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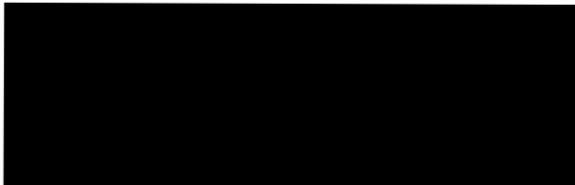


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 25 2006
WAC 04 090 51970

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a computer workstation manufacturer. It seeks to employ the beneficiary permanently in the United States as an entry-level 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 had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied and denied the position accordingly.

On appeal, counsel submits a brief and additional evidence.

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.

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 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 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.

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.

If the petition is for a professional pursuant to Section 203(b)(3)(A)(ii) of the Act 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. 8 C.F.R. § 204.5(l)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Whether the petition is for a professional pursuant to Section

203(b)(3)(A)(ii) or for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act the petitioner must show that the beneficiary possesses both the education and experience required by the Form ETA 750 as of the priority date. 8 C.F.R. § 204.5(l)(3)(ii) and *Matter of Wing's Tea House, supra*.

Here, the Form ETA 750 was accepted for processing on October 10, 2001. The Form ETA 750 states that the proffered position requires four years of college resulting in a "BS [Bachelor of Science] or foreign equivalent" in "CS CIS." [Computer Science or Computer Information Systems]. The Form ETA 750 contains no experience requirement.

The Form ETA 750, Part B, signed by the beneficiary on September 27, 2001, shows that the beneficiary worked in various computer-related jobs from July 1995 to December 1995, from April 1997 to September 1998, and from March 1999 until September 2001.

With the petition, counsel submitted (1) a diploma from the University of Lodz, accompanied by an English translation, showing that the beneficiary received the title of Master "in the line of cultural science in the scope of teatrology," (2) a transcript from DeAnza College in Cupertino, California showing that the beneficiary received credit for 113 credit hours, with a concentration in computer science and mathematics, from that institution, (3) the beneficiary's personal résumé, (4) employment verification letters confirming the beneficiary's employment from July 1, 1995 to December 20, 1995, and from January 1990 to June 1992, and (5) an educational evaluation.

The beneficiary's résumé shows that she worked in various computer-related positions from April 1994 to December 1995, from April 1997 to February 2003, the date of that résumé.¹

The educational evaluation states that the beneficiary's diploma from the University of Lodz is equivalent to a bachelor's degree in theater arts from an accredited United States college or University. That evaluation further states that the beneficiary's education and employment experience, taken together, are equivalent to a bachelor's degree in computer science earned at a college or university in the United States.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on December 9, 2004, denied the petition. That decision evaluated the instant petition as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act but did not evaluate it as a petition for a skilled worker pursuant to 203(b)(3)(A)(i) of the Act.

On appeal, counsel submits an additional educational evaluation dated July 26, 2001, and different from that previously provided. The July 26, 2001 educational evaluation states that the beneficiary's formal education is the equivalent of a bachelor's degree in Computer Information Systems from an accredited U.S. college or university.

In a brief counsel cites the new educational evaluation for the proposition that the beneficiary's education, training, and coursework, without inclusion of the beneficiary's employment experience, is the equivalent of a

¹ The dates of employment shown on that résumé do not correspond to the dates shown on the Form ETA 750B.

bachelor's degree in computer science. Counsel asserts that the beneficiary, therefore, qualifies for the proffered position.

To determine whether a beneficiary is eligible for a third preference visa, CIS must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. In this instance the Form ETA 750 expressly requires a four-year degree in computer science or a foreign equivalent degree.

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).

The only college degree that the record demonstrates that the beneficiary possesses is in cultural science with a concentration in theatre. The beneficiary does not have a bachelor's degree in Computer Science or Computer Information Systems or an equivalent foreign college degree.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one that pertains to professionals.² That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree. No such equivalent is available if the petition is analyzed as a petition for a skilled worker.

The Form ETA 750 in the instant case does not specify any criterion pursuant to which the beneficiary's education, absent a degree, may be analyzed to see whether it is equivalent to a bachelor's degree. The Evaluation Report submitted in this case is unpersuasive for that reason.

The result in this case is the same whether the petition is analyzed as one for a professional pursuant to 203(b)(3)(A)(ii) of the Act or as a petition for a skilled worker pursuant to 203(b)(3)(A)(i) of the Act. In either event, the petitioner is obliged to show that the beneficiary is qualified for the proffered position pursuant to the requirements set forth in the Form ETA 750, in this case, a bachelor's degree or an equivalent degree in Computer Science or Computer Information Systems.³ Because the beneficiary has no such degree, the petition was properly denied.

² The regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for education and degree. No such substitution of experience in lieu of education and a degree is sanctioned by the laws and regulations applicable to the visa category in the instant case.

³ Had the petitioner specified an acceptable substitute for the requisite bachelor's degree in this case, other than another college degree it would have opened the position to U.S. workers without degrees. Although those non-graduate workers may have been excluded from consideration for the proffered position, the petitioner now seeks to hire an alien worker without such a degree. The purpose of the instant visa category is to provide alien workers for U.S. positions, but only if qualified U.S. workers are unavailable. To permit the petitioner to alter the terms of the approved labor certification such that the beneficiary is eligible for the petition after the petitioner could have excluded U.S. workers with similar qualifications would frustrate the purpose of the visa category.

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.