

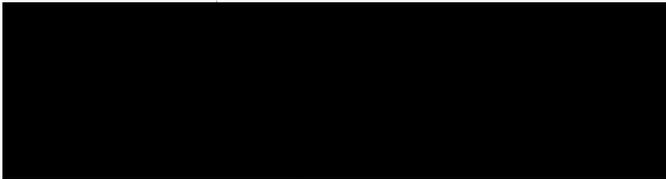
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U.S. Citizenship
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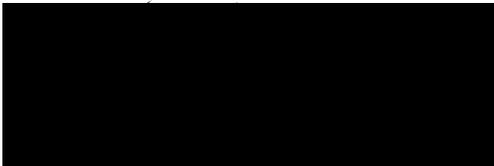
Office: NEBRASKA SERVICE CENTER

Date: **SEP 20 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, Nebraska Service Center, denied the third preference employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner manufactures, sells, and services business and mailing products. It seeks to employ the beneficiary permanently in the United States as a technical training instructor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition and a subsequent motion to reconsider because he determined that the beneficiary did not present evidence that he had the foreign equivalent of a United States bachelor's degree. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, the petitioner's counsel contends that the beneficiary's credentials are sufficient to meet the requirements of the labor certification and submits 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 Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. 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). See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, that date is September 26, 2002.

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 technical training instructor. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education

Grade School	8
High School	4
College	4
College Degree Required	Bachelor's or its Equivalent
Major Field of Study	Computer Science or a related field

The applicant must also have three years of experience in the job offered, which is delineated on Item 13 of the ETA 750A and since it is a public access document will not be recited here, or as a "Trainer in [the] IT Field." Additionally, Item 15 modifies the related occupation experience with the "Other Special Requirements" as follows: "Must possess hands on experience in the design, creation and delivery of technical and non-technical training content; and in the delivery of technical training in a variety of hardware environments, including mainframes and personal computers."

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 Kingston University in the United Kingdom from September 1984 through July 1988 receiving a Diploma and studying in the field of Sciences. He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct. The beneficiary also set forth his employment experience on Part 15.

In corroboration of the Form ETA-750B, the petitioner provided copies of letters establishing the beneficiary's qualifying employment experience, completion of various computer-training courses, and a credential evaluation from the Foundation for International Services, Inc. (FIS). Considering both the beneficiary's three-year degree from "Kingston Polytechnic," referencing the diploma and transcript, copies of which are not contained in the record of proceeding, and the beneficiary's employment experience, the FIS credential evaluation stated the following, in pertinent part:

In summary, it is the judgment of [FIS] that [the beneficiary] has the equivalent of three years of university-level credit in physics from an accredited college or university in the United States and has, as a result of his educational background, training and progressively more responsible employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

The director issued a request for additional evidence on February 24, 2004. The director requested evidence that the beneficiary "holds a foreign degree which is equivalent to a four-year U.S. bachelor's degree in computer science (or in a related field) as is specified in item 14 of [the petitioner's] labor certification." The director noted that the beneficiary's "equivalency" in terms of his educational background could not be substantiated through the combination of education and experience.

In response, the petitioner's counsel asserted that the petitioner requested that the petition be classified as a skilled worker instead of professional, and that the petition requires the "equivalent" of a bachelor's degree, for which the petitioner accepts employment experience in lieu of a four year baccalaureate degree. The petitioner submits the

beneficiary's employment experience letters and transcribed liaison minutes from a Nebraska Service Center teleconference with the American Immigration Lawyers Association (AILA). Counsel highlighted a section in which a hypothetical similar to the facts of the instant petition were set forth and the Nebraska Service Representative stated that such an individual could qualify as a skilled worker.

The AAO notes that while the petitioner did not overtly specify the classification it was seeking with its initial filing, it did reference "The Position Requiring a Professional Of [The Beneficiary's] Experience," as a caption in counsel's letter as well as her language that the petitioner was seeking the "experience of a professional individual." The petitioner would not be permitted to change classifications after the filing; however, since the director did not raise that issue and the results of the adjudication are the same regardless of category sought, the AAO will not further address that issue.

The director denied the petition on May 10, 2004 acknowledging that the service centers could issue erroneous guidance and finding that the beneficiary was not qualified for the proffered position because the evidence did not indicate that he held a foreign equivalent degree equivalent to a four-year baccalaureate degree from an accredited college or university in the United States.

On appeal, counsel asserts that the beneficiary's credentials are sufficient to meet the requirements of the labor certification because an affidavit "accompanying" the labor certification application of Robbin Drew-Elliott (Ms. [REDACTED]), Advisor, Immigration and Human Resources Legal Administration "defines in paragraph 16 how [the beneficiary] is qualified for the proffered position." Additionally, counsel asserts that Ms. [REDACTED] used the "three for one rule" in excluding American workers from consideration during its advertising and recruiting phase of the labor certification process.

On appeal, the petitioner submits pages 4 and 5 of a document signed by Ms. [REDACTED] before a notary public that has no indication of the date it was prepared and sworn to. The document describes the petitioner's advertising and recruitment efforts and states, in paragraph 16, that states the following text, which was highlighted by counsel:

[The beneficiary] meets, and in many cases exceeds, each of the job requirements stated in the job offer for the [proffered position]. [The beneficiary] possesses a Higher National Diploma in Sciences (Physics) from the Business and technical Education Council (BTEC) in England. This degree has been evaluated to be the equivalent of three years of university-level credit in Physics from an accredited institution in the United States. [The beneficiary's] educational and several years of his work experience have been evaluated to be the equivalent of a bachelor's degree in Computer Science from an accredited institution in the United States.

In addition to previously submitted evidence, the petitioner also submits a website page from a credential evaluation service stating that its report evaluates a professional's work history, using "[CIS] 'three-for-one-rule,'" along with that individual's academic qualifications in order to achieve a bachelor's degree equivalency, and also submits other credential evaluation services' websites that provide similar information with the services they provide. The petitioner also submits another sworn and notarized affidavit from Ms. [REDACTED], who states that she uses "[CIS] 'three for one rule,'" credential services evaluations', and an individual's employment experience to determine what is "equivalent" to a U.S. bachelor's degree. Ms. [REDACTED] also states that one

American applicant who did not possess a bachelor's degree was rejected from consideration for the proffered position for lacking the required training skills although her educational experience was evaluated and deemed acceptable.

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 4 years of college and a bachelor's degree or equivalent with a major in Computer Science or a related field.

The director was correct in noting that the teleconference minutes were unreliable guidance from the service centers. Just as 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 applications¹, CIS, through the AAO, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001)².

The evidence submitted on appeal does not alter the requirements as set forth on the certified ETA 750 for the proffered position as they only repeat the description of the beneficiary's purported qualifications. Additionally, the petitioner's results of recruitment through its labor certification application approval process have no relevance to CIS' review of the beneficiary's qualifications for the proffered position.

Guiding the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: "[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." FIS is a member of NACES, the National Association of Credential Evaluation Services. The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector. Thus, the credential evaluation provided by FIS is given appropriate credibility and evidentiary weight.

¹ Although the 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).

² Additionally, It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

The petitioner has not established that the beneficiary is qualified for the proffered position. In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be a foreign equivalent degree, a 4-year degree that is 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. The petitioner clearly requires a 4-year degree, as the number "4" marked in Item 14 under the "MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in Item 13 above" under "College" reflects (Emphasis in original).

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 in Chemistry from India as the equivalent of a United States baccalaureate degree. *Id.* at 245.

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). 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(l)(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, or an equivalent foreign degree. The petitioner simply cannot qualify the beneficiary as a skilled worker without proving the beneficiary meets its additional requirement on the Form ETA-750 of an equivalent foreign degree to a U.S. bachelor's degree.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from the United Kingdom 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 curriculum³. The evaluation submitted with the evidence in this proceeding clearly states that the beneficiary only has the equivalent of three years of education at a United States college or university. The evaluation states that the beneficiary's three year degree *and* his subsequent employment experience should be considered as 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 State's bachelor's degree because it 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) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

Additionally, the petitioner has not indicated that a combination of educational and employment achievements can be accepted as meeting the minimum educational requirements stated on the labor certification. Thus, the combination of educational and employment achievements may not be accepted in lieu of one baccalaureate

³ The AAO cannot analyze the beneficiary's diploma and transcripts independent of FIS' evaluation since the record of proceeding does not contain those documents.

degree. The beneficiary was required to have a bachelor's degree on the Form ETA 750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Based on the evidence submitted, we concur with the director that the petitioner has not established that the beneficiary possesses a bachelor's degree as required by the terms of the labor certification.

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.