

...data related to
...
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

BB

FEB 28 2005



FILE:

EAC 03 064 52097

Office: VERMONT SERVICE CENTER

Date:

IN RE:

Petitioner:

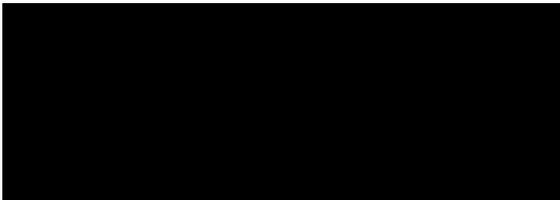
Beneficiary:



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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to employ the beneficiary as a minister/director of music. As required by statute, the petition was accompanied by certification from the Department of Labor (DOL). The director denied the petition because he determined that the petitioner failed to demonstrate that the beneficiary had the required educational credentials as stated on the approved labor certification. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought.

On appeal, counsel asserts that the beneficiary has the necessary educational credentials to meet the qualifications set forth in the approved labor certification.

Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), provides employment based visa classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date. The filing date of the petition is the initial receipt in the Department of Labor's employment service system. See 8 C.F.R. 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). In this case, that date is April 19, 2001.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, Citizenship and Immigration Services (CIS) must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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 programmer/analyst. In the instant case, item 14 shows the required number of years and type of educational background and experience an applicant for the position must possess. It states the following:

- | | | |
|-----|----------------------------|---|
| 14. | Education | |
| | College | 4 |
| | College Degree Required | B.A./B.S. |
| | Major Field of Study | Music |
| | Experience | |
| | Job Offered | |
| | Related Occupation | |
| 15. | Other Special Requirements | Ability to play piano and other keyboard instruments; ability to conduct; familiarity with eastern/global music; ability to operate a sound system and midi/multimedia skills with synthesizers and modern instruments. |

Part B of the ETA 750, signed by the beneficiary on April 19, 2001, indicates she studied at the Trinity College of Music/London in Madras, India from May 1980 until October 1987 and achieved the 8th grade. The record reflects that this period represented her studies from the age of eleven until eighteen or nineteen.

She has also received a Bachelor of Science degree in Natural Sciences from The Women's Christian College in Madras, India in 1990. As of the date of the ETA 750B, the beneficiary states that she is attending Virginia Commonwealth University and studying for a Master's degree in Music.

As evidence of the beneficiary's formal education, the petitioner initially submitted a copy of a 1987 certificate from Holy Angels school in Madras, India reflecting passage of the beneficiary's high school examination and higher secondary educational courses. The petitioner also submitted a copy of a certificate reflecting that the beneficiary received a monetary prize in 1987 from the Trinity College of Music/London in Madras, as well as a copy of her diploma from the University of Madras - The Women's Christian College, showing that she received a Bachelor of Science degree in Zoology in 1990.

The petitioner further offered copies of six reference letters attesting to her activities as a choir director and music minister in various locations, as well as an academic evaluation report from the [REDACTED] Inc., dated September 27, 1999. The signature is illegible. The report itemizes various certificates that the beneficiary has obtained. It first states that the beneficiary's high school examination and higher secondary certificates are the equivalent of a U.S. high school diploma. The evaluation also states that the beneficiary's 1987 certificate from the Trinity College of Music/London at Madras and a 1987 certificate from the "Association of Teachers of Western Music And Speech, Sri Lanka" represent the U.S. equivalent of twelve semester hours of undergraduate university study.¹ The evaluation then determines that the combination of these certificates plus the beneficiary's three-year Bachelor of Science in Zoology degree is the equivalent of a U.S. Bachelor of Science degree in Zoology. The evaluation concludes:

In summary, it is the judgment of [REDACTED], Inc. that Faith Priyadarshani Thomas has completed education equivalent to general academic high school diploma, four years of full-time undergraduate university study in music, languages (English and Tamil), Biology, Chemistry and Zoology course work, and Bachelor of Science degree in Zoology earned from a regionally accredited university in the United States.

On March 11, 2003, the director requested additional evidence from the petitioner establishing that the beneficiary has the required education as set forth in the ETA 750A. The director advised the petitioner that any evaluation must consider formal education only, not practical experience, specify if the collegiate training was post-secondary education, provide a detailed explanation of the material evaluated, and briefly state the qualifications of the evaluator. The director further informed the petitioner that the position requires a degree in music while the evidence submitted thus far had reflected that the beneficiary had a degree in zoology.

In response, counsel for the petitioner submitted an educational evaluation report from Dr. Joseph S. Godfrey of the Richmond Virginia Seminary, dated April 9, 2003. [REDACTED] itemizes the documents he has reviewed including additional undergraduate work the beneficiary completed at the Virginia Commonwealth University in 1999 and "copies of evidences study and performances of Sacred Music from 1991-2001." He concludes that the beneficiary has the U.S. equivalent of a Bachelor of Science in Music. Counsel also offers evaluations by [REDACTED] a dean of FLTI Bible College and School of Ministry and [REDACTED] a Virginia minister of music and choir director. Both are dated April 2003 and mention the beneficiary's certificates and academic studies including her 1999 undergraduate coursework at the Virginia

¹ Copies of these certificates were not submitted.

Commonwealth University, concluding that the beneficiary has the U.S. equivalent of a Bachelor of Arts degree in Music Education.

The director denied the petition on May 27, 2003. The director found that the evidence submitted did not meet the requirements of the approved labor certification because the beneficiary does not possess a U.S. bachelor of arts or science degree in music and that the mixture of items offered did not meet the specific requirements of the labor certification.

On appeal, the counsel offers a revised evaluation from Dr. [REDACTED], dated June 27, 2003, omitting her performances of sacred music 1991-2001, but arriving at the same conclusion as his earlier review, copies of documents previously submitted including a copy of a certificate from The Association of Teachers of Western Music & Speech in Sri Lanka signifying that the beneficiary passed grade four in music theory in 1982 when she was thirteen or fourteen years of age. Counsel also supplies the certificate from the Trinity College of Music/London in Madras representing the beneficiary's passage of grade 8 in pianoforte in October 1987, as well as her earlier certificates from this school from 1984 and 1985, representing her passage of grade 5 and grade 6. Counsel includes copies of various certificates from the Holy Angels' Convent High School from 1984 and 1985.

Counsel asserts that the beneficiary's credentials are sufficient to establish that she has a baccalaureate degree in music. She claims that the both the internal posting notice and the newspaper advertisement of the job opportunity both allowed for an equivalency,² and that the credentials evaluations support the conclusion that the beneficiary has the U.S. equivalent of a Bachelor's Degree in Music.

The petitioner's assertion is not persuasive. As noted by the director, CIS is bound to follow the pertinent regulatory guidelines pursuant to 203(b)(3)(A)(ii) of the Act. At the outset, it is noted that CIS, not the Department of Labor or the Virginia Employment Commission, that has final authority with regard to determining an alien's qualifications for preference status and the authority to investigate the petition under section 204(b) of the INA, 8 U.S.C. § 1154(b). This authority encompasses the evaluation of the alien's credentials in relation to the minimum requirements for the job, even though a labor certification has been issued by the DOL. *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary v. Coomey*, 662 F.2d 1 (1st Cir. 1981); *Denver v. Tofu Co. v. INS*, 525 F. Supp. 254 (D. Colo. 1981); *Chi-FengChang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989). CIS will not accept a degree equivalency or an unrelated degree when a labor certification plainly and expressly requires a candidate with a specific degree, even where a classification may not require a bachelor's degree. In this case, there is no ambiguity within the terms of this labor certification. It explicitly states that the proffered position requires a bachelor's degree, not a combination of certificates or degrees, which could be considered the equivalent of a bachelor's degree. Even if viewed as a petition for a skilled worker, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) provides that the evidence must show that the alien has the education, training or experience, and any other requirements of the individual labor certification. This labor certification does not define or accept any equivalency less than a bachelor's degree. 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 Dragon*

² We note that the copy of the notice of filing states minimum qualifications as a BA/BS or equivalent, while the description of duties states "[m]ust have graduate degree with formal training in music."

Restaurant, 19 I&N Dec. 401, 406 (Comm. 1986).

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

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 member of the professions, the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for an entry into the occupation.

We find that "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration or study" is applicable to what constitutes evidence of a degree. Because neither the Act nor the regulations indicate that a bachelor's degree must be a United States bachelor's degree, CIS will recognize a foreign equivalent bachelor's degree to a United States baccalaureate. The above regulation uses the singular description of a foreign equivalent degree. Thus, the plain meaning of the regulatory language sets forth the requirement that a beneficiary must produce one degree that is determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional for third preference visa category purposes.

On appeal, counsel submits a copy of a letter dated January 7, 2003 from [REDACTED] of the INS Office of Adjudications to counsel in another case, expressing his opinion about the possible means to satisfy the requirement of a foreign equivalent of a U.S. advanced degree for purposes of 8 C.F.R. 204.5(k)(2). Mr. [REDACTED] states that he believes that a single foreign degree is not required to satisfy this equivalency.

It is noted that this [REDACTED] letter involved the interpretation of a different regulatory provision than that guiding the present case, i.e., an equivalent of a U.S. advanced degree, not a baccalaureate degree. Moreover, private discussions and correspondence solicited to obtain advice from CIS are not binding on the AAO or other CIS adjudicators and do not have the force of law. *Matter of Izummi*, 22 I&N 169, 196-197 (Comm. 1968); *see also*, Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, U.S. Immigration & Naturalization Service, *Significance of Letters Drafted By the Office of Adjudications* (December 7, 2000).

The labor certification and regulation cited above clearly require an applicant for the position minister/director of music to have a U.S. bachelor's or a foreign equivalent degree. A bachelor's degree is generally found to require 4 years of education. *Matter of Shah*, 17 IYN Dec. 244, 245 (Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah*, at 245. Based on similar reasoning, it cannot be concluded that this beneficiary's three-year baccalaureate in zoology from the University of Madras/ The Women's Christian College also would represent a four-year baccalaureate degree in music.

It is further noted that although the preamble to the publication of the final rule at 8 C.F.R. § 204.5 in 1991 specifically dismissed the option of equating "experience alone" to the required bachelor's degree for a second preference classification as an advanced degree professional or as a professional under the

third classification, similar reasoning would also prohibit the acceptance of an equivalence in the form of multiple lesser degrees, professional training, or any other level of education deemed to be less than a "foreign equivalent degree" to a United States baccalaureate degree. *See* 56 Fed. Reg. 60897 (Nov. 29, 1991). Therefore, the beneficiary's combination of certificates and zoology degree from the University of Madras do not represent a four-year degree in music. The record does not contain an official college or university record showing that the beneficiary possesses a baccalaureate degree in music from any institution of higher learning either abroad or in the United States as required by 8 C.F.R. § 204.5(l)(3)(ii)(C).

The record contains an evaluation from [REDACTED] Inc., which combines all of the beneficiary's high school studies, certificates and zoology coursework to conclude that she has a bachelor's degree in zoology as well as four years of full-time undergraduate university study in music. It is noted that this ambiguous conclusion does not go so far as to state that the beneficiary has a bachelor's degree in music. It is unclear how it even determined that four years of undergraduate study of music was achieved when it determined that the beneficiary's two 1987 certificates of study from the Trinity College of Music/London in Madras and the Association of Teachers of Western Music and Speech/Sri Lanka amounted to only twelve college semester hours. The evaluations from Dr. [REDACTED] and Ms. [REDACTED] also appear to combine all of the beneficiary's high school, certificates, and undergraduate work in India and the U.S. to conclude that she already possessed a baccalaureate degree in music as of the priority date of April 19, 2001. As noted above, it cannot be concluded that these evaluations are probative of the beneficiary's credentials as required by the terms of the labor certification. 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, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The petitioner's actual minimum requirements could have been clarified or changed before the Form ETA 750 was certified by the Department of Labor. Since that was not done, the director's decision to deny the petition must be affirmed.

Based on the evidence submitted, the AAO concurs with the director that the petitioner has not established that the beneficiary possesses a United States Bachelor of Science or Bachelor of Arts in Music or a foreign equivalent Bachelor of Arts or Bachelor of Science in Music as required by the terms of the labor certification. Therefore, the beneficiary is not eligible for the visa classification sought.

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.