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

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 22 2007
WAC 04 256 53571

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 denied the preference visa petition that is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a manufacturer of flexible printed-circuit boards. It seeks to employ the beneficiary permanently in the United States as a computer systems analyst. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor accompanied 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 and is accompanied by new evidence. 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 petitioner has demonstrated that the beneficiary has the requisite education as described on the approved Form ETA 750 labor certificate.

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)(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 . . . .

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. If the petition is for a skilled worker, the petitioner is still obliged to

demonstrate that the beneficiary was qualified, by the priority date, for the proffered position pursuant to the requirements stated on the Form ETA 750. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted for processing on April 4, 2002.

To determine whether a beneficiary is eligible for a third preference immigrant visa, CIS must ascertain whether the alien is in fact qualified for the certified job. In evaluating the beneficiary's qualifications, 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 *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 Form ETA 750 states that the proffered position requires four years of college culminating in a bachelor's degree in computer science or a related field. The Form ETA 750B, which the beneficiary signed on March 20, 2002, states that the beneficiary has a bachelor's degree in environmental health awarded by the University of Western Sydney in Sydney, Australia.

In the instant case the record contains (1) a photocopy of a diploma from the University of Western Sydney, dated October 3, 2000, awarding the beneficiary a bachelor's degree in environmental health, (2) a copy of the beneficiary's transcript of classes from the university, (3) employment verification letters documenting the beneficiary's employment experience,[1] (4) an evaluation report dated November 13, 2000 that states that the beneficiary's education and experience, taken together, are the equivalent of a bachelor's degree in management information systems from an accredited college or university in the United States, and (5) another evaluation, dated August 31, 2005, that also states that the beneficiary's education and experience, taken together, are the equivalent of a bachelor's degree in management information systems from an accredited college or university in the United States. The record does not contain any other evidence relevant to the petitioner's possession of the requisite bachelor's degree in computer science or a related field.

The director determined that the evidence submitted did not establish that the beneficiary has a United States baccalaureate degree or an equivalent foreign degree in computer science or a related field, and, on December 13, 2005, denied the petition.

On appeal, counsel asserted that the evidence demonstrates that the beneficiary has the equivalent of a bachelor's degree because her employment experience is equivalent to a second major in computer science with an emphasis on management information systems and analysis. Counsel asserted that to demonstrate that she has the equivalent of a bachelor's degree in computer science the beneficiary is obliged to show, "that she has learned specific skills and received specific training which normally is obtained during a Bachelor's level course work [sic] in Computer Information Systems." In support of the proposition that employment experience can be substituted for education counsel cited *Matter of Arjani*, 12 I&N Dec. 649 (Reg. Comm'r 1967) and *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988)

[1] In addition to the degree requirement, the Form ETA 750 stated that the proffered position requires two years of relevant employment experience. That the beneficiary meets the experience requirement is uncontested. The beneficiary's experience need not, therefore, be itemized.

Matter of Arjani deals with the issue of whether an alien was eligible as a professional pursuant to section 101(a)(32) of the Act. It does not relate to whether a combination of education and experience can serve to meet a specific degree requirement stated on a labor certification.[2] Thus, that case is not on point and not persuasive.

Matter of Sea, Inc involves a non-immigrant visa pursuant to section 101(a)(15)(H)(i) of the Act. The regulations pertinent to nonimmigrant petitions explicitly permit the substitution of experience for that education and degree and provide a specific formula for the substitution in that context. The laws and regulations applicable to the visa category in the instant case, however, 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. Further, that case does not involve substitution of experience for the education required by an approved labor certification. Counsel's case is not on point and is unpersuasive.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is questionable in any way, it may be discounted or give less weight. *Matter of Sea, Inc., Id.*

The labor certification in this case states that the proffered position requires four years of college culminating in a bachelor's degree in computer science or a related field. The evidence indicates that the beneficiary's bachelor's degree is in environmental hygiene, rather than a field that might be construed as related to computer science.[3] Counsel argues that the beneficiary's employment experience qualifies her for the position, notwithstanding that it would ordinarily require a bachelor's degree in computer science or a related field.

As was noted above, substitution of experience for education is permitted in other contexts. 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.

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

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[2] *Arjani* is also inapplicable to the instant case because, in that case, the court defined "professional" as it was defined in the Act from its historical context, when section 1153(a)(3) failed to define "professional" as requiring a bachelor's degree. The Act currently defines "profession" for third preference visa petitions as "immigrants who hole baccalaureate degrees." See Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii). Thus, *Arjani* is also irrelevant to whether a bachelor's degree is required in the instant case as *Arjani* utilizes the definition of "professional" that did not necessarily require a bachelor's degree.

[3] In fact, the beneficiary's transcript shows a very low concentration of computer-related classes.

makes clear that the only equivalent for a U.S. bachelor's degree, in that context, is an equivalent foreign 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[4] but did not.[5] Whether the instant petition is analyzed as a petition for a professional pursuant to section 203(b)(3)(A)(ii) or as a petition for a skilled worker pursuant to section 203(b)(3)(A)(i) of the Act does not affect the result. In either case the petitioner is obliged to show that the beneficiary is qualified for the proffered position pursuant to the terms of the approved labor certification. In this case the labor certification unequivocally calls for a bachelor's degree in computer science or a related field.

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. CIS must look to the job offer portion of the labor certification to determine the qualifications required 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 Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.23d 1006 (9th Cir. Cal. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

The petitioner failed to submit evidence sufficient to demonstrate that the beneficiary has a United States baccalaureate in computer science or a related fields or an equivalent foreign degree as clearly required by the approved Form ETA 750 labor certification. 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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[4] 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).

[5] 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 computer science degrees. Although those non-graduate workers were apparently 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 excluded U.S. workers with similar qualifications would frustrate the purpose of the visa category.