

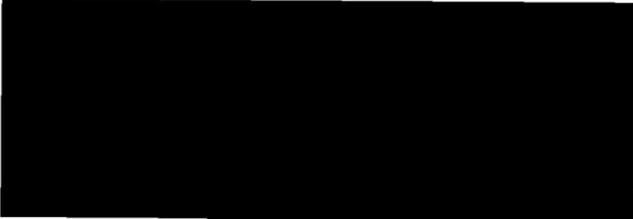
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U.S. Citizenship
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FILE:

[Redacted]
EAC-05-036-51620

Office: VERMONT SERVICE CENTER

Date: **OCT 31 2006**

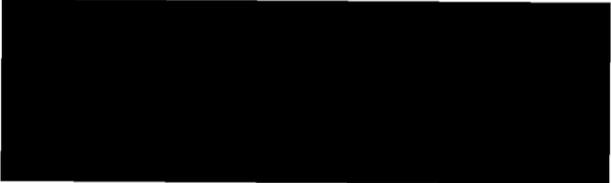
IN RE:

Petitioner:
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:



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, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director.

The instant petition is for a substituted beneficiary.¹ The petitioner is a software developing and consulting firm. It seeks to employ the beneficiary permanently in the United States as a systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification (labor certification or Form ETA 750) approved by the Department of Labor on the behalf of the original alien, accompanied the petition. The director denied the petition because the petitioner did not present evidence that the beneficiary possessed the requisite two years experience, therefore, she was ineligible for classification sought.

On appeal, the petitioner's counsel submits a brief and contends that the beneficiary possessed the requisite two years experience. Counsel also submits additional evidence for additional experience.²

Section 203(b)(3)(A)(i) of the Act 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) also provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. 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 August 14, 2001.

Citizenship and Immigration Services (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).

¹ An I-140 petition for a substituted beneficiary retains the same priority date as the original ETA 750. Memo. from ██████████ Associate Commissioner, Immigration and Naturalization Service, to Regional Directors, *et al.*, *Substitution of Labor Certification Beneficiaries*, at 3, http://ows.doleta.gov/dmstree/fm/fm96/fm_28-96a.pdf (March 7, 1996).

² The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The certified Form ETA 750 in the instant case states that this position requires two (2) years of experience in the job offered or in a related occupation such as SAP consultant, accountant, or financial business systems analyst.

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) or 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.

The instant I-140 petition was submitted on November 16, 2004 with two experience letters to establish the beneficiary's qualifications. One letter is from [REDACTED] Manager – MOSS Data Collection of AT&T. AT&T verifies that the beneficiary worked for them as a SAP FI/CO Systems Analyst from July 1, 1999 to August 31, 2000. The other letter is from [REDACTED] and certifies that the beneficiary was employed with them as a SAP FI/CO Systems Analyst from March 5, 2001 to February 28, 2002. However, the director denied the petition on January 24, 2005 finding that the beneficiary's employment at AT&T amounts to fourteen (14) months and the employment at Compusys can only count for six (6) months because the priority date is August 14, 2001, and therefore, the petitioner failed to establish that the beneficiary possessed the requisite two years experience prior to the priority date.

On appeal counsel explains that the petitioner inadvertently omitted additional experience from the submission because the petitioner did not realize that the experience between August 14, 2001 and February 28, 2002 could not count towards qualifying employment experience. Counsel submits another experience letter to demonstrate the beneficiary's qualifying experience for the proffered position. The beneficiary's third experience letter is from [REDACTED] of the Institute of Information Technology (II Tec), a software development and training company in India. II Tec's experience letter states that the beneficiary was employed by this company as a SAP Consultant from January 15, 1997 to July 15, 1998. The beneficiary's experience would have appeared to make the beneficiary meet the requirements of two years experience for the proffered position if all the employment experiences of the beneficiary were full time.

However, the AAO notes that all three experience letters do not confirm whether the employment of the beneficiary was full time. Nor did the petitioner submit any objective evidence to prove the beneficiary's full time employment, such as personnel records, payroll records, W-2 forms or any other documentary evidence showing the beneficiary worked on a full time basis or was paid a full time salary. If they were not full time, the thirty-eight (38) months part time experience would not be sufficient to meet the twenty-four (24) months requirement. The petitioner should address this issue in any future proceedings. The petition must be remanded to the director for further verification of the beneficiary's employment.

In addition, the record does not contain a Form ETA 750B for the instant beneficiary. There is no evidence showing that the petitioner submitted a new ETA 750B form for the new beneficiary. Therefore, the AAO cannot verify the beneficiary's education and experience with the ETA 750B. Submission of Form ETA 750B with the petition is required by the regulation and Memorandum from [REDACTED] Associate Commissioner, Immigration and Naturalization Service (INS, now CIS).³ The petitioner failed to submit all

³ See note 1. *supra*. [REDACTED] stated in that memo that "the petitioner has the right to substitute a new beneficiary on an ETA 750 labor certification application by filing a new I-140 petition, supported by a new

required initial evidence. The director should have issued a request for additional evidence to request the beneficiary's Form 750B.

Moreover, 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 Form ETA-750A, item 14, sets forth the minimum education, training, and experience that an applicant must have for the position of systems analyst. In the instant case, item 14 also requires "Bachelor's degree in computer science, accounting or related field. Employer will accept a three year undergraduate degree plus one year of experience in the Computer or Accounting field as meeting the degree requirement."

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.

The record does not contain the beneficiary's Form ETA 750B setting forth her credentials and providing information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities). However, in corroboration of the above regulation, the petitioner provided copies of a Degree of Bachelor of Commerce and transcripts from Andhra University in India, Honors **Diploma in Information and Systems Management and transcripts from Aptech Computer Education**, certificates of completion for computer trainings and a credential evaluation of academics from **Izkowitz of Morningside Evaluation and Consulting** pertaining to the beneficiary's credentials. This credential evaluation report evaluates the combination of the beneficiary's bachelor of commerce from Andhra University and honors diploma from Aptech Computer Education as the equivalent of a Bachelor of Business Administration degree with a concentration in Computer Information Systems from an accredited institution of higher education in the United States. The record does not contain any evidence showing that the beneficiary's bachelor of commerce degree is from a four year college program. However, a bachelor degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). It is not clear that the beneficiary's bachelor of commerce is from a three year program or four year program. The evaluation and the record of proceeding do not demonstrate that the honors diploma in information and systems management from Aptech Computer Education is a single academic degree that is a foreign equivalent degree to a U.S. bachelor's degree. As stated above, the regulation 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. If the beneficiary's bachelor of commerce is a three year degree, the combination of a degree deemed less than the equivalent to a U.S. baccalaureate degree and a diploma or certificate does not meet that requirement.

In addition, the credential evaluation submitted on appeal is rejected as incompetent evidence by the AAO. Correspondence from Queens College indicates that **Assistant Vice President and Special Counsel to the** does not have the authority to grant academic credit for either the beneficiary's academic studies or for her work experience. In December 2001, CIS received correspondence from **Assistant Vice President and Special Counsel to the**

ETA 750B for the new beneficiary."

President, Queens College.⁴ letter stated that [REDACTED] did not have the authority to grant college-level credit for foreign university studies and then added:

The only college credit that may be given at Queens College for prior work experience and training is that determined to be its equivalent by the Adult Collegiate Education (ACE) Program after a very specific process of portfolio review. It is the ACE program, not an individual faculty member, which has the authority to grant credit.

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). For the reasons above [REDACTED]'s evaluation may be given less weight in the instant case. The case must be remanded to the director for details on the beneficiary's education.

If the beneficiary does not possess the equivalent of a U.S. bachelor degree, the beneficiary must qualify herself for the proffered position with the alternative method that is a three year undergraduate degree plus one year of experience in the computer or accounting field. In the instant case, the petitioner must establish that the beneficiary possessed an additional one year of experience in computer or accounting to meet the alternative educational requirement. Additionally and as discussed above, the director needs to determine whether the experience verification in the record is sufficient for the beneficiary to meet the requisite two year experience requirement in addition to the education requirement. The director also needs to determine whether the beneficiary possessed an additional one year of experience as part of the educational requirement if he determines the beneficiary's degree is a three year undergraduate degree.

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director to request any additional evidence considered pertinent to the beneficiary's qualifications for the proffered position, such as Form ETA 750B for the beneficiary, verification of full time employment and years of the beneficiary's bachelor of commerce program. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and conduct investigation to verify the beneficiary alleged employment, if necessary, and enter a new decision.

ORDER: The petition is remanded to the director for further action consistent with this decision.

⁴ Letter to [REDACTED] Immigration and Naturalization Service, Texas Service Center, from [REDACTED] Assistant Vice President and Special Counsel to the President, dated November 7, 2001, 2 pages.