U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 01 2007

LIN 07 015 53032

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)

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, Nebraska Service Center, denied the employment-based immigrant visa petition. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a trading and adult day health care company. It seeks to employ the beneficiary permanently in the United States as a marketing manager. 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 met the education requirements of the labor certification at the time of priority date, August 19, 2004. Therefore, the director denied the petition.

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

As set forth in the director's October 23, 2006 denial, the single issue in this case is whether or not the beneficiary met the education requirements of the labor certification at the time of the priority date.

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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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.

---

[3] 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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the Form ETA 750 was accepted on August 19, 2004.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB,* 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[3]

On appeal, counsel submits a statement and claims:

> This appeal is based on two grounds as outlined below:
> 1) The petitioner did not desire the services of the beneficiary as a System Analysts [sic]. The petitioner requested to classify the beneficiary as "Marketing Manager."
> 2) The Service ignored the fact that the beneficiary currently holds an H1B status with the petitioner which indicates that the Service accepted the beneficiary's education to have [sic] a U.S. BA/BS degree or its foreign academic equivalent. A copy of [the beneficiary's] H1B approval is attached for reference.
>
> Therefore, the Service's decision should be overruled.

To determine whether a beneficiary is eligible for an employment based immigrant visa, CIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 Mandany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the Application for Alien Employment Certification, Form ETA-750A, items 14 and 15, set forth the minimum education, training, and experience that an applicant must have for the position of marketing manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14.	Education	
	Grade School	x
	High School	x
	College	4
	College Degree Required	Bachelor
	Major Field of Study	Business Management

The applicant must also have two years of experience in the job offered, the duties of which are delineated at Item 13 of the Form ETA 750A and since this is a public record, will not be recited in this decision. Item 15 of Form ETA 750A reflects that the person chosen for the position must have excellent communication skills and must be familiar with the China market.

The beneficiary set forth his credentials on Form ETA-750B and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On Part 11, eliciting information about schools, colleges and universities attended, including trade or vocational training, the beneficiary represented that he attended the Beijing Manager's College of the Agricultural Ministry, in PR China from September 1985 to July 1988 or two years and ten months and was awarded a Bachelor's degree in Business Management (field of study was Industrial Management). Therefore, the record shows that the beneficiary only finished two years and ten months of education with regard to the achievement of his current bachelor's degree.

The beneficiary also set forth his employment experience on Form ETA-750B. As signed by the beneficiary on August 17, 2004 under penalty of perjury, the beneficiary claims to have been employed by the petitioner as a Marketing Manager from September 2003 through the present (August 17, 2004), to have been employed as an Executive Manager for China Import and Export Corporation of State Farms in Beijing, PR China from August 1994 through September 2003, to have been employed as a General Manager for Shanghai Company of State Farms of China in Shanghai, PR China from August 1993 through August 1994, and to have been employed as a General Manager for Department of Commercial Trade, Goods and Material Company of State Farms of China, in PR China from September 1991 through August 1993. The beneficiary did not indicate any additional employment experience on the Form ETA-750B.

Regarding the beneficiary's qualifications for the experience requirements of the proffered position, the record includes a letter dated May 28, 2003 from China Import and Export Corporation of State Farms, signed by [redacted], General Director, that states that the beneficiary was employed by China Import and Export Corporation of State Farms from September 1994 to December 2002. As the letter meets the regulations at 8 C.F.R. § 204.5(l)(3)(ii)(A), the AAO must conclude that the beneficiary meets the experience requirements of the labor certification.

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) is clear in allowing only for the equivalency of one foreign degree to a United States baccalaureate, not a combination of degrees, diplomas or employment experience. In the instant case, the petitioner must show that the beneficiary has the requisite education, training, and experience as stated on the Form ETA-750 which, in this case, includes a bachelor's degree with a major in business management. The Form ETA-750 as certified by the Department of Labor made no provision for anything less than a bachelor's degree in the instant case.

A bachelor's degree is generally found to require four (4) years of education. *Matter of Shah,* 17 I&N Dec. 244, 245 (Comm. 1977). The combination of education and experience, a combination of degrees, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree may not be accepted in lieu of a four-year degree.

CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817, 820 (Comm. 1988).

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, 795 (Comm. 1988).

In the instant case, the evaluation by the Foundation for International Services, Inc., dated June 9, 2003, states that "[I]n summary, it is the judgment of the Foundation that [the beneficiary] has the equivalent of three years of university-level credit in management specializing in industrial management from an accredited college or university in the United States." The beneficiary's two-year and ten month Bachelor of Business Management degree does not meet the regulatory requirements at 8 C.F.R. § 204.5(l)(3)(ii)(C) nor does the Bachelor of Business Management degree meet the requirements of the ETA-750 as certified by the Department of Labor which requires a four-year Bachelor's degree in Business Management and no alternative thereto such as a combination of lesser degrees and/or work experience.

As stated in 8 C.F.R. § 204.5(l)(3)(ii)(C), to qualify as a professional, the petitioner must submit evidence showing that the alien beneficiary holds a United States baccalaureate degree or a foreign equivalent degree and evidence that the alien is a member of the professions. In this case, the bachelor's degree must be in business management.

In the instant case, the beneficiary possesses a two-year and ten month Bachelor of Business Management degree. He does not have the required four-year Bachelor Degree in Business Management as required by the ETA-750. The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor, but was not done so in this case. In addition, although counsel claims that the director ignored the fact that the beneficiary currently holds an H1B status which indicates that the Service accepted the beneficiary's education to have a U.S. BA/BS or its foreign academic equivalent,[4] CIS, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center.

Based on the evidence submitted, we concur with the director that the petitioner has not established that the beneficiary possesses a four-year United States bachelor's degree in business management, or foreign equivalent degree as required by the terms of the labor certification and regulations.[5]

---

[4] The evaluation in the record equated each three years of employment experience to one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. *See* 8 CFR § 214.2(h)(4)(iii)(D)(*5*).

[5] It is noted that the petitioner specifically stated "we hereby submit this Immigration Petition for Alien worker on behalf of [the beneficiary], an alien of professional [sic] holding a bachelor's degree, and we are seeking classification under the third employment-based preference 203(b)(3)." Therefore, the AAO will not consider the visa petition under the skilled worker classification of 203(b)(3). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). Even if the AAO were to consider the visa petition under the skilled worker classification, the beneficiary would not meet the requirements of the labor certification as it requires a four-year bachelor's degree. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also Mandany v. Smith*, 696 F.2d 1008, 1015, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

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 sustained that burden.

ORDER: The appeal is dismissed.