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U.S. Citizenship
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Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 07 2005
WAC-03-034-53215

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:
[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, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the immigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen. The motion will be granted. The prior decision of the AAO will be affirmed. The appeal will remain dismissed and the petition will remain denied.

The petitioner provides financial consulting and insurance services. It seeks to employ the beneficiary permanently in the United States as an assistant marketing manager. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director denied the petition because he determined that the beneficiary did not present evidence that he had the foreign equivalent of a United States bachelor's degree. The director concluded that the petitioner had not established that the beneficiary was eligible for the visa classification sought. The AAO affirmed the director's decision.

On motion, the petitioner's counsel withdraws his past arguments and presents new evidence that the beneficiary's credentials are sufficient to meet the requirements of the labor certification.

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 professions¹.

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.

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. 8 C.F.R. § 204.5(d). In this case, that date is July 14, 1998.

To determine whether a beneficiary is eligible for an employment based immigrant visa as set forth above, 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 assistant marketing manager. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education

¹ The AAO previously cited to 203(b)(3)(A)(i) of the Act in error. The director correctly cited to 203(b)(3)(A)(ii) of the Act in his decision.

Grade School	6
High School	4
College	4
College Degree Required	Bachelors Degree
Major Field of Study	Business Administration or equivalent ²

The applicant must also have two years of employment experience in the job offered or the related occupation of sales and administration. Additionally, Item 15 sets forth the other special requirements of "Must be able to communicate in Hindi and Punjabi (Indian Languages)."

The beneficiary set forth his credentials on Form ETA-750B. On Part 11, eliciting information of the names and addresses of schools, college and universities attended (including trade or vocational training facilities), he indicated that he attended Victoria Jubilee Technical Institute in India in the field of Engineering from June 1971 through June 1975, culminating in the receipt of a degree in "[e]lectrical [e]ngineering (electronics)." He provides no further information concerning his educational background on this form, which is signed by the beneficiary on April 20, 1998 under a declaration under penalty of perjury that the information was true and correct.

The beneficiary set forth his employment experience on Part 15 of the Form ETA-750B. He indicated that he was employed at Process & Control Elements, in Bombay, India, as a sales agent from 1985 to 1987; was self-employed in Bombay, India in sales and marketing (import/export) from 1977 to a date left blank; and was with the petitioner from a date left blank to present as an assistant marketing manager.

In corroboration of the Form ETA-750B, the petitioner provided copies of the beneficiary's diploma in Electrical Engineering (Electronics) issued by Victoria Jubilee Technical Institute in 1975, without transcripts, the beneficiary's resume, and a sworn and notarized affidavit from the beneficiary stating that he completed a bachelor degree in electrical engineering from Victoria Jubilee Technical Institute in 1975. The beneficiary also stated in the sworn and notarized affidavit that he worked with Brisk Electronics Private Ltd. in Bombay, India as a marketing executive from December 1975 to October 1977 and then owned and operated his own business from December 1977 to August 1985. After selling his business in 1985, he then stated that he worked from August 1985 to October 1987 with Process and Control Elements in Bombay, India as an Exclusive Sales Agent on a full-time basis. The beneficiary does not state anything about pursuing, receiving, or obtaining any additional education at any other institute than Victoria Jubilee Technical Institute in any other academic program. The petitioner submitted experience letters conforming to the requirements set forth at 8 C.F.R. § 204.5(1)(3)³.

² "Or equivalent" was added by amendment before DOL's certification.

³ (ii) *Other documentation*—

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be

A credential evaluation drafted by American Evaluation Institute (AEI) was also initially submitted with the petition and stated that the combination of the beneficiary's completion of a bachelor's degree in electrical and electronics engineering from attendance at Victoria Jubilee Technical Institute in India from 1971 to 1975 and eight years "management experience . . . at [a s]enior level is equal to at least a Bachelor's Degree in Business Administration offered at Accredited Institutions of Higher Education in the United States." The evaluation stated that it examined "certificates, work experience, and transcripts" to make its decision. The evaluation does not mention any other educational credentials achieved by the beneficiary.

Because the evidence was insufficient, the director requested additional evidence on January 10, 2003, specifically requesting evidence of the beneficiary's bachelor's degree in the form of an official college or university record and asked the petitioner not to submit a credential evaluation from a service that evaluates educational equivalents.

In response to the director's request for evidence, counsel stated that the proffered position requires four years of experience (two years in the job offered and two years in sales and administration)⁴, but that a chart outlining the beneficiary's educational experience and employment experience and credential evaluation demonstrate that the beneficiary has a total of 11 years and 8 months of experience, and after using employment experience towards an educational equivalency, still has 5 years and 8 months of experience left to meet the experience requirements of the proffered position. Neither counsel nor the petitioner mentioned any other educational credentials achieved by the beneficiary.

The director denied the petition on April 2, 2003, finding that the beneficiary has a degree in electrical and electronics engineering but not business administration and that the credential evaluation's determination of equivalency to a bachelor's degree was primarily based upon the beneficiary's employment experience.

On appeal, counsel asserted that the petitioner's amendment of the proffered position's educational requirements to include "or equivalent" to the business administration field for the degree requirement was intended to permit a combination of education and experience. Counsel also asserted that in the H-1B nonimmigrant visa context, three years of experience may be converted to one year of experience, and thus, the credential evaluation from AEI is sufficient evidence of the beneficiary's qualifications for the proffered position.

The AAO dismissed the appeal on December 13, 2003 noting the failure of the petitioner to submit transcripts to corroborate that the beneficiary's program at Victoria Jubilee Technical Institute in India was four years and that the requirements of the proffered position did not permit for a combination of education and experience in lieu of

accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

⁴ The proffered position clearly requires either two years of experience in the job offered *OR* two years of experience in sales and administration, not both.

a single bachelor's degree in the related field. The AAO also noted that employment-based immigration visa petitions do not accept the 3:1 employment experience and educational equivalency ratio permitted in the H-1B context.

On motion, counsel states that the petitioner disagrees with the AAO's decision but does "not wish to base our case on this claim any longer." Counsel states that "[t]he employer has conducted further investigation of the qualifications of the alien and came upon a diploma in Business Administration completed by [the beneficiary] at the Institute of Marketing and Management (IMM) in India during the academic year of 1988-1989." Thus, the petitioner submits a new credential evaluation from AEI as well as diplomas and transcripts for both programs the beneficiary allegedly attended for the first time on motion, without explanation for the failure to provide the transcripts or represent the beneficiary's other educational accomplishment earlier in the proceedings⁵.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Thus, since the petitioner submits new evidence and counsel states new facts to be proved, namely, the beneficiary's qualifications to perform the duties of the proffered position, the motion qualifies as a motion to reopen.

At the outset, the transcripts submitted on motion will not be considered. The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8).

As noted by the AAO in its prior decision, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner submits the transcripts on motion without explaining the unavailability of the transcripts in response to the director's request for evidence. The AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The AAO has serious concerns with the fact that the beneficiary has only now decided to represent his completion of a diploma in business administration at IMM in India from 1988 to 1989. The beneficiary submitted a sworn statement that discussed his activities and major life events going back to 1971 around that timeframe and was signed in 1998. The proffered position requires a degree in business administration. Business administration is the crux of the proffered position. It is not reasonable to believe that the beneficiary or the petitioner or counsel would not have omitted such a critical factual representation until now. The Form ETA 750B Part 15 detailing the dates of the beneficiary's employment history conveniently left blank the ending date of the beneficiary's alleged self-employment and beginning date of the beneficiary's employment with the petitioner. All forms

⁵ Even if counsel did provide an explanation, the AAO notes that the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

submitted in connection with the beneficiary's concurrently filed adjustment of status application to lawful permanent resident did not make representations concerning the 1988 to 1989 timeframe.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988) states:

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition.

Matter of Ho, 19 I&N Dec. at 591-592 also states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The new AEI evaluation submitted with the petitioner's motion to reopen states the following, in pertinent part:

[The beneficiary] attended the Victoria Jubilee Technical Institute in India from June 1971 to June 1975 and [o]btained a Bachelor's degree in Electrical and Electronics Engineering in June 1975. He later attended [IMM] in India from June 1988 to September 1989 and was awarded a Diploma in Business Administration in 1989. [The beneficiary] met the general education requirements as part of his Bachelors Degree in Electrical Engineering and his major requirements in Business Administration at [IMM]. These studies are equivalent to a Regionally Accredited Bachelor of Science in Electrical Engineering and a Bachelor of Science in Business Administration degree offered at Accredited Institutions of Higher Education in the United States.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(C), guiding evidentiary requirements for "professionals," 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.

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, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). 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 (four years in college) in business administration or an equivalent field.

It is noted that the *Matter of Sea Inc.*, 19 I&N 817 (Comm. 1988), provides: “[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.” The AEI evaluation is unreliable since it makes the same conclusion based on two distinct sets of facts. Additionally, AEI is not a member of the National Association of Credential Evaluation Services (NACES), which, according to NACES' website at <http://www.naces.org/aboutnaces.htm>, is:

an association of private foreign educational credential evaluation services committed to formulating and maintaining ethical standards in the field of foreign educational evaluation. Within the United States, no government agency monitors the establishment of foreign credential evaluation services. NACES® was founded in 1987 by credential evaluation services dedicated to promoting excellence and committed to setting the standards for the profession.

AEI's first credential evaluation improperly included the beneficiary's employment history to determine that the beneficiary has the equivalent of a bachelor's degree in business administration. The director and the AAO properly discussed the deficiency of the petitioner's attempt to combine the beneficiary's educational degree in an unrelated field with his employment history in their decisions, which will not be reiterated in this decision.

AEI's evaluation on motion lacks credibility. If AEI is not a member of NACES, then the AAO cannot verify that it employs standards to ascertain and verify the veracity and authenticity of documentation and information received by its clients. Its first evaluation failed to include copies of the documentation it allegedly evaluated, such as transcripts, which were submitted for the first time on motion after two denials and an ignored request for those transcripts to be submitted into the record of proceeding. On motion, the petitioner suddenly obtains additional relevant and probative evidence of the beneficiary's qualifications that it gave to AEI to evaluate. The AAO finds it unlikely that AEI evaluated the authenticity of the documentation from IMM.

Based on the evidence submitted, we affirm the AAO's prior decision and concur with the director that the petitioner has not established that the beneficiary possesses a bachelor's degree as required by the terms of the labor certification.

Beyond the decision of the director and the AAO's decision, the AAO notes on review that the petitioner's representative and the beneficiary share the same last name⁶. The forms and correspondence submitted to DOL for

⁶ An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer*

the Form ETA 750's certification contained in the record of proceeding do not indicate that any disclosures were made about familial relationships. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." See *Matter of Summart 374*, 00-INA-93 (BALCA May 15, 2000).

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.

Enterprises, Inc. v. United States, 299 F. Supp.2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).