA 750. Since the labor certification here specifically requires a degree (and since no degree equivalencies are noted in box 15 of the labor certification application), *Matter of Silver Dragon Chinese Restaurant*, supra, controls and CIS cannot add to or ignore any requirement in box 15. Moreover, since the beneficiary does not meet the requirements spelled out in the ETA 750, the issue of the beneficiary's proper classification (professional or skilled worker) is rendered moot.

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(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.