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U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

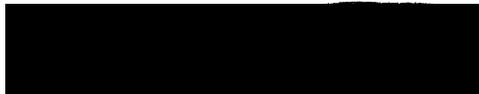
Date:

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IN RE:

Petitioner:



Beneficiary:

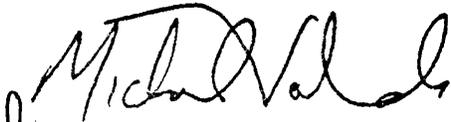
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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 Director, Nebraska Service Center, denied the preference visa petition. In response to a subsequent motion the director denied the petition again. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and motion, affirming the director's decision. The matter is now before the AAO on a second motion to reopen/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 medical doctor. She 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 an audit clerk. The director determined that the petitioner had not established that the beneficiary has the requirements stated on the Form ETA 750 and denied the petition accordingly. The AAO affirmed that decision, dismissing the appeal.

In support of the second motion the petitioner submits a statement. The petitioner argues that the evidence of record at the time the AAO affirmed the appeal was sufficient to show that the beneficiary possesses all of the requirements of the proffered position as listed on the Form ETA 750.

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 motion qualifies as a motion to reconsider because the petitioner 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 unavailable in the United States.

Section 203(b)(3)(A)(ii) of 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.

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 January 21, 1997. The Form ETA 750 states that the proffered position requires four years of college leading to a bachelor's degree in accounting or the equivalent in addition to two years of experience in the proffered position or a related position in accounting.

With the petition, the petitioner submitted transcripts demonstrating that the beneficiary had attended 11 semesters¹ at the Facultad de Contaduria Publica (School of Public Accounting) of the Universidad Libre in Cali, Columbia, but no evidence that she had received any degree. The director denied the petition on April 28, 2000, finding that the evidence did not demonstrate that the beneficiary has the prerequisites for the proffered position.

The petitioner also submitted an Evaluation Report, dated June 7, 1994. The educational evaluator stated in that report that the beneficiary's education and employment experience², taken together, are the equivalent of a bachelor's degree in accounting.

On April 28, 2000 the Acting Director, Nebraska Service Center issued a decision in this matter. The director found that the evidence submitted showed only three and one-half years of higher education, and that the petitioner had not demonstrated that the beneficiary is qualified for the proffered position pursuant to the terms of the labor certification.

On May 13, 2000 the petitioner submitted a motion with a new evaluation, dated May 30, 2000.³ The new evaluation reiterates that the beneficiary has the equivalent of a bachelor's degree in accounting, but does not state how that judgment was reached. The petitioner provided no evidence that the beneficiary has any form of college degree.

On July 21, 2000 the Acting Director, Nebraska Service Center issued a Request for Evidence in this matter. The director requested a copy of all of the evidence that the educational evaluator had used in reaching the conclusion that the beneficiary has the equivalent of a bachelor's degree.

¹ Those semesters were Spring '84, Spring '85, Fall '85, Spring '86, Fall '86, Fall '87, Spring '88, Fall '88, Spring '89, Spring '90, and Fall '90.

² The evaluator specified that employment experience was credited at the rate of three years of employment to one year of university credit. This office notes that the "three-for-one" calculation is inappropriate to this visa category and, further, that the beneficiary is not attempting to substitute any employment experience for education.

³ This office is unable to reconcile the date discrepancy.

In response the petitioner provided copies of the documents showing that the beneficiary has eleven semesters of higher education, but submitted no evidence of the receipt of any degree. The director reviewed the evidence and, on September 7, 2000, denied the petition again, finding that conflicting evidence had been submitted.

The petitioner appealed, urging that the documents submitted adequately demonstrate that the beneficiary has the prerequisites listed on the Form ETA 750 labor certification. The AAO dismissed the appeal on June 19, 2001, finding that the petitioner had not established that the beneficiary has a bachelor's degree in accounting or an equivalent foreign degree.

On the first motion counsel argued (1) that the beneficiary has the equivalent of a bachelor's degree in accounting, (2) that any previous inconsistencies in the evidence had been reconciled, (3) that if the beneficiary does not qualify as a professional pursuant to section 203(b)(3)(A)(ii) of the Act then the petition should be considered as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act, and (4) that, in the alternative, the labor certification should be interpreted as calling for a bachelor's degree or the equivalent in education and experience.

The AAO granted the motion and reviewed the law and the evidence.⁴ The AAO ruled, on September 9, 2003, that the Form ETA 750 states that the proffered position requires a bachelor's degree in accounting or an equivalent foreign degree and that the evidence submitted does not demonstrate that the beneficiary has any such degree.

On the second instant motion the petitioner urges that the Form ETA 750 does not require a degree, but a degree or the equivalent of a degree in accounting. The petitioner states, but provides no evidence to demonstrate, that in Columbia, where the beneficiary received her higher education, academic programs for professional degrees are only offered as combined degree programs awarding a combined bachelor's and master's degree. Thus, the petitioner states, although the beneficiary's education on the priority date was at least the equivalent of a bachelor's degree in accounting awarded by a U.S. institution, the beneficiary has no such degree.

Although 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 for education and a degree and provide no formula pursuant to which such experience might be credited in lieu of education and a degree.

As to counsel's assertion that the beneficiary's education is equivalent to a 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 did not. 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(1)(2) to evaluate the term "or equivalent" in the labor

⁴ Between the petitioner's filing of the first motion and the AAO's September 9, 2003 decision the petitioner filed another petition for the same beneficiary based on the same labor certification. That petition, submitted May 27, 2002, was denied on February 27, 2003 as not being supported by a valid labor petition, as the labor petition as the instant matter, which utilized that labor petition, was still pending. No appeal is available pertinent to a denial of a petition for not being supported by a valid labor petition.

certification. If the instant petition is analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act it necessarily fails, as the regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) makes clear that such a position requires a U.S. bachelor's degree or an equivalent foreign degree.

The petitioner asserts that the instant petition should, in the alternative, be analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. If the petition is considered as a petition for a skilled worker, the requirement as stated on the ETA 750 for a bachelor's degree or the equivalent would be unaffected. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one that pertains to professionals. That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree. Counsel apparently urges that some other equivalent should be accepted when the petition is analyzed as a petition for a skilled worker, but does not specify what that other equivalent should be. No criterion exists pursuant to which the beneficiary's education, absent a degree, may be analyzed to see whether it is equivalent to a bachelor's degree.

The Evaluation Report submitted in this case is unpersuasive for this reason. Although that report states that the beneficiary's education is the equivalent of a U.S. bachelor's degree, it gives no hint of how that opinion was reached, and it could not, apparently, be reached in any way consistent with the regulations. The report stipulates that it is only advisory, and it does not convince this office.

Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary must 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 has a bachelor's degree in accounting or a foreign equivalent degree. Therefore, the petitioner has not overcome this portion of the director's decision.

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(1), 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 motion is granted. The AAO's decisions of June 19, 2001 and September 9, 2003 are affirmed. The petition is denied.