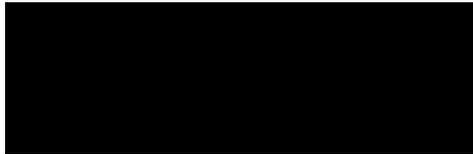




U.S. Citizenship  
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FILE: LIN 03 195 51225 Office: NEBRASKA SERVICE CENTER Date: **SEP 20 2005**

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:  
[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*  
Robert P. Wiemann, Director  
Administrative Appeals Office

\* **DISCUSSION:** The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a sunroof manufacturer. It seeks to employ the beneficiary permanently in the United States as a director of human resources. 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 Alien Employment Certification accompanying the petition specified<sup>1</sup> and denied the position accordingly.

On appeal, the 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), as is the case here, 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 February 4, 2002.

The issue to be discussed in this case is whether or not the petitioner had established that the beneficiary has the requisite education as stated on the labor certification. 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. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

<sup>1</sup> In the subject case, the petitioner “checked-off” on I-140, Part 2, item “e”. that states “A skilled worker (requiring at least two years of specialized training or experience) or professional ....”

To determine whether a beneficiary is eligible for an employment based immigrant visa, Citizenship & Immigration Services (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, (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 certified Alien Employment Application, Form ETA 750 A, item 14 describes the requirements of the proffered position and occupation of director of human resources as follows:

14.	Education (enter number of years)	Form Heading
	Grade School	<u>8</u>
	High School	<u>4</u>
	College	<u>4</u>
	College Degree Required	<u>Bachelor's degree</u>
	Major Field of Study	<u>Human Resources Management or equivalent</u>
	Training	Blank
	Experience	Form Heading
	Job Offered	Form Heading
	Number -Years   Mos.	<u>5</u>
	Related Occupation	Form Heading
	Number -Years   Mos.	<u>5</u>
	Related Occupation ...	Form Heading
	Specify	Human Resources Manager

The employer, who is the petitioner here, has prepared the above ETA 750 A as an essential part of the labor certification process used to support preference visa petitions that are employment based. An employer who desires to employ an alien in the United States must undertake a multiple step process as directed by the United States Department of Labor (USDOL) which, once approved, certifies the Alien Employment Application for the occupation based upon the above criteria specified by the employer although the USDOL may cause the employer to modify the Form ETA 750 as submitted to bring the application into compliance with its regulations as a condition to certification.

In the present case, the above requirements state that the occupation of director of human resources requires a four-year college degree in the field of Human Resources Management or its equivalent. It is important to note that the four-year college bachelor's degree is the employer's requirement. As stated above, 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.

The equivalency, as specified in the next criteria in the form which is the "Major Field of Study" is not the equivalency recited in the regulation 8 C.F.R. § 204.5(l)(3)(ii)(C) *Supra*. The certified Alien Employment Application specifies that the major field of study which is the minimum that the employer will accept is "Human Resources Management or *equivalent* [emphasis added]." In our present case the beneficiary has a three-year degree in sociology. The employer who is our petitioner requires five years of occupational experience.

Along with Form ETA 750, Part A, set forth above, the employer also is required to submit Form ETA 750, Part B that is a "Statement of Qualifications of Alien." Part B identifies the alien, specifies his current and prospective address in the United States, his education including trade and vocation training, and lists his work experience.

The Form ETA 750 Part B prepared by the beneficiary states that the following education experience:

Block 11

[Form Heading] Names and Addresses of Schools, Colleges, and Universities attended (including training or vocational training facilities)

\* \* \*

Bloor Collegiate Institute, Bloor, Ontario, Canada

Field of Study	<u>High School</u>
From ...[mo./yr]	<u>09/1967</u>
To ...[mo./yr.]	<u>06/1972</u>
Degrees or Certificates Received	<u>High School Graduation</u>

York University, Toronto, Ontario, Canada

Field of Study	<u>Sociology</u>
From ...[mo./yr]	<u>09/1972</u>
To ...[mo./yr.]	<u>05/1975</u>
Degrees or Certificates Received	<u>Bachelor of Arts</u>

Humber College of Applied Arts and Technology, Toronto, Ontario, Canada

Field of Study	<u>Personnel Management</u>
From ...[mo./yr]	<u>06/1976</u>
To ...[mo./yr.]	<u>06/1979</u>
Degrees or Certificates Received	<u>Certificate in Personnel Management</u>

Based upon the above information provided by the beneficiary, he graduated high school, and then entered York University where he received a three-year degree in the field of sociology. Thereafter, he attended Humber College, and after three years attendance, received a certificate in the field of personnel management. The petitioner is not asserting that the beneficiary has a four-year college degree in Human Resources Management; nor is the petitioner stating that Humber College "accepted" the credits earned at York University, and awarded the beneficiary a bachelor's degree in the requisite field after a course of education. Rather, counsel asserts, "... A petitioner may properly combine education completed at several foreign institutions of higher education to demonstrate equivalency to a U.S. baccalaureate degree."

Throughout her brief, counsel asserts and attempts to explain that when the petitioner, who is the employer-applicant on the Alien Employment Application, stated that the minimum job requirement for the occupation of director of human resources is a four year college degree in the field of study of Human Resources Management or equivalent, that some other criteria for educational achievement would also be acceptable. This is an assertion of counsel. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N

Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). CIS must examine the documents submitted that are now in the record of proceedings and referenced in this discussion. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Petitioner's clear intent is expressed in the certified Alien Employment Application. A four-year college degree is required in Human Resources Management or its equivalent. CIS is bound by the regulations and above-cited case law to require the petitioner and beneficiary to meet the requirements specified on the ETA-750.

The subject Form ETA 750 Part A requires a bachelor degree from a college. A bachelor degree is generally found to require four (4) years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm. 1977). Therefore, the combination of education and experience may not be accepted in lieu of a four-year degree.

The petitioner has submitted an education credential evaluation dated August 28, 2000 of the beneficiary's foreign schooling as it equates to a higher education offered in the United States. It states in pertinent part:

\* \* \*

[Beneficiary's] Enrollment in York University is based on graduation from high school; the University is an accredited institution of higher education in Canada. [The beneficiary] ... completed three academic years of undergraduate education and received the diploma upon graduation in 1975. This is equivalent to completion of three academic years of undergraduate education in the United States. [The beneficiary] ... also completed seven years and eleven months of progressively advanced work experience in the field of Human Resource Management.

In summary, it is the judgement [sic] of the ... [credentials evaluation service] that ... [the beneficiary] has the equivalent of three years of formal undergraduate education and one additional year of undergraduate education by way of employment ...

A second credential evaluation report by another evaluation service submitted by petitioner dated May 29, 2003, states in summary that based upon all of the beneficiary's "coursework" that the beneficiary has the equivalent of a Bachelor's degree in Human Resource Management. Although mention is made in the evaluation report of the Humber College certificate, there is no positive statement that this education is a continuation of the former education but rather follows counsel's assertion that the evaluator is combining education completed at several foreign institutions of higher education to demonstrate foreign equivalency to a U.S. baccalaureate degree.

We note that this second evaluation report is dated after the director's decision. It would appear to have been requested to support the appeal. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to

the director's request for evidence. *Id.* Under the circumstances, the AAO need not, and does not, consider the sufficiency of the second evaluator's opinion submitted on appeal.

Further, 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 (Comm. 1988). In this instance, two credential evaluators opine that the beneficiary does not have a four-year college degree. It is also true that the first credential's evaluator did not attempt to rely on the Humber College certificate to "combine" a three-year degree with a certificate to equate to a four-year college degree.<sup>2</sup> Counsel did not attempt to explain the inconsistent evaluation opinions submitted.

*Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988) 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.

Despite counsel's arguments, the Service will not accept a degree equivalency when a labor certification plainly and expressly requires a specific degree, as is the present case.

As noted above it was petitioner's own job requirement that a Bachelor's degree in Human Resource Management or equivalent be the minimum occupation requirement. The certified alien employment certification requirement is listed under "college", then "college degree required", then "major field of study." Counsel, in his brief in this matter, has provided sections of the regulations implementing the Act one of which states the requirement controlling in this matter by defining a professional as one who holds "at least a United States baccalaureate degree or a foreign equivalent degree and who is a member of the professionals."<sup>3</sup>

The above regulations use 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.<sup>4</sup>

Counsel introduces two letters prepared as an advisory guidance by CIS personnel for other immigration matters involving immigration visa regulations for other visa classification, that is "Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability."<sup>5</sup> Differing preference categories have different requirements under the regulations. Here, we follow the regulations first above recited that control our adjudications of the subject preference category. Also, the facts of each case are unique and differing facts will effect the Service Center's adjudication for each case. Counsel has not provided this information. The contents of the letters submitted are not relevant to our controversy.

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<sup>2</sup> It, instead, used the three-year degree with occupational experience, which clearly cannot be the methodology for immigrant petitions under the regulation first above stated.

<sup>3</sup> 8 C.F.R. § 204.5(1)(2).

<sup>4</sup> Nonimmigrant visas do allow a combination of education and experience. See 8 C.F.R. § 214.2 (h)(4)(iii)(C)(5) and 8 C.F.R. § 214.2 (h)(4)(iii)(D).

<sup>5</sup> 8 C.F.R. § 204.5(k)(2).

Counsel refers to an unpublished decision issued by the AAO. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

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(1), 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.