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U.S. Department of Homeland Security
20 Mass, N.W. Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **JUL 05 2006**
LIN 04 001 50592

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:

[REDACTED]

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 preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of truck mounted cleaning machines. It seeks to employ the beneficiary permanently in the United States as a management 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 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, the counsel submits a legal 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(1)(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(1)(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(1), 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 750¹ was accepted for processing on September 21, 2001. The Form ETA 750 states that the proffered position requires two years experience.

¹ It has been approximately five years since the Alien Employment Application has been accepted and the proffered wage established. According to the employer certification that is part of the application, ETA Form 750 Part A, Section 23 b., it states “The wage offered equals or exceeds the prevailing wage and I [the employer] guarantee that, if a labor certification is granted, the wage paid to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work.”

With the petition, counsel submitted copies of the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor; a copy of the petitioner's "Combined Financial Statement as of July 31, 2003"; a support letter; a biographic page from the beneficiary's passport; the beneficiary's resume; prior employment verification letters; the petitioner's employment verification; the beneficiary's W-2 statements; certain certificates and awards received by the beneficiary; a credential evaluation as well as other documentation.

The director denied the petition on November 10, 2004, determining that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied.

If the petition is for a professional pursuant to 8 C.F.R. §204.5(l), 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 September 21, 2001. The petitioner selected in Part 2, check box "e" of the I-140 petition. 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, items 14 and 15 describes the requirements of the proffered position and occupation of management analyst as follows:

- | | | |
|-----|---|--------------------------------|
| 14. | Education (enter number of years) | |
| | Grade School | <u>x</u> |
| | High School | <u>x</u> |
| | College | <u>4</u> |
| | College Degree Required | <u>Bachelor's</u> |
| | Major Field of Study | <u>Business Administration</u> |
| | Training | Blank |
| | Experience | |
| | Job Offered | |
| | Number -Years / Mos. | <u>2/0</u> |
| | Related Occupation | |
| | Number -Years Mos. | Blank |
| | Related Occupation | |
| | Specify | Blank |

15. Other Special Requirements

The two years experience must include manufacturing of industrial carpet cleaning systems, carpet cleaning chemicals and accessories, and cleaning & disaster restoration techniques. Must have one year of management experience. Must be certified by the Institute of Inspection and Cleaning Master Cleaner and Restorer. Domestic travel required 20% of the time. Experience may be gained concurrently.

The employer who is the petitioner has prepared the above ETA 750 A 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. In the present case, the above requirements also state that the occupation of management analyst has a four-year college degree or its equivalent, in the business administration field.

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.

The Form ETA 750 Part B prepared by the beneficiary states that the beneficiary has a certificate attained from Centennial Secondary School in 1986, a diploma received from Rainbow University in Carpetology in 1989; a diploma received from Dupont as Masterseries Technician in 1990, and, a certificate from the British Columbia Institute of Technology in small engines in 1994.

As mentioned, the director determined that the petitioner had not established that the beneficiary had the college degree required by the preference classification for which the Alien Employment Certification accompanying the petition specified and denied the position accordingly on November 10, 2004.

On appeal, the counsel asserts that all the recruitment advertising and posted notice of job opportunity contained "... a broader requirement than the narrow requirement stated on the form ETA 750"; and, that the beneficiary meets the broader requirements. On a more technical point of contention, counsel asserts that the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) states in pertinent part that "... education, specialized training, and/or progressively responsible experience that is the equivalent to a completion of a United States baccalaureate or higher degree in the specialty occupation ...". According to counsel, the AAO (formerly designated as AAU) has applied this H-1B work equivalency position to an EB-3 visa petition, and counsel cites a non-precedent decision to support this contention.² Counsel contends that the beneficiary qualifies as a

² Counsel refers to a decision issued by the AAO concerning H-1B work equivalency. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

skilled worker, and, also under that classification cannot be disqualified because of an ‘equivalency’ issue as mentioned above.³

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 a converse, that the experience may be considered for education requirements.

Petitioner’s clear intent is expressed in the certified Alien Employment Application. A four-year college degree is required in the business administration field of study. 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 (l)(3)(ii)(B). Regardless of classification, the ETA-750 contains the requirements that the beneficiary must have four years of college education and a degree in the business administration field of study and two years of job experience. Further, the two years of experience must include manufacturing of industrial carpet cleaning systems, carpet cleaning chemicals and accessories, and cleaning & disaster restoration techniques; must involve one year of management experience; the successful candidate must be certified by the Institute of Inspection and Cleaning Master Cleaner and Restorer, and, the experience may be gained concurrently.

Counsel contends that job experience together with the above mentioned certificates of completion and diplomas from technical/vocation/manufacturing programs⁴ that satisfies the educational requirement for the preference category, that is to say, “four years / equivalent.” Despite counsel's arguments, CIS will not accept a degree equivalency when a labor certification plainly and expressly requires four years of college or its equivalent, as is the present case. The certified ETA 750 does state that four years of college culminating in a Bachelor’s degree in the major field of study, which is business administration.

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). Although certain regulations for temporary worker status allow a combination of education and experience, the immigrant visas (employment based third preference) regulations do not. In addition, the Form ETA 750 separates education from experience.

The above regulations at 8 C.F.R. § 204.5(l)(3)(ii)(C) use a singular description of foreign equivalent degree. Thus, for professionals, the plain meaning of the regulatory language sets forth the requirement that a beneficiary

³ This last contention is contrary to the requirement of a college bachelor’s degree in the ETA 750 part A. Neither the law nor the regulations require the director to consider lesser classifications if the petitioner does not establish the beneficiary’s eligibility for the classification requested. There is no provision permitting the petitioner to alter the visa classification sought upon its initial filing. Additionally, it is noted that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc.Comm.1998).

⁴ The petitioner has not submitted an education credential evaluation in this matter.

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.⁵

Counsel has stated that the advertisements and job notices that were posted in this matter, were not in fact those listed on the certified Alien Employment application. This is an admission against the petitioner's interest. The AAO finds that the recruitment notices and job notices were defective on their face.

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(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.

⁵Certain nonimmigrant visas do allow a combination of education and experience. See 8 C.F.R. § 214.2 (h)(4)(iii)(C)(5).