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U.S. Citizenship
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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **MAY 25 2005**

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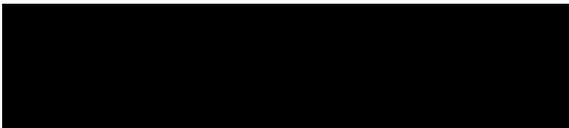
Petitioner:



Beneficiary:

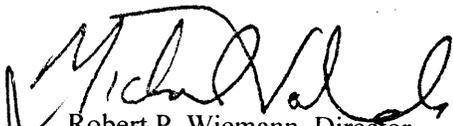
PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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

The petitioner is a software engineering firm. 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 requisite college degree and experience as stated on the labor certification petition and denied the petition accordingly.

On appeal, counsel submits a statement and additional evidence.

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 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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii) states, in pertinent part:

(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 workers.* If the petition 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, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

(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 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.

Eligibility in this matter hinges on the petitioner demonstrating that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the

U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The priority date of the petition is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Here, the request for labor certification was accepted for processing on February 11, 2002.

The labor certification states that the position requires a bachelor's degree in computer science, engineering, or a related field. The labor certification also states that the position requires three years in the proffered position and three years in a related information technology consulting position.¹ The labor certification further specifies that, of that experience, two years must be with either Siebel or Clarify and at least of the following: VB Script, Visual Basic, SQL, HTML, XML, Java, Javascript, ASP, Unix/AIX, Windows NT, ROBMS, COM, CORBA, and Active X.

On the Form ETA 750, Part B the beneficiary stated that he worked (1) as a consultant for the Steel Authority of India, Bhilai Steel Plant, from April 1988 through April 1999, (2) as a consultant for MVP Systems, Incorporated, of Fremont, California, from May 1999 through January 2001; (3) as a Technical Consultant II for the petitioner from January 2001 through January 2002; and (4) as a Senior Consultant for the petitioner from January 2002 to the present.

With the petition counsel submitted (1) a certificate stating that during April 1987 the petitioner passed the Final Model Technician Diploma Course Examination in ferrous metallurgy, a three-year course of study inclusive of practical training, (2) a report, issued by the Board of Technical Education at Bhopal, India, of the petitioner's scores on various parts of that examination, showing that the examination was administered during the beneficiary's "final year (third year)," (3) various documents pertinent to the beneficiary's attendance at the Indian Institute of Metals, of Calcutta, India, including marks sheets, and (4) a certificate, issued by that institute, stating that during December 1989 the beneficiary passed the Associate Membership Examination of that institute.

Counsel also submitted the report of an educational evaluator that stated that the petitioner's diploma in metallurgy and passage of the Associate Membership Examination are the equivalent of passage of a six-year program of study in metallurgy in the United States. The report also stated that the beneficiary's diploma and passage of the examination are the equivalent of bachelor's degree in metallurgical engineering from an accredited university in the United States.

As to the beneficiary's employment experience, counsel submitted (1) a letter, dated October 7, 1998, from a senior manager at the Bhilai Steel Plant in India stating that V. Srinivas² worked under him as "Dy. Mgr. Systems" from December 1996 through November 1997, (2) a letter, dated October 5, 1998, from MVP Systems, Incorporated, of Fremont, California, to [REDACTED] offering him a position as Intermediate Software Engineer, (3) an affidavit from [REDACTED] stating that he worked at MVP Systems

¹ Actually, whether those two requirements mean that the position requires six years in the aggregate or three years in either the proffered position or a related fields is unclear, as is explained further below.

² The beneficiary's name, as shown on the Form I-140 petition, is [REDACTED] not [REDACTED]

³ Again, the name used on that letter does not match the beneficiary's name as shown on the Form I-140 petition.

from May 1999 to October 2000 and that the beneficiary worked there from May 1999 through January 2001, (4) a letter from a senior manager at Royal Carpet Mills, in Irvine, California, stating that the beneficiary worked under him as a technical consultant, from June 1999 through October 1999, while employed by MVP Systems, (5) a letter, dated May 9, 2003, from the petitioner's director of business development stating that the beneficiary worked for that company beginning in January 2001 as a Technical Consultant II, and since January 2002 as a Senior Consultant, and (6) a 2002 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary wages of \$120,483.49 during that year.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree in computer science or an equivalent foreign degree. The director also noted that 8 C.F.R. § 204.5(l)(3)(ii)(A) requires that employment verification letters be provided by former employers, rather than former coworkers, and that the evidence of the beneficiary's employment for MVP Systems was not, therefore, sufficiently probative. On December 18, 2003, the director denied the petition on both bases.

On appeal, counsel asserts that the petitioner's diploma and his examination certificate, taken together, are, as was stated in the educational evaluation, the equivalent of a six-year program of academic study of metallurgy. Counsel states that the governing statutes and regulations do not prohibit a combination of studies equivalent to the requisite bachelor's degree in computer science or the equivalent.

Counsel states that MVP Systems is no longer in business, and implies that this is the reason no employment documentation was provided from that company.

Counsel stated that the petitioner provided two letters from the Bhilai Steel Plant, one stating that the beneficiary worked there from December 1996 to November 1997 as a development manager systems, and one stating that the beneficiary worked there as a deputy manager systems beginning on August 21, 1998.

In fact, counsel had not previously provided that second letter. On appeal, however, counsel provides a letter, dated August 21, 1998, purporting to be from the Bhilai Steel Plant, and stating that the beneficiary worked for that company, on that date, as a deputy manager (systems). That letter makes clear that the beneficiary worked for the petitioner on that date but does not specify the date upon which that employment began or, of course, when it ended.

Counsel also provided a copy of a letter, dated June 22, 2000, purportedly from an employee of Qualcomm in San Diego. That letter states "Vishwanath Srinivas is currently working as Technical designer for implementing Peoplesoft at QUALCOMM Inc from 17 January 2000."

On the Form ETA 750, Part B, the beneficiary was instructed, "List all jobs held during the past three (3) years. Also, list any other jobs related to the occupation for which the alien is seeking certification"

In response, the beneficiary stated that he worked (1) as a consultant for the Steel Authority of India, Bhilai Steel Plant, from April 1988 through April 1999, (2) as a consultant for MVP Systems, Incorporated, of Fremont, California, from May 1999 through January 2001; (3) as a Technical Consultant II for the petitioner from January 2001 through January 2002; and (4) as a Senior Consultant for the petitioner from January 2002 to at least February 11, 2002, the date that form was submitted.

The beneficiary claims to have worked for the Bhilai Steel plant for 11 years. In support of that employment claim, the petitioner submitted a letter that states that he worked there from December 1996 through November 1997 and another that states that he worked there on August 21, 1998. That evidence supports less than one year of the claimed 11 years of experience.

In support of the beneficiary's claim of employment for MVP Systems from May 1999 to January 2001, the petitioner submitted a letter from a coworker and a letter from a company that allegedly contracted with the beneficiary's employer for the his services.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(A) states that,

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.

The governing regulation does not make any exception to the requirement of verification from the employer in the event the company has gone out of business. The letters from a coworker and a company other than the petitioner's employer do not suffice.⁴ The remaining evidence in support of the beneficiary's claim of employment for MVP Systems is a letter in which the beneficiary was offered a job. That letter does not demonstrate that the beneficiary accepted that job and worked for MVP Systems.⁵ The evidence is insufficient to support the beneficiary's claim of employment for MVP Systems.

The evidence in support of the petitioner's claim of qualifying employment for the petitioner consists of the May 9, 2003 letter. That letter states that the beneficiary worked for the petitioner as a Technical Consultant II beginning during January 2001 and was promoted to Senior Consultant in January 2002. That letter indicates that the beneficiary continued in that position until at least May 9, 2003, the date of that letter. The beneficiary's claim of qualifying employment for the petitioner is also supported by a 2002 Form W-2 Wage and Tax Statement showing that the petitioner paid the beneficiary wages during that year.

The priority date in this matter, however, is February 11, 2002. Evidence pertinent to the beneficiary's employment after that date cannot demonstrate eligibility as of the priority date, which is required by the regulations and *Matter of Wing's Tea House, supra*. The evidence from the petitioner establishes one year of qualifying employment as a Technical Consultant II and less than two months of qualifying employment as a Senior Consultant.

The petitioner has demonstrated less than one year of qualifying employment for the beneficiary at the Bhilai Steel Plant and slightly more than one year of employment for the petitioner. Those amounts, taken together,

⁴ Even if the letter from that other company was found to be competent evidence under the governing regulation, it would suffice to show employment only from June 1999 through October 1999.

⁵ Even if that letter were taken as evidence that the beneficiary went to work for MVP Systems, it would not support his assertion that he worked for that company from May 1999 through January 2001.

do not qualify the beneficiary for the proffered position pursuant to the terms of the approved labor certification.⁶ Because the petitioner has not established that the beneficiary has the requisite experience as stated on the labor certification, the petition cannot be approved and was correctly denied on that ground.

The remaining basis of the decision of denial pertains to the beneficiary's education. The Form ETA 750 labor certification states that the position requires a bachelor's degree in computer science, engineering, or a related field.

The petitioner submitted evidence that the beneficiary passed a three-year course of study in ferrous metallurgy under the auspices of the Indian Board of Technical Education. A foreign three-year degree is not a "foreign equivalent degree" to a United States bachelor's degree. A United States bachelor's degree generally requires four years of education. *Matter of Shah*, 17, I&N Dec. 244 (Reg. Comm. 1977). If supported by a proper credentials evaluation, a four-year degree from India might be deemed to be the "foreign equivalent" of a United States bachelor's degree. However, in *Matter of Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States bachelor's degree because the degree did not require four years of study. *Matter of Shah* at 245. Based on the same reasoning, the beneficiary's three-year degree in metallurgy will not be considered the "foreign equivalent degree" to a United States bachelor's degree for purposes of this preference visa petition.

Counsel further established that the beneficiary passed the Associate Membership Examination of the Indian Institute of Metals. The record does not indicate the length of the course of study, if any, leading to that examination. The record contains no evidence that membership in that institute is, in itself, the equivalent of a bachelor's degree.

The petitioner asserts, however, that the beneficiary's three-year course of study in metallurgy under the Indian Board of Technical Education, and his associate membership in the Indian Institute of Metals, taken together, are the equivalent of a United States bachelor's degree in computer science, engineering, or a related field. In support of that position counsel submitted an educational evaluation.

Initially, this office notes that if the educational evaluator undertook a comparison of the classes requisite to a degree in metallurgical engineering and the classes the beneficiary has taken, he did not include that comparison in the evaluation. Rather, the evaluator issued the conclusion that the beneficiary's combined studies are the equivalent of bachelor's degree in metallurgical engineering from an accredited university in the United States

Further, 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 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

⁶ This is so whether the Form ETA 750 is construed to require three years of experience or six years of experience.

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. 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 profession.

The regulations use a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for the third preference visa category purposes. The petition must be denied if analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act, as the petitioner has not demonstrated that the beneficiary qualifies as a professional position pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(C).

If the petition is analyzed as calling for a skilled worker, rather than a professional, the result is the same. Pursuant to the regulations and *Matter of Wing's Tea House, supra*, the petitioner must demonstrate that, on the priority date, the beneficiary was qualified for the proffered position pursuant to the terms of the approved labor certification. The labor certification calls for a bachelor's degree in computer science, engineering, or a related field. A bachelor's degree generally requires four years of education. *Matter of Shah, supra*. In order to qualify for the proffered position, the beneficiary must have a U.S. bachelor's degree or a foreign degree that is equivalent. Neither experience, nor a combination of degrees, nor a combination of a degree and experience, may be substituted for the requisite bachelor's degree.⁷ The evidence does not demonstrate that the beneficiary has the requisite bachelor's degree or an equivalent foreign degree. The petition was correctly denied on this additional ground.

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree and failed to provide evidence that the beneficiary has the requisite experience. For both reasons the petitioner has failed to demonstrate that the beneficiary is qualified for the proffered position and for both reasons the petition may not be approved.

An additional issue is raised by the wording of the Form ETA 750 that was not addressed in the decision of denial. The Form ETA 750 states that the proffered position requires three years of experience in the job offered. The Form ETA 750 also states that the proffered position requires three years in a related field. Counsel appears to assume, in argument, that those two requirements are in the disjunctive, that is, that only one of those requirements must be satisfied. The decision of denial implicitly accepted that interpretation.

The Form ETA 750, however, indicates neither the conjunctive nor the disjunctive. Whether the beneficiary would be eligible with only three years of experience is, therefore, unclear. In order to prevail the petitioner would have to show that the Department of Labor interpreted the Form ETA 750 to require only three years of experience, rather than six years. Because this issue was not previously raised, however, and the petitioner has not been accorded the opportunity to respond to it, it plays no part in today's decision.

⁷ Notwithstanding the educational evaluation, one might also question whether the petitioner's studies in metallurgy would qualify as studies in computer science, engineering, or related fields.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.