



U.S. Citizenship
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EAC-04-085-50369

Office: VERMONT SERVICE CENTER

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OCT 20 2005

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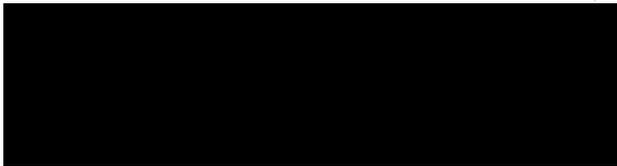
Petitioner:
Beneficiary:



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

The petitioner is a publishing company. It seeks to employ the beneficiary permanently in the United States as a director of systems technology. 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 science or technology 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 hold baccalaureate degrees and who are members of the professions.

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 (Comm. 1977). 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 July 20, 2001.

The Form ETA 750 states that the position of director of systems technology requires a bachelor's degree in science or technology and five years of experience in the offered position or in the related occupation of systems manager/administrator.

On the Form ETA 750B, signed by the beneficiary on October 17, 2003, the beneficiary claimed to have worked for the petitioner beginning in May 2000 and ending in January 2001.

The I-140 petition was submitted on January 29, 2004. On the petition, the petitioner claimed to have been established on October 9, 1998, to currently have approximately 10,000 employees, to have a gross annual income of approximately \$2 billion. The item on the petition for net annual income was left blank. With the petition, the petitioner submitted supporting evidence.

In a decision dated January 13, 2005 the director determined that the evidence failed to establish that the beneficiary had a bachelor's degree in the field specified on the ETA 750 or a foreign equivalent degree. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the ETA 750 as originally submitted by the petitioner allowed for the substitution of experience for the requirement of a bachelor's degree, but that certifying officer with the New Jersey State Workforce Agency informed the petitioner that the petition would not be approved unless that alternative qualification requirement was removed. Counsel states that the petitioner then submitted an amended ETA 750 with no alternative job qualification allowing work experience to substitute for a bachelor's degree, and that the ETA 750 was then certified by the Department of Labor in its amended form.

Counsel states that the Department of Labor has reviewed the beneficiary's qualifications and approved them, and that that fact should be sufficient to establish that the beneficiary is qualified for the offered job.

Counsel states that most of the advertising for the offered position stated that work experience could be substituted for the requirement of a bachelor's degree, and that any deficiency on the ETA 750's qualification requirements is therefore harmless error. Counsel also states that CIS has the authority to relax procedural rules.

Finally, counsel states that some three-year degrees from higher education institutions in India are equivalent to United States bachelor's degrees and states that the director should have issued a request for evidence to afford the petitioner an opportunity to submit evidence to show that the beneficiary's three-year diploma from an Indian higher education institution is equivalent to a United States bachelor's degree.

The evidence submitted on appeal consists of one document describing the higher education system in India and many documents pertaining to the labor certification supporting the instant petition. The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The record contains a copy of a diploma in electronics granted to the beneficiary in April 1983 by the State Board of Technical Education and Training, Department of Technical Education, Government of Tamil Nadu, Madras, India. Course transcripts supporting that diploma show six semesters of study. In other words, the course of study for the diploma was a three-year program.

The record also contains an evaluation of the beneficiary's education and experience dated December 14, 1998 by [REDACTED] which finds that the beneficiary's education and experience are equivalent to a bachelor's degree in electronics engineering and computer science from an accredited university in the United States. The evaluation states that the beneficiary's studies are the equivalent of three years of study at an accredited United States university. The evaluation 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 M. E. I., Inc. 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(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.

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(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.

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.

A bachelor's degree usually requires four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg. Comm. 1977). Therefore even if the petition is considered as one for a skilled worker, the evidence shows only three years of higher education for the beneficiary, which is not usually sufficient for a bachelor's degree.

Counsel states in her brief that the ETA 750 as originally submitted by the petitioner allowed for the substitution of experience for the requirement of a bachelor's degree, but that certifying officer with the New Jersey State Workforce Agency informed the petitioner that the petition would not be approved unless that alternative qualification requirement was removed. Nonetheless, if the petitioner disagrees with the actions of the New Jersey State Workforce Agency or of the United States Department of Labor, any such concerns would have to be raised in another forum. The AAO does not have jurisdiction to review the actions of either of those agencies.

The AAO's jurisdiction is limited to the authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see*

also 8 C.F.R. § 2.1 (2005 ed.). Pursuant to that delegation, the AAO's jurisdiction is limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003). See DHS Delegation Number 0150.1(U) *supra*; 8 C.F.R. § 103.3(a)(iv) (2005 ed.).

In the definition of "professional," the regulation at 8 C.F.R. § 204.5(l)(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. 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.

The evidence summarized above was the only evidence in the record relevant to the beneficiary's education which was submitted prior to the decision of the director. That evidence is insufficient to establish that the beneficiary had a bachelor's degree in science or technology on July 20, 2001 or a foreign equivalent degree.

The evidence newly submitted on appeal consists of documents describing the higher education system in India and documents pertaining to the labor certification supporting the instant petition.

The evidence submitted on appeal also includes extensive documentation pertaining to the ETA 750 labor certification underlying the instant I-140 petition. The evidence includes documentation pertaining to the petitioner's recruitment efforts. In her brief, counsel asserts that such evidence is relevant because it shows that the petitioner's job advertisements and other recruitment efforts did not limit the pool of potential applicants only to persons holding bachelor's degrees, but rather also invited applications from persons who had the equivalent of a bachelor's degree. Counsel asserts that the more restrictive requirement on the ETA 750 of a bachelor's degree was therefore a harmless error, since the advertised job requirements were in fact more liberal than the requirements stated on the ETA 750. Counsel also states that CIS has the authority to relax procedural rules.

Nonetheless, in evaluating the beneficiary's qualifications, CIS must look to the job offer portion of the alien 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). None of the cases cited by the counsel concerning the authority of CIS to relax procedural rules in the interests of justice provide authority for CIS to make any changes concerning the job qualifications on an ETA 750.

Counsel also states that the Department of Labor has reviewed the beneficiary's qualifications and approved them, and that that approval should be sufficient to establish that the beneficiary is qualified for the offered job.

In approving in an ETA 750, the Department of Labor certifies that there are not sufficient United States workers available for the offered position and that the employment of the alien beneficiary will not adversely affect the wages and working conditions of workers in the United States who are similarly employed. The certification does not include a finding that the proposed beneficiary is qualified for the offered position. See Act § 212(a)(5)(A)(i). The certification of a Form ETA 750 by the Department of Labor therefore 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).

Counsel asserts in her brief that the director erred by failing to issue a request for evidence to give the petitioner an opportunity to submit evidence that the beneficiary's three-year diploma from an Indian higher education institution is equivalent to a United States bachelor's degree. Counsel asserts that some bachelor's degrees granted by Indian institutions of higher education are in fact equivalent to United States bachelors' degrees.

The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation.

Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and therefore it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence. The petitioner has submitted extensive documentation on appeal, but the petitioner has submitted no evidence which establishes that the beneficiary's diploma is equivalent to a United States bachelor's degree.

The evidence submitted on appeal includes a printout of a document titled Higher Education in India, printed from the Internet web site of the Department of Education of the government of India. That document provides a detailed description of the various programs and institutions of higher education in India. But that document makes no specific reference to the type of program under which the beneficiary received his diploma. The petitioner has highlighted a section of that document which states that study for bachelors' degrees begins after twelve years of school education and that the course of study for bachelors' degrees is three years, except for certain bachelor's degree programs which may require longer study.

The section of the document Higher Education in India which is highlighted by the petitioner is not directly relevant to the instant petition, because the beneficiary's diploma in the record is not a bachelor's degree. The diploma states the following: "This Diploma of Electronics is awarded to [the beneficiary] who has completed a course of instruction in Electronics with Television Engineering as Elective subjects and passed in First Class at the Board's Final Examinations held in April 1983." (Beneficiary's Diploma, April 1983). The diploma bears the seal of the Board of Examinations, Tamil Nadu, Madras, India, and the signatures of the chair of that board and of the Minister for Education and chair of the State Board of Technical Education and Training, Tamil Nadu. The diploma does not state that the beneficiary is awarded a bachelor's degree. The record therefore fails to establish that the beneficiary holds a bachelor's degree granted by an Indian institution of higher education.

The document Higher Education in India does not make any comparative statements as to whether a three-year bachelor's degree in India is equivalent to a four-year United States bachelor's degree. Rather, the document simply states that in India, some courses of study allow for a bachelor's degree in three years.

The only evaluation of the beneficiary's education in the record is the one by [REDACTED], which relies on a combination of the beneficiary's education and experience as the basis for its findings. However, the record lacks any evaluation of the education of the beneficiary based only on the beneficiary's academic credentials.

The record therefore lacks any basis for a finding that the beneficiary's diploma is a foreign equivalent degree to a United States bachelor of science degree.

In his decision, the director correctly evaluated the evidence which was then in the record. The director correctly found that the evidence failed to establish that the beneficiary had the education required by the ETA 750. The decision of the director to deny the petition was correct, based on the evidence in the record before the director. The assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

It may be noted that the beneficiary's A-file contains a second I-140 petition submitted on February 7, 2005 by the same petitioner, supported by a photocopy of the same ETA 750 as was submitted in support of the instant petition. No decision has yet been issued by the director on the new I-140 petition. Among the documents submitted in support of the new I-140 petition is a copy of the beneficiary's diploma in electronics, the same diploma which is discussed above. The new petition seeks classification of the beneficiary as a skilled worker. The director will presumably adjudicate the new I-140 petition when the file is returned to the director's office after the AAO issues its decision in the instant petition.

With regard to the instant petition and in summary of the above analysis, even assuming that the petitioner's recruitment efforts for United States workers were not limited to persons meeting the educational requirements of the ETA 750, the instant I-140 petition is based on the Form ETA 750 as certified by the Department of Labor. The Form ETA 750 requires a bachelor of science degree or the equivalent. Moreover, the applicable regulations require that any equivalent to a United States bachelor's degree be a foreign equivalent degree, not a combination of education and experience. For the reasons discussed above, the evidence submitted on appeal fails to establish that the beneficiary held a bachelor of science in science or technology or a foreign equivalent degree 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.