

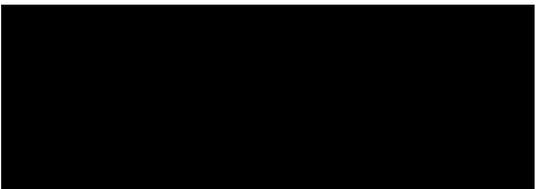


U.S. Citizenship
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FILE:

[Redacted]
EAC 03 130 51287

Office: VERMONT SERVICE CENTER

Date: NOV 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 director denied the employment-based preference visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a home health care company. It seeks to employ the beneficiary permanently in the United States as a supervisor, home health aide. 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 the beneficiary was qualified to perform the duties of the proffered position as of the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief 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 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.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following:

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 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)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

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.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also have the education and experience specified on the labor certification as of the petition’s filing date. See *Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm.

1977). The filing date of the petition is the initial receipt in the Department of Labor's employment service system. 8 C.F.R. § 204.5(d). In this case, that date is April 30, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. The Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of programmer/analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	10
	High School	2
	College	4
	College Degree Required	BSc
	Major Field of Study	Science

The petitioner also specified that any applicants have two years of experience in the related occupation. Under Item 15, the petitioner set forth no additional special requirements. The job offered lists the following duties on Item 13: "Supervising home health aides. Caring for elderly and handicapped persons in patients[sic] homes. Travel required with ambulatory patients, and household visits."

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended Maulana Azad High School, from June 1981 to May 1983 where he studies general studies and received a certification. Also, the beneficiary indicated that he attended Squirra College,¹ Bhopal, India from November 1983 to May 1986 where he studied science and received a bachelor of science diploma. The beneficiary's diploma submitted to the record notes the subject areas of physics, chemistry and mathematics. The beneficiary also stated that he received certification as a home health aide.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that he worked in multiple positions for multiple past employers as follows in reverse chronology:

1. [REDACTED] Commack, New York, Home health aide, October 1998 to December 1999;
2. Melville Marriot, Melville, New York, Host/Server, from 1999 to 2000;²
3. People Care Inc, Hicksville, New York, Home Health Aide, March 1998 to July 1998;
4. Chehek Children Nursing, Bhopal, India, Manager, July 1987 to August 1990.

¹ The beneficiary's diploma identifies the college as Saifia College, Bhopal University.

² The letter of employment verification from Melville Marriot indicates the beneficiary worked there from December 1997 to December 2000.

With the initial petition, the petitioner provided a copy of the beneficiary's diploma from Saifia College, Bhopal University, with a statement of marks for the 1986 school year; the beneficiary's resume; a letter from Chehek Children Nursing verifying the beneficiary's employment from July 1987 to August 1990; a letter from the food and beverage manager of the Marriott Hotel in Melville, New York, verifying the beneficiary's employment; a letter from [REDACTED] of [REDACTED] verifying the beneficiary's employment from 1998 to 1999; and a letter from People Care, Inc, Hicksville, New York verifying the beneficiary's employment, along with a certificate that states the beneficiary completed a training program on April 17, 1998 and is qualified for employment as a home health aide.

Because the evidence was insufficient to establish the beneficiary's qualifications, the director requested additional evidence on September 10, 2003, specifically requesting an evaluation of the beneficiary's foreign education. The director noted that such an evaluation should: consider formal education only, not practical experience; state if the collegiate training was post-secondary education; provide a detailed explanation of the material evaluated; and briefly state the qualifications and experience of the evaluator providing the opinion.

In response to the director's request for evidence, the petitioner submitted an academic credential and work experience evaluation, from IndoUS Technology and Educational Services, Inc., Edison, New Jersey, written by Dr. [REDACTED] in his evaluation stated that the beneficiary's bachelor's degree in science from [REDACTED], Bhopal University, combined with his training program in the field of home health aide areas, was equivalent to three years of academic studies toward a bachelor's degree in health services administration. [REDACTED] then analyzed the beneficiary's work experience and stated that he had over four and a half years of progressively responsible work experience in the field of home health services administration. [REDACTED] then stated that the beneficiary's work experience equated to one and a half years of academic studies towards a bachelor's degree in health services administration from an accredited U.S. college or university. Based on his analysis of both the beneficiary's education, training, and work experience, [REDACTED] finally stated that it was his professional opinion that the beneficiary had the equivalent of a bachelor's degree in health services administration from a U.S. college or university.

The director denied the petition on March 24, 2004. In his examination of the evaluation from IndoUS Technology and Educational Services, Inc., the director noted that, contrary to the director's instructions to only consider formal education, the evaluator considered the beneficiary's formal education, training, and experience. The director further noted that the evaluation stated that the beneficiary's foreign degree was only equivalent to three years of academic studies towards a bachelor's degree in health service administration. The director stated that the petitioner had not established that the beneficiary was a professional.

On appeal, counsel states that the beneficiary undertook a three-year undergraduate degree program in India leading to a bachelor of science degree. Counsel also states that the beneficiary then did clinical training health care services in India for a period of three years from July 1987 to August 1990. Counsel states that the evaluation by IndoUS Technology and Educational Service, Inc. only took into account the formal education of the beneficiary giving credit for three years of undergraduate work, for three years of clinical training in India and for the training program approved by New York State Department of Health for home health aides. Counsel states that, per the evaluation done by the US Technology and Educational Services, Inc., the beneficiary has the equivalent of a U.S. bachelor's

degree in health services administration. Counsel states that the director's decision that the beneficiary does not have four years of college level education is wrong.

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 the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes four years of college, a bachelor's degree of science and two years of experience in a related occupation.

The petitioner has established that the beneficiary has two years of experience as a home health aide or home health attendant. The only issue to be discussed in the remainder of this decision is whether or not the beneficiary has four years of college and a bachelor's degree in science.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be an equivalent degree, not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. A U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year bachelor of science degree from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional. Moreover, the ETA 750 explicitly requires four years of college.

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 uses 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 third preference visa category purposes.

As stated in 8 C.F.R. § 204.5(1)(3)(ii)(B), to qualify as a "skilled worker," the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree in science. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets the requirements on the Form ETA-750 of four years of college and an equivalent degree to a U.S. bachelor's degree in science.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the

beneficiary's formal education consists of less than a four-year curriculum. The evaluation submitted to the record that states the beneficiary's three-year diploma, three years in training programs in India, one training program of undetermined length in the field of home health aide in the United States, and his subsequent employment experience is the equivalent of a baccalaureate degree is not accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United States bachelor of science degree. This is so because the evaluation includes employment experience in the evaluation. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) permit equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Contrary to counsel's assertions, Item 14 of the Form ETA 750A does not expand the educational requirements to work experience that is equivalent to a bachelor's degree. A "Bsc" listed under a question eliciting "College Degree Required," can lead to no alternate conclusion, especially since additional employment experience was set forth under the box eliciting employment experience requirements.

The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, either under a skilled worker or a professional under the third preference immigrant visa category, since it has not proven that the beneficiary holds a four-year baccalaureate degree or foreign equivalent.

In addition, although not addressed in the director's denial of the petition, the petitioner has not established that it has the ability to pay the proffered wage of \$38,000 as of the priority date of April 30, 2001. In the original petition, the petitioner submitted its 2001 Form 1120, Corporate Federal Income Tax Return. This document indicated that the petitioner had taxable income of \$4,369 and net current assets of -\$118,289, as reflected in the petitioner's Schedule L. Based on these figures, the petitioner had not established that it had the ability to pay the proffered wage as of the priority date and onward. On May 2, 2003, the director requested further evidence as to the petitioner's ability to pay the proffered wage. In response, counsel submitted a statement from the petitioner's accountant that stated the beneficiary's work would generate about \$200,000 in new revenues for the petitioner. Counsel also asserted this possibility of increased revenues based on the beneficiary's employment. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, against the projection of future earnings, *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) states:

I do not feel, nor do I believe the Congress intended, that the petitioner, who admittedly could not pay the offered wage at the time the petition was filed, should subsequently become eligible to have the petition approved under a new set of facts hinged upon probability and projections, even beyond the information presented on appeal.

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*, 299 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). Without more persuasive evidence, the petitioner has not established that it has the ability to pay the proffered wage.

Therefore, the petitioner has neither established that the beneficiary is qualified to perform the duties of the position, or that it has the ability to pay the proffered wage as of the priority date. 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.