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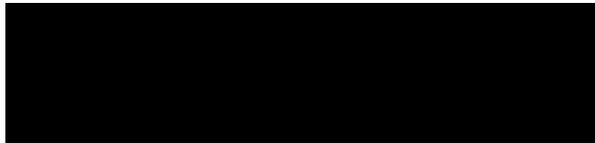
Office: NEBRASKA SERVICE CENTER

Date: NOV 10 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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consulting services corporation. It seeks to employ the beneficiary permanently in the United States as a budget analyst. 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(I), 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 October 22 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 14¹ describes the requirements of the proffered position and occupation of budget analyst as follows:

14. Education (enter number of years)	
Grade School	<u>8</u>
High School	<u>4</u>
College	<u>4</u>
College Degree Required	<u>Bachelor Degree</u>
Major Field of Study	<u>Commerce, Finance or Accounting</u>
Training/No. Yrs./Mos.	<u>0</u>
Experience	
Job Offered	
Number -Years .	<u>1</u>
Related Occupation	
Number -Years	<u>1</u>
Related Occupation	
Specify	<u>Financial Controller, Chief/Accountant, Auditor</u>

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.

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.

¹There is also a note in Item 15 that appears to relate to Item 14 that states, "... Related experience must include using Oracle financial and budget tools."

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)

* * *

University of Bombay, India

Field of Study	<u>Commerce</u>
From ...[mo./yr]	<u>June 1984</u>
To ...[mo./yr.]	<u>June 1987</u>
Degrees or Certificates Received	<u>Bachelor's</u>

The Institute of Chartered Acctants [sic] of India

Field of Study	<u>Accounting</u>
From ...[mo./yr]	<u>March 1985</u>
To ...[mo./yr.]	<u>August 1989</u>
Degrees or Certificates Received	<u>Certificate</u>

The director issued a request for evidence dated September 3, 2003. The director requested evidence that the beneficiary possessed a bachelor's degree in the field of study of Commerce, Finance or Accounting.

In response, the counsel submitted an evaluation report mentioned below, grades transcripts from University of Bombay, India, as well as a certificate of membership from The Institute of Chartered Accountants of India.

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 May 24, 2004.

On appeal, the counsel asserts in her brief that "it does not make sense" that the U.S. Department of Labor certified the Alien Employment application and accepted a combination of education and experience but that combination was not acceptable to CIS.

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 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.

Counsel then asserts that CIS will accept post-graduate degrees or certificates to satisfy the "labor requirements." Counsel submits a CIS memo and two CIS opinion letters to support this assertion. Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although a letter may be useful as an aid in interpreting the law,

such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

Counsel then asserts that CIS should re-evaluate and re-review the petition under the skilled worker classification in the event its findings on the above issues are adverse to the petitioner's assertion that the beneficiary qualifies as a professional worker. Throughout her brief, counsel asserts that it was the intent of the petitioner to, in essence, produce a petition with an underlying certified Alien Employment Application acceptable to pertinent law and regulation. 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)). CIS must examine the documents submitted that are now in the record of proceeding and referenced in this discussion. The 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 Commerce, Finance or Accounting.

Here, counsel has submitted alternate and mutually exclusive contentions. She asserts that the beneficiary has the foreign equivalent of a four-year college degree that could be attained in the United States. In the alternative, she asserts, that should the beneficiary have less than four years of higher education, he should qualify for the Skilled Worker classification despite the facts that the certified Alien Employment application requires a four year college Bachelor's degree and only one year job experience.

The petitioner has 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, the outcome of this case centers around whether or not the beneficiary has attained a bachelor's degree or its foreign equivalent since a bachelor's degree based upon four years of college or university level education is required by the employer. 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 (1)(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, in Commerce, Finance or Accounting, and, one year of work experience. (The "Related Occupations" mentioned are not an issue in this case.)

Counsel also asserts that the credential evaluation submitted states that the beneficiary "has completed more than four years." The petitioner submitted an education credential evaluation dated October 28, 2003, of the beneficiary's foreign schooling as it equates to a higher education offered in the United States. The evaluation prepared by Morningside Evaluations and Consulting stated in pertinent part that according to the courses completed and the number of credit hours earned in the three years the beneficiary attended the University of Bombay, that the beneficiary satisfied "requirements substantially" similar to those in the United States leading to the attainment of a Bachelor's degree. CIS disagrees with that presumption. 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, the beneficiary has attended the University of Bombay for three years in a degree program ending in that period of time and leading to a three-year college degree in Commerce. This matter is not in dispute. The Form ETA 750 requires a bachelor degree resulting from four (4) years of college education.

The evaluation prepared by Morningside Evaluations and Consulting further stated that the beneficiary has “the equivalent of a Bachelor of Business Administration degree” based upon “the credibility” of the University of Bombay, The Institute of Chartered Accountants of India, and, the beneficiary’s coursework. Again, CIS disagrees. The above regulation, 8 C.F.R. §204.5(l), 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. The Form ETA 750 requires a bachelor degree from a college. A bachelor degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the combination of education and a professional “certificate of membership” may not be accepted in lieu of a four-year degree.

The AAO finds that the passage of the professional examination as demonstrated by the certificate from The Institute of Chartered Accountants of India in the record does not establish that the beneficiary earned any additional degree or degrees from a college or university. Nothing in the record suggests that the Institute of Chartered Accountants is a college or university that awards degrees in specific areas of concentration. The record does not contain an official college or university record from the Institute showing the beneficiary has been awarded a degree. Neither the certificates nor the educational evaluation state that the beneficiary has earned any academic degree aside from the 1987 bachelor's degree.

Counsel and the second evaluator mentioned above contend that job experience together with the above mentioned three year degree satisfies the educational requirement for the preference category, “professional” that 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. Although certain regulations for temporary worker status allow a combination of education and experience,² the immigrant visas (employment based third preference) regulations do not. In addition, the Form ETA 750 separates education from 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).

The petitioner failed to establish that the beneficiary had met the minimum qualifications of the Alien Employment Certification accompanying the petition specified. The instant petition, submitted pursuant to 8 C.F.R. §204.5(l), 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.

² *See* 8 C.F.R. § 214.2 (h)(4)(iii)(C)(5).