

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

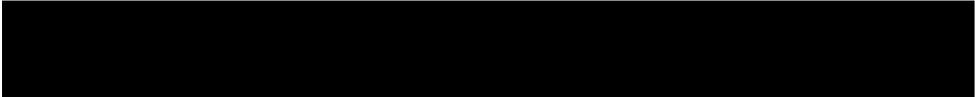
PUBLIC COPY

B6



File: WAC-05-041-53427 Office: CALIFORNIA SERVICE CENTER Date: SEP 20 2007

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 Director, California Service Center (“director”), denied the immigrant visa petition. The matter is now before the Administrative Appeals Office (“AAO”) on appeal. The appeal will be dismissed.

The petitioner operates a tour bus charter, and seeks to employ the beneficiary permanently in the United States as a general and operations manager (“Operations Manager”). As required by statute, the petition was filed with Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (“DOL”). As set forth in the director’s October 28, 2005 decision, the petition was denied for failure to document that the beneficiary met the requirements of the certified labor certification.

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 upon appeal.¹

The record shows that the appeal is properly filed, 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.

The petitioner has filed to obtain permanent residence and classify the beneficiary as a professional worker or skilled worker. The regulation at 8 C.F.R. § 204.5(l)(2) provides that a third preference category professional is 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.” 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.

The proffered position requires a four-year bachelor’s degree in Business Administration. Because the petitioner has provided that the minimum requirement for the position is a bachelor’s degree, rather than work experience, the proffered position is for a professional. DOL assigned the occupational code of [REDACTED] general and operations manager, to the proffered position. DOL’s occupational codes are assigned based on normalized occupational standards. DOL has an updated online resource for standardized occupational norms, O*Net. According to its website at [REDACTED] (accessed July 14, 2007)² and its extensive description of the position and requirements for the position most analogous to the petitioner’s proffered position, the position falls within Job Zone Four requiring “considerable preparation” for the occupation type closest to the proffered position. According to DOL, two to four years of work-related skill, knowledge, or experience is needed for such an occupation. DOL assigns a SVP range of 7-8 to the occupation, which means “[m]ost of these occupations require a four-year bachelor’s degree, but some do not.” *See* [REDACTED] (accessed July 11, 2007); *see also* [REDACTED] (accessed December 12, 2006). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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). *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

² The Employment and Training Administration created the Dictionary of Occupational Titles (“DOT”), and was last updated in 1991. O*Net has replaced the DOT.

A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified. Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

See id.

The proffered position may be properly analyzed as professional since the position requires a four-year bachelor's degree, and no prior work experience. The professional category is the most appropriate category for the proffered position based on its educational and experience requirements.

The regulation 8 C.F.R. § 204.5(g)(2) 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 priority date is the date that Form ETA 750 Application for Alien Employment Certification was accepted for processing by any office within the employment service system of the Department of Labor. *See* 8 CFR § 204.5(d).

In the case at hand, the petitioner filed Form ETA 750 with the relevant state workforce agency on April 5, 2001. The proffered wage as stated on Form ETA 750 is \$23.60 per hour,³ which is equivalent to \$49,088 per year based on 40 hours per week. The labor certification was approved on September 3, 2004, and the petitioner filed the I-140 petition on the beneficiary's behalf on November 30, 2004. On the I-140 petition, the petitioner listed the following information: established: April 1, 1985; gross annual income: \$1.1 million; net annual income: \$72,000; and employees: 22.

On May 5, 2005, the director issued a Request for Evidence ("RFE") for the petitioner to provide: evidence of the petitioner's ability to pay for the years 2001 to 2004 in the form of either federal tax returns, audited financial statements, or annual reports;⁴ to indicate whether the petitioner currently employed the beneficiary, and if so, to provide W-2 statements for wages paid to the beneficiary; to submit a copy of the beneficiary's diploma and transcripts to exhibit courses taken; and to submit an educational evaluation to demonstrate that the beneficiary had the education required on Form ETA 750. The petitioner responded.

³ The petitioner initially listed \$15 per hour, but DOL required that the petitioner increase the proffered wage to \$23.60 prior to certification.

⁴ The petitioner submitted its federal tax returns for the required years. The petitioner's federal tax returns established that the petitioner had either sufficient net income, or sufficient net current assets to pay the proffered wage in each year, so that the petitioner's ability to pay is not at issue.

Following consideration of the petitioner's response, on October 28, 2005, the director denied the petition on the basis that the petitioner failed to demonstrate that the beneficiary possessed the required Bachelor's degree. The petitioner appealed and the matter is now before the AAO.

In evaluating the beneficiary's qualifications, Citizenship and Immigration Services ("CIS") must look to the job offer portion of the alien 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). A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. 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).

On the Form ETA 750A, the "job offer" position description for an Operations Manager provides:

Enforce compliance of operation personnel with administrative policies, procedures, safety rules, and government regulations. Supervise personnel and perform administrative duties to ensure efficient operations. Analyze vehicle and driver assignment for possible consolidation. Plan, direct, and implement scheduling, allocation and dispatching. Provide guidance in operational problems. Have a class B license with air brakes endorsement for active participation in driving of vehicles. Coordinate advertising and sales promotion. In charge of driver payroll. Review and analyze expenditure, financial, and operation reports to determine requirements to increase profits.

Further, the job offered listed that the position required:

Education:	College: 4 years; College degree: Bachelors;
Major Field Study:	Business Administration.
Experience:	none required.

On the Form ETA 750B, signed by the beneficiary, the beneficiary listed prior education as: (1) Philippine School of Business, Manila, Philippines; Field of Study: Business Administration; from June 1979 to October 1981, for which he did not receive a diploma; (2) Jose Rizal College, Manila, Philippines; Field of Study: "high school;" from June 1974 to March 1978, for which he received a high school diploma; (3) Highway Hills Elementary School, Manila, Philippines; Field of Study: "elementary school;" from June 1970 to March 1974.

The regulations define professional under the third preference category 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(1)(2). The regulation at 8 C.F.R. § 204.5(1)(3)(ii) specifies for professional classification that:

(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 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

A bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977).

The petitioner submitted an evaluation of the beneficiary's education in order to document that the beneficiary met the educational requirements of the labor certification:

- Evaluation: completed by the Foundation for International Services, Inc., Bothell, Washington.
- The evaluation provided that the beneficiary completed studies at the Philippine School of Business Administration, Manila, Philippines from 1979 to 1982, which would be equivalent to three years of university level credit in business administration from an accredited college or university in the United States.
- Additionally, the evaluation considered the beneficiary's work experience, based on his resume submitted, which included eight years of general employment experience, and three and one-half years of experience more specifically in the field of business administration. The evaluator considered three years of experience as equivalent to one year of university-level credit.
- Based on the combined education and experience, the evaluator concluded that the beneficiary had the equivalent of a bachelor's degree in business administration from an accredited college or university in the United States.

The evaluation concludes that the beneficiary combined studies and work experience are equivalent to a bachelor's degree. However, educational programs and experience cannot be combined to meet the bachelor's degree standard. See 8 C.F.R. § 204.5(l)(3)(ii). The rule to equate three years of experience for one year of education applies to non-immigrant H-1B petitions, but not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The regulation at 8 C.F.R. § 204.5(l)(3)(ii) uses a singular description of foreign equivalent degree. Thus, in order to qualify as a third preference professional, the regulatory language's plain meaning is that the beneficiary must produce one degree, which is evaluated as the foreign equivalent of a U.S. baccalaureate degree. The beneficiary was required to have a bachelor's degree on the Form ETA 750.

The petitioner did not set forth any alternative requirements or definition of equivalent to include a combination of education and experience. The labor certification was not drafted to consider a Bachelor's degree or equivalent in "education, training, or experience." The ETA 750 did not define equivalency in this manner, and to argue that the ETA 750 should be read to include the equivalent in education and experience, or otherwise, would be unfair to U.S. workers without degrees, but with the equivalent in experience, that may not have responded to advertisements during the labor certification recruitment phase.

The director denied the petition as the petitioner was unable to establish that the beneficiary had the required four-year degree in business administration.

On appeal, counsel contends that the Form ETA 750 was improperly completed, and the words "or equivalent" were left off the form. Further, counsel contends that the advertisement placed "under the supervision of EDD [California State Workforce Agency, Employment Development Department] . . . advertised the position as

requiring a 'B.A. degree or equiv.' meaning a bachelor's degree of the equivalent qualification." Counsel contends that the Board of Alien Labor Certification Appeals ("BALCA") has recognized "that an employer's clerical error in processing can be inadvertent and harmless," and that the petitioner's failure to list "or equivalent" on the labor certification should be "viewed as harmless error." *Matter of Ritz Carlton*, 95 I&N 265 (BALCA 1997).

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). Further, the failure to list "or equivalent," or more importantly, to define the meaning of "or equivalent," is not harmless error.

Counsel asserts that in the present matter the error is harmless since the ad included the words "or equivalent," and that the petitioner working under the supervision of EDD that sets the requirements. In support, counsel has submitted a copy of the ad. Counsel asserts that CIS's role is to make a determination based on the requirements established, and as DOL certified the requirements. Further, counsel provides that the employer elected to consider "those with equivalent qualifications to a bachelor's degree, including a combination of education and experience."

We note that the ad provides "or equivalent," but does not define equivalent in the ad as "including a combination of education and experience." It is unclear whether a U.S. worker would read that ad, and consider "bachelor or equivalent" to include a combination of education and experience, education, and education combined, or simply the equivalent based on work alone. The ad as drafted, and advertised is deficient in informing U.S. workers as to the exact requirements of the position. Further, the record of proceeding does not contain any evidence of the petitioner's intent related to the actual minimum requirements of the position, or communication with DOL regarding the actual minimum requirements of the position.

Counsel cites to *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK (D. Ore. November 3, 2005), where the petitioner required a "B.A. or equivalent" in theology. CIS denied the petition as the beneficiary did not hold a foreign equivalent degree. *Grace Korean* provides 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 that in the present petition, the Form ETA 750 does not contain language to allow for a "B.A. or equivalent," but instead only allows for a bachelor's degree.

Counsel provides that "the court stresses that it is the responsibility of the employer, not the Service to establish the criteria for the position." Further, counsel provides that the court notes the Form I-140 does not require the petitioner to choose whether the application is for a professional, or a skilled worker, rather "visa petitions may attempt classification under both categories; if the applicant is ineligible as a professional, eligibility for classification as a skilled worker must also be considered." *Grace Korean United Methodist Church v. Michael Chertoff*, CV 04-1849-PK.

We note that the AAO is not bound to follow the published decision of a United States district court in matters, which arise in another 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 it is properly before the AAO, the analysis does not have to be followed as a matter of law. *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 *8 (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.*

(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, in relation to the petitioner's print ad, which listed "B.A. degree or equivalent," 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(1)(2). Further, we note that the petitioner failed to designate "or equivalent" on the certified Form ETA 750.

Counsel next contends that the position of Operation Manager is a skilled worker position and not a professional position, and that the Act defines professions at INA 101(a)(32) as: "the term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Further, she provides that the regulations implementing the Act additionally define the term "profession" as meaning one of the occupations listed, as well as "any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." 8 C.F.R. § 204.5(k).

We note that the definition of professions at INA 101(a)(32) includes the listed occupations, but that the list should "not be limited" to only the occupations listed. Further, the petitioner has set the requirement for the position as a minimum of a bachelor's degree, and did not, instead, list that the position required any work experience. As the petitioner contends that the petitioner sets the requirements with DOL, the petitioner has set the requirements as a professional position by requiring a degree instead of work experience.

Counsel contends that the EDD identified the Operations Manager position as being in the category "First-Line Supervisors/Managers of Transportation and Material-Moving Machine and Vehicle Operators," with an Occupational Information Network Code ("O*Net") of [REDACTED]. Further, counsel provides that the O*Net summary provides that these jobs fall into a job zone level of "three" with the following educational requirements: "most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree. Some may require a bachelor's degree."

From where counsel obtained the occupation code of [REDACTED] is unclear. Form ETA 750 clearly identifies the occupation code as [REDACTED], "General and Operations Managers." The O*Net specifically has a category "[REDACTED] General and Operations Managers." O*Net defines the position as a zone four position, which requires "a minimum of two to four years of work-related skill, knowledge, or experience, on-the-job training, and/or vocational training." Most zone four positions require a four-year bachelor's degree, but some do not. Counsel cannot assert that the position should now be considered under a lesser job description. A petitioner must establish the beneficiary's eligibility for the visa classification at the time of filing; a petition cannot be approved at a future date after eligibility is established under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). 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. 1988).

Counsel asserts that the statute or regulation does not contemplate the position of Operations Manager as a profession.

As noted above, the O*Net description encompasses the degree requirement for most positions for the designated Operations Manager job zone. From the ETA 750, the petitioner has set the requirement of having a degree, as opposed to requiring work experience for the position.

Counsel asserts instead that the petitioner set the qualifications for a non-professional position as requiring a bachelor's degree or the equivalent combination of education and experience.⁵ Counsel provides that the

⁵ If the petitioner considered the position to be a "non-professional" position, then the petitioner should have required work experience instead of a degree, or specifically designated on Form ETA 750 that the petitioner would consider work experience in combination with educational studies. We note that the actual position description requires job elements that might require a degree, and other position duties, which would be better suited to requiring specific work experience. However, the Form ETA 750 stands as certified. A petitioner

petitioner has established that the beneficiary has the required combination of education and experience as exhibited by the evaluation, the beneficiary's transcripts, and his resume, and that, therefore, he meets the position requirements. Further, counsel asserts that the position should be considered as a skilled worker position, that CIS was in error in denying the petition.

Form ETA 750 does not list that the petitioner is willing to accept a combination of education, and/or experience to meet the degree requirement. Form ETA 750 specifically lists that the candidate must have four years of education resulting in a bachelor's degree in business administration.

The petitioner has failed to demonstrate that the beneficiary has a bachelor's degree or foreign equivalent as required by the certified ETA 750 to qualify for the proffered position. Therefore, the director properly decided the issue. Further, since the petitioner required a bachelor's degree rather than merely college studies, the petition may not be considered under the lesser category of a skilled worker. The certified ETA 750 requires the completion of a Bachelor's degree. The petitioner has not demonstrated that the beneficiary has a bachelor's degree, and accordingly does not meet the requirements of the certified ETA 750.

The petitioner has failed to demonstrate that the beneficiary meets the requirements of the certified Form ETA 750. 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. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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. 1988).