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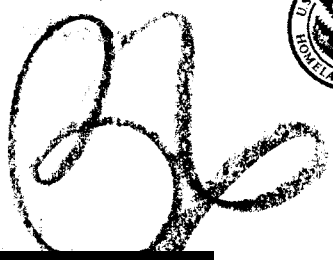
Washington, DC 20529

U.S. Citizenship and Immigration Services



[redacted]

FILE: WAC 03 033 55581 Office: CALIFORNIA SERVICE CENTER Date: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

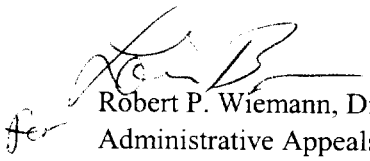
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of aerospace fasteners. It seeks to employ the beneficiary permanently in the United States as a tool designer. 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 denied the petition because he determined that the beneficiary did not meet the education required by the labor certification.

On appeal, counsel submits a brief.

In pertinent part, Section 203(b)(3)(A)(i) of 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) also provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. *Matter of Wing's Tea House,* 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is January 17, 2001.

Counsel initially submitted insufficient evidence as to whether the petitioner established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date. In a request for evidence (RFE), issued January 16, 2003, the director requested evidence that the beneficiary holds a United States baccalaureate degree or the foreign equivalent of a baccalaureate degree, a copy of it, and the official university record, including the area of concentration of study.

Counsel responded to the RFE with the Evaluation Report of the Foundation for International Services, Inc. (the FIS report) and a brief. The FIS report considered certificates from the City and Guilds of London Institute, two letters of former employers verifying experience as a toolmaker, and the beneficiary's resume. The FIS report stated the beneficiary's experience as 27 years and applied the three-for-one rule (to equate three (3) years of experience to one (1) year of university credit). The FIS report concluded that the beneficiary had the equivalent of a bachelor's degree in mechanical engineering technology from an accredited college or university in the United States, including two years of university-level credit from a community college.

The director noted that the three-for-one rule, as found in 8 C.F.R. § 214.2(h)(4)(iii)(D)*(5)*, applied only to H1B petitions of the non-immigrant category. The director determined that no statutory or regulatory provision justified the rule's application to create a degree equivalency for this immigrant petition and denied the petition.

On appeal, counsel submits a brief with a copy of Chapter 1, Sections I-III, from the *Deskbook* of the Board of Alien Labor Certification Appeals (BALCA Deskbook) of the Department of Labor (DOL). Counsel relies on the FIS report and asserts that Citizenship and Immigration Services (CIS), formerly the Immigration and Naturalization Service or INS, has recognized qualifications, in terms of degree equivalency, in respect to the H1B status that the beneficiary holds. *See* counsel's brief, at 5.

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. *See* 8 C.F.R. § 204.5(d). *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750 indicated that the position of toolmaker required four (4) years of college, a bachelor's degree or equivalent in mechanical engineering or mechanical engineering technology, and four (4) years of experience in the job offered or related occupation of toolmaker. The beneficiary did not have a bachelor's degree and did not have four (4) years of university-level credit.

The Form ETA 750 requires a bachelor's degree and four (4) years of college education. A bachelor's degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the combination of education and experience may not be accepted in lieu of a four-year degree.

The Form ETA 750 acknowledges the possibility of a bachelor's or equivalent degree, but regulations, apposite to the instant type of petition, confine equivalency to the acceptance of a foreign equivalent degree for professionals. *See* 8 C.F.R. § 204.5(l)(3)(ii)(C). Connected provisions for skilled workers do not deal further with degrees and do not authorize CIS to construe educational requirements from a combination of education and experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B).

Employment-based petitions depend on priority dates. Subsections (B) and (C) of 8 C.F.R. § 204.5(l)(3)(ii) relate to the same visa allocation category, and they have a convincing nexus to it and, thus, to each other. *See* section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). The petitioner must establish the elements for the approval of the petition as of the priority date. A petition may not be approved if the beneficiary was not qualified at the priority date, but expects to become eligible at a subsequent time. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

Counsel's brief, at 4, persists that CIS commits "a blatant abuse of authority" in applying subsection (C) to understand the connected subsection (B), and, further, says, as to 8 C.F.R. § 204.5(l)(3)(ii)(B):

> [It] states that the petition must be accompanied by evidence that the alien meets the requirements of the individual labor certification. If those requirements included the possession of a "degree equivalency" then whether the alien possessed the said "degree equivalency" would be a "consideration" required by the regulations. Since that is precisely the case in this petition, this refusal to consider the degree equivalency argument is another abuse of discretion.

This contention assumes, but does not identify, some "consideration." In any case, no citation confers the authority of CIS to define or to weigh some "consideration," and, then, to abridge the understanding of a bachelor's degree or the foreign equivalent from the closely connected subsection (C) of 8 C.F.R. § 204.5(l)(3)(ii). 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, Madany v. Smith,* 696 F. 2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon,* 699 F. 2d 1006 (9th Cir. 1983); *Steward Infra-Red Commissary of Massachusetts, Inc. v. Coomey,* 661 F. 2d 1 (1st Cir. 1981).

The ETA 750 required, separately, four (4) years of university-level credit, and there was no equivalency provision for them under *Matter of Shah*, 17 I&N Dec. at 245. CIS does not have the authority to abrogate the common understanding of four (4) years of university-level credit. 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.

Counsel reasons, from selections in the BALCA Deskbook, that the issuance of Form ETA 750 infers a ruling that the beneficiary possesses the educational requirements in block 14 of Form ETA 750. Therefore, it is said, Form ETA 750 precludes CIS from disputing this constructive ruling. *See* the brief at 3.

Though counsel cites many cases, none negates the duty of CIS to ascertain whether the petitioner established the educational and other requirements of the Form ETA 750. Moreover, other decisions, relating to the scope of the action of CIS, do not include a published citation. 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, unpublished 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).

The issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification. The petitioner has not established that the beneficiary had either four (4) years of university-level credit or a foreign equivalent bachelor's degree, as of the priority date. Therefore, the petitioner has not overcome this portion of the director's decision.

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.