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U.S. Citizenship and Immigration Services

File

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG

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, Director
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 malt processing plant. It seeks to employ the beneficiary permanently in the United States as an industrial 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 beneficiary did not present evidence that he 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 submits additional evidence.

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.[1]

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. *See Matter of Wing's Tea House,* 16 I&N Dec. 158,160 (Act. Reg. Comm. 1977). 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). In this case, that date is January 23, 2002.

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

14. Education

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[1] In an accompanying cover letter with the petitioner's initial filing, the petitioner's counsel specifically cited and quoted Section 203(b)(3)(A)(ii) of the INA as the third preference immigrant visa category being sought by the petitioner and stated that "[the beneficiary] is classified as a professional by virtue of his academic training and his professional engineering experience."

Grade School	
High School	
College	4
College Degree Required	Bachelor of Science or equivalent
Major Field of Study	Mechanical Engineering

The applicant must also have seven years of employment experience in the job offered or the related occupation of malting engineering. Additionally, Item 15 modifies the related occupation experience with the "Other Special Requirements" as follows: "***Related experience presupposes malting engineer experience that incorporates three (3) years of malting operations management that has included IMP and World Class Manufacturing (WCM) practices."

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, colleges and universities attended (including trade or vocational training facilities), he indicated that he attended the Department of National Education in South Africa in the field of "Mechanical Technician," from June 1981 through July 1983, culminating in the receipt of a "National Higher 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 bilingual copies of the beneficiary's "Mechanical Engineer's Certificate of Competency" issued by the "Department of Manpower Utilisation" of the Republic of South Africa in 1984, and a "National Higher Certificate for Technicians" issued by the Department of National Education "with effect from 1983-07-01," which presumably means July 1, 1983.

A credential evaluation drafted by the International Education Evaluations, Inc. was also initially submitted with the petition and stated the following:

> South Africa is undergoing changes in what were three distinct systems of education. The overall structure for primary and secondary education is consistent with 10 Standard and two Sub-Standard levels. One Standard is one grade level. The school year lasts 200 days or one month longer than the U.S.A. average school year of 180 days. Admission to a Bachelor's degree requires the Matriculation Certificate or the Senior Certificate with "Matriculation Exemption." Bachelor degree programs require from three to six years depending upon the university and the field of study. South Africa maintains an extensive vocational, technical, and semiprofessional system of schools and awards.
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> Academic records show that [the beneficiary] received the National Higher Certificate for Technicians from the Department of National Education in 1983. To be admitted to this program required minimally the completion of Standard X (Grade 12) and the award of the Senior Certificate. In the United States this award equates to the high school diploma. No transcript was submitted for review of the technician program. According to information on the Certificate, the program extended three years and four months and contained subjects passed in hydraulics, mechanics of machines, strength of materials, and applied thermodynamics. The content of this program equates to three years of tertiary technical credit which may be applied to

> a technical degree in the United States. In 1984 [the beneficiary] received the Mechanical Engineer's Certificate of Competency from the Department of Manpower Utilization.

Because the evidence was insufficient, the director requested additional evidence on October 23, 2002, specifically requesting a copy of the beneficiary's baccalaureate degree in mechanical engineering or its equivalent, and stating that "[e]vidence of education must be in the form of an official record showing the dates of attendance, area of concentration of study, and date of degree award, if any."

In response to the director's request for evidence, the petitioner's counsel stated that the beneficiary should be classified pursuant to Section 203(b)(3)(A)(i) of the INA as a "skilled worker" instead of a "professional."

The director denied the petition on March 28, 2003, finding that the petition was filed under Section 203(b)(3)(A)(ii) of the INA as a "professional," and not permitting the petitioner to change the classification to "skilled worker" in the middle of the proceedings. The director stated "[t]here is no provision in statute, regulation, or administrative case law that permits a petitioner to change the classification sought once a petition has been filed." Additionally, the director determined that the Form ETA-750 requires the beneficiary to have, as a minimum, a Bachelor of Science degree in Mechanical Engineering or equivalent. He stated that "[n]o documentation was submitted to show that the beneficiary has received a Bachelor of Science degree in Mechanical Engineering."

On appeal, counsel asserts that the beneficiary's credentials are sufficient to meet the requirements of the labor certification and submits a new credential evaluation. Counsel states that the evaluation was previously submitted, but the record of proceeding does not reflect that. The new credential evaluation submitted on appeal is drafted by Herb Schiller, Director of the Industrial Management Program at the State University of New York. Mr. Schiller summarizes his findings as follows:

> On the basis of the credibility of Technikon Natal [an accredited institution of higher learning in South Africa], and considering more than twenty-three years of work experience and professional training in mechanical Engineering and related areas, it is my judgment that [the beneficiary] has attained the academic equivalent of a Bachelor of Science in Mechanical Engineering degree with an additional fourteen years of Mechanical Engineering experience from an accredited institution of higher education in the United States.

The AAO concurs with the director's findings. 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). The petitioner's counsel clearly requested the petition to be classified under Section 203(b)(3)(A)(ii) of the Act as a "professional," not under Section 203(b)(3)(A)(i) as a "skilled worker." 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.

Both regulatory provisions governing the two third preference visa categories clearly require that the petitioner submit evidence of the beneficiary's bachelor's degree or foreign equivalent – for a "professional" because the regulation requires it and for a "skilled worker" because the regulation requires 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 or training.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C), regarding 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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), regarding 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. For the "professional category," the beneficiary must also show evidence of a "United States baccalaureate degree or a foreign equivalent degree." Thus, regardless of category sought, the beneficiary must have a bachelor's degree or its foreign equivalent.

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 of science (four years in college) in mechanical engineering.

Guidance on the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. The first credential evaluation submitted made determinations without transcripts or objective evidence, speculating that the beneficiary completed three years and four months of a tertiary program of education after completion of the equivalent of a U.S. high school. The beneficiary indicated on the Form ETA 750B that he attended the referenced "tertiary program of education" for two years, not three years and four months. Additionally, nothing in the credential evaluation, supporting documentation, or the Form ETA 750B refers to "Technikon Natal," the institution referred to by the evaluator who wrote the second credential evaluation. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides:

> [CIS] uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight.

The first credential evaluation lacks substance because it was prepared without checking its facts through objective evidence. The second credential evaluation is unsupported by an official record from Technikon Natal. The petitioner has not established that the beneficiary is qualified for the proffered position. In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be a foreign equivalent degree, not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. 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.

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.

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.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from South Africa could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that

the beneficiary's formal education consists of less than a four-year curriculum. The evaluations submitted with the evidence in this proceeding suggesting that the beneficiary's certificates from various schools and his subsequent employment experience should be considered as the equivalent of a baccalaureate degree is not accepted as competent and probative evidence that the beneficiary holds a foreign equivalent degree to a United State's bachelor's degree because it includes employment experience in the evaluation. Unlike the temporary non-immigrant H-1B visa category for which promulgated regulations at 8 C.F.R. 214.2(h)(4)(iii)(D)(5) permits equivalency evaluations that may include a combination of employment experience and education, no analogous regulatory provision exists for permanent immigrant third preference visa petitions.

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.