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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: NOV 26 2004

EAC 03 097 51118

IN RE: Petitioner: [redacted]
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:

[redacted]

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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's business is semen freezing. It seeks to employ the beneficiary permanently in the United States as an animal scientist. 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.

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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

Regardless of whether the petitioner is seeking to classify the petition under 203(b)(3)(A)(i) or (ii) of the Act, however; to be eligible for approval, a beneficiary must also 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 (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 August 2, 2000.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, 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 animal scientist. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education
    Grade School
    High School
    College

College Degree Required	Bachelor of Science
Major Field of Study	Animal Science

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended "Rutensburg High School" until December 1971 where he studied "School" and received a degree or certificate described as "Graduate School."[1] Also, the beneficiary indicated that he attended "Pretoria Technicon" where he studied "Vet. Technology" from January 1974 to December 1975 and received a "National Diploma Vet. Tech."[2] 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 an evaluation report from the Foundation for International Services, Inc. (FIS), which determined that the beneficiary's credentials are:

> the equivalent of two years of university-level credit in veterinary technology from an accredited community college in the United States, and as a result of his educational background and employment experiences (3 years of experience = 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in animal sciences from an accredited college or university in the United States.

In support of the petition and the credential evaluation by FIS, the petitioner submitted copies of the beneficiary's curriculum vitae; an untranslated document from the "Universiteit van Pretoria;" documents showing the beneficiary's membership in the South African Association of Veterinary Technologists and registration with the South African Veterinary Council; letters from the beneficiary's prior employers; and a copy of the beneficiary's "National Diploma" in Veterinary Technology obtained in 1975.

Because the evidence was insufficient, the director requested additional evidence on March 10, 2003, specifically stating that the ETA 750A indicates that the position requires a bachelor's degree but the beneficiary does not appear to meet that requirement. The director also stated that the beneficiary must have a bachelor's degree or its foreign equivalent and any education evaluation may only consider formal education.

In response to the director's request for evidence, the petitioner's counsel asserted that the combination of the beneficiary's educational background and employment experience qualify him for the proffered position.

The director denied the petition on June 23, 2003, finding that the Form ETA-750 requires the beneficiary to have, as a minimum, a Bachelor of Science degree in Animal Science. The director explained in his decision that the provision permitting a combination of education and experience relates to nonimmigrant petitions not to immigrant preference petitions. He stated that the regulations governing the third preference immigrant visa category clearly require the beneficiary to have a baccalaureate degree "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." Because the beneficiary failed

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[1] Presumably the latter two responses were errors and this entry was intended to describe the beneficiary's completion of secondary school.

[2] Presumably these abbreviations stand for "Veterinary Technology."

to submit proof of such a degree, the director determined that the beneficiary cannot be accorded the status of a professional under section 203(b)(3)(A)(ii) of the Act and does not qualify for the proffered position.

On appeal, counsel asserts that the director erred in failing to consider the beneficiary's employment experience in determining his qualifications for the proffered position and cites four cases: *Augat, Inc. v. Tabor*, 719 F.Supp. 1158 (D.Mass. 1989); *Hong Kong TV Video Program, Inc. v. Ilchert*, 685 F.Supp. 712 (N.D. Cal. 1988); *Matter of Shin*, 11 I&N Dec. 686 (Dist. Dir. 1966); and *Matter of Devnani*, 11 I & N Dec. 800 (Act. Dist. Dir. 1966). CIS does not see how *Augat* and *Hong Kong TV* are binding precedents on CIS outside of the district of Massachusetts and California, respectively. *Augat*, *Shin*, and *Devnani* are inapplicable to the instant petition because for each case the court defines "professional" as it was defined in the Act from its historical context, when section 1153(a)(3) failed to define "professional" with a baccalaureate degree. The Act currently defines "profession" for third preference visa petitions as "immigrants who hold baccalaureate degrees." *See* Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Thus, *Augat*, *Shin*, and *Devnani* are irrelevant as they define third preference petition "professionals" prior to Congress amending that same statutory provision and providing the current definition given to "professionals" that includes a degree requirement. *Augat*, *Shin*, and *Devnani* are thus distinguishable and irrelevant. *Hong Kong TV* is irrelevant as it also pre-dates the current statutory definition of third preference category "professionals" and involves nonimmigrants not immigrants.

In addition to statutory definition of "professional," 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.

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 regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B), guiding 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. And 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 in the instant petition, 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 animal science.

Evidence of the actual credentials held by the beneficiary is provided through a credential evaluation submitted into the record of proceeding for this case. The credential evaluation, however, does not assist the petitioner establish that the beneficiary is qualified for the proffered position. In this case, the labor certification clearly indicates that the beneficiary must have a bachelor's degree, not an equivalent degree, 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. The credential evaluation combines the beneficiary's education and employment experience.

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 evaluation submitted with the evidence in this proceeding suggesting that the beneficiary's two-year diploma 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 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.