



U.S. Citizenship
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Services

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FILE:

[Redacted]
EAC-03-220-52440

Office: VERMONT SERVICE CENTER

Date: **OCT 14 2005**

IN RE:

Petitioner:
Beneficiary:



PETITION: 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 preference 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 software consultant and development company. 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, accompanied the petition. The ETA 750 submitted with the petition lacked a multicolored approval stamp of the Department of Labor. The director determined that the original ETA 750 had been lost and requested a duplicate copy from the Department of Labor, pursuant to the regulation at 20 C.F.R. §656.(e). A duplicate ETA 750 sent to the director by facsimile transmission by the Department of Labor is now in the file.

Concerning the instant petition, the director determined that the petitioner had not established that the beneficiary had a bachelor's degree or the equivalent in the field of computer science as required on the Form ETA 750, and denied the petition accordingly.

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 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 who are members of the professions.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Comm. 1977). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). The priority date in the instant petition is May 1, 2000.

The Form ETA 750 states that the position of programmer requires a bachelor's degree or the equivalent in the field of computer science, and two years of experience in the offered position or in the related occupation of software engineering system analysis, computer program design and development.

On the Form ETA 750B, signed by the beneficiary on March 30, 2000, the beneficiary claimed to have worked for the petitioner as a programmer, but the beneficiary did not enter any information in the items in block number 15a for the date started and the date left.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) of trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The I-140 petition was submitted on July 1, 2003. On the petition, the petitioner claimed to currently have twelve employees. The items on the petition for the date on which the petitioner was established, its gross

annual income and its net annual income were left blank. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated September 3, 2003, the director requested additional evidence pertaining to the beneficiary's education. In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on November 26, 2003.

In a decision dated January 18, 2005 the director found that the petitioner sought classification of the beneficiary as a professional under section 203(b)(3)(A)(ii), a classification requiring a bachelor's degree. The director's decision included a statement that "five years of progressive experience may be used to equate to the Master's Degree required by the classification requested." (Director's decision, January 18, 2005, at 2). The director made no further reference to any alleged requirement for a master's degree. The director then determined that the evidence failed to establish that the beneficiary had a bachelor's degree or the equivalent, and denied the petition.

On appeal, counsel submits a brief and additional evidence.

Counsel states on appeal that the petitioner seeks classification as a professional, not as an advanced degree professional. Counsel states that educational evaluations in the record establish that the beneficiary's combination of education and experience is equivalent to a United States bachelor's degree. Counsel states that the educational evaluations thereby satisfy the requirement on the ETA 750 that the beneficiary has a bachelor's degree or its equivalent. Counsel also states that the Form I-140 contains a single check box for both the professional preference category and the skilled worker preference category, and that if the petition cannot be approved as one for a professional it is approvable in the alternative as one for a skilled worker.

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 record contains a copy of a degree of bachelor of arts awarded the beneficiary on March 30, 1985 by the Manila Athenum, Manila, Philippines, with supporting course transcript. The transcript indicates that the beneficiary graduated with a major in Pre-Divinity. The record also contains copies of certificates of the beneficiary dated from 1985 through 1996 for completion of computer training courses and a business seminar. The record also contains a letter dated August 1, 1997 from the acting country director, CARE-Philippines, stating the beneficiary's work experience with that organization from October 16, 1987 until March 15, 1993, as an analyst/programmer, from April 17, 1993 to July 23, 1995 as MIS officer, and from January 8, to July 8, 1996 as an analyst/programmer. The letter states that in all of his positions the beneficiary was responsible for computer software programming and related duties.

An educational evaluation dated October 28, 1997 by Multinational Evaluation and Translation Services, Inc., Atlanta, Georgia, finds that the beneficiary's combination of education and experience is equivalent to a bachelor's degree in computer science and arts from an accredited university in the United States.

An educational evaluation dated November 6, 2003 by Professor [REDACTED] of Medgar Evers College of the City University of New York similarly finds that the beneficiary's combination of education and experience is equivalent to the equivalent of a bachelor of science degree in computer science from an accredited institution of higher education in the United States.

Citizenship and Immigration Services (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 that evidence, or may give less weight to it. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

The only regulation specifying the equivalent of a bachelor's degree in the context of immigrant petitions is one which pertains to professionals. 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.

Skilled worker means an alien who is capable, at the time of petitioning for this classification, 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. Relevant post-secondary education may be considered as training for the purposes of this provision.

No provision pertaining to skilled workers specifies the equivalent to a bachelor's degree. Therefore even if it were assumed that the petition is for a skilled worker, the petition would thereby lack any criteria by which to evaluate what is to be considered equivalent to a bachelor's 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 in computer science, but the petitioner chose not to do so.

In the definition of "professional," the regulation quoted above uses a singular description of 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.

As noted above, the Form ETA 750 states that the position of programmer requires a bachelor's degree in the major field of computer science or the equivalent. 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).

Neither of the two evaluation reports in the record finds that the beneficiary holds a foreign degree which is equivalent to a U.S. bachelor's degree in computer science.

The ETA 750 also explicitly requires four years of college. The evidence in the record indicates that the beneficiary had less than four years of college as of the priority date.

In his brief, counsel discusses in detail an alleged error of the director in treating the petition as one for an advanced degree professional. Counsel states that due to a mechanical error, the petition was submitted with no box checked to indicate the classification category, and that the receipt for the petition issued by the Vermont Service Center erroneously indicated that the petition was for an advanced degree professional. Counsel states that the evidence in the record clearly showed that the petition was for a professional, not for an advanced degree professional. The original I-140 in the file bears a hand written check mark in the box for advanced degree professional in blue ink which appears similar to the blue ink used by the petitioner's executive vice president in

signing the petition, but the record does not establish with certainty when that check mark was entered. The information in the items on the rest of the form is typed.

In his decision, the director treated the petition as one for a professional, not for an advanced degree professional. Although the director referred to the work experience equivalence for a master's degree in his decision, the director made no further reference to a master's degree. The denial was solely on the basis of the failure of the evidence to establish that the beneficiary had a bachelor's degree or the equivalent. Therefore the petition was evaluated as one for a professional, the category which counsel asserts is the correct one. For this reason, any ambiguity concerning the preference category has been resolved in the manner requested by counsel.

Counsel also asserts that if the petition cannot be approved in the category for professionals, it should be approved in the category for skilled workers, since a single check box on the Form I-140 pertains both to skilled workers and to professionals. However, regardless of whether the petition sought classification of the beneficiary as a skilled worker or as a professional, the beneficiary had to meet all of the requirements stated by the petitioner in block #14 of the labor certification as of the day it was filed with the Department of Labor. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). The petitioner has not established that the beneficiary had a bachelor's degree in computer science on May 1, 2000 or a foreign equivalent degree. In addition, the petitioner has not established that the beneficiary had four years of college on May 1, 2000 as required by the ETA 750.

Counsel asserts that the employer specified a definition of the term "or equivalent" to mean "any combination of education and/or experience as determined by an Evaluation Service to be equivalent to a U.S. baccalaureate degree in Computer Science." (Brief, March 18, 2005, at 2). Counsel states that the definition was placed in correspondence dated August 14, 2001 in response to the Department of Labor's Notice of Findings dated July 3, 2001. Counsel states that the reason that definition was omitted from the Form ETA 750, Part A, Item 14 was due to a lack of space in that item. No copy of the August 14, 2001 letter referred to by counsel is found in the record. Moreover, the phrase "or equivalent" is found in Part A, Item 15, Other Special Requirements. Item 15 contains ample additional space which could have been used for the definition of "or equivalent" as stated by counsel. Furthermore, for several items on the ETA 750 where space was insufficient, the petitioner provided information on attachments to the ETA 750. The attachments contain further information on Part A, Item 13, and on Part B, Items 11 and 15(a), (b) and (d) of the ETA 750 submitted by the petitioner. Therefore, lack of space on the Form ETA 750 does not appear to be a plausible reason for the omission of a definition of the phrase "or equivalent" from the ETA 750 submitted by the petitioner.

For the foregoing reasons, the record fails to establish that the petitioner provided a definition of the phrase "or equivalent" on the ETA 750 or on any documents incorporated into the ETA 750.

In his decision, the director correctly found that any evaluation of the educational background of a beneficiary seeking an immigrant visa must establish that the beneficiary holds a United States baccalaureate degree or a foreign equivalent degree. The director correctly found that both of the educational evaluations in the record relied on a combination of education and experience in finding that the beneficiary had the equivalent of a United States bachelor's degree. The director therefore denied the petition.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director.

In summary, the issue is whether the beneficiary met all of the requirements stated by the petitioner in block 14 of the labor certification as of the day it was filed with the Department of Labor. The petitioner has not established that the beneficiary had a bachelor's degree in computer science on May 1, 2000 or the equivalent.

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.