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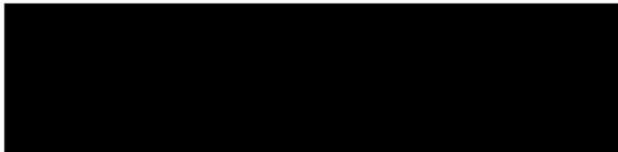
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
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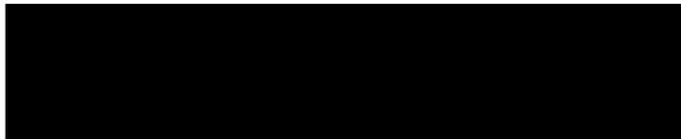
Petitioner:



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

The petitioner is a computer programming/network consulting business. It seeks to employ the beneficiary permanently in the United States as a database administrator. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the U.S. Department of Labor (DOL). The director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position in that the beneficiary does not have the requisite four-year U.S. bachelor's degree or the single-source foreign equivalent degree. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's June 14, 2005 denial, the central issue in this case is whether the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position in that he possesses a four-year U.S. bachelor's degree or a single-source foreign equivalent degree in CIS/CS/MIS or an equivalent field of study.

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, 8 U.S.C. § 1153(b)(3)(A)(ii), also 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) provides in pertinent part:

(ii) *Other documentation*—

(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. 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.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on February 19, 2003.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted on appeal.¹ On appeal, counsel submits a brief and a copy of a United States district court case. Other relevant evidence in the record includes: a Foundation for International Services, Inc. educational evaluation report dated October 25, 2001; a copy of the beneficiary's résumé produced by the petitioner; a certificate dated July 1998 that indicates that the beneficiary has completed the Oracle8 Database Administration course; a certificate dated July 1998 that indicates that the beneficiary has completed the Advanced SQL & SQL Plus course; and a certificate dated June 1998 that indicates that the beneficiary has completed the Introduction to Oracle SQL and PL/SQL using Procedure Builder course. The record does not contain any other evidence relevant to the beneficiary's qualifications.

On appeal, counsel asserts that in the instant case it is sufficient for the petitioner to show that the beneficiary has the equivalency of a bachelor's degree based on education and experience.

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship and 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).

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the February 19, 2003 priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

In this case, items 14 and 15 of the Form ETA 750A set forth the minimum education, training, and experience that an applicant must have for the position of database administrator. Item 14 indicates that eight years of grade school, four years of high school and four years of college culminating in a baccalaureate degree or the equivalent in CIS/CS/MIS or an equivalent field of study are required, and that the applicant must have five years of experience in the related occupation of applications programmer/analyst. The duties

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in this case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

of the proffered position are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A reflects the following special requirements:

- Experience with HP-UX operating system, UNIX Shell scripting and Oracle development with SQL and PL/SQL resource planning and management and SQL tuning.
- Understanding of formal system development methodologies; working in a global enterprise environment.

Item 15 of Form ETA 750A does not list any other special requirements for the proffered position.

The beneficiary set forth his credentials on the Form ETA 750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. At item 11, which requests that the beneficiary list all schools, colleges and universities attended, including any trade or vocational training, the beneficiary indicated that from the age of ten to the age of nineteen he studied at the Natal [Province] Education Department in South Africa and received a senior certificate in general studies. He also indicated that following this he enrolled at Technikon Natal South Africa for two years and ten months of study for which he received a National Diploma in Computer Data Processing. The beneficiary did not indicate on that form that he had pursued any other formal studies.

In response to the director's request for evidence regarding whether the beneficiary possesses a U.S. bachelor's degree in CIS, MS, MIS or an equivalent field of study or a single-source foreign degree equivalent, the petitioner submitted an evaluation from the Foundation for International Services (FIS) which indicates that the beneficiary's formal education equates to a high school diploma and one year of university level credit in data processing from an accredited community college in the United States. The FIS evaluation also indicates that this educational background combined with the beneficiary's years of work experience equates to a bachelor's degree in management information systems (MIS) from an accredited college or university in the United States.

This evaluation used the rule which equates three years of experience to one year of education, but that equivalence rule applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(5). The Form ETA 750 in this instance requires the beneficiary to have a bachelor's degree or a foreign single-source equivalent. The petitioner could have clarified or changed the minimum requirements for the proffered position before the Form ETA 750 was certified by the DOL. For example, the petitioner could have specified 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 Given

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. However, U.S. workers were not given such notice. The petitioner is now apparently seeking to hire an alien worker without such a degree or foreign equivalent degree in contradiction to the stated requirements of the Form ETA 750. Yet, the purpose of the instant visa category is to allow alien workers to fill only those U.S. positions for which qualified U.S. workers are not available. CIS shall not permit the petitioner to offer the beneficiary the proffered position *after* the petitioner, through the stated

that such a step was not taken and that the beneficiary does not have a bachelor's degree or a foreign single-source equivalent in one of the requisite fields of study, the director's decision to deny the petition must be affirmed.⁴

requirements of the Form ETA 750, excluded U.S. workers with similar qualifications from applying for and filling the position.

⁴ On appeal, counsel asserts that CIS should allow the petitioner to combine the beneficiary's education and experience to demonstrate that this beneficiary has the equivalent of a degree as required by the labor certification. As his authority, counsel cites the U.S. District court case *Grace Korean United Methodist Church v. Chertoff*, 437 F.Supp.2d 1174 (D.Ore. November 3, 2005). In *Grace Korean*, the court finds that CIS "does not have the authority or expertise to impose its strained definition of 'B.A. or equivalent' on that term as set forth in the labor certification." We note first that the AAO is not bound to follow the published decision of a United States district court, even in matters which arise in the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when properly before the AAO, the analysis does not have to be followed as a matter of law. *See Id.* at 719. The court in *Grace Korean* makes no attempt to distinguish its holding from other Circuit Court decisions discussed below. Instead, as legal support for its determination, the court cited to a case holding that the United States Postal Service has no expertise or special competence in immigration matters. *Grace Korean United Methodist Church* at 1179 (citing *Tovar v. U.S. Postal Service*, 3 F.3d 1271, 1276 (9th Cir. 1993)). On its face, *Tovar* is easily distinguishable from the present matter since CIS, through the authority delegated by the Secretary of Homeland Security, is charged by statute with the enforcement of the United States immigration laws. *See* section 103(a) of the Act, 8 U.S.C. § 1103(a).

At least two circuits, including the Ninth Circuit overseeing the Oregon District Court, have held that CIS does have the authority and expertise to evaluate whether the alien is qualified for the job. Those Circuit decisions are binding on this office and will be followed in this matter.

Relying in part on *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983), the Ninth circuit stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an *amicus* brief from the DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(14) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

Further, even 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 Form ETA 750 requirement of a bachelor's degree or the equivalent remains the same. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750, regardless of which category of worker is the subject of the petition. See 8 C.F.R. § 204.5(l)(3). See also *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. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Beyond the decision of the director, the record fails to demonstrate that as of the priority date the beneficiary had acquired the five years' experience as an applications programmer/analyst needed to perform the duties of the proffered position. A petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center or District Office does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

As noted above, the regulation at 8 C.F.R. § 204.5(l)(3)(ii) specifies that any requirements of experience for skilled workers, professionals, or other workers must be supported by letters from employers giving the name, address, and title of the employer, and a description of the experience of the alien. The current record does not include any letters of this type. The record does include a résumé for the beneficiary prepared by the petitioner. The résumé indicates that from July 2001 through the priority date of February 19, 2003 the beneficiary gained approximately twenty months' experience in the field of applications programmer/analyst while working for the petitioner. However, this assertion is not supported by a letter that specifies the name, address and title of the beneficiary's employer. Further, on the Form ETA 750B, at Item 15, eliciting information of the beneficiary's work experience, the beneficiary indicated that he did not begin working for the petitioner until December 2001.

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, reached a similar decision in *Black Const. Corp. v. INS*, 746 F.2d 503, 504 (1984).

The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). See generally *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983). See also *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977), "there is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise . . . all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority."

While we do not lightly reject the reasoning of a District Court in *Grace Korean United Methodist Church*, the District Court's decision is not binding on the AAO. Further, the decision is directly counter to other Circuit Court decisions that are binding on us, and is inconsistent with the actual labor certification process before DOL. Thus, we will maintain our consistent policy in this area of interpreting "or equivalent" as meaning a foreign equivalent degree. We note that this interpretation is consistent with our own regulations, which define a degree as a degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(2).

This office also notes that the beneficiary indicates on the Form ETA 750B that he had gained at most a total of three years and four months experience in the field of applications programmer/analyst, which is less than the five years' experience required by the Form ETA 750. The résumé prepared by the petitioner makes reference to what appears to be qualifying experience at various employers which, when combined, represents more than five years' experience. Yet, again, none of the assertions on this résumé are supported by employer letters as required by 8 C.F.R. § 204.5(l)(3)(ii). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In sum, the preponderance of the evidence does not demonstrate that, as of the priority date, the beneficiary had acquired five years' experience as an applications programmer/analyst as set forth on the Form ETA 750A. As such, the petitioner has not demonstrated that he is qualified to perform the duties of the proffered position.

Also, beyond the decision of the director, the record fails to demonstrate that the petitioner has the ability to pay the proffered wage from the priority date onwards as required by the regulation at 8 C.F.R. § 204.5(g)(2) which states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 CFR § 204.5(d).

The petitioner failed to submit into the record any of the three types of evidence, annual reports, federal tax returns, or audited financial statements, that are enumerated at 8 C.F.R. § 204.5(g)(2) as required to illustrate a petitioner's ability to pay a proffered wage. This regulation does allow additional material to document an ability to pay in appropriate cases. Yet, the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. The petitioner did submit into the record a written review of its income and retained earnings for the years 2002 and 2003 that was prepared by an accounting firm. However, as noted on the accounting firm's cover sheet, reviewed financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely 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.