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FILE:



Office: VERMONT SERVICE CENTER

Date: NOV 16 2005

EAC 03 220 52182

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:

SELF-REPRESENTED

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer-consulting corporation. 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 failed to establish that the beneficiary had met the minimum qualifications of the Alien Employment Certification accompanying the petition specified and denied the position accordingly.

On appeal, the counsel submits a brief.

Section 203(b)(3)(A)(i) of 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 CFR § 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.

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.

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 July 20 2001. The petitioner selected on the I-140 petition, Part 2, box "e." That selection states, "a skilled worker (requiring at least two years of specialized training or experience) or professional"

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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, Form ETA 750 A, item 14 describes the requirements of the proffered position and occupation of software engineer as follows:

- 14. Education (enter number of years)
 - Grade School Blank
 - High School Blank
 - College 4
 - College Degree Required Bachelors or equivalent
 - Major Field of Study Computer Science, Engineering, Math
 - Training Blank
 - Experience
 - Job Offered
 - Number -Years 2
 - Related Occupation
 - Number -Years 2
 - Related Occupation
 - Specify Systems Analyst, Programmer Analyst, Database Administrator

The employer, who is the petitioner here, has prepared the above ETA 750A as an essential part of the labor certification process used to support a preference visa petition that is employment based. The employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria. In the present case, the above requirements also state that the occupation of software engineer has four-year Bachelors or equivalent college degree or its equivalent, in the major fields of study of Computer Science, Engineering, Math. In a related occupation identified as Systems Analyst, Programmer Analyst, or Database Administrator, the employer/petitioner requires two years of occupational experience.

Along with Form ETA 750, Part A, set forth above, the employer also is required to submit Form ETA 750, Part B that is a "Statement of Qualifications of Alien." Part B identifies the alien, specifies his current and prospective address in the United States, his education including trade and vocation training, and lists his work experience.

The Form ETA 750 Part B prepared by the beneficiary states the following education history:

Block 11

Names and Addresses of Schools, Colleges, and Universities Attended (including trade or vocational training facilities)

[REDACTED]	*	*	*
Field of Study			<u>Computer Science</u> ¹
From ...[mo./yr]			<u>05/1991</u>
To ...[mo./yr.]			<u>05/1994</u>
Degrees or Certificates Received			<u>Bachelors</u> ²
[REDACTED]			
Field of Study			<u>Computer Science</u>
From ...[mo./yr]			Blank
To ...[mo./yr.]			Blank
Degrees or Certificates Received			<u>Honors Diploma</u>

The director issued a request for evidence dated September 3, 2003. She requested evidence that the beneficiary possessed a bachelor's degree in the major field of study of [computer] science, engineering or mathematics. It stated that if the beneficiary possessed a degree received outside the United States, then in that case, the petitioner should also submit a credentials evaluation report of the beneficiary's educational attainment.

In response, the petitioner submitted two evaluation reports mentioned below.

As mentioned, the director determined that the petitioner had not established that the beneficiary had the educational requirements required by the Alien Employment Certification accompanying the petition specified and denied the position accordingly on April 13, 2004.

On appeal, the counsel asserts that the director erred in denying the petition because one of the petitioner's education evaluators "added ... [to the beneficiary's three years of college education] Beneficiary's work experience. A third evaluator is now being submitted, and it "... equates Beneficiary as having the equivalent of a U.S. Degree in Computer Science, which conforms to our job requirement as reflected on the certified ETA 750A."

The subject Form ETA 750 Part A requires a degree from a college and the completion of four years of baccalaureate studies. CIS regulations do not provide that a combination of education and experience may be

¹ According to the beneficiary's grades transcript and diploma, he studied accounting and graduated with a three year Commerce degree, not computer science. There are no computer sciences courses stated on his official university transcript.

² The degree awarded was a Bachelor of Commerce. There is no computer science courses noted on the grade transcripts from Andhra University, Waltair, India.

accepted in lieu of a four-year degree. While the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) does state that the "relevant post secondary education may be considered as training for the purposes of this paragraph," there is no regulation that would allow for the converse, that the experience may be considered for education requirements.

Petitioner's clear intent is expressed in the certified Alien Employment Application. A four-year college bachelor's degree or equivalent degree is required in a field of study in computer science, engineering or mathematics. Note that even if this petition were considered under the skilled worker regulations, the result would be the same. While it is clear that regulations governing the skilled worker classification do not contain a baccalaureate degree requirement, CIS is still bound by the regulations and above-cited case law to require the petitioner and beneficiary to meet the requirements specified on the ETA-750. *See* 8 C.F.R. § 204.5 (l)(3)(ii)(B). Regardless of classification, the ETA-750 contains the requirements that the beneficiary must have four years of college education culminating in a bachelor degree or equivalent, in computer science, engineering or mathematics, and, two years of work experience. In a related occupation identified as Systems Analyst, Programmer Analyst, or Database Administrator, the employer/petitioner requires two years of occupational experience.

The petitioner submitted an education credential evaluation dated June 4, 1997, of the beneficiary's foreign schooling as it equates to a higher education offered in the United States. The evaluation prepared by International Education Evaluations, Inc. stated in pertinent part:

[The beneficiary] ... presents from India the bachelor of Commerce degree and the Honors Diploma in Computer Science. The Bachelor's yields three years of academic credits (96 semester hours) that may be applied to a U.S.A. undergraduate degree. The combination of his academic credits yields the equivalent of 114 semester hours of academic credits. He lacks the hours for a degree in the United States, and the content and level of courses for a major.

A second credential evaluation report from [redacted] dated June 18, 1997 submitted by petitioner accepted the above recited educational evaluation and recounted the beneficiary's work experience from April 1992 to June 1997 as it related to computer applications and their maintenance in business. The evaluation prepared by [redacted] stated in pertinent part:

In our opinion, ... [the beneficiary's] educational record is equivalent to 114 semester hours (approximately 3.8 years) of university-level credit from an accredited college or university in the U.S.A. and his professional employment record presents at least one additional year of university-level credit (three years of experience equal [sic] one year of university-level credit) towards a major in computer science. Accordingly, it is our opinion that ... [the beneficiary] has the equivalent of a Bachelor's degree in Computer Science from an accredited college or university in the U.S.A.

Counsel, and the second evaluator mentioned above, both contend that job experience together with the above mentioned three year degree satisfies the educational requirement for the preference category, "professional"³ that

³ The petitioner has not raised the issue of whether the beneficiary qualifies in the skilled worker category. Since in either the skilled worker or professional categories, a bachelor degree is required by the certified Alien Employment Application, that outcome of this case centers around whether or not the beneficiary as attained a bachelor's degree or its foreign equivalent since a bachelor's degree based upon four years of

coincides with the ETA-750 that contains the requirements that the beneficiary must have four years of college education culminating in a bachelor degree or equivalent, in computer science, engineering or mathematics, and, two years of work experience. Despite counsel's arguments, CIS will not accept a degree equivalency when a labor certification plainly and expressly requires four years of college studies or its equivalent, as is the present case.

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(l)(2) and 8 C.F.R. § 204.5(l)(3)(ii)(C). Although certain regulations for temporary worker status allow a combination of education and experience, the immigrant visas (employment based third preference) regulations do not. In addition, the Form ETA 750 separates education from experience.

The above regulations at 8 C.F.R. § 204.5(l)(3)(ii)(C) use a singular description of foreign equivalent degree. Thus, for professionals, 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.⁴

As is evident from the two evaluators' opinion stated above, there is no dispute between them as regards the beneficiary's formal education in [REDACTED]. The second evaluator adopted the first evaluator's summary without addition or amendment. However, upon appeal the petitioner submits a third education evaluation dated March 24, 2004, from [REDACTED]. The purpose of the Director's request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not, consider the sufficiency of the evidence submitted on appeal.

Nevertheless, the AAO has examined the opinion for what probative evidence it may present to the issue at hand. The petitioner submitted a third education credential evaluation that is dated March 24, 2004, of the beneficiary's foreign schooling as it equates to a higher education offered in the United States. The evaluation prepared by [REDACTED] stated in pertinent part that "... [the beneficiary] completed the equivalent of three years of academic studies towards a Bachelor's Degree, in the field of business, at an accredited college or university." The evaluator then details the beneficiary's post university courses of instruction⁵ in computer science. The evaluator concludes that the totality of the beneficiary's university level attainment, the computer instruction and work experience is the equivalent of a Bachelor of Science degree in computer information systems.

college or university level education is required by the employer.

⁴Certain nonimmigrant visas do allow a combination of education and experience. See 8 C.F.R. § 214.2(h)(4)(iii)(C)(5).

⁵An additional educational facility is mentioned, besides the [REDACTED], the [REDACTED]. Neither of these facilities is an accredited college or university according to the credential evaluators.

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 or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this instance, by petitioner's three credential evaluators, the beneficiary has less than a four-year college degree. This matter is not in dispute. Petitioner may not combine work experience or non-college or non-university education with a three-year degree to equate to a bachelor degree or equivalent, in computer science, engineering or mathematics, and, two years of work experience.

The petitioner failed to demonstrate that the beneficiary had met the minimum qualifications of the Alien Employment Certification accompanying the petition. 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 appeal is dismissed.