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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: SEP 30 2004

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. A subsequent Motion to Reopen and Reconsider was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a consulting firm specializing in computer programs. It seeks to employ the beneficiary permanently in the United States as a programmer analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director determined that petitioner had not established that the beneficiary met the petitioner's qualifications for the position asserted in the labor certification application. The director affirmed this determination on motion.

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 who are members of the professions.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C) states, in pertinent part:

> 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 showing that the minimum of a baccalaureate degree is required for entry into the occupation.

A labor certification is an integral part of this petition, but the issuance of a labor certification 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). *See also Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this instance, it is December 29, 2000.

On appeal, counsel submits a brief and additional evidence.

The regulations define a third preference category professional as a "qualified alien who holds at least a United States baccalaureate degree or foreign equivalent degree and who is a member of the professions." *See* 8 C.F.R. § 204.5(1)(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.

The beneficiary indicates on Form 750 Part B that he has a Bachelor of Science degree from the University of Punjab. The beneficiary also indicates that he has four months training in the study in Visual Basic Systems Analysis and Designs. The petitioner initially submitted evidence of the beneficiary's evaluated credentials in the form of a letter from Dinesh Batra, Ph.D. (Dr. Batra), who identifies himself as the Director of the Master of Science (MS) in Management Information Systems (MIS) program at the Florida International University.

Dr. Batra identifies himself as a Consultant with Global Education Group, Inc. Dr. Batra stated, in pertinent part:

> Using the three for one formula instituted by [CIS], [the beneficiary] meets the requirements for a U.S. bachelor's degree equivalency in his field. He has the equivalent of completion of two years of undergraduate study at a regionally accredited university in the United States. In addition, he has completed over nine years of professional work experience in the computer information systems field... [The beneficiary's] academic study and over nine years of professional work experience in the field of computer information systems are equivalent to the U.S. Bachelor's degree in Computer Information Systems (four year degree).

The petitioner also submits a letter from Michelle A. Birch, who identifies herself as a consultant at Global Education Group, Inc. Ms. Birch states that the University of Punjab, in Pakistan, is a recognized, accredited university. Ms. Birch stated that the beneficiary was awarded a Bachelor of Science degree in April 1989, which is the equivalent of completion of two years of undergraduate study at a regionally accredited university in the United States.

In addition, the petitioner submitted evidence of the beneficiary's work history as well as Dinesh Batra's resume. The petitioner submits a copy of Michelle A. Birch's work history. Ms. Birch is identified as President and consultant of Global Education Group, Inc. (GEG), "a service firm of experienced professional consultants with extensive and diverse backgrounds in the field of international education."

The director denied the petition because the regulations governing the third preference employment-based immigrant classification and the Act do not provide for the substitution of work experience in lieu of a foreign equivalent of a U.S. baccalaureate degree. The director subsequently affirmed his decision in denying a Motion to Reopen and Reconsider.

The Form ETA 750 indicated that the position of programmer analyst required a bachelor's degree in science, with a major field of study in "Computer Science/Engineering or equivalent" and three years of experience in the job offered or four years of experience in the related occupations of software consulting or systems analysis.

On appeal, counsel reasserts issues proffered in the Motion to Reopen and Reconsider. Counsel asserts that the director failed to address whether the position could be reclassified to a skilled worker, that CIS changed the application of regulations retroactively and that the Form I-485, Application to Register Permanent Resident or Adjust Status, should not be denied while the Form I-140, Immigrant Petition for Alien Worker, is pending.

Counsel resubmits the evaluation letters of the beneficiary's qualifications from Dinesh Batra and Michelle Birch.

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

On appeal, counsel asserts that CIS is applying regulatory changes retroactively. Counsel states that in her 10 years of experience, CIS would always accept work experience as an equivalent to a degree, but fails to give specific examples, case names, or receipt numbers. 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. Additionally, while the petitioner noted that CIS approved other petitions that had been previously filed on behalf of unnamed individuals, the director's decision does not indicate whether he reviewed the prior approvals of the other immigrant petitions. If the previous immigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the immigrant petitions on behalf of other unnamed individuals as asserted by counsel, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd.* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On appeal, counsel asserts that the Form I-485 (Application for Adjustment of Status to Permanent Resident) cannot be dismissed without the complete adjudication of the Form I-140. There is no right of appeal of a denial of an application for adjustment of status to permanent resident. 8 C.F.R. § 245.2(a)(5)(ii).

The role of DOL in the immigration process is to certify that there are not enough qualified and available U.S. workers at the time of the application and that employment of the alien will not adversely affect similarly employed U.S. workers. Section 212(a)(5)(A) of the Act, 8 U.S.C. § 1182. *See also* 20 C.F.R. § 656.24. DOL's determination, if any, regarding the alien's qualifications for the job specified on the labor certification is merely advisory, and CIS is not bound by any such determination. *See Matter of Wing's Tea House*, 16 I&N Dec. at 160.

A bachelor degree is generally found to require four (4) years of education. *See 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 petitioner in its request for labor certification specifically described the education and experience requirements it sought as a Bachelor's Degree with a major field of study in computer science/engineering or equivalent. It did not specify that experience or a combination of experience and education could also satisfy the degree requirement.[1] According to the petitioner's expert, the beneficiary has the equivalent of two years of undergraduate experience, and does not meet the minimum educational requirements specified by the petitioner in the labor certification.

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[1] Additionally, on the ETA 750A, Item 14, the petitioner's use of the word "equivalent" is used to qualify the major field of study not the degree.

On appeal, counsel asks that the requirements be changed to reflect that a "skilled labor" level of expertise by the beneficiary be sufficient to establish eligibility for the position sought. 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. 1988). Further, the beneficiary must meet the qualifications of the labor certification ETA 750A at the time of filing. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Thus, regardless of immigrant visa category sought and the concomitant regulatory requirements of the intended category, the petitioner must *also* prove that the beneficiary meets the terms of the proffered position as delineated on the labor certification application.

Upon review, it is determined that the petitioner has not overcome the findings of the director in his decision to deny the petition. The petitioner has not established eligibility pursuant to section 203(b)(3)(A)(i) of the Act and the petition will be dismissed.

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.