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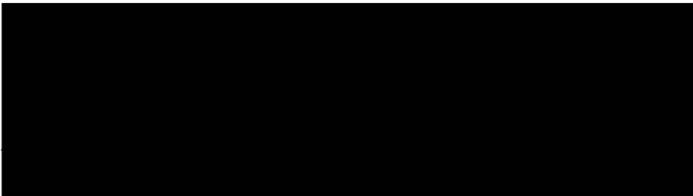
U.S. Department of Homeland Security
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U.S. Citizenship
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FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: **OCT 06 2006**
SRC-05-012-52999

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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an information technology firm. It seeks to employ the beneficiary permanently in the United States as a director of information technology (IT) characterized by the Department of labor as a Department Manager. 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 she determined that the petitioner did not present evidence that the beneficiary 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 resubmits credential evaluations for the beneficiary.

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 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 all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is August 12, 2002.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (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 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 IT director. In the instant case, item 14 describes the requirements of the proffered position as follows:

- | | | |
|-----|-------------------------|---|
| 14. | Education | |
| | Grade School | 6 |
| | High School | 6 |
| | College | 4 |
| | College Degree Required | Bachelor or Equivalent |
| | Major Field of Study | Computer Science or Information Systems |

The applicant must also have four years of employment experience in the job offered or the related occupation of network engineering design and IT support or IT personnel management.

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 took courses at Algonquin College in Ottawa, Canada in the field of "Computer Technology" from September 1981 through December 1981; he also took courses at Mohawk College in Hamilton, Canada in the field of "Computer Electronic Technician" from September 1983 through June 1985, and he attended Algonquin College in Ottawa, Canada in the field of "Computer Technology" from January 1988 through April 1988, culminating in the receipt of a "Certificate." 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 credential evaluations drafted by the [redacted] and [redacted] professor of Civil Engineering, the University of North Carolina at Charlotte (Prof. Evett) with the initial filing and appeal. Although evaluations indicate that copies of transcripts from Brookfield High School dated 1981 and transcripts from Algonquin College of Applied Arts and Technology dated 1981-1988 were received, these documents were not attached to the evaluations, nor did the petitioner submit them with the petition.

IEE's credential evaluation attests in pertinent part the following:

[The beneficiary] presents from Canada the Ontario Secondary School Honours Graduation Diploma, plus the equivalent of one year of academic credits from Algonquin College of Applied Arts and Technology. In the United States the combination of his credits equates to the Associate in Applied Science degree in Electronic Engineering Technology.

Prof. Evett summarizes his finding in his evaluation as follows:

In my opinion, [the beneficiary]'s educational record cited above is equivalent to two years of university-level credit from an accredited college or university in the U.S.A. and his professional employment record presents at least two additional years of university-level credit (three years of experience equal one year of university-level credit) toward a major in computer science.

Accordingly, it is my opinion that [the beneficiary] has the equivalent of a Bachelor's degree in Computer Science from an accredited college or university in the U.S.A. Furthermore, his training and work experience provide him with the theoretical and practical application of the knowledge required in the practice of computer science.

The director denied the petition on March 7, 2005, finding that the petition was filed under Section 203(b)(3)(A)(ii) of the INA as a "professional," and the Form ETA 750 specifies that the position requires a bachelor's degree or its foreign degree equivalent, however, "evidence beyond reasonable doubts of a US degree or its foreign equivalent has not been submitted for the beneficiary." The director noted that both evaluation reports evaluate the beneficiary's education in Canada as an equivalent of an Associate in Applied Science degree in Electronic Engineering Technology or the equivalent of two years of university-level credit from an accredited college or university in the U.S.A.

On appeal, counsel asserts that the beneficiary's credentials are sufficient to meet the requirements of the labor certification according to [redacted] credential evaluation report combining education, training and experience. Counsel also asserts that the beneficiary qualifies as a skilled worker based on his work experience in the event that he does not qualify as a third-preference professional because he does not have a bachelor's degree.

As quoted above [redacted] evaluation report states that the beneficiary obtained the equivalent of two years of university-level credit from an accredited college or university in the U.S. and has, as a result of progressively more responsible employment experiences, an educational background the equivalent of a Bachelor's degree in Computer Science from an accredited college or university in the U.S. 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).

Prof. Evett's evaluation equated 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). 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.

On appeal counsel argues that the beneficiary may qualify under Section 203(b)(3)(A)(i) as a "skilled worker." However, 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). Counsel cannot materially change the analysis in the middle of proceedings upon an apparent realization that changing categories may result in an approved petition. Regardless of the category the petition was submitted under, however, the petitioner must not only prove statutory and regulatory eligibility under the category sought, but must *also* prove that the sponsored beneficiary meets the requirements of the proffered position as set forth on the labor certification application.

Regulatory provisions governing the third preference visa categories as a “skilled worker” clearly require that the beneficiary qualify according to the terms of the labor certification application in addition to proving a minimum of two years of employment experience. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding evidentiary requirements for “skilled workers,” states the following:

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.

Thus, for petitioners seeking to qualify a beneficiary for the third preference “skilled worker” category, the petitioner must produce evidence that the beneficiary meets the “educational, training or experience, and any other requirements of the individual labor certification” as clearly directed by the plain meaning of the regulatory provision.

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 a bachelor's degree (four years in college) in computer science or information systems, plus four years of experience in the job offered or the related occupation of network engineering design and IT support or IT personnel management.

Guiding the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. As discussed above, the IEE credential evaluation attests that the beneficiary had an equivalent of an associate’s degree from his two years of college studies. [REDACTED] report evaluates the beneficiary’s formal education in Canada as equivalent to two years of university-level credit. No documents evidence that the beneficiary had four years of college studies, and a bachelor’s degree or its foreign equivalent. Also as previously noted, the rule to equate three years of experience for one year of education only applies to non-immigrant H1B petitions, but not to immigrant petitions. 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 from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies regardless of whether or not the petition was filed as a skilled worker or professional.

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.

Additionally, 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.

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.