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U.S. Citizenship and Immigration Services

[redacted]

FEB 10 2005

FILE: LIN-02-254-52608 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
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 full service design and construction firm specializing in ambulatory healthcare facilities. 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, accompanied the petition. The director denied the petition because he determined that the petitioner failed to provide sufficient evidence that the beneficiary is qualified for the proffered position. 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 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 programmer/analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

| | | |
|---|---|---|
| 14. | Education | |
| | Grade School | 8 |
| | High School | 4 |
| | College | 4 |

| | |
|---|---|
| College Degree Required | B.S. or equivalent |
| Major Field of Study | Comp. Sci. or related field |

The petitioner also specified that any applicants have two years of experience in the job offered or two years of experience in the related occupation of systems analyst/software implementation consultant. Under Item 15, the petitioner also set forth additional special requirements as follows: "Must have JDEdwards instructor certification for accounting modules." The job offered lists the following duties on Item 13:

> Analyze, design, program, test, implement, maintain, & support JDEdwards software for job costing & financial, payroll & purchasing modules; develop & deliver JDEdwards training to all levels of end-users & provide expertise to end-users in the use of the JDEdwards software, applications & technical support; review system capabilities, workflow, & scheduling limitations to determine which components of the JDEdwards software are feasible within the existing system or can be converted/upgraded & which applications will be scalable in the future; study the JDEdwards systems to evaluate its effectiveness & develop new components & applications to improve workflow; as needed will upgrade the system & correct errors to maintain the system & its applications after implementation; will plan & prepare technical reports, memoranda, & instructional manuals to document JDEdwards program development; may supervise a Business Systems Analyst & other Systems Analysts.

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 Northern Alberta Institute of Technology in Edmonton, Alberta, Canada, from the fall of 1982 until May of 1984 where he studied "Comp Sys Tech" and received a diploma. Also, the beneficiary indicated that he attended Northern Alberta Institute of Technology in Edmonton, Alberta, Canada, from the winter of 1994 through the fall of 1996, studying "Comp Sys Tech" and in the box eliciting information about degrees or certificates received, he wrote "Studies pursued." 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.

On Part 15, eliciting information concerning the beneficiary's past employment experience, the beneficiary indicated that he worked in multiple positions for multiple past employers as follows in reverse chronology:

1. The petitioner, Systems Analyst, February 2001 – Date of filing ETA 750;
2. Deloitte & Touche, LLP, Management Consultant, February 1998 – January 2001;
3. KPMG, LLP, Management Consultant, December 1997 – February 1998, totaling 3 months;
4. Alberta Treasury, Systems Analyst, September 1985 – July 1997, totaling almost 12 years; and
5. Alberta Justice Department, Senior Systems Analyst, August 1997 - December 1997, totaling 5 months.

With the initial petition, the petitioner provided a copy of a credential evaluation from [redacted] that concludes that the beneficiary "has achieved, through his education and work experience between September 1985 and March 1992, the equivalent of a bachelor's degree with a major in Computer Information Systems." The petitioner also provided a copy of the beneficiary's diploma from the Northern Alberta Institute of Technology (NAIT), dated 1984, with accompanying transcripts; the beneficiary's resume; a letter from the Alberta Treasury verifying the beneficiary's employment as a Systems Analyst 3 from September 1985 through July 1997, with an attached job description; a letter from KPMG, LLP verifying the beneficiary's employment as a Management Consultant from December 1997 through February 1998; a letter from Deloitte & Touche, verifying their sponsorship of the beneficiary on a TN visa for employment as a Management Consultant; and copies of certificates issued to the beneficiary from JDEdwards certifying him as an instructor for General Accounting, Accounts Payable, and Certified Professional, all in 1998.

Because the evidence was insufficient, the director requested additional evidence on November 23, 2002, specifically requesting proof that the beneficiary obtained the required U.S. or foreign B.S. degree before January 23, 2002. The director noted 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 re-submitted previously submitted evidence and new evidence in the form of an additional credential evaluation issued by Foreign Credential Evaluations, Inc., which stated that the beneficiary's:

> two years of university-level study and fourteen years and three months of professional experience in Computer Systems Analysis are equivalent to the degree, Bachelor of Science in Computer Systems Analysis, for employment purposes, from an accredited educational institute in the United States, plus a minimum of two years of additional work experience as a Systems Analyst.

The director denied the petition on March 20, 2003, finding that while "the beneficiary has the equivalent of two years of university level credit plus work experience, it does not establish that the beneficiary has the equivalent of a bachelor's degree."

On appeal, counsel asserts that the director erred and submits additional evidence. Counsel asserts that CIS should consider the beneficiary as qualified either under the professional or skilled worker category of the third preference category of the immigrant visa sought. Additionally, counsel states that transcribed teleconferences between the American Immigration Lawyers Association (AILA) and the Nebraska and California Service Centers indicate that CIS should and does accept employment experience as equivalent to a bachelor's degree for either a professional or skilled worker category.

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, the petitioner must show that the beneficiary meets the requirements of the Form ETA 750A, which includes a baccalaureate 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). 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 or equivalent (four years in college) in computer science or a related field; and two years of experience in the job offered or in the related occupation of systems analyst/software implementation consultant; and a JDEdwards instructor certification for accounting modules.

The petitioner has established that the beneficiary has a JDEdwards instructor certification for accounting modules and two years of experience in the job offered or in the related occupation of systems analyst/software implementation consultant. The only issue to be discussed in the remainder of this decision is whether or not the beneficiary has a bachelor's degree or its equivalent in computer science or a related field.

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. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

In this case, the labor certification clearly indicates that the equivalent of a U.S. bachelor's degree must be an 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 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 degree to a U.S. bachelor's degree.

If supported by a proper credentials evaluation, a four-year baccalaureate degree from Canada 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 two-year diploma, continuing but not completed studies, 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.

Contrary to counsel's assertions, Item 14 of the Form ETA 750A does not expand the educational requirements to work experience that is equivalent to a bachelor's degree. A "B.S. or equivalent" listed under a question eliciting "College Degree Required," can lead to no alternate conclusion, especially since additional employment experience was set forth under the box eliciting employment experience requirements.

Counsel's reliance upon AILA's transcribed teleconference notes with two service centers is also without merit. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS, formerly the Service or INS, are binding on all CIS 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). It is not clear that the hypotheticals in the AILA teleconference notes and other statements are to be interpreted as counsel did. The AAO does not have the cases with the facts summarized in the teleconference to ascertain similarity to the instant case. Additionally, some of the service center comments appear to be broad statements that the service centers will consider a petitioner's qualification in either a skilled worker or professional category of the third preference immigrant visa category and not necessarily a more specific view that experience could substitute for a bachelor's degree. Even if the AILA teleconference notes were accurately interpreted by counsel, the transcribed teleconference notes are not precedent, and would constitute error. 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). It is also noted that the AAO's authority over a service center is similar to that of a court of appeals and a district court. Even if a service center director

had previously approved immigrant petitions on behalf of other similarly unqualified beneficiaries, 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).

The AAO concurs with the director's decision that the petitioner has not established that the beneficiary is qualified for the proffered position, either under a skilled worker or a professional under the third preference immigrant visa category, since it has not proven that the beneficiary holds a four-year baccalaureate degree or foreign equivalent.

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.