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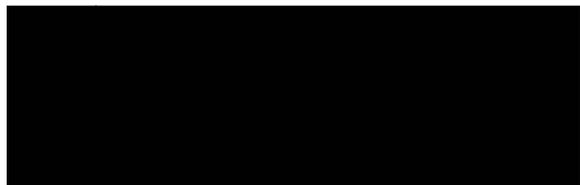
U.S. Department of Homeland Security
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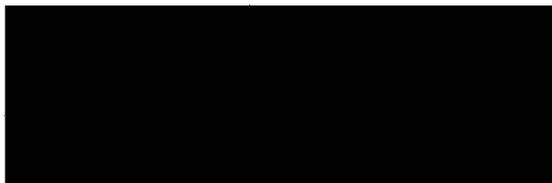
Date: DEC 06 2006

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:



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 Acting Director, Nebraska 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 software and IT solution provider. It seeks to employ the beneficiary permanently in the United States as a data communications analyst (programmer analyst.) As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The acting 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 petition accordingly.

On appeal, counsel 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 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.

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)(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.

Whether the instant petition is analyzed as a petition for a professional or as one for a skilled employee the petitioner must demonstrate that the beneficiary satisfied all of the prerequisites for the proffered position as listed on the approved Form ETA 750 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 November 14, 2003. The Form ETA 750 states that the proffered position requires a "B.S. or equivalent" in "Computer Science, Management Information Systems and Engineering- any branch" as well as two years of experience in the job offered or two years of experience as a "Network/ Systems Engineer, Assistant Operations Engineer."

With the petition, counsel submitted (1) a diploma, (2) report cards and transcripts, (3) various IT certifications, (4) evidence pertinent to the beneficiary's professional experience, and (6) an educational evaluation dated October 21, 2003.

The diploma submitted shows that during 1996 the Board of Technical Education in Delhi, India awarded the beneficiary an unspecified diploma in Electrical Engineering. The report cards and transcripts confirm that the beneficiary was a student at that university.

In the October 21, 2003 education evaluation the evaluator states,

For employment purposes [the beneficiary's] education and professional experience [considered together] are equivalent to . . . a Bachelor degree in Electrical Engineering & Computer Science from an accredited University in the United States.

The acting 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 May 26, 2005, denied the petition. The acting director noted that a combination of education and experience cannot be used to satisfy the degree requirement.

On appeal, counsel stated,

Beneficiary has an equivalent of a Bachelor's degree. The Beneficiary received a diploma and a degree. We will provide evidence with a brief within 30 days showing his educational equivalency is to that of a Bachelor's Degree.

Subsequently counsel provided another educational evaluation

The additional educational evaluation is dated July 6, 2005 and states that the beneficiary's education, experience, training, and certifications, taken together, are "equivalent to . . . a Bachelor of Engineering degree in Electrical Engineering & Computer Science awarded by an accredited institution/college of tertiary education in the United States." [Emphasis in the original.]

Later still counsel submitted a third educational evaluation. The third evaluation states that the petitioner's three-year degree from Delhi, India is the equivalent of a Bachelor of Science with a major in Computer Science from a Regionally Accredited Institution of Higher Education in the United States of America.

The educational evaluations submitted reach the conclusion that the beneficiary has the equivalent of a U.S. bachelor's degree by two different lines of reasoning. The most recently submitted evaluation states that the

beneficiary's three-year Indian degree, in itself, is equivalent to a U.S. bachelor's degree. The other two evaluations state that the beneficiary's education, training, and experience, together, are equivalent to a U.S. bachelor's degree.

The argument that the beneficiary's foreign three-year degree is equivalent to a United States bachelor's degree is unconvincing. A United States bachelor's degree generally requires four years of education. *Matter of Shah*, 17, I&N Dec. 244 (Reg. Comm. 1977). According to India's Department of Education, the nation's educational degree structure provides for both three-year and four-year bachelor's degree programs. See generally Government of India, Department of Education, *Higher Education in India, Academic Qualification Framework - Degree Structure*, (last updated October 1, 2001), available at <http://www.education.nic.in/htmlweb/higedu.htm>. After 12 years of primary and upper primary school, a bachelor's degree in the arts, commerce, or the sciences may be earned after just three years of higher education. *Id.* A bachelor's degree in a professional field of study such as agriculture, dentistry, engineering,¹ pharmacy, technology, or veterinary science generally requires four years of higher education. *Id.* If supported by a proper credentials evaluation, a four-year bachelor's degree from India might reasonably be deemed to be the "foreign equivalent" of a United States bachelor's degree. However, in *Matter of Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States bachelor's degree because the degree did not require four years of study. *Matter of Shah* at 245. Based on the same reasoning, the beneficiary's three-year degree from Board of Technical Education in Delhi will not be considered to be equivalent, in itself, to a United States bachelor's degree for purposes of this preference visa petition.

The remaining question is whether the beneficiary's three-year degree, together with his certifications and employment experience, can be considered the equivalent of a U.S. bachelor's degree in the context of the subject labor certification.

The labor certification makes explicit that some equivalent to a bachelor's degree would be acceptable, but does not state what that acceptable equivalent is.

The regulation at 8 C.F.R. § 204.5(k)(2) allows an alien to substitute a bachelor's degree plus five years of progressive experience for an advanced degree. The regulation at 8 C.F.R. § 214(h)(2)(iii)(D)(5) permits the substitution of three years of experience for one year of college for special occupation nonimmigrants. Clearly CIS' predecessor agency was capable of issuing regulations providing for the substitution of experience for education in a limited context. Despite this capability, no such provisions appear at 8 C.F.R. § 204.5(l) and its subparagraphs relating to professionals and skilled workers.

¹ Information available to this office indicates that an Indian bachelor's degree in engineering requires four years of study. The beneficiary received his degree after only three years of study and nothing on that degree indicates that it is a bachelor's degree. Because this issue was not raised in the decision of denial, however, and the petitioner has not been accorded an opportunity to address it, today's decision is not based, even in part, on that issue. If the petitioner attempts to overcome today's decision on motion, however, it should address the issue of whether the beneficiary's three-year degree is considered a bachelor's degree even in India.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for education and a degree, the laws and regulations applicable to the visa category in the instant case sanction no such substitution of experience for education and a degree and provide no formula pursuant to which such experience might be credited in lieu of education and a degree.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is 8 C.F.R. § 204.5(l)(1), which states that a "United States baccalaureate degree or a foreign equivalent degree" qualifies a beneficiary for a professional position pursuant to section 203(b)(3)(A)(ii) of the Act. That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree. No criterion exists pursuant to which the beneficiary's experience, or experience coupled with education, absent the requisite bachelor's degree, may be analyzed to see whether it is equivalent to that requisite degree.

The petitioner was free to specify on the Form ETA 750 that it would accept some amount of experience or other qualification *besides* the foreign degree equivalent as equivalent to a bachelor's degree² but did not.³ The acting director was therefore correct in treating the petition as one for a professional, and in using the criteria in the regulation at 8 C.F.R. § 204.5(l)(2) to evaluate the term "or equivalent" in the labor certification.

If the instant petition is analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act it necessarily fails, as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) read together with the Form ETA 750 make clear that such a position requires a U.S. bachelor's degree or an equivalent foreign degree in computer science, management information systems or engineering. The beneficiary does not have such a degree.

If the instant petition is analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act the result is the same. If the petition is considered as a petition for a skilled worker, the requirement as stated on the ETA 750 for a bachelor's degree or the equivalent would be unaffected. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification. See *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

² In that event, CIS would analyze the petition as a skilled worker petition pursuant to section 203(b)(3)(A)(i) of the Act, rather than a petition for a professional pursuant to section 203(b)(3)(A)(ii). Only petitions that require a *minimum* of a bachelor's degree or equivalent foreign degree are considered petitions for professionals.

³ If the petitioner had specified an acceptable substitute for the bachelor's degree or foreign equivalent degree on the Form ETA 750, that would have put U.S. workers without degrees on notice that they were eligible to apply for the proffered position. The petitioner now seeks to hire an alien worker without such a degree or foreign equivalent 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. CIS shall not permit the petitioner to alter the terms of the approved labor certification such that the beneficiary is eligible for the petition *after* the petitioner excluded U.S. workers with similar qualifications.

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree. 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.