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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUL 27 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: 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 software development and professional services firm. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

The director determined that the evidence failed to establish that the beneficiary held a bachelor's degree or a foreign equivalent degree as of the priority date, as required on the Form ETA 750 individual labor certification. On appeal counsel states that the evidence establishes that the beneficiary's education was the equivalent of a United States bachelor's degree.

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 hold baccalaureate degrees and who are members of the professions.

Eligibility in this matter hinges on whether the petitioner has established that the beneficiary met the petitioner's required qualifications for the position as stated in the Form ETA 750. 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. § 204.5(d). The petition's priority date in this instance is March 18, 2002.

The Form ETA 750 states that the position of programmer analyst requires a college degree of "bachelor or equivalent" with a major field of study in computer science or mathematics. The Form ETA 750 also states that the position requires one year of experience in the position offered or in the related occupation of "consultant or system engineer."

The evidence submitted for the record which is relevant to the issue of the beneficiary's qualifications includes the following: a copy of a Bachelor in Science degree in Mathematics awarded to the beneficiary in September 1993 by the [redacted] a copy of an Advanced Diploma in Application Programming and Techniques awarded to the beneficiary on August 4, 1998 by [redacted] India; copies of letters from three former employers of the beneficiary attesting to his work from January 1997 to August 1998 as a programmer analyst, from August 1998 to October 1999 as a software developer, and from October 2000 to January 2002 as a client side developer/consultant; a copy of an evaluation of the beneficiary's academic credentials dated October 15, 1999 by the International Credentials Evaluation Service; a copy of an evaluation of the beneficiary's academic credentials dated December 9, 2003 by the [redacted]; and a copy of a letter to a lawyer who is not a representative in the instant case dated July 23, 2003 from Efren Hernandez III, Director, Business and Trade Services, Office of Adjudications, Citizenship and Immigration Services.

The director determined that the evidence failed to establish that the beneficiary held a bachelor's degree or a foreign equivalent degree as of the priority date, as required on the Form ETA 750 individual labor certification.

On appeal counsel submits a brief and no additional evidence. Counsel states on appeal that the evidence establishes that the beneficiary's education was the equivalent of a United States bachelor's degree.

Since no additional evidence was submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The regulation at 8 C.F.R. § 204.5(l)(2) states in pertinent part:

> *Definitions*. As used in this part:
>
> . . .
>
> *Professional* means 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.
>
> *Skilled worker* means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision.

The regulation at 8 C.F.R. § 204.5(l)(3) states in pertinent part:

> (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 . . . .
>
> (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.

To determine whether a beneficiary is eligible for a third preference immigrant visa, Citizenship and Immigration Services (CIS) must ascertain whether the alien is, in fact, qualified for the certified job. CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree. 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).

The two educational evaluations in the record do not find that the beneficiary holds a United States bachelor's degree or a foreign equivalent degree. Each evaluation report refers to a combination of the beneficiary's education at two different institutions: a three-year bachelor's degree from the University of Madras, India, and a one-year diploma for studies in the computer field from Bihari Information Technology Systems Pvt. Ltd., Pursawalkam, India. Relying on the beneficiary's combination of studies, each of the two evaluations finds that the beneficiary has education equivalent to a United States bachelor's degree.

A combination of foreign degrees or diplomas, however, fails to satisfy the regulatory requirement for a "foreign equivalent degree." The regulation defining the term "professional" uses a singular description of foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must have 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. *See* 8 C.F.R. § 204.5(l)(2).

Counsel's brief asserts that the petition should be evaluated under the criteria applicable to skilled workers, governed by Section 203(b)(3)(ii) of the Act, rather than the criteria applicable to professionals, governed by Section 203(b)(3)(i) of the Act. It is true that with regard to the preference category, the Form I-140, Part 2, Petition Type, does not distinguish between skilled workers and professional, for a single check box applies both to skilled workers and to professionals. Nonetheless, even if the instant petition is considered as a petition for a skilled worker, the requirements stated on the ETA 750 for a bachelor's degree or the equivalent would be unaffected. Moreover, the only regulation specifying the equivalent of a bachelor's degree in the context of employment-based third preference immigrant petitions is that in the definition of the term "professional" in the regulation at 8 C.F.R. § 204.5(l)(2), quoted above. Similar language is found in the definition of "advanced degree" in the regulation pertaining to employment-based second preference immigration petitions. *See* 8 C.F.R. § 204.5(k)(2).

No regulation pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore if counsel's assertion were accepted that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree, but the petitioner chose not to do so.

The record contains a copy of a letter to a lawyer who is not a representative in the instant case dated July 23, 2003 from Efren Hernandez III, Director, Business and Trade Services, Office of Adjudications, CIS. Concerning the regulation at 8 C.F.R. § 204.5(k)(2), on professionals with advanced degrees, Mr. Hernandez states that, in his opinion, the combination of a three-year university course of study resulting in a bachelor's degree, followed by the completion of a post-graduate diploma program "may be deemed the equivalent of a four-year U.S. bachelor's degree."

Letters and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although a letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. *See* Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

In his decision, the director stated that in immigrant petitions CIS may not accept a series of certificates from different institutions when determining whether a beneficiary held a U.S. bachelor's degree or a "foreign equivalent degree." The director was correct in his analysis.

Regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in computer science or mathematics on March 8, 2002 or a foreign equivalent degree. Therefore, the petitioner has not overcome the director's decision on that issue.

Beyond the decision of the director, the record lacks evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

The regulation at 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 either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [CIS].

A letter dated June 5, 2003 in the record states that in fiscal year 2001 the petitioner reported approximately 13,000 employees, with gross annual income exceeding $192 million and net annual income of $119 million. The letter is on the petitioner's letterhead and is signed by an individual named [redacted] with the title "[Petitioner] Immigration Attorney." The attorney [redacted] is not counsel of record in the instant case, therefore statements by that attorney may be accepted as evidence. Nonetheless, [redacted] is not identified as a financial officer with the petitioner. For that reason the letter from [redacted] fails to qualify as a statement from a financial officer of the petitioner, as allowed by the regulation at 8 C.F.R. § 204.5(g)(2). No other evidence of the petitioner's ability to pay the proffered wage is found in the record.

For the foregoing reasons, even if the record established that the beneficiary had the required qualifications for the offered position as of the priority date, an alternate ground for denial would still exist because of the failure of the petitioner to submit adequate evidence of its ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

In summary, the evidence fails to establish that the beneficiary had the required United States bachelor's degree in computer science or mathematics or an equivalent foreign degree as of the priority date and fails to establish the petitioner's ability to pay the proffered wage during the relevant period.

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.