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U.S. Citizenship and Immigration Services

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[redacted]

FILE: Office: CALIFORNIA SERVICE CENTER Date: JAN 16 2007
WAC 02 235 55197

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 jeweler. It seeks to employ the beneficiary permanently in the United States as a market research analyst. 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.

The record shows that the appeal was properly and timely filed and makes a specific allegation of error in law or fact. The procedural history of this case is documented in the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's decision of denial the sole issue in this case is whether or not the beneficiary has the education necessary to qualify him for the proffered position.

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.

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

> *Skilled workers*. 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 . . . .

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. If the petition is for a skilled worker then the petitioner is still obliged to show that the beneficiary was qualified for the proffered position on that date pursuant to the qualifications listed on the Form ETA 750, including educational qualifications.

Here, the Form ETA 750 was accepted for processing on October 4, 1999. The Form ETA 750 states that the proffered position requires a bachelor's degree and that the major field of study must be, "Marketing or International Business (or its equivalent)." On the Form ETA 750, Part B the beneficiary stated that he has an LLB degree in law from Ain-Shams University in Cairo, Egypt but does not claim to have any other degree.

The AAO reviews *de novo* issues raised in decisions challenged on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all evidence properly in the record including evidence properly submitted on appeal.[1]

In the instant case the record contains (1) a photocopy of a diploma showing that the beneficiary was awarded an LLB in law on May 19, 1978, and (2) an evaluation of the beneficiary's education and experience. The record does not contain any other evidence relevant to the beneficiary's education. The record does contain employment verification letters pertinent to the beneficiary's professional employment experience.

The evaluation of the beneficiary's education and experience is dated September 8, 1999. The evaluator states that the beneficiary has, in addition to his law degree, "the equivalent of a second baccalaureate degree in Business Administration with specializations in Marketing and International Business." That equivalent is based on the sum of the beneficiary's education and professional employment experience, giving credit for one year of education for each three years of professional employment experience.

The petition was approved on September 6, 2003. On June 24, 2005, the director revoked approval of the petition. On appeal, counsel asserted that pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) the equivalent of a college education may be shown through professional employment experience. Counsel urges that the evaluation of the beneficiary's education and professional employment experience supports the proposition that the beneficiary has the equivalent of the requisite bachelor's degree.

Counsel cited *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988) and a nonprecedent decision of this office for the proposition that the beneficiary can qualify as a professional notwithstanding that he does not have the degree required by the approved Form ETA 750 labor certification.

Counsel's reliance on a non-precedent decision, the facts of which he asserts are similar to the facts of the instant case, is misplaced. Although 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS

[1] 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). The record in the instant case provides no reason to preclude consideration of any documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

employees in the administration of the Act, unpublished decisions are not similarly binding. Although counsel is permitted to note the reasoning of a non-precedent decision, to argue that it is compelling, and to urge its extension, counsel's citation of a non-precedent decision is of no precedential effect.

Matter of Sea, Inc., supra is a case involving a non-immigrant visa pursuant to section 101(a)(15)(H)(i) of the Act. 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 and provide no formula pursuant to which such experience might be credited in lieu of education and a degree. Counsel's case is not on point.

The labor certification in this case states that the proffered position requires four years of college culminating in a bachelor's degree in marketing, international business, or a related field. The evidence indicates that the beneficiary's degree is in law, rather than a field that might be construed as closely related to marketing or international business. 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), cited by counsel, 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.

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[2] but did not.[3] The Acting Director was therefore correct in treating the petition as one

[2] In that event, CIS would analyze the petition as a skilled worker petition pursuant to section 203(b)(3)(A)(i) of the Act, rather than a petition for a professional pursuant to section 203(b)(3)(A)(ii). Only petitions that require a minimum of a bachelor's degree or equivalent foreign degree are considered petitions for professionals.

[3] If the petitioner had specified an acceptable substitute for the requisite bachelor's degree on the Form ETA 750, that would have put U.S. workers without a marketing, international business or the equivalent degree on notice that they were eligible to apply for the proffered position. However, U.S. workers were not given such notice. The petitioner is now apparently seeking to hire an alien worker without such a degree in contradiction to the stated requirements of the Form ETA 750. Yet, the purpose of the instant visa category is to allow alien workers to fill only those positions for which qualified U.S. workers are not available. CIS

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 computer science or a related subject, 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 stated on the ETA 750 for a bachelor's degree in marketing, international business, or a similar field 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 the requisite bachelor's degree in marketing, international business, or a similar field. The instant petition, submitted pursuant to 8 C.F.R.§204.5(l), may not be approved.

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.

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shall not permit the petitioner to offer the beneficiary the proffered position *after* the petitioner, through the stated requirements of the Form ETA 750, excluded U.S. workers with similar qualifications from applying for and filling the position.