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

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: EAC 01 062 54318 Office: VERMONT SERVICE CENTER Date: JUL 13 2005

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 employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted, the previous decisions of the director and the AAO will be affirmed, and the petition will be denied.

The petitioner is a luxury hotel. It sought to employ the beneficiary as a benefits manager. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL).

After initially denying the petition due to abandonment, the director subsequently reopened the matter to consider the petitioner's evidence, which had been received but overlooked. The director denied the petition on January 29, 2002, because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner's evaluations submitted in support of the beneficiary's foreign education was not sufficient because they had considered combinations of professional experience and education, rather than education alone. The director also noted that the labor certification (ETA-750A) had failed to state that experience may be substituted for education. The director concluded that the beneficiary was not eligible for the visa classification sought because she did not possess the required baccalaureate degree.

On September 4, 2002, the AAO affirmed the director's decision and dismissed the appeal. The AAO also found that the beneficiary's educational credentials failed to satisfy the requirements of the labor certification as she did not possess a bachelor's degree as of the July 31, 2000, priority date established by the initial receipt of the application for labor certification in the Department of Labor's employment service system. *See* 8 C.F.R. § 204.5(d); Matter of Wing's Tea House, 16 I&N 158 (Act. Reg. Comm. 1977).

On motion, counsel submits copies of its correspondence with DOL requesting modification of the labor certification and DOL's response. Counsel contends that Citizenship and Immigration Services (CIS) had no reasonable basis to conclude that the beneficiary does not meet the educational requirements of the labor certification. Counsel also suggests that even if CIS had a reason to question the labor certification, it should have consulted with DOL. Counsel also renews the assertion that CIS should adopt the work experience equivalency formula used in non-immigrant regulatory provisions to find the beneficiary qualified for the certified position.

Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state new facts to be provided and must be supported by affidavits or other documentary evidence. The regulation at 8 C.F.R. § 103.5(a)(3) provides that a motion to reconsider must offer the reasons for reconsideration and be supported by pertinent legal authority showing that the decision was based on an incorrect application of law or CIS policy. It must also demonstrate that the decision was incorrect based on the evidence contained in the record at the time of the initial decision. As the petitioner has submitted both additional evidence and argument that the decision of the director and the AAO were incorrect, the petitioner's motion qualifies as a motion to reopen and reconsider.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), 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 In this case, that date is July 31, 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 a benefits manager. In the instant case, item 14 and item 15 show the following requirements:

14. Education	
Grade School	x
High School	x
College	4
College Degree Required	Baccalaureate
Major Field of Study	Hospitality Management or equivalent
Experience	
Related Occupation	1 (yrs.)
Related Occupation (specify)	Hotel Manager
15. Other Special Requirements	Prior experience must include one year in hotel operations management

As evidence of the beneficiary's formal education, the petitioner submitted copies of two documents in German, unaccompanied by any English translation, as well as the beneficiary's graduation certificate and grade transcript from the [redacted] Municipal High School, dated May 30, 1990, suggesting that she completed primary and secondary school levels I and II (grades 5-10 and 11-13). These documents were also included in subsequent submissions. It is herein noted that the English translation of the beneficiary's high school documents was not certified, nor were the English translations of the recommendation letters from the [redacted] or [redacted] Hotels. Thus, it is noted that this evidence failed to comply with the regulation at 8 C.F.R. § 103.2(b)(3) requiring any document in a foreign language to be submitted with an English language translation which has been certified to be accurate and complete by a translator who has attested to his or her competence to translate the foreign language into English. As such, the evidence is not probative and cannot be accorded any evidentiary weight.

The petitioner also included for consideration two educational evaluations submitted in support of the beneficiary's academic credentials. The initial evaluation, dated October 28, 1997, was written by an international education consultant, [redacted] Ph.D. He states that his review was based on various documents including an examination certificate from the Chamber of Industry and Commerce in Koblenz, an apprenticeship certificate from the [redacted] and an evaluation report from the [redacted] as well as the beneficiary's professional work experience. Dr. [redacted] concludes that the beneficiary's combination of work experience and other credentials may be considered the U.S. equivalent of a bachelor's degree in hotel and restaurant management.

The second evaluation submitted in response to the director's request for additional evidence is from the [redacted] dated October 10, 2001. This evaluation is signed by [redacted] and also incorporates an "opinion letter" from [redacted] of [redacted] Mr. [redacted] states that the beneficiary's secondary school diploma represents the educational equivalent of

[1] This report does not appear in the record.

graduation of high school plus one year of university-level credit from an accredited college or university in the United States. He adopts [redacted] suggested formula of equating three years of experience to one year of university-level credit to conclude that the beneficiary's combination of work experience and academic credentials should be considered to be the equivalent of a bachelor's degree in the field of hotel management in the United States.

The director denied the petition on January 29, 2002. The director rejected the petitioner's suggestion that the beneficiary's work experience should be considered as equivalent to university credit pursuant to the formula used in nonimmigrant petition adjudications and found that the evidence submitted did not meet the requirements of the approved labor certification because the beneficiary does not possess a United States baccalaureate degree or a foreign equivalent degree. As noted above, the AAO subsequently affirmed this decision, determining that the terms set forth in the labor certification clearly require a bachelor's degree, or a foreign equivalent degree pursuant to the provisions of section 203(b)(3)(A)(ii), and rejected the petitioner's contention that a formula combining the beneficiary's work experience and formal education suffice to qualify the beneficiary for the visa classification sought.

On motion, the petitioner submits documents related to the petitioner's recruitment efforts to fill the certified position, as well as a copy of a letter, dated September 26, 2002, addressed to the Department of Labor, requesting a correction of the labor certification based on the petitioner's harmless error in mischaracterizing the requirements of the certified position. The petitioner requested the DOL to amend the labor certification by inserting the phrase "or its equivalent" next to "baccalaureate" within the box describing the college degree required in item 14. With a subsequent submission, the petitioner includes a copy of a letter, dated October 16, 2002, addressed to the DOL, renewing its request to amend the labor certification and referencing a DOL letter dated October 7th. The October 7th letter from DOL is not included in these materials. The petitioner offers a copy of a DOL letter, signed by [redacted] Certifying Officer" dated October 24, 2002, in which the request to amend the requirements of the approved labor certification is refused because "this office does not amend the approved form." Mr. [redacted] adds that if the requirements had been a baccalaureate or equivalent in hospitality management, the DOL would have certified the application with that requirement also.

Counsel contends that CIS misinterpreted the labor certification requirements and asserts that even if CIS had a basis to question the terms of the labor certification it should have consulted with DOL.

It is noted that CIS, not the Department of Labor, has the final authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the Act, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *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); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). CIS is empowered to make a de novo determination of whether the alien beneficiary is qualified to fill the certified job and receive entitlement to third preference status. *See Tongatapu Woodcraft Hawaii, Ltd. v. INS*, 736 F.2d 1305, 1308 (9th Cir. 1984).

In evaluating the beneficiary's qualifications, CIS reviews the job offer portion of the labor certification to determine the required qualifications for the position. CIS may, in its discretion, use advisory opinions such 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). CIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Dragon Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986).

In this case, the minimum educational requirements set forth in item 14 of the labor certification clearly require four years of college culminating in a baccalaureate degree. The major field of study may be in hospitality management or an equivalent field of study. Counsel cites *Denver Tofu Co. v. INS*, 525 F. Supp. 254 (D. Col. 1981) and *Rosedale And Linden Park Company v. Smith*, 595 F. Supp. 829 (D.D.C. 1984) in support of his position that the alien's credentials satisfy the terms of the labor certification. The facts in the present matter are distinguishable to the facts presented in those cases. In *Denver Tofu Co. v. INS*, the district court found that the former Immigration and Naturalization Service (INS) erred in denying a preference petition for an alien as a product development manager on the basis of the alien's lack of managerial training, where the job involved directing only three workers. The court in *Rosedale And Linden Park Company v. Smith* held that where a certified job offer required a certain level of education with an emphasis on business and languages, INS erred in denying the preference petition on the basis of the school's characterization of the courses taken by the alien as being "secretarial courses," where two-thirds of the courses taken by the alien actually involved business or languages.

Although *Rosedale And Linden Park Company v. Smith* at least involved reviewing the minimal academic requirements set forth on a labor certification application, it is noted that the court emphasized that the INS' decision to treat the alien's secretarial coursework as inconsistent with a major in business or languages was unreasonable in view of the parties' agreement that no college degree was required for the position. The court stated that like INS, it "must examine the certified job offer exactly as it is completed by the prospective employer." *Rosedale And Linden Park Company v. Smith*, 595 F. Supp. at 832. In the present case, the certified job offer requires four years of college resulting in a baccalaureate degree with a major in hospitality management or an equivalent field of study. The AAO notes that this does not involve any technicalities of the law or a basis to question the terms of the ETA 750-A; rather it relates to applying the meaning of the plain language of the ETA 750-A. *See Rosedale And Linden Park Company v. Smith*, 595 F. Supp. at 833.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) also provides 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 member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for an entry into the occupation.

The AAO finds that "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration or study" is applicable to what constitutes evidence of a degree. Because neither the Act nor the regulations indicate that a bachelor's degree must be a United States bachelor's degree, as noted above, CIS will recognize a foreign equivalent bachelor's degree to a United States baccalaureate. The above regulation uses the singular description of a foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that, when the visa classification sought is that of a professional, a beneficiary must produce one degree that is determined to the foreign equivalent of a U.S. baccalaureate degree in order to be qualified for third preference visa

category purposes. In this case, the evidence fails to indicate that the beneficiary possesses either a United States bachelor's degree or a foreign equivalent degree. A petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed. *See* 8 C.F.R. § 103.2(b)(12).

As noted in the prior AAO decision, even if viewed as a petition for a skilled worker, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the evidence must show that the alien has the *education, training or experience, and any other requirements of the individual labor certification.* (Emphasis supplied). Here, CIS interprets the Form ETA 750-A as requiring either a U.S. or a foreign equivalent baccalaureate degree, to be shown by an official college or university record giving the date the degree was awarded and the major field of study showing that such degree was attained by the priority date. Therefore, the combination of education and work experience may not be accepted in lieu of a four-year degree.

The AAO concurs with its prior decision and rejects the suggestion that a combination of the beneficiary's academic studies and her work experience satisfies the terms of the labor certification in requiring college studies culminating in a baccalaureate degree. The labor certification clearly distinguishes between academic requirements, training, and experience in the job offered.

Counsel's renewal of the assertion that the formula of equating three years of work experience to one year of education should be applied here is misplaced. As noted by the director and the prior AAO decision, that equivalence applies to non-immigrant petitions, not to immigrant petitions. It is further noted that while the regulation relating to immigrant petitions at 8 C.F.R. §204.5(k)(2) permit a certain combination of work experience and a bachelor's degree to be considered the equivalent of an advanced degree, there is no comparable provision to substitute a combination of degrees, work experience, or certificates which, when taken together, is deemed to be the equivalent to a United States baccalaureate degree. Here, for third preference category professionals, the beneficiary was required to have a U.S bachelor's degree or a foreign equivalent degree, not a functional equivalent of this requirement. 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, it cannot be concluded, based on the evidence submitted, that the petitioner has established that the beneficiary possesses the requisite baccalaureate degree as required by the terms of the labor certification. Therefore, the beneficiary is not eligible for the visa classification sought.

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 sustained that burden.

ORDER: The previous decisions of the director and the AAO are affirmed. The petition remains denied.