

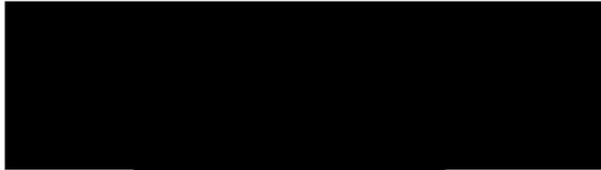


U.S. Citizenship
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Services

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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: MAR 24 2006
EAC-04-099-50117

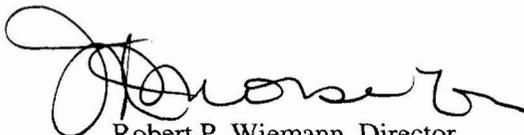
IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

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:
[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, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a computer services company. It seeks to employ the beneficiary permanently in the United States as a software engineer. 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 because he determined that the evidence submitted did not establish that the beneficiary possessed the requirements as certified on the ETA-750.

On appeal, the petitioner's counsel contends that the beneficiary had the requisite "equivalent" of a bachelor's degree in computer science before he was hired for the job in question.

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 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 June 14, 2002.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, 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 software engineer. In the instant case, item 14 describes the requirements of the proffered position as follows:

- 14. Education
 - Grade School
 - High School
 - College
 - College Degree Required Bachelor's or equivalent
 - Major Field of Study CS/Engineering/Math or related

The applicant must also have two (2) years of experience in the job offered or the related occupation of software development. Additionally, Item 15 states with the "Other Special Requirements" as follows: "Such experience

must include Windows NT, HTML, ASP, SQL Server, and Visual Basic. Must be willing to be assigned to unanticipated client sites throughout the United States.”

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 the University of Bombay in India in the field of “Microbiology” from June 1986 through May 1988, culminating in the receipt of a “Master of Science” degree, and from June 1983 to May 1986, culminating in the receipt of a “Bachelor of Science” degree. He also obtained training in Microsoft solution development at Microsoft Training Center from February 1999 to May 1999, in the Internet at Brainbench in December 1999 and in software at Advance Technology labs from March 1999 to May 2000. 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. In corroboration of the Form ETA-750B, the petitioner provided copies of the beneficiary’s “Master of Science” and “Bachelor of Science” degrees in Microbiology and transcripts from the University of Bombay.

A credential evaluation drafted by George J. Petrello, a credential evaluator, was also initially submitted with the petition and stated the following in pertinent part:

Diploma, with supporting documents, dated December 18, 1986 from the University of Bombay, India, indicating the completion of a Bachelor of Science in Microbiology Degree; and another diploma, with transcript, dated December 22, 1989 from the University of Bombay indicating the completion of a Master of Science in Microbiology Degree. In my judgment, these degrees are the equivalent to a Bachelor of Science and Master of Science in Microbiology from a regionally accredited college in the United States.

* * * *

In my opinion, the combination of the courses completed in the Bachelor of Science and Master of Science in Microbiology degree programs of study at the University of Bombay which served as foundation for work and further study in the computer field, the various computer competencies developed through on the job experience, the computer training courses completed and the designation as a Microsoft Certified Professional, as well as the documented work experience in the computer field, is the equivalent of a Bachelor of Computer Science Degree from a regionally accredited college in the United States.

The director denied the petition on September 8, 2004, finding that the petition was filed under Section 203(b)(3)(A)(ii) of the Act as a “professional,” and the evaluator considered the beneficiary’s experience and determined that the beneficiary holds the functional equivalent of a “Bachelor’s Degree in Computer Science”. The director stated “[e]ducation and experience cannot be combined to overcome the requirement for the relevant degree as certified by the Department of Labor. Therefore, the evidence submitted does not establish that the alien beneficiary possesses the requirements as certified on the ETA-750.”

On appeal, counsel asserts that the regulations specifically recognize education plus experience which is “equivalent” to a bachelor’s degree and the beneficiary had the requisite “equivalent” of a bachelor’s degree in computer science based on education and experience before he was hired for the job in question.

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 record indicates that the beneficiary holds a Bachelor of Science Degree in Microbiology and a Master of Science Degree in Microbiology from the University of Bombay in India. The credentials evaluation states that these degrees are the equivalent to a Bachelor of Science and Master of Science in Microbiology from a regionally accredited college in the United States. The record indicates that the beneficiary's bachelor's degree is a three-year undergraduate degree. It may be equivalent to the three years undergraduate study in an accredited U.S. college or university, however, the three year degree itself cannot be the equivalent to a U.S. bachelor's degree although combination of the three-year bachelor's degree and the master's degree is deemed the equivalent of US bachelor's degree. A U.S. bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). However, while the ETA 750 specifically requires a U.S. Bachelor's degree or equivalent in Computer Science, Engineering, Mathematics or related field, the equivalent of Bachelor's Degree or Master's Degree in Microbiology does not meet the requirement of the certified ETA-750.

The evaluator also states that the beneficiary obtained a Bachelor of Science and Master of Science degrees in Microbiology from the University of Bombay, and has, as a result of progressively more responsible employment experiences, an educational background the equivalent of an individual with a Bachelor's degree in Computer Science from an accredited university in the United States. 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). Counsel's assertion on appeal that since the regulations recognize education plus experience which is "equivalent" to a bachelor's degree in the H-1B context, the rule should apply for immigrant petition is misplaced. In the instant petition the beneficiary was required to have a bachelor's degree or equivalent in computer science, engineering, mathematics or related field on the Form ETA 750. Counsel also argues that the employer's standard requirements are not limited to a degree only, but allow for equivalent experience. However, the petitioner has not indicated that a combination of education and experience can be accepted as meeting the minimum educational requirements stated on the labor certification, or that experience could be accepted in lieu of educational accolades. Thus, the combination of education and experience, and experience alone, may not be accepted in lieu of education. 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.

Counsel contends on appeal that the Department of Labor has long accepted broad alternative requirements and refers decisions made by the Board of Alien Labor Certification Appeals (BALCA) to support the assertion. However, counsel does not state how these rules applied to labor certification applications by BALCA are applicable to the instant petition before the Department of Homeland Security's AAO. 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, BALCA 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).

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.