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U.S. Citizenship  
and Immigration  
Services

B6



FILE: [REDACTED]  
WAC 03 045 53659

Office: CALIFORNIA SERVICE CENTER

Date: JUN 07 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, 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 is an electronics company. It seeks to employ the beneficiary permanently in the United States as a senior engineer and production manager. 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 not established that beneficiary had the required baccalaureate degree as outlined in Form ETA 750. Accordingly, the director denied the petition.

On appeal, the petitioner states it is willing to substitute work experience for a baccalaureate degree, and that based on the beneficiary's work experience, the beneficiary has the equivalent of a college degree and is a member 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 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

In addition, 8 C.F.R. §204.5(l)(3)(ii)(C) states:

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. Evident 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 occupation

The regulation at 8 C.F.R. § 204.5(l)(3) also 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.
- (B) *Skilled worker.* If the petitioner 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 . . . The minimum requirements for this classification are at least the two years of training or experience.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on 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. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is \$4,000 per month, which amounts to \$48,000 annually. The labor certification also states that the minimum qualifications for the position is a baccalaureate degree in electronics and three years of work experience in the specific job outlined in the ETA 750 or three years in the related occupation of electronic production management. In Part B, the beneficiary stated that he had attended the Kwangwoon University, Seoul, Korea from March 1967 to August 1971, and received a bachelor of science degree in electronic communication engineering. In the beneficiary's resume that was also submitted, the beneficiary indicated that he had attended the Kwangwoon University from March 1967 to February 1971.

Because the evidence submitted was deemed insufficient to demonstrate whether the beneficiary possessed a baccalaureate degree, on May 13, 2003, the director requested additional evidence pertinent to the beneficiary's educational credentials. The director specifically requested evidence that the beneficiary holds a U.S. baccalaureate degree or the foreign equivalent of a baccalaureate degree in electronics, including a copy of the degree received, official college or university records that showed the date the baccalaureate degree was awarded, and university records on letterhead that show the courses taken and credits received, and any certificate or degree bestowed. The director also stated that if the petitioner was establishing that the beneficiary was a member of the professions, it submit evidence to show that the minimum of a baccalaureate degree was required for entry into the proffered position.

In response, counsel submitted documents from Kwangwoon University that stated the beneficiary had fulfilled three semesters in the Department of Electronic Communication Engineering from March 8, 1967 to August 30, 1971. Counsel also submitted six letters from individuals who had either employed or worked with the beneficiary. All letters in specific detail attested to the beneficiary's work abilities and experience in the field of electronics from 1978 to 1999. Counsel in a cover letter stated that the ETA 750 called for a baccalaureate degree in electronics. Counsel stated that the beneficiary had one and a half years of college studies in his field, and if the legacy INS' rule of three years of work experience for one year of college studies were utilized in the instant petition, the beneficiary would need seven to eight years of work experience to give him the experience that would be equivalent to a baccalaureate degree in electronics. Counsel stated that the beneficiary had twenty years of experience in the field of electronics. With regard to the director's request for evidence that the beneficiary is a member of the professions, the petitioner submitted a letter to the record. In this letter, the petitioner states that his company repaired items, such as home theater systems, CD players and car amplifiers from China and Korea. The petitioner states that to solve technical problems or to purchase repair parts, it needed a person who could communicate with technicians in Korea or China.

On February 5, 2004, the director denied the petition. The director noted that, notwithstanding counsel's request that the three for one rule be applied to the beneficiary's work experience, the beneficiary did not hold a United States baccalaureate degree or a foreign equivalent degree of a baccalaureate degree. The director further stated that the fact that the petitioner was still willing to employ the beneficiary without his possession of a baccalaureate degree was evidence that a baccalaureate degree was not required for entry into the occupation.

On appeal, counsel states that the beneficiary is a professional based on his combined education and experience, and that both the petitioner and the Department of Labor accepted that the beneficiary was a professional. In subsequent correspondence, counsel stated that pursuant to the Department of Homeland

Security's own regulations, the beneficiary can use a combination of education and experience to show that he has the foreign equivalent of a U.S. degree. Counsel further states that the petitioner stated on the ETA Form 750 that a degree or its equivalent was required and that the petitioner accepted the combination of education and experience to satisfy the degree requirement.

To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS), formerly the Service or INS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific 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).

Counsel in the response to the director's request for further evidence raised the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. 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(1)(2). The regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for the classification of a 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 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 occupation.

Form ETA 750 stipulates that the beneficiary is required to have a bachelor's degree. The petitioner's actual minimum requirements 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.

It should also be noted that the beneficiary, in Part B of ETA Form 750, stated that he received a degree in electronic engineering communications from Kwangwoon University, in Seoul, Korea. Both counsel and the petitioner in subsequent statements in the record, as well as the Kangwoon University documentation submitted by the petitioner, directly contradict the beneficiary's statement. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) states: "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." Although counsel and the petitioner did explain the beneficiary's actual academic credentials, the instant petition could have been

denied based on this major discrepancy between the beneficiary's statements on Form ETA 750 and his actual academic credentials, without further examination of whether the beneficiary's work experience could be equated to an actual college degree. In addition, counsel asserts on appeal that the Department of Labor certified the beneficiary's ETA 750 and thus, it accepted that the beneficiary was a professional. However, as stated previously, the Form ETA 750 contained incorrect information that the beneficiary had a degree. Counsel's assertion with regard to the DOL certification is not persuasive.

Without more persuasive evidence, the petitioner has not established that the beneficiary had a baccalaureate degree in electronics at the time the original petition was filed. 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 to perform the duties of the position.

**ORDER:** The appeal is dismissed.