

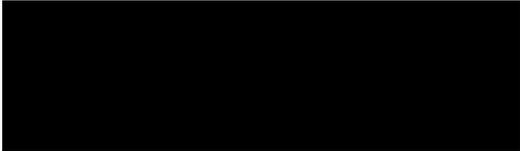
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U.S. Department of Homeland Security
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U.S. Citizenship
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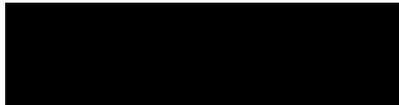


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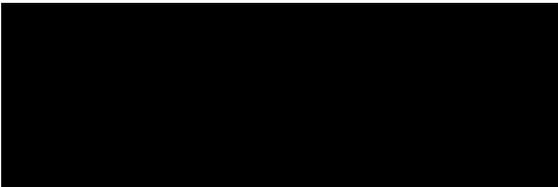
MAR 02 2005

IN RE: Petitioner:
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:



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, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a company that harvests, manufactures, and distributes beehive products. It seeks to employ the beneficiary permanently in the United States as a purchasing agent. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied 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(1)(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(1)(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(1), 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 February 27, 2002. The Form ETA 750 states that the proffered position requires a bachelor's degree in business and two years of experience in a related occupation. The Form ETA 750 did not specify what an acceptable related occupation would be.

With the petition, counsel submitted a letter, dated December 6, 2002, in which counsel stated that the proffered position requires a bachelor's degree in business or the equivalent. Counsel further stated that the

beneficiary has the equivalent of a bachelor's degree in business with a specialization in purchasing, procurements, and contracts. Counsel did not then provide any evidence in support of that assertion.

Because the evidence submitted was insufficient to demonstrate that the beneficiary has a baccalaureate degree, the California Service Center, on January 7, 2003, requested additional evidence. The Service Center requested, *inter alia*, that the petitioner provide evidence that the beneficiary has a U.S. bachelor's degree or a foreign equivalent degree.

In response, counsel stated, "[the beneficiary] does not possess a formal baccalaureate degree, but holds an equivalent to a bachelor's degree in business, due to her many years of training and experience.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on May 10, 2003, denied the petition.

On appeal, counsel asserts that, "The Department of Labor approved the position of Purchasing Agent for certification as a job requiring the specialized skills of [redacted] on October 3, 2002." In support of that contention, counsel provides a copy of the approved Form ETA 750 labor certification. Counsel states that "[CIS] incorrectly seeks to second-guess the Department of Labor."

Counsel notes that the decision was issued with an incorrect cover letter and questions, therefore, whether the balance of the decision pertains to the instant case.

Counsel further stated that the Form I-140 was filed for a skilled worker or professional and that the petitioner "required a degree or the equivalent of a degree for the position." Counsel notes that this requirement was the same when the petitioner filed for an H1B visa for the beneficiary. Counsel states, "Obviously, this is a high level position which is in a state of transition to requiring a bachelor's degree as standard requirements but currently it requires either the equivalent in experience(,) or experience and training(,) or a degree."

Counsel urges that the regulations do not eliminate the possibility of a degree equivalency in examining the qualifications of an alien for a proffered position. Counsel cites various decisions in support of that assertion. Counsel argues that, in any event, the petition is approvable as a petition for a skilled worker, as it clearly requires at least two years of experience or relevant training or education.

With the appeal, counsel submits an Evaluation Report, dated November 9, 1999, from an educational evaluation service. That report states that the beneficiary's education, training, and employment, taken together, are the equivalent of a bachelor's degree in business with a specialization in purchasing, procurements, and contracts from an accredited U.S. college or university.

Initially, this office addresses counsel's suggestion that the decision in this matter does not relate to the instant case. Counsel is correct that the incorrect cover letter was attached to the decision when it was issued. The body of the decision, however, correctly identifies the issues in the instant case, correctly states that a Request for Evidence was issued in this matter on January 7, 2003, quotes at length from that Request for Evidence, correctly identifies the date on which CIS received the petitioner's response, and quotes at length from that response. No doubt exists that the decision of denial issued on May 10, 2003 pertains to the instant case.

The counsel's remaining arguments are, in substance, identical to each other. Counsel asserts that the beneficiary's education, training, and work experience, taken together, are the equivalent of the bachelor's degree required by the Form ETA 750 and that the beneficiary is therefore qualified for the proffered position.

Counsel's assertion that an H1B petition submitted by the instant petitioner for the instant beneficiary was approved is inapposite. H1B non-immigrant petitions are for positions that ordinarily require four years of college and a bachelor's degree. The regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for that education and degree. The laws and regulations applicable to the visa category in the instant case sanction no such substitution of experience in lieu of education and a degree explicitly required by the terms of the approved Form ETA 750 labor certification.

Counsel asserts that the approval of the Form ETA 750 labor certification by the Department of Labor indicates that the beneficiary is qualified for the proffered position. Counsel is incorrect. That approval indicates that the Department of Labor has determined, based on the evidence presented to it, that the petitioner is unable to locate a suitable U.S. worker to fill the proffered position. This office shall not disturb that finding. The approval of the labor certification does not, however, demonstrate the beneficiary's eligibility for the proffered position.

To determine whether a beneficiary is eligible for a third preference visa, the Service must ascertain whether the alien is, in fact, qualified for the certified job pursuant to the terms of the labor certification. 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).

In this case, the labor certification, prepared and filed by the petitioner, clearly requires a bachelor's degree in business or an equivalent foreign degree. The evidence submitted does not demonstrate that the beneficiary has such a degree. This analysis is no different if the petition is analyzed as a petition for a skilled worker rather than as a petition for a professional. In either event, the petitioner must demonstrate that the beneficiary has all of the qualifications listed on the approved Form ETA 750. In either event the approved Form ETA 750 in this matter calls for a bachelor's degree in business and counsel has admitted that the beneficiary has no such degree.

Counsel's assertion that the profession of the proffered position is in transition from requiring a degree or equivalent to requiring a degree is irrelevant. The petitioner must demonstrate that the beneficiary is qualified pursuant to the terms of the approved labor certification. Counsel's assertion that the profession is in transition does not affect that analysis.

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.



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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.