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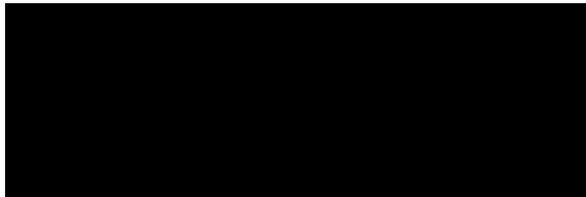
FILE: [REDACTED] Office: VERMONT SERVICE CENTER
EAC 03 265 50273

Date: DEC 21 2005

IN RE: Petitioner: [REDACTED]
 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:



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, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Vermont 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 an Internet development technology firm. It seeks to employ the beneficiary permanently in the United States as a programmer. 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 brief.

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 November 5, 2001. The Form ETA 750 states that the proffered position requires a bachelor's degree in computer information systems and two years of experience as a programmer.

With the petition, counsel submitted no evidence that the beneficiary has the required bachelor's degree. Therefore, the Vermont Service Center, on November 21, 2003, requested evidence pertinent to the beneficiary's education.

In response, counsel submitted (1) a copy of a diploma issued by the Peruvian Minister of Education and an English translation, (2) a copy of an educational evaluation dated September 22, 1999, and (3) evidence pertinent to the petitioner's employment experience.

The beneficiary's diploma shows that, on September 22, 1999, he was awarded the degree of "Technical Professional in Computing and Informatics."

The educational evaluation states that the beneficiary's education and experience, taken together, are the equivalent of a bachelor's degree with a major in computer information systems. That report states that the petitioner's education, considered separately, is the equivalent of three years, or 90 semester credit hours, of undergraduate study.

The evidence pertinent to the beneficiary's employment experience indicates that the beneficiary has considerably more than the requisite two years of experience as a programmer.

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 March 8, 2005, denied the petition.

On appeal, counsel cites *Hong Kong TV Video Program, Inc. v. Ilchert*, 685 F.Supp. 712 (1988), *Augat, Inc. v. Tabor*, 719 F.Supp. 1158 (1989), *Matter of Shin*, 11 I&N Dec. 686 (DD 1969), and *Matter of Devnani*, 11 I&N Dec. 800 (1966) for the proposition that the beneficiary's education and experience, taken together, qualify him for a professional position in the instant visa category.

Counsel urges that, as 8 C.F.R. § 204.5(k)(3) allows flexibility in establishing eligibility for the advanced degree category, the same flexibility should apply in the instant visa category. Counsel provides a copy of an H-1B1 visa approval notice dated November 8, 2002 and issued to the beneficiary. Counsel states that, by approving the beneficiary's current H-1B1 visa, CIS has determined that the beneficiary meets the eligibility requirements of a professional worker.

Counsel asserts that there is no distinction between professionals and skilled workers, as they share the same visa allotment. Finally, counsel cites two non-precedent decisions for the proposition that CIS regularly finds evaluations of education and experience to have demonstrated eligibility for professional positions.

Counsel's citation of two non-precedent decisions is inapposite. Although 8 C.F.R. § 103.3(c) provides that Service precedent decisions are binding on all Service employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's citation of a non-precedent decision is of no effect.

None of the precedent decisions cited by counsel for the proposition that the beneficiary's education and experience, taken together, qualify him for a professional position in the instant case, convinces this office. Moreover, the all predate IMMACT 90, which changed to governing statute to specifically include a degree requirement for professionals.

Matter of Shin, supra, is a case in which a District Director found that the beneficiary, who had a master's degree, qualified as a professional based on possession of that degree. Initially, this office notes that a

master's degree is a higher degree than a bachelor's degree. Because the beneficiary in the instant case possesses neither a bachelor's degree nor any other college degree, the instant case is clearly distinguishable. Further, this office is not bound by the decisions of District Directors.

In *Matter of Devnani, supra*, the beneficiary had both a two-year bachelor's degree in chemistry and a master's degree in business administration. The Acting District Director decided, in that case, that the beneficiary qualified as a professional notwithstanding that he did not have a U.S. four-year bachelor's degree or an equivalent foreign degree. The text of that case does not indicate that the approved labor certification stated that a bachelor's degree was a prerequisite of the proffered position, as the labor certification in this case does.

In *Hong Kong TV Video Program, Inc. v. Ilchert, supra*, the court found that the beneficiary of a petition for an H-1 non-immigrant visa qualified as a professional based on her experience. That case does not relate directly to the proposition for which counsel cited it, that is, that such experiential equivalents are applicable to the instant EB-3 immigrant category. The language of that decision appears to limit the decision to H-1 non-immigrant visas.

Further, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court even in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id* at 719. Again, counsel was free to note the reasoning of that case and argue that it is convincing and should be logically extended to immigrant visa categories, but did not.

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 most 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.

The labor certification in this case states that the proffered position requires four years of college and a bachelor's degree in computer information systems. The evidence indicates that the beneficiary has three years of college and no such degree. Counsel argues that the beneficiary's employment experience qualifies him for the position, notwithstanding that it would ordinarily require a bachelor's degree.

Counsel is correct that 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. Further, 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. Those regulations, however, are not directly relevant to the instant visa category.

However, those regulations do clearly indicate that 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.

Counsel's assertion that the approval of the beneficiary's H-1B1 visa indicates that the instant petition should be approved is unconvincing. 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.

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 degree¹ but did not.² It could have stated that the position required less than four years of college and no degree. 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 computer science or a related subject, and the beneficiary does not have that required degree.

¹ 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).

² 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 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.

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 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. 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.