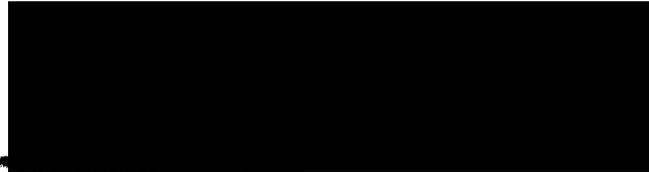




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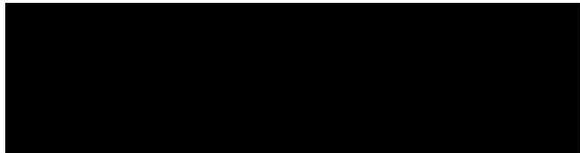
Petitioner:



Beneficiary:

PETITION: 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, Vermont Service Center. A motion to reconsider filed by the petitioner was granted, and the previous denial decision was affirmed by the director. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a tennis and fitness club firm. It seeks to employ the beneficiary permanently in the United States as a management analyst. 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 had a bachelor's degree in management/business analysis as required on the Form ETA 750, and denied the petition accordingly.

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 not available in the United States. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who, at the time of petitioning for classification under this paragraph, are professionals.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is February 26, 2001.

The Form ETA 750 states that the position of management analyst requires a bachelor's degree, and four years of experience in the offered position. On the Form ETA 750B, signed by the beneficiary on February 22, 2001, the beneficiary did not claim to have worked for the petitioner.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The I-140 petition was submitted on December 6, 2002. On the petition, the petitioner claimed to have been established in 1979, to currently have five employees, to have a gross annual income of \$1,148 million,¹ and to have a net annual income of \$5,029,000. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated June 16, 2003, the director requested evidence that the beneficiary had the educational equivalent of a United States bachelor's degree.

¹ The petitioner's Form 1120S U.S. Income Tax Return for an S Corporation for 2001 states the figure of gross receipts or sales of \$1,148,532.00, or about \$1.148 million.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on September 5, 2003.

In a decision dated February 10, 2004 the director determined that the evidence failed to establish that the beneficiary had a bachelors degree in management/business analysis or a foreign equivalent degree. The director therefore denied the petition.

The petitioner submitted a motion to reconsider which was received by the director on March 12, 2004.

In a decision dated May 28, 2004 the director granted the motion to reconsider, and affirmed her previous decision to deny the petition, on the same grounds as had been stated in her denial decision of February 10, 2004.

On appeal, counsel submits a brief and not additional evidence.

Counsel states on appeal that the evidence establishes that the beneficiary has the functional equivalent of a United States bachelor's degree and that the evidence also establishes that the petitioner is willing to accept a functional equivalent of a bachelor's degree as satisfying the qualification requirements on the ETA 750. Counsel also states that even if the beneficiary does not qualify under the preference classification for a professional, she qualifies under the preference classification for a skilled worker.

Since no new evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The record contains a copy of a letter dated November 14, 2000 from the administrative director of a hotel in Medellin, Colombia, which states the beneficiary's experience with that hotel as a management systems and budget analyst from January of 1994 until February of 1999. That letter is sufficient to establish that the beneficiary had at least four years of experience in the offered position as of the priority date, as required on the ETA 750.

The record also contains an evaluation of the beneficiary's education and experience dated January 8, 2001 by [REDACTED] which finds that the beneficiary's education and experience are equivalent to a bachelor's degree in business administration and management from an accredited university in the United States. The evaluation finds that the beneficiary received a diploma of specialist in tourism management and that her formal education is the equivalent of three years of undergraduate education in the United States. The evaluation also finds that the beneficiary has four years and one month of relevant work experience, and that three years of the beneficiary's work experience are equivalent to one year of undergraduate course work in business administration and management in the United States.

The evaluation by [REDACTED] relies on a formula that for every year of university studies three years of specialized work experience may be substituted.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The formula employed by [REDACTED] in substituting three years of specialized work experience for one year of university level studies is one which is found in the regulations governing H-1B nonimmigrant visas petitions.

See 8 C.F.R. 214.2(h)(4)(iii)(D)(5). However, the nonimmigrant regulations governing H-1B visa petitions are not applicable to the instant immigrant petition.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals. 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.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States. Relevant post-secondary education may be considered as training for the purposes of this provision.

Concerning the evidence needed to support classification in the above preference categories, the regulation at 8 C.F.R. § 204.5(1)(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.

No provision pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore even if it were assumed that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor of science degree, but the petitioner chose not to do so.

In the definition of "professional," the regulation at 8 C.F.R. § 204.5(1)(2) uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must have 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.

The evaluation report in the record makes no finding that the beneficiary holds a foreign degree which is equivalent to a U.S. bachelor's degree. A bachelor's degree usually requires four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg. Comm. 1977). Therefore, the beneficiary's diploma obtained after a three year course of study cannot be considered a foreign equivalent degree. Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to 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.

In her brief, counsel cites as authority a decision by the United States district court for the Northern District of California in the case of *Chintakuntla et al. v. INS*, Case number C-99-5211 MC, (N.D.CA, May 2000). Counsel states that the court in that case issued a permanent injunction against CIS (formerly the INS), prohibiting CIS from denying employment-based immigrant petitions where a master's degree was a required qualification and where aliens had not demonstrated that they had the identical degree requirements listed on the ETA 750, but had demonstrated that they had the equivalency of such requirements.

Counsel provides no citation to any official publication of the decision in *Chintakuntla et al. v. INS*, and provides no copy of the decision. In any event, even if the decision in that case was officially published the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Moreover, the petitioner in the instant petition is located in Norwalk, Connecticut, and the beneficiary also lives in Norwalk, Connecticut. Therefore, the instant petition is not within the jurisdiction of the court which decided *Chintakuntla et al. v. INS*, which is in the Northern District of California.

Furthermore, counsel's summary of the reasoning of the court in *Chintakuntla et al. v. INS* indicates that the Form ETA-750 underlying the petition in that case specified that five years of experience would be accepted in lieu of a master's degree. In the instant petition, however, the petition has not specified any alternative qualifications to the requirement of a bachelor's degree.

Counsel also asserts that even if the instant petition is not approvable in the preference classification for a professional, it is approvable in the classification for a skilled worker. Nonetheless, as noted above, even if the petition is evaluated as one for a skilled worker, the beneficiary had to 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, one of which requirements is a bachelor's degree in management/business analysis.

The statute and the regulations for the skilled worker classification contain a minimum requirement that the position of two years training or experience. Act § 203(b)(3)(A)(i); 8 C.F.R. § 204.5(l)(2). While the statute and the regulations do not contain a requirement of a bachelor's degree in that classification, the ETA 750 underlying the instant petition does contain such a requirement. 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).

Counsel states that the petitioner has indicated its willingness to accept a functional equivalency to a United States bachelor's degree. However, the ETA 750 as certified by the Department of Labor requires a bachelor's degree, and states no alternative requirement of a functional equivalency to a bachelor's degree.

For the foregoing reasons, the evidence fails to establish that the beneficiary met 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.

In her decision denying the petition and in her subsequent decision on the petitioner's motion for reconsideration the director correctly found that the evidence failed to establish that the beneficiary had a bachelor's degree, as required by the ETA 750, or that the beneficiary had a foreign equivalent degree. The director's decision to deny the petition was correct.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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.