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U.S. Citizenship
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MAY 18 2005

[Redacted]

FILE [Redacted] Office: NEBRASKA SERVICE CENTER Date:

LIN 03 180 52869

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.

[Handwritten signature of Robert P. Wiemann]

Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a telecommunications company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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.

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 27, 2000. The Form ETA 750 states that the proffered position requires four years of college. In the space marked “degree required” the petitioner entered “Bachelor’s (or equivalent).” In the space marked “Major

Field of Study” the petitioner entered “computer related field.”¹ The Form ETA 750 further states that the proffered position requires five years experience in a related occupation.²

With the petition, counsel submitted various documents pertinent to the beneficiary’s education including a copy of the beneficiary’s diploma, issued during March 1990, by the University of Madras, India. That diploma states that the beneficiary has a Bachelor of Arts degree in English. Statements of marks (report cards) submitted show that the beneficiary attended that University for at least six semesters, from March 1987 through March 1990, inclusive.

Counsel also submitted certificates showing that the beneficiary attended short-term seminars pertinent to various computer software applications.

Finally, counsel submitted an evaluation report from an educational evaluation service. That report states that beneficiary’s three-year degree in English and his employment experience in computers, taken together, are equivalent to a bachelor’s degree in computer information systems. The evaluator further stated that his opinion was based on the “three-for-one” rule, equating three years of relevant employment experience to one year of education.

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 December 4, 2003, denied the petition. The director interpreted “bachelor’s degree or equivalent” on the Form ETA 750 to mean a bachelor’s degree or an equivalent foreign degree.

On appeal, counsel urges that the instant matter should be consolidated with the appeal of an EB-2 visa petition filed by the same petitioner for the same beneficiary. Because the two different visa categories are governed by different statutory and regulatory language, nothing would be gained by consolidating the two separate cases.

Counsel further urges that various submissions in that other case be incorporated by reference into the instant case. If counsel considered that those materials were relevant to the instant case, and wished those materials to be considered in the instant case, counsel was obliged to submit them in the instant case, rather than to refer to them. The materials submitted in connection with the other case are not present in the instant record and will not be considered.

Counsel asserts that the interpretation of the director, that the Form ETA requires a bachelor’s degree or an equivalent foreign degree, is inconsistent with the petitioner’s intent when it stated that the proffered position requires a bachelor’s degree or equivalent in a computer-related field. Counsel asserts that the petitioner intended the language on the Form ETA 750 to permit experience to be substituted for the otherwise mandatory degree. Counsel urges that the petitioner’s intent in drafting the requirements should prevail.

¹ The petitioner provided a list of disciplines that it considers to be “computer related.”

² The petitioner also stipulated that a master’s degree in a computer related field would be an adequate substitute for the bachelor’s degree and two years of the requisite five years of experience.

In support of his contention that the petitioner intended the degree requirement as stated on the Form ETA 750 to permit a degree equivalent, rather than only an equivalent degree, counsel cites a September 21, 2000 letter from the petitioner's Immigration Coordinator to the Missouri Division of Workforce Development, which letter was apparently submitted with the Form ETA 750 Application for Alien Labor Certification. That letter does make clear that the petitioner intended to satisfy the degree requirement on the Form ETA 750 with a combination of education and experience.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for education and a 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. The regulation at 8 C.F.R. § 204.5(I)(1) states that a "United States baccalaureate degree or a foreign equivalent degree" qualifies a beneficiary for a professional position pursuant to section 203(b)(3)(A)(ii) of the Act. Experience or experience and education, absent a bachelor's degree or an equivalent foreign degree, does not qualify a beneficiary under that regulation.

The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree³ 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(I)(2) to evaluate the term "or equivalent" in the labor 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(I)(3)(ii)(C) makes clear that such a position requires a U.S. bachelor's degree or an equivalent foreign degree.

If that the instant petition is analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act the result is the same. 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. 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 F.2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Under education, the Form ETA 750 specified a "Bachelor's degree (or equivalent)" in a computer-related field. The evaluation letter makes clear that the beneficiary's degree is in English. The only item, therefore, in the beneficiary's résumé that could represent the equivalent of a bachelor's degree in a computer related field is his six years of experience. This office does not agree that six years of experience without any relevant education can be found to be the equivalent of a bachelor's degree in a computer-related field and thus satisfy the education requirement on the Form ETA 750.

Moreover, 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. No such equivalent is available if the

³ In that event the petition would be analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. Because it would not, in that event, explicitly require a minimum of a bachelor's or equivalent foreign degree, it would not be a petition for a professional pursuant to section 203(b)(3)(A)(ii).

petition is analyzed as a petition for a skilled worker. 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 just that reason. Although that report states that the beneficiary's education is the equivalent of a U.S. bachelor's degree, it states that it reached that opinion by applying the "three-for-one rule, where each year of missing university education requires three years of relevant professional-level work experience." That rule is inapplicable to the instant visa category. Further, the evaluator's conclusion 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 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(I), 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.