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U.S. Citizenship
and Immigration
Services

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FILE: LIN-04-067-52198 Office: NEBRASKA SERVICE CENTER Date: APR 26 2006

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:



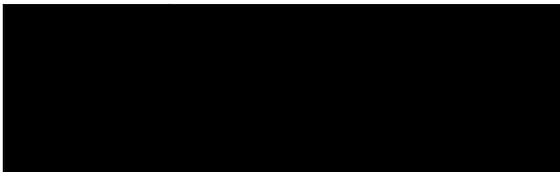
INSTRUCTIONS:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

CC:



DISCUSSION: The Director, Nebraska Service Center, denied the third preference employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner's business is software consulting. It seeks to employ the beneficiary permanently in the United States as a systems analyst. 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.

On appeal, the petitioner's counsel contends that the beneficiary's credentials are sufficient to meet the requirements of the labor certification and submits additional evidence¹.

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 professions.

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). See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). In this case, that date is March 21, 2003.

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

¹ A properly executed Form G-28, Notice of Entry of Appearance as Attorney or Representative, was completed by former counsel and the petitioner's president, [REDACTED] signed the visa petition, Form ETA 750A, and correspondence. On appeal, apparently substituted counsel submitted a Form G-38 signed by [REDACTED] whose association with the petitioner is unclear. Since substituted counsel states that he is the petitioner's attorney, a copy of this decision is being provided to both former and substituted counsel.

15, set forth the minimum education, training, and experience that an applicant must have for the position of systems analyst. In the instant case, item 14 describes the requirements of the proffered position as follows:

14. Education	
Grade School	Blank
High School	Blank
College	4
College Degree Required	Bachelor or equivalent
Major Field of Study	Science and Commerce

The position also requires one year of experience in the proffered position or in the related occupation of software consultant. No additional training is required. Item 15, under "Other Special Requirements," states "Computer Science or related field," which is unclear what that requirement appends although presumably refers to the major field of study under the educational requirement.

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 Ispat College in Rourkela, India studying Science from April 1988 through April 1991 which culminated in his receipt of a Bachelor of Science degree. Additionally, the beneficiary indicated that he attended the Institute of Cost and Works of India in Rourkela, India, studying Commerce from June 1991 through December 1995, culminating in a degree or certificate in cost accountancy². He provides no further information concerning his educational background on this form, which is signed by the beneficiary under a declaration under penalty of perjury that the information was true and correct.

In corroboration of the Form ETA-750B, the petitioner provided copies of the beneficiary's Bachelor of Science degree conferred by Sambalpur University in Jyoti Vihar, Burla, India in 1991 with accompanying transcripts; two certifications that the beneficiary passed an intermediate and final examination at The Institute of Cost and Works Accountants of India in 1993 and 1995 with accompanying transcripts; course completion certificates in various information technology programs; a transcript showing completion of high school/secondary school; and a credential evaluation from the Foundation for International Services, Inc. (FIS), dated May 10, 2002, which evaluated the beneficiary's diploma from Sambalpur University, examination certificates from The Institute of Cost and Works Accountants of India (ICWAI), and employment experience and determined that the beneficiary's credentials are as follows:

The equivalent of graduation from high school in the United States, a bachelor's degree in accounting from an accredited college or university in the United States and has, as a result of his educational background and employment experiences (3 years of experience – 1 year of university-level credit), an educational background the equivalent of an individual with a bachelor's degree in computer science from an accredited college or university in the United States.

² Under the column "Degree or Certificates Received," the beneficiary represented "Cost Accountancy" without annotation of whether it was a degree or certificate, or award or license, etc.

The director issued a request for additional evidence on April 6, 2004 stating, *inter alia*, that the beneficiary “must hold a four-year U.S. bachelor’s degree or foreign degree which is equivalent to a four-year US bachelor’s degree in order to meet the education requirement on the [Form ETA 750A].” The director requested evidence that ICWAI is a degree granting institution.

In response, the petitioner submitted a letter from ICWAI stating that it “was established by an Act of Indian Parliament in the year 1959 . . . to impart Coaching and Training in the field of Cost Accountancy and conduct examination and award degrees after passing the examination which is recogni[z]ed by the Government of India and all over the world.” The petitioner also submitted print-outs from ICWAI’s website reflecting that it is a professional association that oversees the licensing of professionals in cost accountancy in India.

The director denied the petition on July 20, 2004 finding that the beneficiary was not qualified for the proffered position because the evidence did not indicate that he held a foreign equivalent degree to a baccalaureate degree. The director stated that the record of proceeding did not indicate that ICWAI, while a reputable organization, was an accredited institution capable of granting degrees like a college or university.

On appeal, counsel asserted that the beneficiary has the equivalent of a four-year US degree. Counsel states that the beneficiary’s degree from Sambalpur University is the equivalent of a bachelor’s degree from an accredited institution in the United States and submits a letter written by [REDACTED] on July 23, 2003 in the context of second preference employment-based immigrant visa petitions for advanced degreed professionals subject to 8 C.F.R. § 204.5(k)(2). In that letter, [REDACTED] explained that a three-year university course of study resulting in a bachelor’s degree, followed by the completion of a PONSI-recognized post-graduate diploma program may be deemed to be the equivalent of a four-year U.S. bachelor’s degree.

On appeal, the petitioner submits an additional credential evaluation from [REDACTED] of Morningside Evaluations and Consulting, who claimed to have authority to evaluate whether a school may grant college-level credit for experience, training, and/or course taken at other U.S. or international universities because of the position he holds at Queens College of the City University of New York. [REDACTED] considered the beneficiary’s attendance of secondary school, Sambalpur University, and ICWAI and concluded the following:

On the basis of the credibility of Sambalpur University, the number of years of coursework, the nature of the coursework, the grades earned in the coursework, and the hours of academic coursework, it is the judgment of Morningside Evaluations and Consulting that [the beneficiary] has attained the equivalent of a Bachelor of Science degree in Accounting & Business Management, from an accredited institution of higher education in the United States.

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 or equivalent (four years in college) with a major in Science and Commerce.

Guiding the actual credentials held by the beneficiary is provided through credential evaluations submitted into the record of proceeding for this case. 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.”

FIS is a member of NACES, the National Association of Credential Evaluation Services (NACES). The U.S. Department of Education refers individuals seeking verification of the equivalency of their foreign degrees to American degrees through private credential evaluation services to NACES. The objective of NACES is to raise ethical standards in the types of credential evaluations provided by the private sector. Thus, the credential evaluation provided by FIS will be given appropriate evidentiary weight in these proceedings. It is noted that FIS did not equate the beneficiary's completion of a bachelor's degree program from Sambalpur University as equivalent to a four-year bachelor's degree in computer science in the United States. FIS explicitly described the beneficiary's attendance at Sambalpur University as a three-year program. The transcripts from Sambalpur University also reflect that the beneficiary was enrolled in a three-year baccalaureate degree program as does his represented timeframe for attending the university on the Form ETA 750B. FIS equated the beneficiary's credentials to a four-year bachelor's degree from an accredited institution in the United States by combining the beneficiary's education and employment experience.

Additionally, the credential evaluation submitted on appeal is rejected as incompetent evidence by the AAO. It is noted that [REDACTED] did not describe the actual number of years the beneficiary attended or studied at Sambalpur University. Correspondence from Queens College indicates that [REDACTED] does not have the authority to grant academic credit for either the beneficiary's academic studies or for his work experiences. In December 2001, CIS received correspondence from [REDACTED]. [REDACTED]'s letter stated that [REDACTED] did not have the authority to grant college-level credit for foreign university studies and then added:

The only college credit that may be given at Queens College for prior work experience and training is that determined to be its equivalent by the Adult Collegiate Education (ACE) Program after a very specific process of portfolio review. It is the ACE program, not an individual faculty member, which has the authority to grant credit.

Thus, [REDACTED] evaluation will not be considered. Even considering FIS's credential evaluation, however, the petitioner has not established that the beneficiary is qualified for the proffered position. FIS determined that the beneficiary's equivalency to a U.S. bachelor's degree in computer science is derived through the combination of the beneficiary's graduation from secondary school, three-year bachelor's degree from Sambalpur University, and employment experience. In this case, however, the labor certification clearly indicates that the equivalent of a U.S.

³ Letter to [REDACTED] Immigration and Naturalization Service, Texas Service Center, from [REDACTED] dated November 7, 2001, 2 pages.

bachelor's degree must be one 4-year degree that is not a combination of degrees, work experience, or certificates which, when taken together, equals the same amount of coursework required for a U.S. baccalaureate degree. The petitioner clearly requires a 4-year degree, as the number "4" marked in Item 14 under the "MINIMUM education, training, and experience for a worker to perform satisfactorily the job duties described in Item 13 above" under "College" reflects (Emphasis in original).

Additionally, a U.S. baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). In that case, the Regional Commissioner declined to consider a three-year Bachelor of Science degree in Chemistry from India as the equivalent of a United States baccalaureate degree. *Id.* at 245. *Shah* applies to the instant petition since the Regional Commissioner made specific findings concerning a three-year degree from India in the context of third preference petitions.

The regulations define a third preference category "professional" as 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." See 8 C.F.R. § 204.5(l)(2). The regulation 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.

Counsel's appellate submissions also do not overcome the director's decision since [REDACTED] letter was written exclusively within the context of advanced degree professionals in the second preference category. [REDACTED] guidance is limited to the second preference category and not the third preference category. The second preference category is described with plural degrees in the Act, but the same is not true of the third preference category. They are distinguishable categories with separate eligibility requirements and no analogy may be made absent clear guidance from Congress, the statute, the regulations, case law, or CIS binding policy. In any event, letter and correspondence issued by the Office of Adjudications are not binding on the AAO. Letters written by the Office of Adjudications do not constitute official CIS policy and will not be considered as such in the adjudication of petitions or applications. Although the letter may be useful as an aid in interpreting the law, such letters are not binding on any CIS officer as they merely indicate the writer's analysis of an issue. See Memorandum from Thomas Cook, Acting Associate Commissioner, Office of Programs, *Significance of Letters Drafted by the Office of Adjudications* (December 7, 2000).

If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be considered to be a "foreign equivalent degree" to a United States bachelor's degree. Here, the record reflects that the beneficiary's formal education consists of less than a four-year curriculum. Additionally, the petitioner has not indicated that a combination of educational achievements can be accepted as meeting the minimum educational requirements stated on the labor certification. Thus, the combination of educational achievements may not be accepted in lieu of one baccalaureate degree. Finally, the proper evaluation in the record used the rule to equate three years of experience for one year of education, but that equivalence applies to non-immigrant H1B petitions, not to immigrant petitions. See 8 CFR § 214.2(h)(4)(iii)(D)(5). The beneficiary was required to have 4 years of college and a bachelor's degree or equivalent on the Form ETA 750. 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, we 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, an additional review of the record of proceeding raises concerns about the petitioner's continuing ability to pay the proffered wage beginning on the priority date. The petitioner calls itself HCL Technologies (Illinois), Inc. with an employer identification number (EIN) [REDACTED] the address Oak Brook, IL on the petition. However, the petitioner calls itself HCL Enterprise Solutions, Inc. with the same Oak Brook, IL address on the ETA 750A. In the petitioner's audited financial statements, there is a discussion that HCL Technologies (Illinois), Inc. was formerly HCL Enterprise Solutions, Inc. An internal CIS database does not contain records under HCL Technologies (Illinois), Inc. Instead, most records came up under HCL Technologies and HCL Technologies, Inc. One record came up under HCL Enterprise Solutions, Inc. The records under HCL Technologies show a Sunnyvale, CA address, which corresponds to HCL Enterprise, the beneficiary's represented employer on his resume, and the employer name on the beneficiary's pay stubs and W-2 forms. Many I-140s are pending for the Illinois entity and only a few for the Sunnyvale, CA entity. There are 2 additional locations listed in Illinois to complicate things. According to the audited financial statements, the petitioner's net current assets are negative. The petitioner's net income is not represented on the audited financial statements except under cash flow from operating activities for 2003, which is modest and the accompanying notes do not provide an explanation. The petitioner must have sufficient net income or net current assets or evidence that it actually paid the proffered wage to the beneficiary in order to establish its continuing ability to pay the proffered wage beginning on the priority date. The petitioner must demonstrate that it can pay the proffered wages of all immigrant petitions it filed. In any future proceedings, the petitioner should explain its structure, restructuring, any successor-in-interest issues, multiple petitions and obligations to pay multiple wages, and its continuing ability to pay the proffered wage from the priority date. *See* 8 C.F.R. § 204.5(g)(2).

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 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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.