

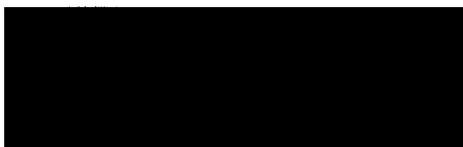


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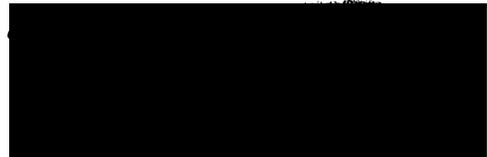


FILE: WAC-03-110-54026 Office: CALIFORNIA SERVICE CENTER Date: JUL 20 2005

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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 company engaged in the design, development, manufacturing and sale of computer networking systems. It seeks to employ the beneficiary permanently in the United States as a customer support engineer.

The instant petition is for a substituted beneficiary. The record contains an original Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, submitted in the name of the previous beneficiary. A note on that document states that the original ETA 750 was retrieved from another record of proceeding, presumably one pertaining to an I-140 petition for the previous beneficiary.

An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from [REDACTED] Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, Immigration and Naturalization Service, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

The director determined that the petitioner had failed to establish that the beneficiary had the education required by the ETA 750 as of the priority date, and accordingly denied the petition.

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 or seasonal nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act 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(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

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. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is December 24, 1999.

The Form ETA 750 states that the position of customer support engineer requires a Bachelor of Science degree "or foreign equiv." in a major field of study of "C.S./C.E./E.E. or rel." (ETA 750, Part A, block 14). The ETA 750 also requires one year of experience in the job offered or one year of experience in the related occupations of "Software Development, network Engineer, or rel." (ETA 750, Part A, block 14).

The I-140 petition was submitted on September 24, 2002. On the I-140 petition, the petitioner claimed to have been established in 1984, to currently have 35,797 employees, and to have a gross annual income of \$11,072,000,000.00. The item for net annual income was left blank on the petition. With the petition, the petitioner submitted a Form ETA 750B, with information pertaining to the qualifications of the new beneficiary. On the Form ETA 750B, signed by the beneficiary on February 5, 2003, the beneficiary claimed to have worked for the petitioner beginning in March 2001 and continuing through the date of the ETA 750B. With the petition, the petitioner also submitted supporting evidence.

In a request for evidence (RFE) dated October 7, 2003, the director requested additional evidence relevant to the beneficiary's education and training.

In response to the RFE, the petitioner submitted additional evidence.

In a decision dated March 22, 2004 the director determined that the petitioner had failed to establish that the beneficiary had the education required by the ETA 750 as of the priority date. The director found that the evidence showed the beneficiary to hold a Bachelor of Business Administration from the University of Madras and a technical degree from the Murugappa Polytechnic Institution, but that the evidence failed to establish that the beneficiary held a Bachelor of Science degree or that a technical degree in electronics and communication engineering would suffice rather than the Bachelor of Science degree. The director therefore denied the petition.

On appeal, counsel submits a brief and additional evidence. Counsel states on appeal that the director adopted an overly narrow interpretation of the educational requirements for the position, and that the petitioner believes that the beneficiary's major field of study of business administration is sufficiently related to the fields of study listed on the ETA 750 to satisfy the educational requirement. Counsel states that the beneficiary's Bachelor of Business Administration degree is a foreign equivalent to the Bachelor of Science degree stated on the ETA 750.

The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations at 8 C.F.R. § 103.2(a)(1). Where a petitioner fails to submit to the director a document which has been specifically requested by the director, but attempts to submit that document on appeal, the document will be precluded from consideration on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). In the instant case, the evidence newly submitted on appeal consists of the following documents: a copy of the beneficiary's course transcript dated December 4, 1991 from [REDACTED] a copy of a professional transcript of the beneficiary dated March 14, 1997 issued by the Microsoft corporation; and an examination score report of the beneficiary dated August 4, 2000 on a computer networking examination of the petitioner. None of the documents submitted for the first time on appeal were specifically requested by the director. Therefore no grounds would exist to preclude any documents from consideration on appeal. For this reason, all evidence in the record will be considered as a whole in evaluating the instant appeal.

In addition to the evidence newly submitted on appeal, the evidence pertaining to the beneficiary's qualifications includes the following documents: a copy of a Bachelor of Business Administration degree granted to the beneficiary on January 25, 1999 by the University of Madras, India, with accompanying course transcript; a copy of a professional resume of the beneficiary; a copy of a letter dated March 12, 1995 by a company in Madras, India stating the beneficiary's experience with that company as a junior engineer, systems support and operations, from March 1992 to February 1995; a copy of an undated letter from a company in Teaneck, New Jersey stating the beneficiary's experience with that company as assistant manager, network and system support, from February 1995 until March 2001; a copy of a facsimile transmission dated September 3, 1997 of an undated certificate issued to the beneficiary by the Microsoft corporation, certifying the beneficiary as a Microsoft systems engineer;

a copy of an educational evaluation report of the beneficiary's education dated July 4, 2001 by Educational Evaluation Services, Inc.; and a copy of an evaluation report dated November 25, 2003 of the beneficiary's education by the American Evaluation Institute.

The educational evaluation by Educational Evaluation Services, Inc. states in part as follows:

In summary, it is the judgment of Educational Evaluation Services, Inc. that [the beneficiary] has as a result of his formal education background (a Bachelor's degree, a technical degree and a total of seven years of university-level study) the equivalent of an individual with at least a Bachelor's degree in Business Administration from an accredited college or university in the United States.

(Educational Evaluation Report, Educational Evaluation Services, Inc., July 4, 2001, at 1)

The evaluation report by the American Evaluation Institute states in part as follows:

This candidate completed a Diploma of Electronics and Communication Engineering from the State Board of Technical Education and Training. This candidate also completed a Bachelor of Business Administration Degree from the University of Madras, India. This candidate completed post secondary certification in Computer Engineering in 1997. These combined studies are equivalent to a Regionally Accredited Bachelor of Science in Engineering as conferred by Accredited Institutions of Higher Education in the United States.

(Evaluation Report, American Evaluation Institute, November 25, 2003, at 1)

In referring to the beneficiary's post secondary certification in Computer Engineering, the evaluation report of the American Evaluation Institute appears to be referring to a certificate issued to the beneficiary by the Microsoft corporation stating that the beneficiary has completed the requirements to be recognized as a Microsoft Certified Professional in the certification category of Systems Engineer. That certification is a product certification and it does not represent post-graduate studies at an accredited institution of higher learning.

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 that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals. The regulation at 8 C.F.R. § 204.5(1)(2) states in pertinent part

Professional means 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.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision.

No provision pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore even if it were assumed that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's degree. The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a Bachelor of Science degree, but the petitioner chose not to do so.

In the definition of "professional," the regulation quoted above 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 evaluation report by Educational Evaluation Services, Inc. does not find that the beneficiary holds a degree which is foreign equivalent degree to a United States Bachelor of Science degree. Rather, it finds that the beneficiary's Bachelor of Business Administration from the University of Madras is equivalent to a United States Bachelor's degree in Business Administration.

The evaluation report by the American Evaluation Institute finds that the beneficiary's combined studies are equivalent to a United States Bachelor of Science degree. But that report fails to establish that the beneficiary holds one degree which is the foreign equivalent of a United States Bachelor of Science degree.

Counsel asserts that the beneficiary's academic background in Business Administration has been very helpful to the beneficiary in serving the needs of the petitioner's customers. But this assertion fails to address the issue of the minimum educational requirements stated on the ETA 750. Counsel asserts that the beneficiary's Bachelor of Business Administration qualifies as a degree in a "related field" as stated on the ETA 750. (Brief, at 2). But counsel's assertions merge the degree requirements with the major field of study requirements, which are two separate sections of block 14 of the ETA 750. In the section of block 14 for College Degree Required, the petitioner states "B.S. or foreign equiv." The record fails to establish that the beneficiary's Bachelor of Business Administration is a foreign equivalent degree to a United States Bachelor of Science Degree.

In the section of block 14 for Major Field of Study, the petitioner states "C.S./C.E./E.E. or rel." Counsel describes those abbreviations as referring to Computer Science, Computer Engineering, Electrical Engineering and/or a related field. Counsel's interpretations of those abbreviations are reasonable, given that the duties of the offered job as described in block 13 of the ETA 750 include technical work on computer networks, including, "systems architecture," as well as "multi-protocol, diagnostic and long term problem resolution" and duties to "design and build internetworking software in lab environment and evaluate and recommend equipment." (ETA 750, Part A, block 13).

The transcript attached to the beneficiary's Bachelor of Business Administration degree from the University of Madras shows no course work in the areas of computer science, computer engineering or electrical engineering, nor any course work in any areas related to those fields. The beneficiary's course work includes a range of business courses, including quantitative techniques, financial and management accounting, business data processing and business law. But none of those course titles indicates any study in technical matters related to computers or electrical engineering.

The record contains a copy of a transcript of the beneficiary's studies at Murugappa Polytechnic dated December 4, 1991. That transcript shows courses which appear to be courses in computer science and computer engineering. But those courses were not part of the beneficiary's studies toward his Bachelor of Business

Administration degree. Neither of the educational evaluations in the record refers to the beneficiary's diploma from Murugappa Polytechnic as a Bachelor of Science degree or a Bachelor of Arts degree.

In his decision, the director found that the evidence failed to establish that the beneficiary held a Bachelor of Science degree or a foreign equivalent degree. In a letter dated February 21, 2003 counsel had stated that the evidence included a "Bachelor of Science degree from the University of Madras." In his decision, the director discussed the issuance of an RFE seeking evidence of a Bachelor of Science degree and the failure of the petitioner to submit evidence of that degree. The director correctly found that the record lacked evidence that the beneficiary held a Bachelor of Science degree and the director correctly determined that the educational evaluations in the record failed to establish that the beneficiary had a foreign equivalent degree.

In her brief on appeal, counsel states that her earlier assertion in her cover letter about the type of degree held by the beneficiary's degree was made "inadvertently." But the sentence in the brief attempting a clarification in fact repeats the same erroneous assertion. Counsel states, "We inadvertently indicated on the cover letter that [the beneficiary's] Degree as a Bachelor of Science was in fact was [sic] a Bachelor of Business Administration from the University of Madras." (Brief, May 21, 2004, at 4). Counsel then goes on to state, "Nevertheless, [the beneficiary] possesses a Bachelor of Science as listed on Form ETA 750 as a result of the equivalency of his combined education as evidenced by the independent evaluation from Dr. [REDACTED] (Brief, May 21, 2004, at 4). Dr. [REDACTED] is the person who signed the educational evaluation by the American Evaluation Institute.

As discussed above, the education evaluation by the American Evaluation Institute relies on a combination of the beneficiary's education at multiple institutions at to find an equivalency to a Bachelor of Science degree, and does not find that the beneficiary holds a single degree which is the equivalent of a Bachelor of Science degree. Counsel's assertions on appeal and the evidence newly submitted on appeal fail to overcome the decision of the director, for the reasons discussed above. The decision of the director to deny the petition was correct.

In summary, the evidence fails to establish that the beneficiary held a Bachelor of Science degree or a foreign equivalent degree as of the priority date, as required by the ETA 750.

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.