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U.S. Citizenship
and Immigration
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

FEB 19 2008

SRC-05-264-51578

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: DISCUSSION: The preference visa petition was approved by the Director, Texas Service Center, but is now before the Administrative Appeals Office (AAO) on certification. The AAO will affirm the director's decision but withdraw in part, and the petition will be approved.

The petitioner is an audio video conference service company. It seeks to employ the beneficiary permanently in the United States as a database administrator. As required by statute, a Form ETA 9089, Application for Permanent Employment Certification (Form ETA 9089 or labor certification) approved by the Department of Labor (DOL), accompanied the petition. The director approved the petition under Section 203(b)(3) of the Immigration and Nationality Act (Act) seeking classification of the beneficiary as a professional, and certified the case for review to AAO.

The record shows that counsel for the petitioner submits a brief and additional evidence properly and timely and requests sustaining the decision of the director. 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 October 7, 2005 decision, the single issue in this case is whether or not the petitioner has demonstrated that the beneficiary held a US bachelor's degree or foreign equivalent in computer science or computer engineering and two years of experience or alternatively possessed two years of college studies and four years of experience in the job offered prior to the priority date as set forth on the Form ETA 9089.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted with a brief upon certification.¹ On certification, counsel submits copies of recruitment documents and some AAO decisions to support his assertions. Other relevant evidence in the record includes the beneficiary's General Certificate of Education from the Badulla Central College in Sri Lanka, Diploma in Computer Studies NCC The National Center for Information Technology, United Kingdom, Australian Computer Society Examination in Computer, certificates from IDM Computer Studies Limited in Sri Lanka, a credentials evaluation from Worldwide Education Evaluators, Inc. and six experience letters from previous employers verifying the beneficiary's experience as a database administrator from July 1991 to December 2004. The record does not contain any other evidence relevant to the beneficiary's qualifications.

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 or seasonal 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, at the time of petitioning for classification under this paragraph, are professionals.

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 the instant 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).

A labor certification is an integral part of this petition, but the issuance of a ETA Form 9089 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. *See* 8 C.F.R. § 103.2(b)(1), (12). *See also 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 ETA Form 9089 was accepted for processing by DOL. *See* 8 C.F.R. § 204.5(d). The priority date for the instant petition is July 25, 2005. The approved labor certification in the instant case is for database administrator position. DOL assigned the occupational code of 039.162-010 Database Administrator to the proffered position. DOL's occupational codes are assigned based on normalized occupational standards. According to DOL's public online database at <http://online.onetcenter.org/crosswalk/DOT/s+039.162-010+&g+Go> (accessed February 1, 2008) 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 standard vocational preparation (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* <http://online.onetcenter.org/link/summary/15-1061.00#JobZone> (accessed February 1, 2008). Additionally, DOL states the following concerning the training and overall experience required for these occupations:

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.

Therefore, a database administrator position may be analyzed as a professional position or as skilled worker since the normal occupational requirements do not always require a bachelor's degree but a minimum of two to four years of work-related experience. In this case, the petitioner filed a Form I-140, Immigrant Petition for Alien Worker, seeking classification pursuant to section 203(b)(3)(A) of the Act by checking box e in Part 2 of the I-140 form. The box e is for either a professional or a skilled worker. The director evaluated and approved the petition under the professional category, but certified the case for review to AAO. The AAO will examine the petition under both the professional category and the skilled worker category.

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, which as noted above, is July 25, 2005. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

As noted above, the ETA 9089 in this matter is certified by DOL. At the outset, DOL's certification of the Form ETA 9089 does not supercede Citizenship and Immigration Services (CIS)' review and evaluation of the criteria the petitioner must prove in order to establish that the petition is approvable, and that includes a review of whether or not the beneficiary is qualified for the proffered position, which in this case, is governed by 203(b)(3)(A)(i) and (ii) of the Act and 8 C.F.R. § 204.5(1)(3). CIS has authority to evaluate whether the alien

is eligible for the classification sought and has authority to evaluate whether the alien is qualified for the job offered.

To determine whether a beneficiary is eligible for an employment based immigrant visa, 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, the Application for Permanent Employment Certification, Form ETA-9089, Part H, set forth the minimum education, training, and experience that an applicant must have for the position of database administrator. In the instant case, Part H describes the requirements of the proffered position as follows:

- | | | |
|------|--|---|
| 4. | Education: minimum level required: | Bachelor's |
| 4-B. | Major field of study | Computer Science |
| 6. | Is experience in the job offered required for the job? | Yes |
| 6-A. | If Yes, number of months experience required: | 24 |
| 7. | Is there an alternate field of study that is acceptable? | Yes |
| 7-A. | If Yes, specify the major field of study: | Computer Engineering |
| 8. | Is there an alternate combination of education and experience that is acceptable? | Yes |
| 8-A. | If Yes, specify the alternate level of education required: | Other |
| 8-B. | If Other is indicated in question 8-A, indicate the alternate level of education required: | 2 years of academic studies in Computer Science or Computer Engineering |
| 8-C. | If applicable, indicate the number of years experience acceptable in question 8: | 4 |

In addition to the two years of experience in the job offered, the petitioner indicates two options to meet the minimum requirements: a bachelor degree or foreign equivalent in Computer Science or Computer Engineering plus two years of experience in the job offered; or two years of academic studies in Computer Science or Computer Engineering plus four years of experience in the job offered. The alternate requirements are interpreted by according set forth at Part H, Item 8-A, 8-B, and 8-C, as well as Part H, Item 6 and 6A. The petitioner sets forth an alternate requirement that applicants may qualify through two year of studying computer science or computer engineering on Item 8-B but also requires four years of experience in 8-C.

In corroboration of the above educational requirements, the petitioner submitted a credentials evaluation from Worldwide Education Evaluators, Inc. (WEE), which concludes that: "[the beneficiary's] combination of accredited post-secondary study in Computer Science is equivalent to the completion of the two-year degree, Associate of Science in Computer Science, from a regionally accredited technical college in the United States."²

² The WEE credential evaluation is based on the beneficiary's General Certificate of Education from the Badulla Central College in Sri Lanka, Diploma in Computer Studies NCC The National Center for Information Technology, United Kingdom, Australian Computer Society Examination in Computer, and certificates from IDM Computer Studies Limited in Sri Lanka. WEE evaluates the beneficiary's General Certificate of Education from the Badulla Central College as the equivalent to the completion of a high school diploma from an accredited secondary school in the United States, considers Diploma from NCC as a two-

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), guiding evidentiary requirements for “professionals,” 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.

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). The regulation uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary 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. 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 did not submit any evidence showing that the beneficiary possessed a four-year U.S. bachelor’s degree or the foreign equivalent. The petitioner would also have failed to establish the beneficiary’s bachelor’s degree or equivalent with a combination of his education and experience because the rule to equate three years of experience for one year of education is not applicable to the instant I-140 immigrant petition as it only applies to non-immigrant H1B petitions. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Therefore, the petitioner failed to demonstrate that the beneficiary possessed a US bachelor’s degree or its equivalent, and is thus qualified for the proffered position as a professional through the petitioner’s primary requirement of a bachelor’s degree or foreign equivalent in computer science or computer engineering.

The director and counsel rely on the petitioner’s alternative requirement to establish that the beneficiary is qualified as a professional under the third preference category. That is misplaced. As noted above, a bachelor’s degree is generally found to require four years of education and a singular degree under the professional part of the third preference category. *Id.* Since the beneficiary in the instant case does not hold a singular actual degree, he is not qualified for the proffered position under the professional category, and therefore, the petition cannot be approved as a professional. The director’s October 7, 2005 decision is herewith withdrawn.

While no degree is required for the skilled worker classification, the regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification must be accompanied by evidence that the beneficiary “meets the education, training or experience, and any other requirements of the individual labor certification.”

semester program of study in computer programming at college level, and Australian Computer Society Examination in Computer as another two-semester program of study in computer programming. The WEE evaluation also considers certificates for short-term courses on Programming, Advanced Programming Techniques and RPG/400 Programming.

The issue before us is whether the beneficiary meets the job requirements of the proffered job as set forth on the labor certification. The regulations specifically require the submission of such evidence for this classification. 8 C.F.R. § 204.5(l)(3)(B) (“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”). As noted above, the ETA Form 9089 in this matter is certified by DOL.

The key to determining the job qualifications is found on ETA Form 9089 Part H. The employer requires a bachelor’s degree in computer science or computer engineering plus two years of experience in the job offered as the main minimum requirements. However, the employer also set forth alternative requirements for the proffered position, that is, two years of academic studies in Computer Science or Computer Engineering plus four years of experience in the job offered. The employer’s alternative requirements expressly indicates its intent to offer the proffered position as a skilled worker and to be considered under the skilled worker category.

Therefore, the instant petition contains a position that qualifies in the skilled worker category. The regulation at 8 C.F.R. § 204.5(l)(3)(B) provides that a petition for an alien in this classification “must be accompanied by evidence that the alien meets the educational, training or experience, and other requirements of the individual labor certification.” The record contains a certificate from UVA College, Badulla for eight courses studies in 1982, certificates from Badulla Central College for studies at that college for 1985 and 1986, three diplomas issued by IDM Computer Studies Limited in Sri Lanka in 1989 and 1990, a diploma in computer studies and academic record from National Centre for Information Technology in United Kingdom for seven computer related course studies, and a certificate from Australian Computer Society for passing four Australian Computer Society Examinations in Computer in June 1992. The record also contains an education evaluation dated April 21, 2005 from WEE which evaluated the beneficiary’s combination of accredited post-secondary study in computer science as equivalent to the completion of a two-year degree, Associate of Science in Computer Science, from a regional accredited technical college in the United States. The AAO finds that the beneficiary meets the educational requirement of two years of academic studies in computer science or computer engineering set forth on the ETA Form 9089 Part H as an alternative educational requirement.

As previously noted, the approved labor certification requires four years of experience in the job offered in addition to the two years of academic studies in computer science or computer engineering as part of the alternative requirements. On appeal, counsel submits recruitment efforts conducted related to the relevant labor certification, including the internal posting notice, newspaper advertisements and internet job posting. These recruitment documents clearly stated that in lieu of a bachelor’s degree, two years of academic studies in computer science and two extra years of work experience as a database administrator will be accepted. The AAO finds that US workers were clearly on notice about the alternative requirement.

The record also contains experience letters from the beneficiary’s former employers verifying that the beneficiary worked as a UNIX System Administrator with DHL International E.C. from July 28, 1999 to July 15, 2000, as an Informix Database Administrator/Unix Administrator with Crescent Systems from July 28, 2000 to September 9, 2001, and as a Data Base Administrator with Providian from September 10, 2001 to December 3, 2004. These experience letters from the beneficiary’s former employers demonstrate that the beneficiary possessed the requisite four years of experience as a database administrator prior to the priority date in the instant case. Therefore, the beneficiary meets the alternative requirements for the proffered position set forth on the ETA Form 9089 as a skilled worker. The petition is approved under the skilled worker category.

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 been met.

ORDER: The director's October 7, 2005 approval is affirmed but withdrawn in part. The petition is approved under the skilled worker category.