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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE [redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 26 2006
WAC 02 245 54817

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center revoked approval of the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a social change organization. It seeks to employ the beneficiary permanently in the United States as its Director of Hispanic Services. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanies the petition. The director determined that the petitioner had not established that the beneficiary has the college degree required by the preference classification for which the petitioner applied and denied the position accordingly.

On appeal, counsel submits a statement.

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 granting preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 granting 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.

The regulation at 8 C.F.R. § 204.5(l)(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."

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

> *Professionals*. 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.

If the petition is for a professional pursuant to 8 C.F.R.§204.5(l), then, the petitioner must demonstrate that the beneficiary received a United States baccalaureate degree or an equivalent foreign degree prior to the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. Here, the Form ETA 750 was accepted for processing on December 22, 1998. The Form ETA 750 states that the proffered position requires four years of college and a bachelor's degree or the equivalent,[1] and eight years of experience in the proffered position or the related field of community development.

[1] In the space reserved to state the college degree required the petitioner entered, "B.A. (equiv.). In the space reserved to state the major course of study of the required degree the petitioner entered, "Social Work."

With the petition, counsel submitted no evidence pertinent to the beneficiary's education. Because the petitioner failed to demonstrate that the beneficiary has a baccalaureate degree, the California Service Center, on October 24, 2002, requested additional evidence. The Service Center specifically requested that the petitioner, "Submit evidence to establish that the beneficiary possesses the education/training listed on the Form ETA 750 (Application for Alien Employment Certification.)" and further, "If a ***baccalaureate degree is required***, submit a copy of the official college or university transcript." [Emphasis in the original.]

In response, counsel submitted an educational equivalence evaluation dated October 3, 1994 and a letter dated December 18, 2002. The evaluation states, in essence, that the beneficiary's employment experience is equivalent to a bachelor's degree in social work from an accredited college or university in the United States.[2] In his December 18, 2002 letter counsel stated, "we are including the **education equivalent** letter confirming that the beneficiary has the equivalent of a baccalaureate degree." [Emphasis in the original.]

The petition was approved on January 17, 2003. On February 11, 2003 the beneficiary submitted a Form I-485 application to adjust status. In adjudicating the Form I-485 the service center determined that the beneficiary does not have the requisite college degree and that the Form I-140 petition had been approved in error. On November 18, 2004 the service center issued a Notice of Intent to Revoke in this matter on that ground.

In response counsel submitted a letter dated December 16, 2004. In his letter counsel cites *Richards v. INS*, 554 F.2d 1173 (1977) and *Augat, Inc. v. Tabor*, 719 F.Supp. 1158 (1989) for the proposition that failure to consider experience in assessing whether a person is a professional with a baccalaureate degree is arbitrary, capricious, and an abuse in discretion.

Counsel argued,

> The petitioner's labor certificate required a baccalaureate degree or its "equivalent." Thus, from the onset the employer avowed that an equivalent in experience and training would meet its requirement for the listed position. Specifically, the labor certificate lists 8 years in experience in community development as sufficient to meet its requirement.

Counsel further argued, in the alternative, that the instant visa petition should be considered as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree, and, on February 1, 2005, denied the petition.

On appeal, counsel reiterated his assertion that the petition should be considered as a petition for a skilled worker.

Counsel cites *Richards v. I.N.S., supra* for the proposition that,

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[2] The evaluator stated that he was basing his opinion on the equivalence of three years of experience to one year of education.

> (F)ailure to allow experience to assess whether a person is a professional with a baccalaureate degree is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."

Richards is a case in which a student visa was denied to an alien who failed to maintain his visitor visa. It does not pertain to the instant visa category. Further, as that case was decided against the alien any language decrying the reasonableness of the government's decision or the sufficiency of its basis would be, at best, dictum. Further still, decisions of a U.S. Circuit Court of Appeals are binding precedent only within jurisdiction of the court that decided the matter. Finally, this office notes that that case does not address consideration of experience in the determination of whether a beneficiary qualifies as a professional. The opinion in that case in no way supports the proposition for which counsel cited it.

Counsel further cites *Augat, Inc. v. Tabor*, 719 F.Supp. 1158 (1989), for the proposition that a beneficiary can qualify as a professional under the EB-3 category even without a bachelor's degree based upon experience equivalent to the required degree.

In *Augat, Inc. v. Tabor, supra,* the petitioner sought an EB-3 immigrant visa, as in the instant case. In that case the court found that, although the proffered position was for a professional, the beneficiary was qualified by virtue of his experience, notwithstanding his lack of a college degree. This is clearly the more salient of the cases cited by counsel.

That case is still distinguishable from the instant case. The text of that case contains no indication that the approved labor certification in that case required a bachelor's degree. In fact, the petition appears to have been denied because the proffered position **did not** require a bachelor's degree and was found, therefore, not to be a professional position within the meaning of sections 101(a)(32) and 203(b)(3)(A)(ii) of the Act. Whether the approved labor certification in that case specified that the position required a bachelor's degree remains unclear.

Further, the law in effect at the time of *Augat*, did not, as it does now, specifically require a degree (See 203(b)(3)(A)(ii) of the Act.) for the professional category. The Act has been specifically amended to require a degree.

The labor certification in this case states that the proffered position requires four years of college culminating in a "B.A. (equiv.)" in social work. The evidence indicates that the beneficiary has no such education or degree. Counsel argues that the beneficiary's employment experience qualifies him for the position, notwithstanding that it would ordinarily require a bachelor's degree.

The regulation at 8 C.F.R. § 204.5(k)(2) allows an alien to substitute a bachelor's degree plus five years of progressive experience for an advanced degree. The regulation at 8 C.F.R. § 214(h)(2)(iii)(D)(5) permits the substitution of three years of experience for one year of college for special occupation nonimmigrants. Clearly CIS' predecessor agency was capable of issuing regulations providing for the substitution of experience for education in a limited context. Despite this capability, no such provisions appear at 8 C.F.R. § 204.5(l) and its subparagraphs relating to professionals and skilled workers.

Although the regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for education and a degree, the laws and regulations applicable to the visa category in the instant case sanction no such substitution of experience for education and a degree and provide no formula pursuant to which such experience might be credited in lieu of education and a degree, and no such regulation or equivalence will be construed.

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is 8 C.F.R. § 204.5(l)(1), which states that a "United States baccalaureate degree or a foreign equivalent degree" qualifies a beneficiary for a professional position pursuant to section 203(b)(3)(A)(ii) of the Act. That regulation makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign degree. No such equivalent is available if the petition is analyzed as a petition for a skilled worker. No criterion exists pursuant to which the beneficiary's experience, or experience coupled with education, absent the requisite bachelor's degree, may be analyzed to see whether it is equivalent to that requisite degree.

The petitioner was free to specify on the Form ETA 750 the qualifications that it would accept as equivalent to a bachelor's degree.[3] Counsel urges that, in stating that the position requires eight years of education, the petitioner was specifying just such an equivalent. This office, however, does not read the Form ETA as stating those requirements in the disjunctive. The Form ETA 750 appears to require four years of college **and** a bachelor's degree in social work **and** eight years of experience, rather than one or another of those requirements.

Had the petitioner specified an acceptable substitute for the requisite bachelor's degree in this case, that would have opened the position to U.S. workers without degrees. Although those non-graduate workers may have been excluded from consideration for the proffered position, the petitioner now seeks to hire an alien worker without such a degree. The purpose of the instant visa category is to provide alien workers for U.S. positions, but only if qualified U.S. workers are unavailable. To permit the petitioner to alter the terms of the approved labor certification such that the beneficiary is eligible for the petition after the petitioner may have excluded U.S. workers with similar qualifications would frustrate the purpose of the visa category.

The Acting Director was therefore correct in treating the petition as one for a professional, and in using the criteria in the regulation at 8 C.F.R. § 204.5(l)(2) to evaluate the term "or equivalent" in the labor certification.

If the instant petition is analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) of the Act it necessarily fails, as the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) makes clear that such a position requires a U.S. bachelor's degree or an equivalent foreign degree in social work, and the beneficiary does not have that required degree.

If that the instant petition is analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act the result is the same. If the petition is considered as a petition for a skilled worker, the requirement as

[3] In that event the petition would be analyzed as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act. Because it would not, in that event, necessarily require a minimum of a bachelor's or equivalent foreign degree and would not, therefore, be a petition for a professional pursuant to section 203(b)(3)(A)(ii).

stated on the ETA 750 for a bachelor's degree or the equivalent would be unaffected. The petitioner must demonstrate that the beneficiary is qualified for the proffered position pursuant to the requirements stated on the approved Form ETA 750 labor certification. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). See also *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F2d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F2d 1 (1st Cir. 1981).

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate or an equivalent foreign degree as is required by the Form 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. The instant petition, submitted pursuant to 8 C.F.R.§204.5(l), may not be approved.

ORDER: The appeal is dismissed.